STATE OF MICHIGAN

IN THE SUPREME COURT

LEON V. BONNER and
MARILYN E. BONNER,

Plaintiffs-Appellees,

v

CITY OF BRIGHTON,

Defendant-Appellant.

Michigan Supreme Court
Case No. 146520

Court of Appeals
Case No. 302677

Livingston Circuit Court
Case No. 09-24680-CZ

CITY OF BRIGHTON,

Plaintiff-Appellant,

v

LEON V. BONNER and
MARILYN E. BONNER,

Defendants-Appellees.

Consolidated with
Livingston Circuit Court
Case No. 09-24900-CZ

APPELLEES LEON AND MARILYN BONNER'S BRIEF ON APPEAL ORAL ARGUMENT REQUESTED PROOF OF SERVICE

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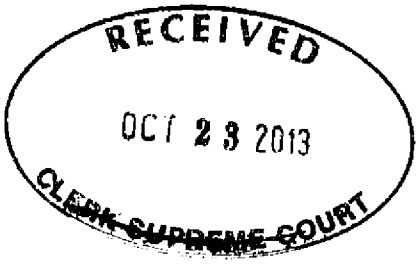

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COUNTER-STATEMENT OF JURISDICTION

On December 4, 2012, the Court of Appeals issued a published opinion affirming the trial court's decision that City of Brighton Code of Ordinance §18-59 is unconstitutional, holding that it violates substantive and procedural due process rights. (Opinion, **Appellant's Apx.** 189a-216a). The City of Brighton filed an application for leave to appeal with this Court, which was granted on July 1, 2013, this vesting jurisdiction in the Court pursuant to MCR 7.301(A)(2) and MCR 7.302(H)(1). (Order, **Appellant's Apx.** 217a).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. IS THE CITY OF BRIGHTON'S ORDINANCE FACIALLY UNCONSTITUTIONAL WHERE IT PERMITS THE CITY TO HAVE AN UNSAFE STRUCTURE DEMOLISHED AS A PUBLIC NUISANCE WITHOUT PROVIDING THE OWNER THE OPTION TO REPAIR IT IF THE STRUCTURE IS DEEMED UNREASONABLE TO REPAIR, WHICH IS PRESUMED WHEN REPAIR COSTS WOULD EXCEED 100 PERCENT OF THE STRUCTURE'S ASSESSED VALUE AS REFLECTED ON THE CITY TAX ROLLS?

The Bonners answer: Yes

The City of Brighton answers: No

II. DOES THE CITY OF BRIGHTON'S ORDINANCE VIOLATE PROCEDURAL DUE PROCESS WHEN IT FAILS TO PROVIDE A PROCEDURE TO SAFEGUARD AN OWNER'S RIGHT TO RETAIN PROPERTY BY PERFORMING WHAT OTHERS MIGHT CONSIDER UNREASONABLY EXPENSIVE REPAIRS?

The Bonners answer: Yes

The City of Brighton answers: No

INTRODUCTION

This case concerns a City of Brighton Building Ordinance that allows the demolition of homes that the City believes would be unreasonable to repair. The ordinance is titled (Sec. 18-59 *Unreasonable Repairs*).

The ordinance denies a property owner, in this case Plaintiffs (the Bonners), the right to repair their home if the City Building Official deems it unsafe and further opines that the cost of repair would exceed the assessed value of the home on City tax rolls.

The ordinance has prevented repairs of alleged dangerous conditions in the Bonners' homes now for over 4 years. On November 23, 2010, the trial court found the ordinance to be unconstitutional and that it shocked the conscience. The City of Brighton appealed.

On December 4, 2012, the Court of Appeals issued a published opinion holding that City of Brighton Code 18-59 was in fact unconstitutional because it violated both substantive and procedural due process. (Opinion, p.20, **Appellants' Apx** 208a)

There was an irrational dissent that embraced City Code 18-59 and ignored the basis upon which the majority formed its opinion. The majority took the time in its opinion to render a respectful response to the dissent which pointed out the dissent's erroneous conclusions.

The majority found that City of Brighton Code 18-59 was arbitrary and unreasonable:

> We interpret BCO §18-59 as only allowing the exercise of an option to repair when a property owner overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. We conclude that this standard is arbitrary and unreasonable. (Opinion p. 20, **Appellants' Apx** 208a)

The dissent argued that a person's property should never become unsafe in the first place, concluding that 18-59 is not arbitrary in denying repair and allowing demolition:

> Structure owners whose property the presumption applies to always have the option to repair before the city gets involved or a

> finding that the structure is unsafe is made. If repairs are made on a regular or as needed basis the structure should never become unsafe. (Opinion dissent, p.8 footnote 9, **Appellants' Apx** 216(a))

This Honorable Court will find that case law both in this state and in no less than 25 sister states have found ordinances such as City of Brighton Code 18-59 to be arbitrary and not related to a legitimate governmental interest and, therefore, unconstitutional. This Court will find that not one of the 27 cases cited by the City stands for demolition without an opportunity to repair.

