

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

3	BUCKEYE COMMUNITY HOPE	)	No. 16 C 4430
4	FOUNDATION, et al.,	)	Chicago, Illinois
		)	July 25, 2016
5		)	9:30 o'clock a.m.
6	-vs-	)	
7	VILLAGE OF TINLEY PARK, et	)	
	al.,	)	
8		)	
	Defendants.	)	

TRANSCRIPT OF PROCEEDINGS - MOTION  
BEFORE THE HONORABLE MILTON I. SHADUR

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THE CLERK: 16 C 4430, Buckeye Community Hope

1 Foundation versus Village of Tinley Park.

2 MR. McGRATH: Good morning, your Honor, Alastar  
3 McGrath on behalf of defendants.

4 MR. WEITZEL: And Jerome Weitzel on behalf of the  
5 defendants.

6 MR. WARDENSKI: Joseph Wardenski for plaintiffs.

7 MR. SCHLACTUS: Glenn Schlactus for plaintiffs.

8 MS. WALZ: Katherine Walz for plaintiffs.

9 MR. MURDOCH: Chris Murdoch for plaintiffs.

10 THE COURT: Okay. Well, let me start with the easy  
11 part. I am going to grant leave to file more than 15 pages  
12 on the response.

13 MR. McGRATH: Thank you.

14 MR. WEITZEL: Thank you.

15 THE COURT: Now to a more difficult thing. Let me  
16 ask that you people take your seats while I give you some  
17 preview of this thing, and also I am going to have some  
18 questions to pose.

19 As for the substance of the brief, the defendants  
20 lean very heavily on portraying the Village's Planning  
21 Director Amy Connolly as a subversive bete noir when there  
22 is, frankly, nothing to suggest that she was doing anything  
23 other than a professional job in seeing whether an applicant  
24 who was seeking to build affordable housing, which is a  
25 legitimate goal that has been promoted by Congress, you know,

1 in the Fair Housing Act, where opposition is rooted in  
2 impermissible motives, whether that could be done by  
3 obtaining permission to do so without doing violence to the  
4 Village's preexisting Legacy Code.

5 Because the -- as I read the materials that have  
6 been supplied, because the Planning Director both compelled  
7 Buckeye to tailor its planning to conform to what at least  
8 she viewed as consistent with the Legacy Code's fundamental  
9 purpose but thought called for an amendment to the -- to the  
10 Code to deal with this particular application, what was done,  
11 as I read it, was that she sought to serve both those  
12 purposes, which can hardly be characterized as anything other  
13 than a legitimate activity by somebody who is described as a  
14 planning director.

15 So it is -- I found it extraordinarily troubling to  
16 read defendants' current response in light of this undisputed  
17 sequence of events that ensued when the Buckeye proposal  
18 became a cause celebre in the Village in consequence of a  
19 newspaper article in the south suburban newspaper that serves  
20 at least some of the populace in the Village. Given then the  
21 reaction of the Village's -- Village government's leaders  
22 when that happened, it is ironic and, I will say candidly, it  
23 appears hypocritical to say at the very outset of the  
24 introduction that the -- let me get the thing here in front  
25 of me -- I will get the -- that this case is not about the

1 Village of Tinley Park keeping out affordable housing.

2 Frankly it -- what appears here is that that is  
3 just what the case is about. For this -- at least for  
4 someone who seeks to be an unbiased and objective observer  
5 and to see the source of that same introduction toward its  
6 end conclude with a pejorative characterization of the Code  
7 amendment that is at issue here as an ill-gotten modification  
8 raises the volume of rhetoric without really adding to the  
9 logical analysis.

10 That said I do have a couple of questions that I  
11 want to pose to each side because I do not mean by my initial  
12 characterization here to indicate an ultimate determination.  
13 And I am not doing that, and that will become clear by the  
14 questions that I am posing.

15 The first on which I would appreciate input is  
16 caused by the extraordinary volume of paper that I have been  
17 favored with and the one that I -- in particular I would like  
18 a response to, and this is from either side, is to where in  
19 the submissions I can find the actual amendatory ordinance,  
20 the one that was adopted in October 2015, October 6th, that  
21 the Village later sought to revoke in order to place the  
22 terms of the Legacy Code as they had been before that  
23 amendment.

24 And I don't care who does it, but if you can  
25 identify what exhibit it would be in one -- any one of the

1 submissions, I would -- I would appreciate that. Can either  
2 side tell me? Either side. Plaintiff, defendant, I don't  
3 care.

4 MR. McGRATH: We cannot, your Honor. We did not  
5 submit it, your Honor. It would only be the plaintiff that  
6 did.

7 THE COURT: Have you submitted it?

8 MR. WARDENSKI: We submitted it as a supplementary  
9 exhibit after one of these status conferences.

10 THE COURT: One of the exhibits doesn't enlighten  
11 me a lot because there are beaucoup exhibits, right?

12 MR. WARDENSKI: I understand that.

13 THE COURT: So tell me -- if one of you can tell me  
14 just where it is located.

15 MR. WARDENSKI: We will look for it right now. And  
16 if not, we can tell you after the hearing, your Honor.

17 THE COURT: Okay. And relatedly if the exhibits  
18 include other documentation as to that earlier amendment, I  
19 would appreciate input on that as well. I am not asking you  
20 to track it down now because I do have a couple of other  
21 questions that I pose, but certainly I need to review that  
22 because any consideration of possible preliminary injunctive  
23 relief, whether in the form of TRO or preliminary injunction,  
24 would have to treat that essentially as reflecting a  
25 restoration of status quo.

1 MR. WARDENSKI: Your Honor --

2 THE COURT: Yes?

3 MR. WARDENSKI: Your Honor, we identified the  
4 exhibit. It was Document 56-1 on ECF.

5 THE COURT: Wait just a minute. 56-1?

6 MR. WARDENSKI: Yes.

7 THE COURT: And that is the entirety of 56-1?

8 Because the way that the Clerk's Office does that, as you  
9 know -- you should know is to make subsidiary documents that  
10 are subsidiary to any docket number successive -1, -2, and so  
11 on. So that is self-contained as 56-1?

