

CUYAHOGA FALLS V. BUCKEYE:

Supreme Court Case Tests Limits of Fair Housing Act, Property Rights Advocates Point to Potential Chilling Effect on Affordable Housing Development

*EDITOR'S NOTE: For the following article, KnowledgePlex interviewed experts in the housing, policy and law fields and asked them to express their opinions and analyses of the Supreme Court case, *City of Cuyahoga Falls, Ohio, et al. v. Buckeye Community Hope Foundation, et al.* This article summarizes the range of opinions. A more detailed glimpse of the experts' viewpoints can be found in edited [interview transcripts](#).*

[Overview](#)

[The Facts](#)

[Fair Housing Act – Safe and Sound or Diminished?](#)

[The First v. The Fourteenth Amendment – Limited Precedential Consequences](#)

[Referenda and the Potential Chilling Effect](#)

[Challenging Exclusionary Zoning](#)

[Property Rights – Did the Court Punt?](#)

[Municipal Management by Referendum](#)

[Positive Outcomes for Housing](#)

By Lora Engdahl
Knowledgeplex Editor-at-Large

Overview

WASHINGTON — On March 25, 2003, the U.S. Supreme Court ruled 9-0 in favor of an Ohio suburb in what was just the sixth fair housing-related case in the court's history. The predominately white Cuyahoga Falls, Ohio, did not violate the Constitution's due process and equal protection clauses by allowing voters to initiate a referendum to block a low-income housing development, the court said. The Buckeye Community Hope Foundation, developer of the 72-unit complex, had sued the city for damages, alleging construction delays caused by racially biased city officials cost the nonprofit company roughly \$3 million.

Cuyahoga Falls Mayor Don Robart was "elated" at being "vindicated against any allegations of discrimination," reported the Cleveland *Plain Dealer*. Buckeye executive director Gil Barno was "very disappointed" at the "drubbing." Housing, civil rights, and municipal government groups wondered just what impact, if any, this tricky-to-interpret case might have on their future activities.

The facts of the case lead to wildly differing interpretations, from observations that "the sky is falling" to comments that the case is "sort of a dud." Espousing the former view is Michael Allen, publisher of [The NIMBY Report newsletter](#) and co-director of the [Building Better Communities Network](#). Allen believes the ruling gives opponents of affordable housing another seemingly Supreme Court-endorsed tool in their arsenal, and that this will have a chilling effect on already gun-shy affordable housing developers.

In the latter category falls John Relman, who says the case *could* have shredded some important tools for affordable housing developers but, in fact, turned out “like a firecracker that looked like it was going to have a big bang and fizzled.” Relman, an attorney who represented the [National Fair Housing Alliance](#) in an amicus brief, says the decision left intact the ability, in affordable housing cases, to claim disproportionate impact under the Fair Housing Act at a time when there is some indication that conservatives on the Supreme Court would like to restrict the application of disparate impact to employment discrimination law.

While they disagree on the nature of its impact Allen, Relman, and other observers who shared their opinions with KnowledgePlex agree the ruling is important to examine because it could have an impact on many issues, from NIMBY-ism to the clash between free speech and property rights, from the limits of the Fair Housing Act to racism and classism.

The Facts

City of Cuyahoga Falls v. Buckeye Community Hope Foundation is not what lawyers call a “clean” case because the alleged racially motivated referendum was never actually enacted.

In June 1995, the nonprofit Buckeye Community Hope Foundation and partners bought land zoned for apartment houses in Cuyahoga Falls. Buckeye subsequently submitted a site plan to the city housing commission for a multi-family, low-income housing project to be funded by tax credits. The commission approved the site plan and, despite growing public opposition voiced during hearings on the project, the City Council approved it, as well.

In April 1996, a group of citizens filed a formal request for a referendum to repeal the City Council ordinance approving the site plan, citing a city charter that gives voters the right to approve or veto any ordinance within 30 days of its passage. Buckeye filed suit in state court, arguing that the Ohio Constitution does not permit referenda on purely administrative matters.

In June 1996, because of the referendum petition under way, the city engineer refused to issue building permits. In July, Buckeye filed suit in federal (District) court seeking an injunction ordering the city to issue the building permits as well as compensation for damages from the construction delay. By allowing the petition to halt construction, city officials violated the equal protection and due process clauses of the [Fourteenth Amendment](#), as well as the [Fair Housing Act](#), Buckeye claimed.