This Honorable Court will also become witness to one of the most egregious governmental abuses of power aimed at property owners' homes, which are considered sacred places within our country's constitution, laws and traditions.

STATEMENT OF FACTS

This case concerns five historical centennial homes owned by Appellants Leon and Marilyn Bonner (The Bonners). The homes are known as 116 and 122 E. North St., and 519 and 521 Franklin and 212 S. East St. in the City of Brighton. The Bonners, an elderly couple, are in their 80's. The homes are over 150 years old. A current photo of 116 and 122 E. North St. is attached. (Photos, **Apx** 1B) The homes are located in the city's business district and at the time of this action had lawful nonconforming use of residential. In 1978, the City disconnected the water service to all five homes to retaliate against the Bonners for challenging the City's code enforcement actions. The Bonners then sued the City for turning off their water. The Bonners subsequently prevailed in the Court of Appeals, *Bonner v City of Brighton,* 91 Mich. App. 547, 283 N.W.2d 793 (1979). The Court of Appeals found that the City's action of turning off the Bonners' water supply was unlawful (1979 COA Opinion **Apx** 5B). Notwithstanding the COA's Order, the City refused to turn the water back on for over 30 years and continues to keep the

water off today. Although the homes have had no water service which has prevented normal use and occupancy, the Bonners have maintained the homes and properties throughout the years.

Appellee City of Brighton has an ordinance that extinguishes nonconforming use of property if it is not used for more than one year. On 7-16-09, the City extinguished the residential use of 116 and 122 E. North St. due to alleged nonuse (City's Verified Complaint Decision on Appeal, **Appellants' Apx** 112a at letter K).

The City found non-use even though Leon Bonner testified that he has always visited the homes on a regular basis, maintained the homes and paid the taxes. Mr. Bonner testified also that he kept the homes furnished, kept them heated, kept the electrical service on and cut the lawns. Mr. Bonner even kept refreshments in the refrigerator. He further testified that he wanted to rent the homes but could not because the City turned-off the water. The trial court upheld the City's actions. The Bonners appealed. The Bonners appeal of loss of their nonconforming use is now pending in the Court of Appeals, COA No. 314597.

The Appellee City of Brighton has another ordinance (City Code Article III, Sec. 18.59). The Ordinance allows the City Building Official to order demolition of any home that is in need of repair if the Building Official deems the home unsafe and arbitrarily determines that the cost to repair would be unreasonable (City Ordinance18-59, **Appellants' Apx** 231a). On January 30, 2009, the Appellee City of Brighton's Building Official, James Rowell deemed 116 and 122 East North Street to be unsafe and ordered the homes demolished pursuant to City Code 18-59 (Demolition Orders, **Appellants' Apx** 60a-63a). Incredibly, Mr. Rowell's demolition orders indicate that his decision to implement 18-59 against the Bonner homes was made by outside observations only. (**Appellants' Apx** 60a-63a)

Mr. Rowell testified that he made his evaluation and determination that the homes should be demolished based on his personal 35 years of experience of being on construction sites. Mr.

Rowell's professional evaluative standard was stated as follows: "I speculate on them," "If it looks like a duck and quacks like a duck, it's probably a duck". (Transcript of James Rowell testimony 3-7-10, p. 320, **Apx** 49B)

The Bonners filed a timely appeal of the Building Official's demolition orders and informed the City Council that they would immediately correct any alleged unsafe conditions. The record in this case shows that the January 30, 2009 violation notice was the first and only violation notice the Bonners had received concerning their Brighton homes in over 30 years.

The City's pleadings in this case have repeatedly stated "The Bonners' homes are the most egregious instance of blight in the City of Brighton"; however, other than Mr. Rowell's January 30, 2009 notice, there is no evidence in this case of any other complaints regarding the Bonners' homes.

In preparation for the administrative appeal with the City, the Bonners hired a structural engineer and various contractors to determine what repairs were needed to eliminate the City's alleged unsafe conditions. The engineers and contractors found that the homes were structurally sound and that they could readily be repaired. On 6-4-09 Bonners' engineer provided detailed drawings and plans to the City Council to address all of the City's concerns (minutes of Council Meeting p. 4, **Apx** 16B).