12 MR. WARDENSKI: That's right.

13 THE COURT: Okay. I will track that down then.  
14 Thank you.

15 MR. WARDENSKI: And that is the full Legacy Code as  
16 amended on October -- in October 2015.

17 THE COURT: That is not what I asked.

18 MR. WARDENSKI: Oh, I am sorry.

19 THE COURT: What I asked was, what was submitted to  
20 the Village -- or was that not in the form of an amendment as  
21 contrasted with an entire compendium that reprinted the Code  
22 with amendments built in? Do you understand my question?

23 MR. WARDENSKI: I do understand. So we have --

24 THE COURT: You know, I hesitate to go back to  
25 ancient days when I was a Village Trustee, but, you know,

1 when we got stuff submitted to us, it was in the form of here  
2 is the stuff we are asking for.

3 MR. WARDENSKI: Understood, your Honor. So what we  
4 have previously submitted is the Planning Department staff  
5 report from early September 2015 identifying the changes that  
6 would be proposed as well as the ordinance containing those  
7 changes.

8 THE COURT: Ah. So wait just a minute. So what  
9 you are saying -- when I asked about other documentation,  
10 what you are saying is that in order to understand that one,  
11 the 56-1, I would also need to be provided with that  
12 September document, or what?

13 MR. WARDENSKI: So you have that September  
14 document, and in addition --

15 THE COURT: And tell me --

16 MR. WARDENSKI: -- there is an ordinance -- yes? I  
17 am sorry, go ahead.

18 THE COURT: I know I have got everything, but, you  
19 know, the only way I can find it is by that kind of tracking.  
20 So tell me what that -- if that is what is necessary in order  
21 to understand 56.1 and the changes that were made, then  
22 obviously I need the earlier part of the submission that you  
23 have referred to. Is that the September thing?

24 MR. WARDENSKI: Yes, your Honor. So the September  
25 staff report shows the changes and strike out --



1 THE COURT: Staff report to whom, to the Board?

2 MR. WARDENSKI: To the Village.

3 THE COURT: That is what I need then. Let's get  
4 the number of that.

5 MR. WARDENSKI: Okay.

6 MR. SCHLACTUS: That is 56-2, your Honor.

7 THE COURT: Okay. Now let me pose a question on  
8 the other side of the coin, one that is directed, although I  
9 appreciate Buckeye having given me the answer on No. 1. And  
10 I assume that the defendants don't quarrel with that  
11 characterization, right?

12 MR. McGRATH: We have no reason to understand it to  
13 be a different number than what they have told you, your  
14 Honor.

15 THE COURT: So now I am going to put one directly  
16 to Buckeye, and that is, how would you visualize the posture  
17 of the case and the next step in the litigation if I were to  
18 grant your motion in the way that you have framed it, that  
19 is, where would that put you in terms of the posture of the  
20 litigation? And that is a general question.

21 But I would also want to make a specific reference  
22 to that one by asking what about the IDOT request that was  
23 related -- referred to at pages 12 and 13 I think it is --  
24 let me take a look -- of the defendants' recent response --  
25 yes? So two-part question. One -- well, maybe that second

1 part is subsidiary to the first one. In your view if you  
2 were to get the kind of relief that you have sought now, what  
3 would then be the next step? What is the posture of the case  
4 if that were to take place?

5 MR. WARDENSKI: Your Honor, what we are seeking  
6 through our motion is to restore Buckeye and the Village to  
7 where they were before the February 4th Planning Commission  
8 meeting at which the vote that was expected to --

9 THE COURT: Well I understand that.

10 MR. WARDENSKI: -- was taken.

11 THE COURT: But you have gone farther than that.  
12 You said that if that is done, then there has to be a vote by  
13 the Plan Commission.

14 MR. WARDENSKI: Correct.

15 THE COURT: And you are saying that that is a vote  
16 in which the Board does not participate. And now assume that  
17 that gets done, what then happens to the lawsuit at that  
18 point? What -- you know, that doesn't do the job. The  
19 defendants are complaining if that were to happen and you  
20 were free to go ahead then with construction, we might find  
21 ourselves -- I remember a case years ago in which there was a  
22 challenge to a wall having been built that was assertedly in  
23 violation of a zoning ordinance. And what the Court did was  
24 to require the wall to get torn down when they found against  
25 it.

1           So essentially that is the kind of argument that  
2 has been advanced on behalf of the -- on behalf of the  
3 Village, that is, that if the relief that you are seeking  
4 would then result in what amounts to what they characterize  
5 as full relief, the ultimate relief, what is your response on  
6 that one?

7           MR. WARDENSKI: Your Honor, we disagree that this  
8 would be seeking the final relief. It would clear a hurdle  
9 and allow Buckeye to move forward.

10          THE COURT: And what -- and that is what I am  
11 asking the question about. You say "clear a hurdle." What  
12 happens next in that situation?

13          MR. WARDENSKI: In that situation we would  
14 anticipate that the Plan Commission would take a vote. Under  
15 our reading of the Legacy Code that vote should be to approve  
16 the project.

17          THE COURT: I understand your --

18          MR. WARDENSKI: I am sorry.

19          THE COURT: I recognize what you are saying, but  
20 that is still not -- doesn't answer my next question.  
21 Suppose they vote, vote in conformity with your desires.  
22 Now, what happens to the go-ahead or whatever takes place  
23 next in connection with your getting that relief?

24          MR. WARDENSKI: Your Honor, Buckeye would still  
25 seek damages that it has already incurred to date as a result

1 of the Fair Housing Act violations and --

2 THE COURT: But that is really not -- I am talking  
3 about what happens in connection with the basic relief that  
4 you are seeking to which damages from your point of view are  
5 supplemental, from the defendants' point of view they are an  
6 adequate remedy by themselves. And what would happen in  
7 terms of the actual going ahead with the construction?

8 And again I remind you that one of the subsidiary  
9 aspects of that is that I get for the first time a reference  
10 in the -- in the defendants' memo to an IDOT requirement  
11 that, as I understand it, requires the consent of the  
12 property owner that has not been obtained.

