NO. 01-1269

IN THE
SUPREME COURT OF THE UNITED STATES

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

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BRIEF OF NATIONAL MULTI HOUSING COUNCIL, NATIONAL LEASED HOUSING ASSOCIATION, NATIONAL ASSOCIATION OF INDUSTRIAL OFFICE PROPERTIES AND NATIONAL APARTMENT ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici Curiae are trade associations whose members own real property.[1] Based in Washington, D.C., the National Multi Housing Council ("NMHC") is a national association representing the interests of the larger and most prominent apartment firms in the United States. NHMC's members are the principal officers of firms engaged in all aspects of the apartment industry, including ownership, development, management, and financing. NHMC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living.

The National Leased Housing Association ("NLHA") is a national organization dedicated to the provision and maintenance of affordable rental housing for all Americans. NLHA is a vital and effective advocate for 550 member organizations, including developers, owners, managers, public housing authorities, nonprofit sponsors and syndicators involved in government related rental housing.

The National Association of Industrial and Office Properties ("NAIOP") is the trade association for developers, owners, investors and asset managers in industrial, office and related commercial real estate. Founded in 1967, NAIOP is comprised of more than 10,000 members in 48 North American chapters and provides networking opportunities, educational programs, research on trends and innovations and strong legislative representation.

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[1] Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

The National Apartment Association ("NAA") is the largest national federation of state and local apartment associations. NAA is comprised of 155 affiliates and represents more than 30,000 professionals who own and manage more than 4.5 million apartments. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment.

Amici and their members have a stake in ensuring that real property owners have a substantive Due Process right to rely on the predictable rules and criteria of existing zoning regulations. They are concerned that, if in individual cases local governments are permitted to condition the administrative implementation of existing zoning regulations on referendum approval, this will erode landowners' property rights and impede their ability to make educated judgments about the risks inherent in valuable land use opportunities.

Amici also are concerned about the development of rental housing in the United States, and their members participate in federal government programs designed to meet the need for affordable housing. Forty percent (40%) of affordable housing rental units in the country are occupied by households with children. As direct participants in the affordable housing market, *amici* are familiar with both the history of discrimination against families with children and minorities and the laws designed to root out that discrimination.[2] *Amici* thus have an interest in the interpretation of the Due Process Clause, which provides a

[2] *Amici* understand that Respondents do not raise a separate disparate impact claim and have informed us that they do not view their complaint as addressing such a claim. *Amici* will take no position with regard to whether a disparate impact claim is cognizable under the Fair Housing Act.

constitutional limitation on the ability of opponents to block the development of affordable housing.

SUMMARY OF ARGUMENT

The national economy and the rights of millions of Americans are negatively affected when local governments arbitrarily abuse land use policies to block the construction of apartments and affordable housing in a particular community. Although apartments and affordable housing developments provide communities with great benefits,[3] there remains a bias against their expansion, and irrational discrimination has contributed to a severe national shortage of affordable housing.

The Fair Housing Act and other laws prohibit discrimination in housing. Therefore, municipalities may not overtly reject affordable housing on the grounds that its intended residents will include a disproportionate number of families with children and minorities.

A local government should not be able to do indirectly what it cannot do directly – arbitrarily prevent the development of affordable housing that is consistent with existing zoning laws and presents no threat to the general safety or welfare. This Court has always held that real property owners have property rights cognizable under the Due Process Clause of the Fourteenth Amendment. The Cuyahoga City (the "City") Charter provision violated those rights by permitting voters to decide whether Respondent

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[3] *See* Brochure by National Multi Housing Council and National Apartment Association, *Creating Successful Communities: A New Housing Paradigm* (Jan. 17, 2002) *at* http://www.nmhc.org/Content /ServeFile.cfm?FileID=2501. Copies of this document and all other internet-based documents cited herein have been lodged with the Clerk of the Court.

property owner would be permitted to benefit from the City's existing zoning regulations.

Landowners do not enjoy property at the sufferance of the electorate. Voters may not be granted an administrative veto that is unconstrained by standards imposed pursuant to legislative policy. Rather, a developer who selects property based on the existing zoning law, complies with all existing zoning requirements, and obtains the City's approval of a site plan as consistent with the zoning code has a right to the benefit of those zoning regulations. A law subjecting property rights to referenda allows voters to circumvent those rights. Such a standardless system of administrative veto by referendum would prevent landowners from making informed decisions about the intended use of their property, and deprive them of fundamental property rights. The Due Process Clause prohibits such arbitrary and capricious results.