In November 1996, Cuyahoga voters passed the referendum, but it was declared invalid in 1998 when the Ohio Supreme Court held that the state constitution authorizes referenda only in relation to legislative acts, not administrative acts. This decision forced the city to issue building permits and allow construction to begin but also reduced Buckeye’s federal action to a claim for damages.

The District Court granted the city summary judgment in the federal case in November 1999, but the 6th Circuit Court of Appeals in Cincinnati reversed that decision, finding that Buckeye had produced sufficient evidence of racial bias to pursue Fourteenth Amendment and Fair Housing Act claims.

The city of Cuyahoga Falls then asked the Supreme Court to review the case. The court reversed an earlier ruling by the 6th Circuit Court with regard to Buckeye’s equal protection and substantive due process claims, and vacated the 6th Circuit Court’s disparate-impact

holding under the Fair Housing Act. The case was sent back to the lower court for another ruling based on the Supreme Court decision.

Fair Housing Act – Safe and Sound or Diminished?

Buckeye dropped the Fair Housing Act claim before the Supreme Court review, some believe, to avoid an adverse ruling on the issue. In this sense, affordable housing advocates count the case as a limited win.

The [Fair Housing Act](#) bans housing discrimination based on race (as well as religion, familial status and other characteristics). Fair Housing Act cases usually involve private actors such as landlords accused of discriminating on the basis of race or family status when renting or selling property, says David Barron, assistant professor of law at Harvard Law School.

In the lower court, Buckeye made a Fair Housing Act claim based on the theory of disparate impact, which, holds that discrimination can exist even without intent to discriminate if an otherwise neutral action has a harsher effect on a minority group. (Disparate impact is commonly used in employment law cases.) In essence, Buckeye argued that the staying of the site plan ordinance disproportionately affected African-Americans because, as an expert witness testified before the District Court, “black income eligible households comprise a disproportionately high percentage of the multi-bedroom rental housing market.”¹

Ten of the 11 circuit courts (just below the level of the U.S. Supreme Court) have held a disparate impact claim can be asserted under the Fair Housing Act, Relman says. This means plaintiffs wouldn’t have to demonstrate an act of housing discrimination was *motivated* by racial bias in order to challenge it (which makes it easier to make such a challenge). The Supreme Court has never addressed this question but may have been looking for an opportunity to declare the theory invalid in Fair Housing Act issues.

“I knew when the Supreme Court took this case that they were not looking to give the 6th Circuit a big pat on the back,” Relman says. “The Supreme Court takes a case like this because they are troubled by something, and they are looking to reverse.”

The case could have tested the reach of the Act with regard to challenging local land-use policies, Barron says. But, because the plaintiff didn’t pursue the Fair Housing Act claim, and the Supreme Court didn’t press the issue (vacating it but not holding it wrong), the Fair Housing Act’s application in land-use cases “remains as open now as it was prior to Cuyahoga Falls,” Barron says.

Dropping the Fair Housing claim was the legally sensible thing to do because the referendum itself was invalidated, Relman says. Had the claim remained, lawyers would have had to defend the use of disparate impact in a one-time situation (that of a particular citizen petition drive) against the common-sense argument that any one-time act by necessity has a disparate impact on someone.

The First v. The Fourteenth Amendment – Limited Precedential Consequences

¹ The testimony occurred when the case was at the summary judgment stage before the federal district judge. See the reference to that testimony in the electronic citation pursuant to [Sixth Circuit Rule 206](#), Section II B.

Because Buckeye dropped the Fair Housing Act claim, the Supreme Court case concerned an equal protection claim (requiring proof of racially discriminatory intent) and two due process claims. With regard to the due process claims, Buckeye argued the city engineer's refusal to issue permits while the petition was pending constituted egregious or arbitrary conduct depriving Buckeye of its property rights, and that the act of submitting the ordinance to a referendum constituted per se arbitrary conduct.

Buckeye tried to preserve the right it won in the 6th Circuit to pursue a claim that city officials were racially biased and conspired with citizens, thus violating the equal protection and due process clauses of the Fourteenth Amendment. According to Buckeye and its supporters, city officials could have issued building permits much earlier but delayed them in order to give citizens time to organize the petition for a referendum.