13 MR. WARDENSKI: Your Honor, with regard to the IDOT  
14 approvals, that is part of several steps that Buckeye would  
15 need to take before it could begin construction. That has  
16 always been true, although it is not part of the Legacy Code  
17 approval process. And so what Buckeye is seeking is the  
18 ability to move forward so that it can seek the approval from  
19 IDOT with regard to the curb cuts issue to seek other  
20 necessary permits from the Village and importantly to seek to  
21 restrain defendants from further interfering with the project  
22 in any myriad of ways during -- prior to or during  
23 construction of the building.

24 So to give you more detail on the IDOT issue, that  
25 -- the Legacy Code does not by its terms reference external

1 approvals. Those have always been necessary. And Buckeye  
2 has always intended to seek and obtain them. It believes it  
3 can do so in short order, although it needs this first site  
4 plan approval from the Village in order to move forward in  
5 seeking all of the remaining permits and approvals.

6 THE COURT: Okay. Thank you.

7 Let me hear from defense counsel about that, if I  
8 may.

9 MR. McGRATH: There is a few issues with that, your  
10 Honor. First of all, the Legacy Code does require approval  
11 of a valid site plan that would reflect the project.

12 THE COURT: Yes, I understand that. Yeah.

13 MR. McGRATH: In its current status the site plan  
14 cannot be approved. It has to be changed unless they get  
15 this approval, which they have known about for several  
16 months, at least four or five -- I haven't done the math --  
17 in which as they have said here today they haven't done  
18 anything about. It is not a matter of just getting some kind  
19 of, you know, change in the specs of an hvac vent. This is  
20 they don't get it done, their entire site plan will have to  
21 change in some respect and maybe significantly.

22 That issue aside, your Honor, can we go back to  
23 what you are discussing with regard to ultimate relief? What  
24 Buckeye hasn't been stating is where they see this going is  
25 an approval, plans, permits and building. That is what they

1 are saying happens as a result of your Honor entering a TRO  
2 today. The problem, your Honor, is it would be an entry of  
3 of a TRO which would allow the ultimate relief, in our  
4 opinion, of the building because what you have done is you  
5 have allowed them to build prior to this Court, either via a  
6 jury or through your Honor maybe via summary judgment.  
7 Finding an FHA violation.

8 So what they are trying to do, without saying it to  
9 your Honor, is, "We would like to do this piecemeal, just get  
10 us to a place where it is basically a fait accompli. So once  
11 we do this, it is now we get to build, and they have never  
12 had to showed their FHA violation. At this point in time it  
13 is inappropriate for this kind of relief.

14 THE COURT: Thank you.

15 Yes? What is the -- what is the essential reply to  
16 that one?

17 You know, I have not made it a secret, and I -- and  
18 again I emphasize that that doesn't get in the way of my  
19 deciding this thing on the merits. I have not made it a  
20 secret that I find the -- what created this lawsuit quite  
21 appalling because it clearly reflects, and I think patently  
22 so, the situation in which the authorities in a community  
23 succumb to what appear to be the least possible legitimate  
24 motivations for what goes on in the Village in terms of the  
25 essential goals of the Fair Housing Act, which is to avoid

1 discrimination that is in a prohibited area.

2 And it is -- has been quite disturbing to see what  
3 amounts to a cave-in and maybe worse on the part of  
4 authorities in the Village when they encounter that kind of  
5 -- that kind of reaction.

6 I recognize that governmental authorities have a  
7 responsibility to the -- to their constituents, the people in  
8 the area. But when those -- the desires of people in the  
9 area are at odds with some fundamentals in our society and  
10 not only that but fundamentals that Congress has weighed in  
11 on, it is especially regrettable.

12 That, however, doesn't mean that you are entitled  
13 to the relief that you seek. And I am really quite troubled  
14 by the idea that -- and I should -- let me digress for a  
15 second. I don't think that the fact, for example, of undoing  
16 the revocation of an amendment that was -- I -- as I would  
17 understand it was disclosed to the -- to the Village  
18 authorities and was nonetheless then, despite what ultimately  
19 happened, not found objectionable at the time of the original  
20 vote, that restoring that is -- would violate the  
21 fundamentals that we like to think about as the precursors to  
22 interim injunctive relief.

23 What I am troubled by, though, is that those --  
24 that a concern about those motivations really shouldn't  
25 affect the kind of response that I think is a responsible

1 judicial response to a situation in which we don't get a  
2 solution. And that is what I hear from counsel. What I hear  
3 from counsel is that this is a step that I think you have  
4 acknowledged leads only to further possibilities, none of  
5 which we have a response to.

6 And counsel makes the point that this thing that I  
7 have a mentioned a couple of times was always there, was  
8 always present, and nonetheless was never met. Counsel is  
9 making the point that the investment that you people had in  
10 place, which they criticized as being somehow having occurred  
11 before you had a right to do that, but I think that is at  
12 odds with the established authority on the -- in the field.  
13 I think that having gone ahead on the premise that this was  
14 going to get done and to be doing that in good faith in order  
15 to arrange for the financing was perfectly appropriate, and  
16 if you were to get the ultimate relief that you are seeking  
17 would be reasonable.

18 But I don't see in what you have presented a real  
19 solution to this one that counters their argument that says  
20 that you may have a claim, but it is a claim for damages  
21 because you don't have an entitlement to the preliminary  
22 injunctive relief that at best gets you into future problems  
23 and therefore is not really a normal ground for granting that  
24 kind of relief.

25 Now, having said all this I want to take a look at



1 the -- at these documents that you referred me to earlier.  
2 And I am sure that since I have saved everything on this one  
3 I can do that and maybe I would like to resume at maybe -- in  
4 the very early afternoon after I have had a chance to take a  
5 look at this one. But I will tell you if you are -- if both  
6 sides are available. It sounds to me as though plaintiff is  
7 on the side of an -- plaintiffs -- uphill climb in light of  
8 everything here, although equity would call for a different  
9 result. But I want to make sure of what the thing was in the  
10 way presented and see if that requires a further look.