ARGUMENT

I. The Critical Need For, And History Of Discrimination Against, Affordable Housing Demands That Landowners Be Protected Against Arbitrary Government Action

A. There Is A Need For Affordable Housing, Which Is Important To The National Economy

In December 2000, Congress established the bipartisan Millennial Housing Commission to examine, analyze and explore "the importance of housing, particularly affordable housing . . . to the infrastructure of the United States" and "the various methods for increasing the role of the private sector in providing affordable housing. . . ." Public Law 106-74, § 206(b), 113 Stat. 1047 (amended

1999). On May 30, 2002**,** the Commission issued a letter to Congress and its report concluding:

> First, housing matters. . . . The development of housing has a major impact on the national economy and the economic growth and health of regions and communities. Housing is inextricably linked to access to jobs and healthy communities and the social behavior of the families who occupy it. The failure to achieve adequate housing leads to significant societal costs. Second, there is simply not enough affordable housing. The inadequacy of supply increases dramatically as one moves down the ladder of family earnings. The challenge is most acute for rental housing in high-cost areas, and the most egregious problem is for the very poor . . . .
>
> The importance of helping more Americans satisfy these objectives cannot be overstated. . . . Very particularly, it improves life outcomes for children. In the process, it reduces a host of costly social and economic problems that place enormous strains on the nation's education, public health, social service, law enforcement, criminal justice, and welfare systems.

Letter From MHC Co-Chairs Susan Molinari and Richard Ravitch to Congress and Report of the Bipartisan Millennial Housing Commission Appointed by the Congress of the United States 13 (May 30, 2002) *at* http://www.mhc.gov ("*MHC Report*").

Other evidence suggests that a significant number of low and moderate income households are struggling to find affordable housing. Data from the Census Bureau's 1999 American Housing Survey indicate that more than one-half (1/2) of apartment renters with incomes of less than half of the area median face severe housing cost burdens (pay more than fifty percent (50%) of their income for rent and utilities). Many more renters face moderate housing cost burdens (thirty to fifty percent (30-50%) of their income for housing costs). *See* NMHC, *Housing Affordability: The Apartment Universe* (Aug. 27, 2002) *at* ttp://www.nmhc.org/Content/ServeContent.cfm?IssueID=382&ContentItemID=2591.

Moreover, many families with earnings significantly higher than the full-time, minimum wage equivalent also face moderate and severe housing affordability problems. Consider household heads working in retail sales (with a median income of $15,940), licensed nursing ($27,850), or law enforcement ($37,560). Among the 11.8 million households with earnings between the median for retail sales workers and the median for licensed nurses, fully thirty-four percent (34%) had moderate housing cost burdens, and ten percent (10%) had severe problems. Among the 11.4 million with earnings between the medians for licensed nurses and law enforcement, nineteen percent (19%) had moderate problems, and five percent (5%) had severe problems. *MHC Report* 21 *at* http://www.nhc.gov.

Congress has recognized that every American should have access to decent and affordable housing regardless of whether the housing is owned or rented, and has enacted measures designed to counteract the shortage of affordable housing. Housing production programs, such as the federal Low Income Housing Tax Credit ("LIHTC"), provide housing at lower rental rates to residents and are an

important part of the national effort to develop affordable housing.

This is the program that Respondent Buckeye Community Hope Foundation utilized to develop its property in the City of Cuyahoga Falls, Ohio. Under the program, institutional investors become the principal partners in the partnership that develops the property in consideration of receiving federal income tax credits. The developer advances fees and expenses and arranges for other financing for which it earns a development fee and other financial benefits flowing from the ownership and operation of the apartment community. The Internal Revenue Code establishes a variety of requirements which must be met in order for investors to receive the tax credits. These requirements include regulation of the income level of residents and the amount of rents that may be charged. It is estimated that the LIHTC and other project-based subsidies have been responsible for about twenty to twenty-five percent (20-25%) of the new apartment stock developed in the last five years. *See* NMHC, *Research Notes: Affordable Rental Housing* (May 4, 2001) *at* http://www.nmhc.org/Content/ServeContent.cfm?IssueID=382&ContentItemID=1494.

B. Bias Against Apartments Is Unfounded

Contributing to the shortage of affordable housing is a bias against apartments. A common misperception is that homeowners, in contrast to renters, make neighborhoods more stable, are more committed to neighborhood improvement, and are financially better off because they are owners. Unfortunately, though the assertions are common, they are more myth than fact. In reality, apartment residents are more socially engaged than single-family homeowners. They are equally involved in community groups and

similarly attached to their communities and religious institutions. *See* NHMC, *Research Notes: Apartment Residents as Citizens and Neighbors* (Jun. 25, 1999) *at* http://www.nmhc.org/Content/ServeContent.cfm?ContentItemID=545.

Some of the often overlooked benefits of apartment homes include:

* they promote balanced suburban development;
* they help revitalize urban neighborhoods;
* they conserve land and promote open space;
* they use the municipal infrastructure more efficiently than single family homes;
* they reduce the demand for new roads and school construction; and
* they provide necessary housing for millions of public service employees, such as teachers, nurses and public safety officials.