Citizens, the mayor and other city officials made statements that could be interpreted as expressions of racial bias against blacks, the [6th Circuit Court opinion states](#).² According to the evidence cited in the 6th Circuit and the Supreme Court opinions, citizen statements referred to concerns that the housing complex would bring in a certain "element," that it would be a site for crime and drug activity, and that it would attract a population "similar to the one on Prange Drive," the city's only African-American neighborhood.

The [National Fair Housing Alliance's amicus brief](#) also described other comments and actions, including one complaining of "those people" with their "boom boxes." According to the 6th Circuit Court opinion, the mayor and other officials spoke of their support for blocking the project and made other statements suggesting they agreed with citizens.

The justices have been eager to clarify the extent to which the First Amendment protects city officials and the citizenry from charges of making discriminatory statements and may have initially seen Cuyahoga as an opportunity for that, Relman says. (The issue was explored in [Virginia v. Black](#), a case argued one month before Cuyahoga and decided in

Cuyahoga Raises Issues About Place-Based Housing Solutions

While Chip Bromley heads a housing advocacy group and Ron Utt hails from the conservative Heritage Foundation, they both agree on one thing: The Cuyahoga case points to issues raised by place-based solutions to affordable housing needs.

According to Utt, a senior research fellow with the [Heritage Foundation](#), project-based housing assistance leads to racial segregation. He cites a mid-90s case in which the American Civil Liberties Union sued the U.S. Department of Housing and Urban Development and the Baltimore Housing Authority for fostering racial segregation because all of the public housing projects in Baltimore were African-American.

Programs that "take 400 black families, keep them all together and send them someplace else" prompt violent citizen reaction, exacerbate racial tensions and constitute phony integration a.k.a., "microsegregation," Utt says. "If you take the same 400 families and give them a voucher, nobody would notice, and essentially they would self-integrate."

Chip Bromley, director of the [Housing Research and Advocacy Center](#) in Cleveland, says the problem Cuyahoga reveals is not project-based assistance but the scope of those entities producing the projects. Much of the affordable housing development in this country is done by place-based nonprofits (community development corporations or CDCs), he explains. Though CDCs do great work, they are often too busy and too focused on staying afloat to step back and take the necessary broader look at what's going on in the region. Assisted housing ends up concentrated in poor inner city areas where there are fewer jobs and where the schools are less equipped to shoulder more special-needs children. Tax credit allocation exacerbates the problem because federal policy encourages building tax-credit financed projects in low- to moderate-income census tracts.

To read what sources suggest to remedy concentration, see "[Top 10 Steps](#)"

² The comments were collected as evidence when the case was at the summary judgment stage before the federal district judge. The Sixth Circuit judge referred to this evidence in his opinion.

April 2003). But it didn't turn out that way because of the peculiarities of the case, most notably the fact that the damages being sought stemmed, as the Supreme Court repeatedly emphasized, from the referendum *process*.

In a [unanimous opinion](#), the Supreme Court found Buckeye had not presented proof of an equal protection claim and that both due process claims lacked merit.

In denying the equal protection claim, the Supreme Court could have but did not treat the petition process as if it were an actual referendum with a legally operative effect, says Harvard's David Barron: "That led them to treat evidence of the voters' views as essentially a private rather than governmental action."

The Supreme Court said, "statements made by private individuals in the course of a citizen-petition drive . . . do not, in and of themselves, constitute state action for the purposes of the Fourteenth Amendment."

The Supreme Court, in its opinion, did not give much credence to the theory of a conspiracy between city officials and citizens. In its questioning during oral arguments and in the opinion, the court focused on whether city officials had any *choice* in delaying permits or allowing referenda. The court found city officials did not violate due process rights because they could not be held liable for ministerial acts over which they had no discretion. The court said the city was just acting legally under its charter in submitting the referendum to the public and refusing to issue building permits.

"It's a good holding," Relman says. "Because the court limited its understanding of the facts to a case where city officials had no choice, future cases that involve city discretion can't use *Buckeye v. Cuyahoga Falls* as a defense."