11 So how are you all situated in terms of say  
12 resuming at maybe 1:15? Is that okay?

13 MR. McGRATH: We are -- defendants are fine, your  
14 Honor, 1:15.

15 MR. WARDENSKI: Your Honor, we are available. If I  
16 may make a few points in response.

17 THE COURT: Absolutely.

18 And, by the way, if when I am tracking through I  
19 can't find 56-1 or 56-2 -- I doubt that that would be the  
20 case because I have got the whole stack here that I will go  
21 through -- but if so, I would have my -- one of my clerks  
22 call to make sure we get a copy of that. Okay?

23 MR. WARDENSKI: No problem.

24 THE COURT: Go ahead with your comments.

25 MR. WARDENSKI: So, your Honor, plaintiffs' burden

1 at this point is to show that they have a likelihood of  
2 success on the merits of their Fair Housing Act claim. We  
3 think we have more than met that threshold and that the harm  
4 that will accrue to Buckeye will be the inability to build  
5 this project if it can't move forward very quickly.

6 What we are asking the Court to do is enjoin the  
7 Village from continuing to interfere with the vote to which  
8 Buckeye is entitled. That won't get us the whole way  
9 because, as your Honor has already mentioned, there are other  
10 steps that Buckeye needs to pursue prior to putting shovels  
11 in the ground. However, it cannot move forward with those  
12 steps, including seeking IDOT approval, until it has site  
13 plan approval from the Village.

14 Now, with regard to the IDOT issue I want to direct  
15 the Judge -- direct your Honor to Page 61 of the Legacy Code  
16 in either of its versions which deals with vehicle access  
17 requirements under the Code. And on that -- that provision  
18 does not make any reference to --

19 THE COURT: Is that a page reference or paragraph  
20 reference?

21 MR. WARDENSKI: It is a page reference.

22 THE COURT: All right. Wait just a minute. 61?

23 MR. WARDENSKI: I believe it is 61. We are  
24 checking that.

25 THE COURT: All right. Go ahead.

1 MR. WARDENSKI: But that is a provision that  
2 applies to the entire Legacy Code area with regard to vehicle  
3 access and curb cuts. That provision makes no reference to  
4 external approvals. And the point that I want to emphasize  
5 is that the curb cuts as they exist in Buckeye's current site  
6 plan conform to the Legacy Code. Buckeye believe they also  
7 conform to Illinois State requirements, IDOT's requirements,  
8 and it will seek that approval.

9 However, there was no space between what the  
10 Village Planning Department approved with its final staff  
11 determination in early February and the site plan as it  
12 exists right now. Whether -- you know, we can quarrel with  
13 the wisdom of the Legacy Code in not making to reference to  
14 external approvals, but it makes no such reference. And what  
15 we are asking for is approval under the Legacy Code.

16 Whether that raises some issues with IDOT or in the  
17 permitting process later is a bridge that will have to be  
18 crossed. It has always been a factor in Buckeye's  
19 consideration in terms of timing. The ramp-up that I have  
20 previously discussed of one months to two months or -- to  
21 begin construction, that has always been factored into  
22 Buckeye's timing in terms of seeking the relief by the end of  
23 this summer in terms of getting an approval so that it can  
24 move forward with all of the rest of the work that it needs  
25 to do.

1           The curb cut issue was not raised at all by IDOT  
2 until I believe at or even after the February 2nd Board of  
3 Trustees meeting where the community opposition really became  
4 an issue and the Village officials made statements endorsing  
5 that community suggestion. So Buckeye believed reasonably  
6 that it would be futile to go seek further approvals for this  
7 project before it had the site plan approval to which it is  
8 entitled under the Legacy Code.

9           THE COURT: So implicit in what you are saying is  
10 that the Court would somehow have to make a determination  
11 that it was at the stimulus of the Village that IDOT raised  
12 the issue or -- I am not sure just how you are framing that.

13           MR. WARDENSKI: No, your Honor, what I am saying is  
14 that -- that it was an issue that was -- that occurred during  
15 the normal course of the planning process. The Legacy Code  
16 site plan approval is separate and apart from any State  
17 approvals. And so whether or not Buckeye can obtain IDOT  
18 approval is irrelevant to whether it is entitled to site plan  
19 approval under the Legacy Code by the Legacy Code's own  
20 terms.

21           MR. McGRATH: If I can, a couple things, your  
22 Honor.

23           THE COURT: Wait.

24           MR. McGRATH: Oh, I think he has another -- I am  
25 sorry.

1 MR. WARDENSKI: No, go ahead.

2 THE COURT: Go ahead.

3 MR. McGRATH: I think there is two points to be  
4 made there, your Honor. First going back to the issue with  
5 regard to the type of relief they are seeking. The issue is,  
6 your Honor, there is an ordinance in place right now. And in  
7 order for them to get the vote they are requesting, they are  
8 asking that your Honor ignore the current ordinance and go  
9 back to the interim ordinance. The only way your Honor can  
10 do that, though --

11 THE COURT: Yes, and you know --

12 MR. McGRATH: If I may, your Honor.

13 THE COURT: You know -- wait just a minute. They  
14 are -- you know, that is -- that poses a different problem  
15 than one on which -- I think you are on sort of thin ice  
16 because the -- again, I started out by reflecting the fact  
17 that the -- at least the materials that were provided to me  
18 did not, I think, justify the extraordinarily pejorative  
19 characterization in which you have sought to portray that.

20 And so the -- you know, the idea that somehow the  
21 Village can basically bootstrap itself by having engaged in  
22 something that frustrated what may have gone before -- and  
23 that is the one reason I want to look at these two documents  
24 particularly. If in fact those things were presented fairly  
25 to the Village authorities and the Village authorities signed

1 off on them, and this at a time when Buckeye was engaged in  
2 activities that were in pursuit of what they were doing, that  
3 brings you into this group of cases that were submitted to me  
4 the first time around in which what you do is you -- is to  
5 look at the posture of matters at the time that the party  
6 seeking relief engaged in good-faith expenditures.

7 And so to resolve it somehow in terms that you have  
8 just been putting I think cuts in -- right into the question  
9 whether somehow Village authorities can in hindsight say,  
10 'Oh, well, we really didn't realize that that was happening."  
11 And I don't know the answer to that. That is why I want to  
12 look at these two documents -- these two exhibits.

13 MR. McGRATH: Your Honor, again I am not sure how  
14 those documents are going to help you without looking at the  
15 evidence and testimony of everybody.