In addition, apartment development stimulates the national economy. The nation's 16.1 million apartment units (in buildings of at least five units) are worth approximately $1.3 trillion. *See* Kenneth T. Rosen, *et al.*, *Apartments: A $1.3 Trillion Market* (Nov. 2001 Revised) *at* http://www.nmhc.org/Content/ServeFile.cfm?FileID=1158. Rental apartments are a critical component of housing. Renter households constitute one-third (1/3) of the households in the United States (approximately 36 million households). Thirty-five percent (35%) of households in metropolitan areas rent, and twenty-four percent (24%) of households in

rural areas rent. *See* National Low Income Housing Coalition: *Out of Reach 2002* (2002) *at* http://www.nlihc.org/oor2002/introduction.htm. According to the National Association of Home Builders, "the construction of 1000 apartment units generates:

> * 1,030 full-time jobs in construction and construction-related industries;
> * $32 million in wages; and
> * $15.8 million in combined federal, state and local tax revenues and fees."

See NHMC, *Quick Facts: New Construction* (2001) *at* http://www.nmhc.org/Content/ServeContent.cfm?IssueID=253&ContentItemID=145.

One of the most common objections developers face is the belief that new apartments will overburden local school districts. An analysis of the U. S. Census Bureau's 2001 American Housing Survey suggests otherwise. On average, rental apartments house fewer school-age children (0.31 per household) than single-family residences (0.53 per household). In fact, single family owners are significantly more likely to have school age children than are apartment renters. The differences are even greater for residences built since 1990, which is most relevant to the current impact of new construction of apartment in communities. On average there are 64 school age children for every 100 new owner-occupied single family houses, but only 29 children for every 100 new apartments. *See* NMHC, *Research Notes: Apartments and Schools* (July 11, 2002) *at* http://www.nmhc.org/Content/ServeContent.cfm?ContentItemID=827&IssueID=80. Generally, there is no empirical support for the all too common strategy of barring or limiting apartment construction to relieve pressure on local school systems.

C. There Is A History Of Discrimination In Affordable Housing

One cause of the affordable housing shortage is a national stigma against development that primarily will house families with children and minorities. Local development policies, escalating land costs and development barriers all have had a profound impact on rental housing production. "Not-in-my back-yard" (NIMBY) attitudes and exclusionary local government policies, procedures and actions make it difficult to expand the supply of low and moderate income housing. *See* NMHC, *Research Notes: Affordable Rental Housing at* http://www.nmhc.org. Irrational discrimination against renters also exacerbates housing problems for moderate income persons. The arbitrary and capricious denial of property rights to build apartment housing not only harms the developer, but also low and moderate income Americans and the national economy.

While prejudices against affordable housing occupants historically were overt, communities have become more adept at concealing their true motives. The devices used to accomplish such discrimination now are more subtle. Crosses are not burned. Facilities are not segregated by ordinance. Instead, a permit or administrative vote is delayed until available financing is lost; irrelevant and costly studies are demanded of developers; novel zoning issues arise; or elected officials organize citizens to protest at a hearing or to vote through referendums to block housing designed for occupancy by minorities and families with children.

D. Local Governments Should Not Be Able To Conceal Discrimination Through Arbitrary Decision-Making

Of course, the Fair Housing Act prohibits local governments from overtly discriminating against the development of affordable housing inhabited by families with children and minorities. 42 U.S.C. § 3601, *et seq.* (2002). *See*, *e.g.*, *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981). Indeed, developers are entitled to enforce the Fair Housing Act, and may bring a claim under the Act to protect their rights from unlawful discrimination. *See*, *e.g.*, *Silver Sage Partners v. City of Desert Hot Springs*, 251 F.3d 814 (9th Cir. 2001); *San Pedro Hotel Co., v. City of Los Angeles*, 159 F.3d 470 (9th Cir. 1998).[4]

However, beyond the Fair Housing Act, owners have property rights that cannot be infringed upon by local government. A municipality should not be able to do indirectly what the Fair Housing Act prohibits it from doing directly – prevent the development of affordable housing for reasons unrelated to the public health, safety, morals or general welfare. Affordable housing opponents cannot be

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[4] In *Silver Sage*, the court held that developers and others were entitled to $3.1 million in damages because of the municipality's violation of the Fair Housing Act. Plaintiff had alleged that the city had intentionally failed to certify a project's compliance with local law requirements because members of the city council did not want a project populated by minority children. *See Silver Sage*, 251 F.3d at 819-21.