"The city did what it needs to do within the legal parameters," says Juan Otero, principal legislative counsel of the [National League of Cities](#). "It's always best for cities to stay within the letter of the law, and they did what they needed to do in terms of submitting it to a referendum. Alleged discriminatory statements by private individuals during the petition drive were clearly not state action, and it seem to me that holding the city responsible would have been a large misreading of the law."

Referenda and the Potential Chilling Effect

Because the ruling concerns the referendum *process*, it doesn't significantly address equal protection challenges that could be brought against a referendum, Barron says.

"In a clean case, where there was a referendum that was legal under state law . . . evidence of an improper racial motivation for that referendum could suffice to render it invalid under the equal protection clause," Barron says.

Still, though Barron and others agree the Supreme Court didn't grant referenda immunity from equal protection challenges, it affirmed free speech rights in a way that worries some housing and property rights advocates.

The opinion said, "The people retain the power to govern through referendum . . . In fact, by adhering to charter procedures, city officials enabled public debate on the referendum to take place, thus advancing significant First Amendment interests."

In his concurring opinion, joined by Justice Clarence Thomas, Justice Antonin Scalia wrote, “There is nothing procedurally defective about conditioning the right to build low-income housing on the outcome of a popular referendum.”

It is the wording of the opinion, more than the actual decision, that leads some housing developers to predict the case will have a chilling effect on affordable housing development.

“It is an invitation to develop yet another tool of opposition and to do it in ways that appear to be blessed by Supreme Court,” says Michael Allen of the Better Communities Network.

According to this line of thought, Buckeye confirms that citizens are free to launch referendum processes and the possibility is sufficient to deter those who would build affordable housing projects, homeless shelters, soup kitchens and other types of projects often viewed as unwanted land use.

“This will open doors to NIMBYists throughout the country,” says William Sullivan, executive director of the [Rocky Mountain Mutual Housing Association](#) in Denver. “Affordable housing developers —for- or nonprofit — are going to say, ‘Hmm. Even if we have zoning and planning commission approval, they can do a referendum and hold it up for a year. Even if we win, it adds so much to the costs of development, why do it? And what kind of tax credit investor would invest in this kind of thing? You’ve got citizens out there carrying pitchforks and walking around with petitions so investors will back out.’”

If people had observed what actually happened in Cuyahoga separate from the Supreme Court case, they might be less wary of future referenda, says Bill Faith, director of the [Coalition on Homelessness and Housing](#) in Ohio. The mayor “took a lot of political heat for this,” Faith says, “so I don’t know that it encourages anybody to pursue matters like this in the future.”

Challenging Exclusionary Zoning

Though he disagrees that the threat of referenda is grave, Relman does say the case may provide a blueprint for enacting referenda that can beat equal protection challenges — specifically, how to cover racial bias with euphemisms, or to base opposition on classes unprotected by the Constitution, such as social class itself.

Indeed, opposition to low-income housing today isn’t as much race-based as class-based, observers say. Cuyahoga was as much about citizen attempts to “upgrade the demographics, keep out the low income,” says Ron Utt, a senior research fellow at the Heritage Foundation. Sullivan refers to it as classism, and he and others like Chip Bromley, Director of the Housing Research and Advocacy Center in Cleveland, say the classism exhibited in places like Cuyahoga Falls will lead to further concentration of affordable housing in already disadvantaged neighborhoods that lack jobs and have struggling school systems.

“The big picture to take away from Cuyahoga is that the [Supreme] Court remains unfortunately unwilling to acknowledge the degree of exclusion from many communities of low-income minorities that is practiced,” Allen says. “This case falls into an unfortunately long line of cases in which the court has chosen not to construe federal law in a way that would place limits on those exclusionary practices.”

Marty Mellett, director of the [Community Development Support Collaborative](#) in Washington, partially agrees. Though he does not foresee much impact from Cuyahoga, simply because there are already more subtle ways to stop projects — such as zoning laws and density

restrictions — he says he is disappointed the Supreme Court chose not to send a message that disfavors the various mechanisms people hide behind when they oppose affordable housing.

Though Buckeye prevailed in keeping disparate impact safe for the time being, “the case shows that The Fair Housing Act in practice is not turning out to be a very effective tool for combating problems created by exclusionary zoning,” Barron says. “The lower court decision suggested that the Fair Housing Act and equal protection clause might serve as legal means of challenging barriers to constructing affordable housing in suburban communities. ... Whatever promise the 6th Circuit decision held out for greater opportunities to challenge existing local barriers to affordable housing construction, that promise is gone.”