16 THE COURT: That is evidence.

17 MR. McGRATH: Well, further evidence of who was at  
18 -- your Honor, that is four pages of -- pieces of paper. You  
19 don't even know what was said to the Trustees, what was said  
20 between the parties. There has been no evidence at this  
21 point presented, your Honor.

22 Again, I understand your --

23 MR. WEITZEL: We haven't even answered the  
24 Complaint, your Honor. Like there -- this is not an  
25 evidentiary hearing, right? We -- if your Honor wants to

1 have an evidentiary hearing, that is a preliminary injunction  
2 at its earliest after discovery.

3 THE COURT: Yes, I know about the difference  
4 between.

5 MR. WEITZEL: I know you do, Judge.

6 THE COURT: I don't --

7 MR. WEITZEL: So --

8 THE COURT: You know, I really don't need education  
9 on that. Let me try again.

10 MR. WEITZEL: Well, what I --

11 THE COURT: Wait just a minute. To say that you  
12 don't have evidence on something on which there may be  
13 documentary evidence in this -- in this form is really, I  
14 suggest, somewhat myopic. I have to look at that to see. I  
15 don't know that evidence that says, oh, I didn't read it, or  
16 I didn't understand it, or something like that, enters into  
17 that consideration at all.

18 I want to see what it was that the Trustees had  
19 before them at the time that they voted back in October 2015.  
20 That may be a preliminary to the ultimate determination. But  
21 for you to characterize that as saying, well, we are without  
22 evidence is --

23 MR. McGRATH: I never said --

24 THE COURT: -- really is, you know --

25 MR. McGRATH: I didn't say you were without

1 evidence, your Honor.

2 THE COURT: We have -- we do have the parol  
3 evidence rule, you know, among other things that tell us --  
4 yes, that tell us how it is we evaluate evidence. And what  
5 you are saying is that I should not take a look at those  
6 things and see where that places us is I think  
7 over-simplistic.

8 So now you go ahead and tell me, is there some  
9 reason that it doesn't make sense for me to look at those  
10 before we resume?

11 MR. WEITZEL: The point I do want to make, your  
12 Honor, is basically what you have been talking about the last  
13 few minutes is really looking at this issue from a vested  
14 rights perspective.

15 THE COURT: From a what?

16 MR. WEITZEL: Vested rights perspective. You were  
17 talking just two minutes ago about, you know, how much money  
18 they spent and actions they took in reliance on something.  
19 That is a vested rights issue. That is a mandamus issue,  
20 Judge.

21 THE COURT: No, it is not.

22 MR. WEITZEL: Yes, it is.

23 THE COURT: No, it is not.

24 MR. WEITZEL: It absolutely is.

25 THE COURT: Don't tell me what it is in that sense.



1 It is not a mandamus issue. The --

2 MR. WEITZEL: It has no relevance to the FHA, your  
3 Honor. It doesn't.

4 MR. McGRATH: At the end of the day, your Honor, we  
5 believe you have -- they have to show an FHA violation in  
6 order for your Honor to order the Village to act under the  
7 old ordinance in order to let them build a building. I think  
8 that is where we are at right now.

9 MR. WEITZEL: And those issues are very separate  
10 from the vested rights mandamus issue.

11 THE COURT: Thank you.

12 MR. WARDENSKI: Again, your Honor, we only need at  
13 this stage to show a likelihood of success on the merits, and  
14 we believe we have done that with the evidence before the  
15 Court.

16 I would like to make two other points.

17 THE COURT: Yes.

18 MR. WARDENSKI: The January 21st, 2016 Plan  
19 Commission minutes, which I believe are in the record -- and  
20 we will get you an exhibit citation immediately after the  
21 hearing -- acknowledges that the IDOT issue is separate from  
22 Buckeye's ability to obtain approval under the Legacy Code.  
23 So that it is a separate consideration. And we will point  
24 your Honor in that -- to the appropriate exhibit after the  
25 hearing.

1 I also just want to direct the Court to Promatek  
2 Industries versus Equitrac Corporation.

3 THE COURT: Wait, wait, wait. What?

4 MR. WARDENSKI: Promatek Industries versus Equitrac  
5 Corporation, 300 F.3d 808 --

6 THE COURT: Wait just a minute.

7 MR. WARDENSKI: Yep.

8 THE COURT: Yes?

9 MR. WARDENSKI: -- which is a 7th Circuit case in  
10 2002. That case held an evidentiary hearing for a --

11 THE COURT: I will read it, but tell me, yeah.  
12 What?

13 MR. WARDENSKI: It held that an evidentiary hearing  
14 for a preliminary injunction was not necessary unless the  
15 nonmoving party raises genuine issues of material fact, and  
16 that party must demonstrate that it has and attempts to  
17 introduce evidence that if believed will so weaken the moving  
18 party's case as to affect a judge's decision on whether to  
19 issue the injunction.

20 We think because the October amendments were passed  
21 under proper notice and approval procedures that there is no  
22 material issue of fact with regard to what happened before  
23 October. And defendants have raised nothing in their  
24 response to our motion for preliminary injunction challenging  
25 our sequence of events after October 5th. We -- so we think

1 that the -- whether you call it a TR0 or a PI in this case,  
2 that an evidentiary hearing is not absolutely required,  
3 although the Court may certainly call for one if there is a  
4 genuine issue of -- dispute over some material fact.

5 THE COURT: I will look at the case. Okay?

6 MR. SCHLACTUS: Your Honor, might I just -- one  
7 other point that the Court raised earlier?

8 THE COURT: Yes.

9 MR. SCHLACTUS: You asked whether if the Court  
10 grants the preliminary relief, the project become a fait  
11 accompli essentially outpacing the litigation such that what  
12 we can prove in the litigation becomes, I guess, irrelevant  
13 to whether the project is built. And I would submit that the  
14 answer is no for at least a couple reasons. First, as  
15 defense counsel indicated earlier, the vote might be no,  
16 right, in which case nothing goes forward. That is actually  
17 what they said will happen, although they gave both answers  
18 in their brief.