In *San Pedro,* the court upheld the finding that the city had violated the Fair Housing Act by failing to make the routine approval of the use of funds previously allocated to enable the sale of a property to a not-for-profit developer of housing for the mentally disabled. The court pointed out that the violation was not the failure to approve the loan but that the City improperly interfered with the loan by breaching its duty to act in a nondiscriminatory manner. *See San Pedro*, 159 F.3d at 475-76.

allowed to utilize arbitrary procedures to achieve cloaked objectives. The Due Process Clause does not permit the abrogation of a landowner's rights under existing zoning laws in a referendum that provides no standards or guidelines for review of an administrative action.

Such is the case here. The drafters of the referendum petition and city officials had lobbied the City Council to reject the Respondents' site plan, not because of some legitimate public interest, or because it contravened a public purpose, but because the intended residents of the affordable housing were families with children and minorities. When the City Council passed the Ordinance approving the Respondents' site plan, these citizens and city officials channeled their efforts into a referendum petition that would improperly circumvent the administrative adjudication of the site plan's conformance with existing zoning laws. Such arbitrary procedures violate the Due Process rights of property owners, who are entitled to rely on the benefit of existing zoning regulations. Local government cannot circumvent these rights because of objections to the development of affordable housing.

II. The Issue For The Court Is Whether The City, In Giving Effect To The Referendum And Denying Respondents The Benefit Of A Generally-Applicable Zoning Plan, Acted Arbitrarily And Capriciously In Violation Of Due Process

The Constitution states that no "State [may] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Due Process Clause of the Fourteenth Amendment confers both procedural and substantive rights. *See United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697 (1987); *Daniels v. Williams*, 474 U.S. 327, 331, 106

S. Ct. 662, 664, 88 L. Ed. 2d 662 (1986); *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 1785, 118 L. Ed. 2d 437 (1982); *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 2705-06, 33 L. Ed. 2d 548 (1972). The substantive component of Due Process protections recognizes "that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed...." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (citations omitted).

The Due Process Clause of the Fourteenth Amendment guarantees land owners the substantive right to be free from arbitrary or irrational governmental actions which infringe on its rights. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263, 97 S. Ct. 555, 562, 50 L. Ed. 2d 450 (1977) (recognizing landowners' right "to be free of arbitrary or irrational" land use decisions); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 369, 47 S. Ct. 114, 121, 71 L. Ed. 2d 303 (1926) (if a land use regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," it must be struck down). Government may not interfere with the general rights of a landowner unless the restriction bears a "substantial relation to the public health, safety, morals, or general welfare." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S. Ct. 50, 51-52, 73 L. Ed. 210 (1928) (quotation omitted). The "critical constitutional inquiry" is whether the governmental restriction "produces arbitrary or capricious results." *City of Eastlake v. Forest Enters,. Inc.*, 426 U.S. 668, 675 n.10, 96 S. Ct. 2358, 2363 n.10, 49 L. Ed. 2d 132 (1976).

A. An Owner of Real Property Has A Property Interest Cognizable Under The Due Process Clause

The first step in analyzing a substantive due process claim is to determine whether there is a property interest that is cognizable under the Fourteenth Amendment's Due Process Clause. The Court always has held that ownership of real property is a property interest sufficient to invoke Due Process. *See Village of Euclid*, 272 U.S. at 386-87, 47 S. Ct. at 118, 71 L. Ed. 2d 303. The government may place restrictions on the right to use that property, but this does not defeat a real property owner's property interest in the land itself. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165-66 (7th Cir. 1994). Although the real property owner may not have the right to develop the land for any intended use, the owner retains the right to apply for an amendment or variance to accommodate his individual needs, and as Justice Stevens recognized, "the opportunity to apply for an amendment [to an existing zoning plan] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment." *City of Eastlake*, 426 U.S. at 682-83, 96 S. Ct. at 2366, 49 L. Ed. 2d 132 (Stevens, J., dissenting).

In *Roth*, the Court held that government benefits may qualify as property within the meaning of the Due Process Clause if there is "a legitimate claim of entitlement" to the benefit, and thus expanded Due Process protections beyond that which is owned to, in some limited circumstances, that which is sought. 408 U.S. at 577, 92 S. Ct. at 2709, 33 L. Ed. 2d 548; *DeBlasio v. Zoning Bd. of Adjustment for Township of West Amwell*, 53 F.3d 592, 601 n.9 (3d Cir.), *cert. denied*, 516 U.S. 937, 116 S. Ct. 352, 133 L. Ed. 2d 247 (1995). According to the Court, the property interests in such government benefits "are created and their dimensions

are defined by *existing* rules or understandings that stem from an independent source such as state law -- rules or understandings that *secure* certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 507, 92 S. Ct. at 2709, 33 L. Ed. 2d 548 (emphasis added).