The Bonners then applied for permits from the City to repair all of the alleged unsafe conditions. The City refused to process the Bonners' permit applications and posted a stop work order on the property (stop work order, **Apx** 18B. The City claimed that the Bonners had no right to repair their homes due to the City Code 18-59 unreasonable repairs cost restraint.

On July 16, 2009, the City Council held a public meeting on the Bonners' appeal. The Bonners again indicated they would restore the homes to their historical luster. The City Attorneys then presented the City with two options. The first option was to allow restoration of

the homes pursuant to City Code Section 18-60 which specifically allows restoration of unsafe structures. The second option was to deny the Bonners' appeal and to order the homes demolished as too costly and unreasonable to repair pursuant to City Code 18-59. The decision was left to the pleasure of the Council Members (**Appellants' Brief on Appeal**, p. 10). The City Council arbitrarily chose to deny repair and it ordered the homes to be demolished pursuant to Code 18-59 (7-16-09 Council meeting minutes, p.3 **Apx** 21B).

The Bonners had also appealed the denial of permits to the City of Brighton Construction Board of Appeals. The Bonners' appeal was denied on the advice of the City lawyers, stating that the City had already ordered the homes demolished; therefore repairs could not be permitted by the appeals board (Decision on appeal, **Apx** 25B-27B).

On August 11, 2009, the Bonners filed a complaint for mandamus in the Livingston County Circuit Court. The complaint asked that the City be ordered by the Court to allow the repairs of the alleged "dangerous conditions" in their homes. The City argued that the Bonners had failed to exhaust administrative remedies. On August 20, 2009, the trial court dismissed the Bonners' mandamus complaint on the basis of failure to exhaust administrative remedies (Order of Dismissal, **Apx** 28B-29B). Consequently, due to the City's actions and Code 18-59, no repairs could be made. The homes remained in what the City alleged to be a "*a danger to the health, safety and general welfare of the citizens of the City*". (City of Brighton verified complaint (**Appellants' Apx** 36a at 17).

On September 4, 2009, the Bonners filed this lawsuit in Livingston County Circuit Court (verified complaint, **Appellants' Apx** 5a-32a). The Bonners alleged in part that City of Brighton Code Article III Section 18-59 was unconstitutional because it violated both substantive and procedural due process in denying opportunity to repair.

The Bonners simultaneously filed a motion for injunctive relief to allow repairs of the alleged unsafe conditions in their homes. The City's response to the Bonners' request for injunctive relief is revealing. The City opposed the repairs. City Attorney Michael Wachsberg stated to the Court:

> "What the Plaintiffs are proposing to this court is anything but a preservation of the status quo, **they are attempting to improve and change the condition of the properties"**. (Emphasis added)

(City's Brief Regarding Preliminary Injunction of 11-6-09, p.2, **Apx** 31B)

Mr. Wachsberg was right; the Bonners were attempting to improve the properties by abating the City's alleged "dangerous" conditions in their homes. Mr. Wachsberg's argument on 11-6-09, (just 60 days into this litigation) shows that the City was not attempting to abate a nuisance. The City was instead preventing abatement of alleged danger because Code 18-59 allowed it to do so.

On December 3, 2009 (3 months after the Bonners' complaint was filed against the City), the City filed a complaint for injunctive relief against the Bonners (Case No. 09-24900-CZ). Importantly, the City's complaint did not contain a nuisance claim (complaint, **Appellants' Apx** 33a-125a). The City's December 3, 2009 complaint simply asked for demolition of the Bonners' homes pursuant to City Code 18-59. The City's complaint was then consolidated with the Bonners' September 4, 2009 complaint.

On November 23, 2010, the trial court entered an opinion and order that found City of Brighton Code Section 18-59 to be unconstitutional. The Court also declared the City demolition orders to be invalid (opinion and order, **Appellants' Apx** 185a-186a). The City sought leave to appeal which the Court of Appeals granted on May 17, 2011, Docket No. 302677.

Despite the trial court's order, the City continued to prosecute the Bonners under City Code 18-59 and continued to deny permits and deny the Bonners' opportunity to repair the homes. Consequently, the City's alleged dangers remained unaddressed. From January 30, 2009 through August, 2011, the Bonners repeatedly filed applications for repair permits and motions with the trial court asking to be allowed to correct the City's alleged dangerous conditions in their homes. Incredibly, all permit applications and motions to allow repairs were denied. Examples are as follows:

On March 3, 2011, the trial court entered an order denying repair that stated: "Plaintiffs motion to allow repairs of alleged nuisance is denied" (Order, **Apx** 36b).