19 Perhaps more fundamentally even if the answer is  
20 yes, there is -- this is an extended project, as we have  
21 discussed several times. The litigation can proceed on --  
22 there is -- on a fast track basis potentially. Defense  
23 counsel raised that earlier. And I think we could  
24 potentially get to a fully litigated result well before the  
25 project is essentially baked in.

1           MR. McGRATH: I find that hard to believe because  
2 we sat here three weeks ago, four weeks ago, offering this  
3 same possibility. We were told under no circumstances. By  
4 the end of August we had to be breaking ground and undergoing  
5 this construction. So --

6           THE COURT: Well, I --

7           MR. McGRATH: -- I think it is difficult for them  
8 now to come back and say otherwise.

9           MR. SCHLACTUS: Wait.

10          MR. McGRATH: So again I just -- they don't even  
11 own the land at this point in time, your Honor, and they have  
12 been waiting on it. So again I am not sure how that is even  
13 possible given their prior affidavits and statements to the  
14 Court.

15          MR. SCHLACTUS: To be clear I am not saying  
16 anything different from what we have said. But the time  
17 period we have set out is based on we have to be able to get  
18 moving from the starting line, right, and that is what we are  
19 hoping to be able to do now.

20          THE COURT: Regrettably the commodity that is in  
21 the shortest supply in the federal judicial system is  
22 typically the judge's time. And what all of that discussion  
23 tends to disregard is something that I have mentioned before,  
24 and that is I have a couple of upcoming trials that I can't  
25 budge. And, moreover, I have still another two matters that

1 pose TRO situations that I am in the process of addressing  
2 now. So that the idea that we can come to a quick  
3 opportunity, for example, to conduct the kind of evidentiary  
4 hearing that counsel has talked about is, frankly,  
5 unrealistic. Not much I can do about that, I regret to say  
6 because, you know, I hate to have justice in any respect  
7 frustrated by problems of -- problems of the fact that the  
8 days are only 24-hour days.

9 And I -- that is my problem I guess. And I am  
10 sorry that it may become your problem.

11 But in any event I will see you, if I may, just --  
12 let's say 1:15.

13 MR. McGRATH: Very good, your Honor.

14 THE COURT: Okay?

15 MR. WARDENSKI: Yes, your Honor. Thank you.

16 THE COURT: If you have something else that you  
17 want to bring to my attention, just call it into chambers,

18 MR. SCHLACTUS: Your Honor, just to be clear, I was  
19 just suggesting that whatever might happen in the next  
20 several months would not be undoable. That is all I was  
21 intending to suggest. The litigation would be made entirely  
22 relevant to the ultimate injunctive relief.

23 THE COURT: Okay. Thank you.

24 MR. SCHLACTUS: Thank you, your Honor.

25 (Proceedings recessed at 10:15 o'clock a.m.)

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IN THE UNITED STATES DISTRICT COURT.  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,	)	No. 16 C 4430
	)	Chicago, Illinois
Plaintiffs,	)	July 25, 2016
	)	1:15 o'clock P.m.
-vs-	)	
VILLAGE OF TINLEY PARK, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS - MOTION  
BEFORE THE HONORABLE MILTON I. SHADUR

APPEARANCES:

For the Plaintiffs: RELMAN DANE & COLFAX PLLC  
 BY: MR. JOSEPH J. WARDENSKI  
 MR. GLENN SCHLACTUS  
 and  
 SARGENT SHRIVER NATIONAL CENTER  
 ON POVERTY LAW  
 BY: MS. KATHERINE E. WALZ  
 and  
 HOLLAND & KNIGHT  
 BY: MR. CHRISTOPHER J. MURDOCH

For the Defendants: KOZACKY WEITZEL McGRATH, P.C.  
 BY: MR. ALASTAR S. McGRATH  
 MR. JEROME R. WEITZEL  
 and  
 QUERREY & HARROW, LTD.  
 BY: MR. BRANDON K. LEMLEY  
 MR. PAUL A. RETTBERG

Court Reporter: ROSEMARY SCARPELLI  
 219 South Dearborn Street  
 Room 2304A  
 Chicago, Illinois 60604  
 (312) 435-5815

1 THE CLERK: 16 C 4430, Buckeye.

2 THE COURT: Counsel, you can keep your places. You  
3 can just announce yourselves for the record so that Rosemary  
4 gets it.

5 So call the case, and then we will hear from  
6 counsel.

7 THE CLERK: Okay. 16 C 4430, Buckeye Community  
8 Hope Foundation versus Village of Tinley Park.

9 MR. WARDENSKI: Joseph Wardenski for plaintiffs.

10 MR. SCHLACTUS: Glenn Schlactus for plaintiffs.

11 MS. WALZ: Katherine Walz for plaintiff.

12 MR. MURDOCH: Chris Murdoch for plaintiffs.

13 MR. WEITZEL: Jerome Weitzel for defendants.

14 MR. McGRATH: Alastar McGrath for defendants.

15 MR. LEMLEY: Brandon Lemley for defendants.

16 MR. RETTBERG: Paul Rettberg for defendants.

17 THE COURT: Well, a lot of you around. And I  
18 suppose that I can always claim like -- who was it, Lochinvar  
19 who said, "My strength is as the strength of ten because my  
20 heart is pure," but I won't do that.

21 Well, counsel, I went back to the documents that I  
22 had read initially when I was focusing, as you know, in the  
23 first instance primarily on Buckeye's effort to get relief in  
24 mandamus. That was a potential remedy that, as you know,  
25 after I had to look at the case law dealing with the

1 potential federal enforcement of what was essentially a state  
2 cause of action, I rejected that position.

3 But now having done so, that is, having gone back  
4 to the documents, I am, I am sorry to say, quite appalled by  
5 the position advanced in defense counsels' current submission  
6 as the response to the motion that is sought to be placed to  
7 the effort at obtaining a TRO.

8 Let me -- let me explain why I say that. Having  
9 reviewed once again the Legacy Code for purposes of what is  
10 now before me, I find the arguments advanced by defense  
11 counsel regrettably misleading. You know, the idea of saying  
12 over here on Page 2 that "Once discovered the Village quickly  
13 moved to return the Legacy Code to its original form" is  
14 really extraordinarily troubling. "Once discovered"?