Although there is some disagreement in the federal courts about whether *Roth* applies to land regulation cases, *see Amicus* Brief of Pacific Legal Foundation and the Center for Equal Opportunity at 24 & n.4-5 (collecting cases), the *Roth* entitlement inquiry is properly confined to government benefits cases. A landowner has an indisputable interest in the land he owns that is unaffected by any governmental restriction on the use of that property. *See Village of Euclid*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 2d 303; *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989) (questioning "why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test"). In *City of Eastlake*, the Court impliedly recognized the distinction between property interests in land ownership and government benefits when it assumed that a real estate developer who had applied for a zoning change had a sufficient property interest to warrant due process protections. 426 U.S. at 673-75; 96 S. Ct. at 2361-62, 49 L. Ed. 2d 132.

There is no question that Respondents owned the land at issue in this case; therefore, Respondents have a property interest deserving of constitutional protection. Moreover, even under the *Roth* entitlement theory, Respondents had clear entitlement to a building permit and thus had a property interest within the meaning of the Fourteenth Amendment. Respondents had a valid site plan, which the City Planning Commission determined conformed to the existing zoning plan and was in harmony with the public interest, and which the City Council approved. As

the Sixth Circuit concluded, Respondents' "property interest was securely vested upon the City's affirmative representation that the site plan conformed with the existing zoning regulations as reflected by the City's approval, by ordinance, of the site plan." *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 643 (6th Cir. 2001), *cert. granted in part*, 122 S. Ct. 2618, 153 L. Ed. 2d 802 (2002).

B. A Landowner's Right To Due Process Is Violated When An Administrative Referendum Deprives The Landowner Of The Benefit Of An Existing Zoning Regulation

The Court must determine whether a City Charter provision lawfully may grant voters the unqualified right to deny a landowner the benefit of existing zoning regulations by submitting an Ordinance approving a land use to a public vote. The Due Process Clause places limits on the manner in which citizens can veto administrative land use decisions that adjudicate rights under generalized zoning ordinances. A City may not subject its administration of land use policy to a voter consent process that is uncontrolled by any standard or rule governing the exercise of that power. Such a law, by definition, violates Due Process because it invites arbitrary and capricious results.

1. The Respondents' Site Plan Met All The Requirements Of The Zoning Law

The City had an established zoning ordinance with generalized requirements. Respondents' land was zoned for multifamily use, and the Planning Commission concluded that Respondents' site plan complied with the zoning requirements. Pursuant to the City Charter, the City Council approved the Planning Commission's application of existing

zoning regulations to Respondents' site plan and passed an Ordinance[5] approving the site plan. The City Charter also injected an additional layer of review – it provided for its citizens the power to approve or reject at the polls any ordinance or resolution passed by the Council by requesting that the ordinance be submitted to the voters as a referendum. *Buckeye Cmty*, 263 F.3d at 632. Before the ordinance approving Respondents' site plan was to take effect, a petition was submitted that requested a referendum to approve or reject the ordinance. As a result, the Respondents were unable to obtain a building permit and the referendum deprived the Respondents of the benefit of the Council's approval through the ordinance and the generalized zoning scheme.[6]

2. The Court Has Recognized The Difference Between Citizen Consent Provisions Involving Legislative And Administrative Determinations

The issue of whether citizen consent provisions violate the Fourteenth Amendment Due Process Clause is not new to this Court. On four occasions, the Court has considered whether citizens' freedom to reject a land use proposal is repugnant to the Due Process Clause of the

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[5] Whether or not the form of an "ordinance" is required to "approve" the site plan, that is what was used by the City Council. Since this was an administrative matter, the Council no doubt could have just voted to "approve" the site plan. By using the form of an "ordinance," the council could not turn what is an administrative action into a legislative one.

[6] Respondents' Due Process claim is not dependent on the validity of the referendum under state law. Even if state law authorized voter approval of the City Council's administrative land use decisions (which it does not in this case), the referendum nevertheless would violate Respondents' Due Process rights.

Fourteenth Amendment. In the first of these decisions, *Eubank v. City of Richmond*, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912), the Court struck down a Richmond ordinance that empowered two-thirds (2/3) of the property-owners on any block to establish, within a specified range, a building set-back line. The Court ruled that the ordinance violated Due Process, stating:

> The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest and even capriciously.

Id. at 143-44; 33 S. Ct. at 77, 57 L. Ed. 156. The Court found it "hard to understand how public comfort or convenience, much less public health can be promoted by a line which may be so variously disposed." *Id*. at 144, 33 S. Ct. at 77, 57 L. Ed. 156.

Five years later, in *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 37 S. Ct. 189, 61 L. Ed. 472 (1917), the Court considered an ordinance that prohibited the construction of billboards in residential areas, but permitted neighbors to waive that prohibition and consent to the use. The Court concluded that the neighborhood consent provision was a "provision affecting the enforcement of laws and ordinances." *Id.* at 531, 37 S. Ct. at 192, 61 L. Ed. 472. The ordinance did not implicate Due Process rights because it allowed the intended beneficiaries of the ordinance to waive the otherwise applicable legislative limitation, and thus expanded property rights rather than denigrating the use

or depreciating the value of land. According to the Court, "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property." *Id*. at 530, 37 S. Ct. at 191, 61 L. Ed. 472.