On April 7, 2011, the trial court entered an order denying repair that stated: "The Bonners motion to allow Defendants to abate alleged dangers to the health, safety and welfare of the general public is denied" (Order, **Apx** 37B).

If there were truly dangerous conditions, as alleged by the City, the Bonners were unable to understand why they were being prohibited from taking any corrective action.

On September 30, 2010, in addition to denying one of the Bonners' motions to allow repair, the trial court sanctioned the Bonners $500.00 for repeatedly asking to be allowed to abate the alleged dangerous conditions (Order, **Apx** 38B).

After the City's ordinance was declared unconstitutional by the trial court, the City took a new approach in prosecuting the Bonners. The City sought leave to amend its complaint adding a nuisance claim against the Bonners. The Bonners opposed the City's motion to add a nuisance claim because it was the City that was maintaining any alleged nuisance by preventing repair; not the Bonners. The Bonners argued in vain that the City could not prevent the abatement of its alleged dangerous conditions and then sue the property owner for maintaining a nuisance. On

March 4, 2011 (19 months after the Bonners filed their lawsuit against the City for denying repair permits) the City filed an amended complaint which now included a nuisance claim.

The Bonners responded by bringing a motion for dismissal of the City's nuisance claim. The Bonners argued that there was no case in controversy because they were always willing to do whatever was required of them to abate any nuisance but were prevented by the City from doing so. It is important to note that on 3-20-11 (prior to the City filing its amended complaint) the Bonners retained a contractor to repair all of the City's alleged unsafe conditions. The contractor filed applications for permits to repair the City's alleged dangers (Ken Brock application, **Apx** 39B-44B). The City refused to process the applications due to City Code 18-59, even though the ordinance had been found unconstitutional by the trial court. The trial court denied the Bonners' motion to dismiss the City's nuisance claim.

On October 27, 2010, pursuant to the scheduling order entered by the trial court, the above consolidated cases proceeded to case evaluation. This resulted in two separate awards.

In the initial action involving the Bonners as Plaintiffs against the City of Brighton Case Number 09-24680-CZ, the case evaluators entered a monetary award in favor of the Bonners and against the City (Award, **Apx** 45B). The City accepted the evaluation award; the Bonners rejected.

In the subsequent action with the City as Plaintiff against the Bonners, Case No. 09-24900-CZ, an evaluation award was again entered in favor of the Bonners, "zero to Plaintiff Brighton from Defendant Bonner" (Award, **Apx** 46B). The City and the Bonners both accepted the case evaluation award in the City's action (Notice of Acceptance, **Apx** 47B).

Due to case evaluation acceptance by both parties, the City's case should have then been dismissed pursuant to MCR 2.403(M)(1), but it was not; the trial court instead vacated case evaluation thus eliminating that possibility.

Finally, on December 4, 2012, the Court of Appeals issued a published opinion regarding the constitutionality of City Code 18-59. The COA affirmed the lower court's finding that City of Brighton Code 18-59 was unconstitutional and found that it violated both substantive and procedural due process. (COA Opinion, p. 20, **Appellants' Apx** 208a). The City filed an application for leave to appeal in this Honorable Court which resulted in this pending appeal.

STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed *de novo*. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). Constitutional issues as well as questions concerning the proper construction of an ordinance are also reviewed *de novo*. *Kyser v Kasson Twp*, 486 Mich 514, 519; 786 NW2d 543 (2010).

ARGUMENT

I. THE CITY OF BRIGHTON'S ORDINANCE IS FACIALLY UNCONSTITUTIONAL WHERE IT PERMITS THE CITY TO HAVE AN UNSAFE STRUCTURE DEMOLISHED AS A PUBLIC NUISANCE WITHOUT PROVIDING THE OWNER THE OPTION TO REPAIR IT IF THE STRUCTURE IS DEEMED UNREASONABLE TO REPAIR, WHICH IS PRESUMED WHEN REPAIR COSTS WOULD EXCEED 100 PERCENT OF THE STRUCTURE'S ASSESSED VALUE AS REFLECTED ON THE CITY TAX ROLLS.

Brighton City Ordinance § 18-59, which is titled "Unreasonable repairs," provides in relevant part as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of

the owner to repair (Brighton Code, **Appellant's Apx** 231a).

