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## Baker v. Coxe, 230 F.3d 470 (1st Cir. 2000)

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Baker v. Coxe, 230 F.3d 470 (1st Cir. 2000)

judgment of the court of appeals.

*Kris A. Zumalt*

## UNITED STATES CIRCUIT COURTS

### FIRST CIRCUIT

**Baker v. Coxe, 230 F.3d 470 (1st Cir. 2000)** (holding substantive due process and equal protection rights were not violated when neither a legitimate government purpose in delaying the issuance of a land use permit existed, nor an exercise of free speech violation existed, when the delay was not the result of retaliation).

In May 1991, Plaintiffs, John and Susan Baker ("Bakers"), applied for a permit to build a pier on land they owned and operated as a tree farm on Clark's Island in Plymouth Harbor, Massachusetts. The pier would enable equipment unloading in furtherance of the tree farm operation. Clark's Island served as a major nesting area, or heronry, for several varieties of sea birds. The Army Corps of Engineers was in the process of preparing to issue the permit when Jay Copeland, an environmental researcher for Natural Heritage, objected.

Natural Heritage felt the proximity of the nesting area to the Bakers' tree farm would disrupt the heronry, thus causing the birds to abandon their nests. After the issuance of a notice-and-comment period, Natural Heritage contacted an ornithologist, Dr. Katharine Parsons, who was familiar with the island. Parsons informed Copeland of her concerns about the land use and of her suspicions that the land was merely a "tax dodge." Parsons also told Copeland of Mr. Baker's opposition to 1989 legislation that, if enacted, would have classified Clark's Island as an Area of Critical Environmental Concern ("ACEC"), subjecting it to use restrictions. Copeland and others' subsequent visit to the island revealed the heronry was essentially destroyed.

After contact with other agencies and some investigation into the Bakers' operation, Natural Heritage filed a formal opposition to the permit application, asserting the pier construction would significantly contribute to the destruction of a major natural resource. Further, Natural Heritage successfully collected ten citizens' signatures to initiate environmental review under the Massachusetts Environmental Policy Act. After Natural Heritage filed the required forms, the Massachusetts Executive Office of Environmental Affairs ("EOEA") issued a decision requiring the Bakers to file an Environmental Impact Report ("EIR"). After litigation concerning the scope of the EIR, the Army Corps of Engineers issued the permit to the Bakers in 1997, and the Bakers built the pier.

This suit followed. The Bakers alleged, among other things, that Massachusetts EOEAs officials—namely, Trudy Coxe, Thomas French, Jay Copeland, Patricia Huckery, Bradford Blodgett, Jane Mead, Susan Tierney, and Janet McCabe (collectively “EOEA officials”)—violated the Bakers’ substantive due process and equal protection rights (“Count I”), and First Amendment rights for retaliation in the exercise of free speech (“Count VII”) by delaying the permit issuance. The district court dismissed Count I for failure to state a claim, and granted summary judgment concerning Count VII in favor of the EOEAs officials.

The First Circuit affirmed both decisions. Regarding Count I, due to the nature of the governmental conduct, the court found that substantive due process and equal protection claims regarding local land use permits were essentially the same inquiry. The court declared that even an arbitrary denial, absent either a gross abuse of power that shocked the conscience, invidious discrimination, or legally irrational action, did not rise to the level of a constitutional violation. The court determined the Bakers’ three alleged instances of official misconduct did not breach this constitutional barrier. In each instance, the EOEAs performed a legitimate government purpose by reviewing the permit application, and the Bakers suffered no adverse action from the alleged misconduct.

Regarding Count VII, the court noted that delay of an application for a land use permit in unjustifiable retaliation for expressions of political views violated the First Amendment if a plaintiff established three elements: (1) he engaged in protected speech; (2) he was qualified for the permit; and (3) the delay was in retaliation for the disfavored speech. The First Circuit focused on only the last requirement, as did the district court. The court acknowledged the speech at issue involved Mr. Baker’s opposition to the ACEC legislation in the Massachusetts legislature, two years before the Bakers filed their pier permit application. However, only defendants Copeland, Huckery, French, and McCabe knew of Mr. Baker’s opposition to the legislation, thereby making the evidence of retaliatory motive insufficient. Further, the protected speech occurred two years before the review of the Bakers’ application. More importantly, even if Mr. Baker had made a *prima facie* case, Coxe had a nonretaliatory reason for opposing the permit—the tree farm’s impact on the heronry, not the pier’s impact on the heronry. The court found the district court’s reasoning appropriate, and the Bakers’ claims of errors non-meritorious. As such, the First Circuit affirmed the district court’s decision.

*Adam B. Kehrli*

## FIFTH CIRCUIT

**Geraghty & Miller, Inc. v. Conoco, Inc., 234 F.3d 917 (5th Cir. 2000)**  
(holding groundwater quality monitoring company was not liable)