In the third of these cases, the Court considered a Seattle zoning ordinance that allowed a home for the aged poor to be built in a particular area, but only with "the written consent . . . of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." *Roberge*, 278 U.S. at 118, 49 S. Ct. at 50-51, 73 L. Ed. 210. A property owner sought a permit to erect a home for the aged poor, and the legislative body found that the construction and maintenance of the home was in harmony with the public interest and within the general scope and plan of the zoning ordinance. When the landowner failed to furnish the consents required in the ordinance, the permit was denied. Again, the Court struck down the ordinance:

> The [ordinance] proposes to give the owners of less than one-half the land within 400 feet of the proposed building authority – uncontrolled by any standard or rule prescribed by legislative action – to prevent the [owner] from using its land for the proposed home. . . . [The citizens] are free to withhold consent for selfish reasons or arbitrarily and may subject the [owner] to their will or caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment."

Id. at 121-22, 49 S. Ct. at 52, 73 L. Ed. 210. The Court found it particularly troubling that the landowner was "bound

by the decision or inaction of such owners.... [T]heir failure to give consent is final." *Id.* at 122, 49 S. Ct. at 52, 73 L. Ed. at 210.

Eubank and *Roberge* remain good law today. In *City of Eastlake*, 426 U.S. at 677-78, 96 S. Ct. at 3363-64, 49 L. Ed. 2d 132 (1976), the Court reaffirmed both *Eubank* and *Roberge* and confirmed that Due Process prohibits a law which grants citizens the unbridled administrative decision-making power to adjudicate property rights.

In *City of Eastlake*, the Court upheld a city charter provision granting citizens a voice on questions of public policy by requiring that any proposed changes in land use be ratified by fifty-five percent (55%) of the votes cast in a referendum. In rejecting the developer's due process challenge, the Court explained that "[a]s a basic instrument of democratic government, the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment *when applied to a rezoning ordinance*." *Id.* at 679, 96 S. Ct. at 2364-365, 49 L. Ed. 2d 132 (emphasis added). Because the rezoning decision was properly reserved to the people, it was constitutional to permit the voters to decide whether to effectuate the plaintiff's proposed rezoning plan. *Id.* Distinguishing between acts that legislate land use policies and acts that administer existing land use policies, the Court stated:

> The situation presented here 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 . . . . 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.

Id. at 679 n.13, 96 S. Ct. at 2365 n.13, 49 L. Ed. 2d 132. The Court also noted that the provision was not constitutionally infirm because the landowner could seek variances if the decision caused unnecessary hardship. *Id.*

3. Citizen Consent Provisions That Enable Citizens To Reject Administrative Determinations Violate Due Process

It thus is clear that a legislature may allow its citizens to make a generalized zoning decision, or decide, in the valid exercise of its police powers, to restrict a land use manifestly subject to regulation, and then condition the imposition of such restriction upon voter approval. *See Cusack*, 242 U.S. at 531, 37 S. Ct. at 192, 61 L. Ed. 472. *See also New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S. Ct. 403, 411, 58 L. Ed. 2d 361 (1978) ("an otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection"); *City of Eastlake*, 426 U.S. at 677-78 n.12, 96 S.Ct. at 2364 n.12, 49 L. Ed. 2d 132. The determinative question is whether the voter consent goes only toward the modification of restrictions that have already been validly framed by the legislature and that reflect a clear expression of governmental policy.

A referendum can empower voters to act in this legislative capacity, and thereby give the general public direct political participation. However, a referendum on administration of an ordinance, which does not guide voters with standards, ignores the legislature's will and deprives a landowner at the voter's whim of the right to the benefit of a generally-applicable zoning ordinance. Where there are no

such standards, an election to decide whether a particular landowner should be entitled, in an administrative adjudication, to benefit from a generalized zoning ordinance:

> exemplifies popular justice, the mode by which an Athenian jury, without deliberation, without instruction or control by professional judges, without possibility of correction on appeal, and without the assistance of lawyers, condemned Socrates. . . . There is no standard [here] to guide voters . . . We need not attribute frivolous motives to them. Just as we do not trust jurors to deliberate without instructions, so we should be concerned that an elector free-for-all might result in serious errors . . .
>
> This will not bother anyone who believes that the democratic process should be left completely unhindered by law. But that is not the theory of the Constitution. An individual's life, liberty, and property are not held or enjoyed at the sufferance of the electorate. . . .

Club Misty, Inc. v. Laski, 208 F.3d 615, 621 (7th Cir. 2000) (referenda empowering voters to resolve legislative actions fundamentally different than referenda to resolve administrative/judicial actions).