Property Rights — Did the Court Punt?

In the Cuyahoga Falls case, Buckeye claimed city officials could have issued building permits but didn’t, and this refusal constituted an arbitrary deprivation of their property rights. To show that due process has been denied, one must first possess a Constitutionally protected property interest. The National Association of Home Builders filed [an amicus brief](#) arguing that Buckeye had a fundamental right to own the property on which it planned to develop the housing, and that this right included the right to use it. Tom Ward, director of litigation for the [NAHB](#), says the Supreme Court did what many lower courts have done before it — essentially ignore this first part of a due process claim.

“In layman’s terms, the court punted,” Ward says.

Perhaps Scalia picked up the ball.

Immediately after the Cuyahoga decision came down, a land-use discussion group moderated by Peter Buchsbaum for the American Bar Association was awash in speculation. What exactly, emailing subscribers mused, did Scalia mean when he wrote, “Freedom from delay in receiving a building permit is not among these ‘fundamental liberty interests’”?

Lani Williams, associate counsel for [the International Municipal Lawyers Association](#), says that while “the rest of the opinion, I think, will be a mere footnote,” the Scalia opinion could have greater reach.

The opinion appears to potentially limit property rights and will make it harder for developers to challenge the permitting process and easier for governments to substantiate what they’ve done, Williams says. If a government is going to “deprive” a developer of a building permit, and that permit is not considered a fundamental liberty interest, then the government does not have to show its actions are narrowly tailored and serve a compelling government interest. This could affect such cases as wetlands development, wherein governments that don’t want to issue permits won’t be subject to a strict court review of their actions.

Municipal Management by Referendum

To Ron Utt of the Heritage Foundation, the Cuyahoga case is just another in a long line eroding individual property rights in the face of increasingly formal community consultation on the use of private property.

“Property rights have been so diminished over time,” Utt says. “It’s increasingly difficult for property owners to make a persuasive, winnable case in most courts of law. With the advent of ‘smart growth’ and growth controls, you see even more restrictions ... The mere fact of changing zoning is technically a violation of property rights.”

Harvard Law Professor Michael Barron says the court's implicit condoning of changing zoning codes in a single shot through referendum "caters to very short-term thinking about land use."

William Sullivan of the Rocky Mountain Mutual Housing Association in Denver agrees. Of the trend toward decision-making by referendum,³ he says: "If we are going to direct democracy, let's go there and eliminate elect[ing] officials but, jeez, this is crazy."

Positive Outcomes for Housing

By not holding the city liable, the case improves prospects for affordable housing development, says Otero of the National League of Cities. The threat of lawsuits and the need for legal protection would drain funding from housing programs, he says. "We don't like liability. At the end of the day it doesn't serve anybody's interests."

Midwest developer Alan Arthur, executive director of the Central Community Housing Trust in Minneapolis, sees a silver lining emerging from the Cuyahoga case.

"These things are hard for communities to decide, and a case like this forces us to look at ourselves and ask ourselves, 'What kind of country, what kind of state, what kind of community do we want to be?'" Arthur says. "So, although in the short-term the decision and incidents like this are negative on the ability to provide housing for all our people, in the long run they force us to be honest about who we are. They force discussion, and I think discussion is a healthy thing. Hopefully, that discussion will lead to a better place."

Editor's Note: Since his interview for this article, William T. Sullivan left Rocky Mountain Mutual Housing Association. He remains in Denver, where he is now consulting in the community development and housing areas.

³ Not all states allow initiatives and referenda, according to the National Civic League. If a state allows initiatives or referenda, the city charter would have to include language that allows the use of that power. According to the 2001 International City/County Management Association Municipal Form of Government Survey, 57.8 percent of U.S. cities surveyed have the initiative process (allowing citizens to place charter, ordinance, or home rule changes on the ballot by collecting a required number of signatures on a petition), 72.2 percent have legislative referenda (allowing the council to place any question on the ballot for binding or non-binding voter approval or rejection), and 46.7 percent have popular referenda (allowing citizens to petition to place on the ballot any charter, ordinance, or home rule change that has been adopted by the local government before the change can take effect).