15 Instead I looked at Docket No. 56-2 which I have  
16 got here. Here it is. And that of course is the Plan  
17 Commission staff report of September 3rd, 2015, just a month  
18 before the October 6th determination that dealt with that by  
19 the Village Board. And repeatedly -- repeatedly that refers  
20 -- and not only refers but highlights it in red and in  
21 emphasis to the deletion of "street-level commercial  
22 required" with "street-level commercial permitted."

23 And if that were not enough of itself -- and it  
24 occurs in several places -- to bring the charge of --  
25 directly to the attention of the Village President and



1 Village Board members, I turn to Page 3 of that document  
2 which is headed in boldface, all caps, STREET-LEVEL  
3 COMMERCIAL REQUIRED. And it says there, "Village Planning  
4 staff recommends amending the Code within the downtown  
5 core district and the neighborhood flex districts to  
6 soften the language regarding street-level commercial  
7 required to street-level commercial permitted."

8 "Permitted" is in red. "You can see in the illustration to  
9 the left and below the diagrams of those districts have  
10 a requirement that specifies that street-level  
11 commercial is required in these areas. However, the  
12 Code does not specify how much street-level commercial  
13 is required or how little could be provided.

14 Additionally, we believe that the requirement unfairly  
15 burdens properties within these districts with a  
16 requirement that may make a single-use residential  
17 development difficult. Using a 'framer's argument'  
18 staff cannot remember wanting to be so strict with  
19 requiring street-level commercial but only saying  
20 that some type of commercial use would be appropriate or  
21 allowed at the street level. Staff notes that when we  
22 were establishing the neighborhood flex district we  
23 wanted to be flexible about allowing practically any  
24 type of use in this district as long as the required  
25 building functionality and setbacks, private frontage

1 standards, private lot standards were followed. The  
2 neighborhood flex district is uniquely located more  
3 directly adjacent to Will County areas with lower tax  
4 rates. So spurring any type of development in these  
5 corners was the goal of the plan. We believe that  
6 requiring street-level commercial could complicate the  
7 redevelopment of these corners, particularly if a  
8 residential developer seeks to build in the district.  
9 Note that residential multiple-family building  
10 functionality is permitted by right in the neighborhood  
11 flex district and the downtown core district which  
12 conflicts with the 'street-level commercial required'  
13 requirement (that is, how can you have a residential use  
14 that is required to have street-level commercial?)"

15 Then in red the following paragraph: "At the  
16 August 27 workshop meeting assigned Commissioners Pierce  
17 and Reidy determined that these were appropriate amendments  
18 to make to reduce confusion and bring clarity to the Legacy  
19 Code."

20 Well, "once discovered"? Scarcely. I don't think  
21 that you are really trying to contend that your clients, the  
22 Village Trustees are Village idiots that don't understand  
23 matters on which they vote. At least I trust that is not the  
24 case.

25 Let me also correct your view of -- that I heard of

1 the type of mandatory relief that is sought here, an entirely  
2 permissible remedy where it is an adjunct to the enforcement  
3 of a federal right as somehow being out of bounds. You know,  
4 there is a distinction, and a sharp one and an important one,  
5 between a formal mandamus proceeding and things that  
6 represent mandatory relief. I don't have to pause on that,  
7 but I again find difficulty in having acknowledged that one.

8 So at step one plaintiffs would meet the standards  
9 for initial relief either through a TRO or preliminary  
10 injunction, but -- and it is a major "but" and I think -- I  
11 fear a conclusive "but." What I find defeats Buckeye's  
12 effort to get such interim relief under the present  
13 circumstances is that as -- I guess it is not improper to say  
14 -- call it shameful as the position of defendants and  
15 defendants' counsel may be perceived to be, I just don't see  
16 any way to determine a likelihood of success on the ultimate  
17 merits because of the essential step that would have to be  
18 taken once past the restoration of the October 6, 2015 Legacy  
19 Code as it was modified.

20 Remember at that point the adoption of that  
21 version, a point at which the Village President and Village  
22 Board don't have any input under the Legacy Code, it takes a  
23 vote of the Plan Commission to approve the Buckeye project.  
24 And no such vote, as all of us know, has taken place. On  
25 that score my recollection of the sorry kind of history that

1 was portrayed in the -- in Buckeye's Complaint was I think an  
2 accurate one and I guess regrettably so.

3 After recounting at length the stormy events of the  
4 February 4th, 2006 Plan Commission meeting and then going on  
5 to recount a number of events, the Amended Complaint went  
6 back to the February 4th situation. And I hauled out the  
7 thing. Page -- Paragraph 152 stated, "In the face of the  
8 widespread public opposition to the reserve, numerous Tinley  
9 Park officials have resigned or have been removed from their  
10 positions."

11 153 recounts that "Shortly after that meeting seven  
12 of the nine Plan Commission members abruptly resigned from  
13 the Commission in the face of the burgeoning public outcry  
14 over the reserve," which resulted understandably in  
15 cancellation of Plan Commission meetings thereafter. It  
16 lacked a quorum and other factors.

17 Then 154 recounts that the Village put Community  
18 Development Director Amy Connolly, who now has been your  
19 convenient target of this most recent thing, on indefinite  
20 leave with pay pending an investigation into her conduct. So  
21 she resigned from her position as Community Development  
22 Director in May of this year.

23 Then the March 2016 meeting of the Village's  
24 Committee of the Whole, the assistant -- the then Assistant  
25 Village Manager Mike Mertens explained the proper procedures

1 for project approval, explaining that the Legacy Code Area  
2 was intended from the beginning to transition from  
3 predominantly residential in the outer areas to predominantly  
4 commercial in the downtown code. And he explained, "If you  
5 meet the Code and you need site plan approval, you only need  
6 Plan Commission approval, not Village Board approval," and  
7 went on with a further explanation.

8 I could jump ahead to Paragraph 157 which says that  
9 he then tendered his resignation from his position as  
10 Assistant Village Manager on March 28th.

11 Going back to 156 the -- I -- no, I won't comment  
12 on 156. It is -- it is troubling, but I am not going to  
13 comment on it.

14 158 says that a Village Trustee resigned from the  
15 Board.