As Judge Posner recognized in *Club Misty*, a law authorizing an "electoral free-for-all" in an administrative adjudication violates Due Process for the same reason that a law authorizing a state agency to resolve permit issues without regard to the expression of governmental policy expressed in the governing zoning laws is constitutionally

infirm. There is no enforcement of legislative will, but rather there is arbitrary decision-making untied to any legislative standard, and without regard to the public interest. Any such attempt to deny a landowner the benefit of a generalized ordinance would violate the landowner's Due Process rights by undermining the legislature's intent and bearing no relation to the public health, safety, morals or general welfare. *Roberge*, 278 U.S. at 121, 49 S. Ct. at 51, 73 L. Ed. 210.

4. The Referendum That Denied Respondents The Benefit Of Existing Zoning Regulations Violated Due Process

The rule that a municipality may reserve to its citizens the right to establish zoning laws of general applicability is not implicated here. The referendum did not ask voters to establish zoning policy through community legislation. The referendum did not ask the electorate to make a decision based on general, legislative grounds, or to grant an exception to an existing zoning structure. That would involve a legislative determination that *City of Eastlake* makes clear is properly reserved for popular vote.

Because the referendum at issue here does not call for a legislative determination, the Court need not decide whether a municipality violates substantive Due Process rights when it conditions affordable housing development permits on voter approval. *See James v. Valtierra*, 402 U.S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678 (1971). Here the City expressed no such legislative policy against affordable housing. Instead, the City's expression of legislative policy about affordable housing is reflected in the City's generalized zoning laws, which unquestionably permit the development of affordable housing.

The referendum here challenged an administrative decision adjudicating whether the Respondents' site plan conformed with *existing* zoning codes that permitted the development of affordable housing. The zoning ordinance made a general determination affecting Respondents' property rights, and the referendum allowed voters to determine on an individual basis whether to allow development consistent with that generalized ordinance. This administrative adjudication did not expand or create new use rights; rather, it determined whether Respondents could use the rights they already had under an existing zoning scheme.

The referendum interfered with Respondents' right to develop the property even though the Ordinance approving the land use had not yet become effective. The City had already decided to permit land use of the proposed type. Respondents' right to benefit from the zoning scheme already existed when the City gave effect to the referendum. The referendum thus questioned whether to allow Respondents to enjoy rights established under a previously adopted zoning plan, and thereby blocked the implementation of the existing zoning provisions authorizing the land use. The electorate, acting in an administrative capacity, cannot defeat property rights granted in a zoning ordinance enacted by the legislative branch. The state's use of administrative processes to terminate Respondents' right to benefit from generally applicable state zoning laws deprived Respondents of a protected property interest.

The referendum subjected the Respondents' enjoyment of these existing rights to the voters' whims, prevented Respondents from the benefit of the existing uniform laws, and diminished the use of the Respondents' land. In *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th

Cir. Unit B 1981), *cert. denied*, 456 U.S. 973, 102 S. Ct. 2236, 72 L. Ed. 2d 847 (1982), the Fifth Circuit struck down a law that similarly impacted a landowners' Due Process rights. In *Wheeler*, the developers submitted a plan that satisfied the existing zoning ordinance, and the City of Pleasant Grove issued a building permit for the construction of an apartment complex. *Id.* The citizens responded by submitting a referendum demonstrating "an overwhelming resistance to the proposed apartment complex." *Id.* The city then adopted a new ordinance which forbade the building of new apartments, thereby prohibiting the developers from constructing the apartment complex. *Id.* at 100. The Fifth Circuit found that the city's deference to the majority will in implementing the new ordinance had "no substantial relation to the public health, safety, morals, or general welfare," and thus was arbitrary and capricious and violated plaintiff's right to Due Process. *Id.* (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 121, 71 L. Ed. 303 (1926)).

As *Wheeler* and *City of Eastlake* make clear, a referendum affecting the enforcement of ordinances, like that present here, violates Due Process if it denigrates property rights. The City cannot leave to the discretion of the citizenry whether to give effect to a zoning ordinance that already is in place. The City may not require the Respondents to satisfy the requirements in the zoning code and then leave the ultimate decision to the whims of the electorate. The referendum is an improper exercise of administrative power that is repugnant to Due Process protections.