16 159, the Villages's Economic Development Director  
17 resigned from that position.

18 And then 160 recites that on April 5, 2016 the  
19 Board of Trustees voted to approve the Mayor's recommendation  
20 to fill six of the vacant seats on the Plan Commission naming  
21 them. Then going on with some further explanation that at  
22 least some of them were active members of the Citizens of  
23 Tinley Park group and some -- and had been particular leaders  
24 in the opposition to what Buckeye was seeking to do.

25 Now, how does that bear on the Court's decision?

1 Think about it. How can this Court reach a determination of  
2 likelihood of success on the merits in that posture of events  
3 without an evidentiary hearing? However dubious what has  
4 transpired may appear to be, the vote by a Plan Commission is  
5 inherently a discretionary action. This Court is not in a  
6 position and it would never seek to hold the hand of each  
7 member of the Plan Commission, either literally or  
8 figuratively, to force an affirmative vote. That is not the  
9 Court's role.

10 If the vote were to result in non-approval of the  
11 Board -- Buckeye's project, that would by definition  
12 necessitate an evidentiary hearing into the view and even  
13 motivation of the various members -- current members of the  
14 Plan Commission because I am certainly not in a position to  
15 oust them and force a return of people who have resigned.  
16 But what would happen is that if I were to conduct such a  
17 hearing, I would have to have findings as to credibility, for  
18 example, of negative votes.

19 So although it is always distressing to reward  
20 litigants for what I think is -- regrettably has the  
21 appearance of misconduct, I see no reasoned alternative other  
22 than to deny the motion for interim injunctive relief.

23 I don't need any further comment as to the conduct  
24 of defense counsel for advancing arguments that really  
25 approach the meretricious. You won this one, frankly,

1 despite yourselves. And I will assure you that is not going  
2 to be held either for you or against you in connection with  
3 the future course of this litigation. So that is my ruling  
4 on the current motion.

5 Let me ask counsel with all that said, what comes  
6 next in this lawsuit? Plaintiffs' counsel?

7 MR. WARDENSKI: Your Honor, we will have to go back  
8 to our clients and review, you know, what, if any, options  
9 remain to them in order to keep construction a viable option.

10 THE COURT: Yes.

11 MR. WARDENSKI: It may be that their options are  
12 running out which is, you know, really the case in terms of  
13 the current low income housing credit tax financing, but we  
14 do need to confer with them about next steps moving forward.

15 THE COURT: Defense counsel, any comment?

16 MR. McGRATH: At this time, your Honor, given  
17 everything that has been going on all the injunctive relief,  
18 we probably need take a look to see with regard to answering  
19 certain portions of the Complaint and see what is still  
20 remaining. So whenever your Honor would like us to come  
21 back.

22 THE COURT: What I think probably makes sense then  
23 is to set a next status date to permit both sides to  
24 contemplate their respective navel and see what you come up  
25 with. How far out should I put that? I don't want to extend

1 it too far, but whatever you think is reasonable.

2 MR. WARDENSKI: Well, your Honor, we -- you know,  
3 our -- I think in any event we would like to proceed on an  
4 expedited schedule, you know, in the chance that this project  
5 still can be saved.

6 THE COURT: Yes.

7 MR. WARDENSKI: With that in mind I think we -- we  
8 have not yet received discovery requests from defendants but  
9 are -- remain and are willing and able to produce discovery  
10 in short order. You know, if they propound discovery  
11 tomorrow, we can get it to them relatively quickly, within  
12 probably two or three weeks, if not sooner than that. And --

13 THE COURT: So I will tell you what --

14 MR. WARDENSKI: We are ready to move fast.

15 MR. McGRATH: Your Honor --

16 THE COURT: What I thought might well be done is to  
17 set a date that seems reasonable, with the understanding that  
18 if anybody wants to bring something on in advance, you just  
19 do it by notice. So with that understanding, what would you  
20 both suggest for a next status date?

21 MR. McGRATH: Your Honor, could we have one minute  
22 just to confer?

23 THE COURT: Sure. Why don't you talk and come  
24 back.

25 MR. McGRATH: Do you guys want to talk and maybe we



1 can talk together, is that all right?

2 MR. WEITZEL: Your Honor?

3 THE COURT: Yes?

4 MR. WEITZEL: So we have conferred. And how is  
5 next Thursday, the 4th, to come back?

6 THE COURT: You want to do it that quickly?

7 MR. McGRATH: I think we are going to try and meet,  
8 your Honor, confer about maybe a proposed schedule, see if we  
9 can work something out.

10 THE COURT: All right. Now let me --  
11 unfortunately, as you have heard this morning, my Courtroom  
12 Deputy who is always supposed to give me her red diary  
13 because you see I enter dates on my bench calendar when I  
14 announce them, when typically a new complaint comes in, and I  
15 give her a note that says, "Okay, 49days or whatever it is,  
16 so she enters those, but I don't end up with them. I believe  
17 that on the 4th I have 8:45 open, if that is okay.

18 MR. WARDENSKI: That is fine.

19 MR. McGRATH: That is fine with us.

20 THE COURT: All right. So 8:45 on Thursday, August  
21 4th.

22 Thank you.

23 MR. WEITZEL: Thank you, your Honor.

24 MR. WARDENSKI: Your Honor, if I may, I understand  
25 your decision on the -- on the motion. Just to clarify, you

1 know, for the record what we were seeking was simply a vote.  
2 Our position has always been that the Fair Housing Act  
3 violation was the obstruction, the interference with the  
4 vote.

5 THE COURT: I understand that. But again you see  
6 you have to focus on success -- likelihood of success on the  
7 merits. And you see the merits of getting a vote are really  
8 not what you are looking at in this situation. You are  
9 talking about something that is more substantive than simply  
10 getting a vote. And that is the reason that, when I went  
11 through the thing, I came to the conclusion that I was  
12 talking about.

13 MR. WARDENSKI: Thank you, your Honor.

14 THE COURT: Thank you.

15 (Which were all the proceedings heard.)

16 CERTIFICATE

17 I certify that the foregoing is a correct transcript  
18 from the record of proceedings in the above-entitled matter.

19

20 s/Rosemary Scarpelli/

Date: July 26, 2016

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