Moreover, the voter consent provision was not based on any articulated legislative policy, and there were no standards to govern the citizens' vote. A referendum is constitutionally infirm if it "creates no standard by which the

power thus given is to be exercised." *Eubank*, 226 U.S. at 143-44, 33 S. Ct. 77, 57 L. Ed. 156. A referendum may not allow voters to decide individual land use applications "uncontrolled by any standard or rule prescribed by legislative action." *See Roberge*, 278 U.S. at 122, 49 S. Ct. at 52, 73 L. Ed. 210. Here the voters had the right, unqualified by any legislative policy, and uncontrolled by any legal standard, to veto the City Council's determination that a particular land use is appropriate. A referendum cannot in this way allow voters to deny a landowner the benefit of the generalized zoning laws. "[A]dministrative decision-making [may not be] made potentially subservient to selfish or arbitrary motivations or the whims of local taste." *Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662, 666 (4th Cir. 1989).

Acknowledging this rule, the Sixth Circuit, in the case before this Court, relied on *TLC Development, Inc. v. Town of Branford*, 855 F. Supp. 555 (D. Conn. 1994). In *TLC*, a builder had requested a site plan which could only be denied "if it fail[ed] to comply with requirements already set forth in the zoning ... regulations." *Id.* at 557 (quoting Conn. Gen. Stat. § 8-3(g)). The Town of Branford nonetheless denied approval of the site plan because of reasons other than those specifically articulated by law. The Court found that "there was no basis in the law for the denial." *Id.* at 558. According to the Court:

> [A] town, through its Commission, cannot arbitrarily refuse to permit a landowner to use land if the proposed use comports with the uses permitted in the district in which the land is located. By articulating the uses permitted in a district, a town has fixed the uses which accommodate all the considerations permitted by the law in adopting a town plan. Once it

> has done so, a town cannot prevent a permitted use based on factors which might have been, or were, considered in deciding the uses permitted in the zoning district.

Id. In other words, once the zoning decision has been made, it would be arbitrary and irrational to deny a site plan which actually conforms to that zoning decision.

As the Court in *TLC* recognized, this type of citizen veto over an administrative land use decision that has been approved by the local government and explicitly found to conform to the local zoning scheme runs afoul of Due Process protections. When a local government has no rational basis or acts arbitrarily and capriciously in denying the right to develop, that constitutes a violation of substantive due process rights. Moreover, *City of Eastlake* makes clear that a provision placing administrative authority in the hands of the electorate does not remove the decision from Due Process inquiry: "If the substantive result of the referendum is arbitrary and capricious…then the fact that the voters wish it so would not save the restriction." 426 U.S. at 676, 96 S. Ct. at 2363, 49 L. Ed. 132.

The Sixth Circuit also recognized that the danger inherent in voter consent provisions involving administrative adjudications is that voters could utilize such an administrative referendum to "gang up" against a landowner who they do not like for reasons unrelated to any plausible public interest. A referendum allows for the "arbitrary targeting" of a "particular premises," and enables citizens to "gang up" on a particular landowner whose development project they dislike for "reasons unrelated to any plausible public interest," and thus prevent the development of a low-income housing project for reasons unrelated to the consideration of a site plan ordinance. *See Brookpark*

Entm't, Inc. v. Taft, 951 F.2d 710, 715 (6th Cir. 1991), *cert. denied*, 506 U.S. 820, 113 S. Ct. 68, 121 L. Ed. 2d 35 (1992). "This is a distinct type of arbitrary action that the requirement of fair procedure is designed to prevent...." *Id.* at 716 (citation omitted).

A landowner must be able to expect that its submission of an acceptable site plan that conforms to an already-existing zoning code will result in a building permit. Respondents purchased property that was zoned for the intended purpose and incurred considerable expense in preparing a site plan. The site plan met all of the City ordinance requirements, the Planning Commission recommended its approval, and the City Council approved the site plan. Respondents had a protected property right to construct the planned housing development in accordance with the existing zoning laws. The City violated Respondents' Due Process rights when it submitted to referendum the City Council's approval of Respondents' site plan and the City Engineer consequently refused to issue Respondents a building permit to which they were entitled under the generalized ordinance. By giving effect to the referendum and denying Respondents the benefit of the site plan ordinance, when the Respondents had met all legal requirements for approval, the City impaired the exercise of the Respondents' existing rights and engaged in arbitrary and irrational behavior prohibited by the Due Process Clause of the Fourteenth Amendment. *Roberge*, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210; *Eubank*, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (requiring the consent of property owners to allow building in accordance with zoning laws was repugnant to the Due Process Clause of the Fourteenth Amendment).

CONCLUSION

Respondents satisfied the applicable zoning requirements, and cannot be held hostage to voters' standardless decision-making. Otherwise, local communities could cloak discriminatory animus by divesting themselves of administrative constraints and subjecting landowners' property rights to popular will. This would produce arbitrary and capricious results, and severely inhibit the development of desperately needed affordable housing. Landowners do not hold their real property interests at the sufferance of the electorate. If local governments are permitted to subject the implementation of generally-applicable land use rules to the whims of the electorate, a landowner's property interest would be ephemeral indeed. *Amici* believe that the decision of the Sixth Circuit should be affirmed.

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