The Court of Appeals correctly set forth the standard to be employed in applying a substantive due process challenge to City of Brighton Ordinance § 18-59. The Court of Appeals noted:

> In *Kropf v City of Sterling Hts*, 391 Mich 139, 157; 215 NW2d 179 (1974), our Supreme Court discussed a substantive due process claim in the context of a zoning ordinance, stating:
>
> > A plaintiff-citizen may be denied substantive due process by the city or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence. The power of the city to enact ordinances is not absolute. It has been given power by the State of Michigan to zone and regulate land use within its boundaries so that the inherent police powers of the state may be more effectively implemented on the local level. But the state cannot confer upon the local unit of government that which it does not have. For the state itself to legislate in a manner that affects the individual right of its citizens, the state must show that it has a sufficient interest in protecting or implementing the common good, via its police powers, that such private interests must give way to this higher interest.
>
> A citizen is entitled to due process of law when a municipality, exercising its police power, enacts an ordinance that affects the citizen's constitutional rights. Kyser, 486 Mich at 521. In determining whether an ordinance enacted by a municipality comports with due process, the test employed is whether the ordinance bears a reasonable relationship to a permissible legislative objective. Id. When a municipal ordinance restricts the use of property, the issue is whether the exercise of authority entails an undue invasion of private constitutional rights without a reasonable justification in connection with the public welfare. Id. We begin with the presumption that an ordinance is reasonable and thus constitutionally compliant. Id. "[T]he burden is upon the person challenging . . . an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance." Id. The property owner must demonstrate that the challenged ordinance arbitrarily and unreasonably affects the owner's use of his or her property. Id. An ordinance does not offend the Due Process Clause when it satisfies the reasonableness test; the ordinance must be reasonable or reasonably necessary for purposes of preserving the public health, morals, or safety.8 Id. at 523, 529. An ordinance will be declared unconstitutional only if it constitutes an arbitrary fiat or a whimsical ipse dixit, leaving no legitimate dispute regarding its unreasonableness. Id. at 521-522 (Opinion, p. 6-7, **Appellant's Apx** 194a-195a)

The majority decision of the Court of Appeals provided a meticulous analysis of the City of Brighton's ordinance and concluded that it cannot pass constitutional scrutiny. More specifically, the majority of Court of Appeals concluded that substantive due process was most assuredly violated by the language of the ordinance:

> We hold that BCO § 18-59 violates substantive due process because it is arbitrary and unreasonable, constituting a whimsical ipse dixit; it denies a property owner the option to repair an unsafe structure simply on the basis that the city deems repair efforts to be economically unreasonable. When a property owner is willing and able to timely repair a structure to make it safe, preventing that action on the basis of the ordinance's standard of reasonableness does not advance the city's interest of protecting the health and welfare of its citizens. We do not dispute that a permissible legislative objective of the city under its police powers is to protect citizens from unsafe and dangerous structures and that one mechanism for advancing that objective can entail demolishing or razing unsafe structures.12 But BCO § 18-59 does not bear a reasonable relationship to this permissible legislative objective.13 Kyser, 486 Mich at 521. There are two ways to achieve the legislative objective, demolition or repair, either of which results in the abatement of the nuisance or danger of an unsafe structure. There is simply no sound reason for prohibiting a willing property owner from undertaking corrective repairs on the basis that making such repairs is an unreasonable endeavor, given that the repairs, similar to demolition, will equally result in achieving the objective of protecting citizens from unsafe structures. If a property owner fails to make the necessary repairs within a reasonable timeframe, demolition can then be ordered. The city's restriction on plaintiffs' opportunity to repair the structures and right to protect their constitutionally recognized property interests from invasion has no reasonable relation to the public welfare. Kyser, 486 Mich at 521. The public welfare is safeguarded by the construction repairs, and the ordinance does not afford the public greater protection or safeguards by calling for demolition over repairs when making repairs is characterized as being unreasonable. Of course, the municipality has the authority to define the repairs necessary and to set a reasonable time limit for their completion. For the reasons set forth above, we conclude that BCO § 18-59 violates substantive due process (Opinion, p. 11-12, **Appellant's Apx** 199a-200a).

The panel also correctly observed two additional points. First, although, the Court found that although § 18-59 states that demolition "may" be ordered, "this discretionary language does not save the ordinance from constitutional challenge, considering that the ordinance places no

constraints on the exercise of what is essentially unfettered discretion."

Second, the Court addressed the presumption contained within § 18-59. The City of Brighton in its brief to this Court places special emphasis on the built-in presumption of the Ordinance and the City concludes that because it is rebuttable, the Ordinance must be found to be constitutional. However, the Court of appeals addressed this "presumption" argument and rejected it because the presumption itself was irrational and unreasonable:

> The preceding argument naturally leads to the dissent's primary argument, made in the context of both procedural and substantive due process, that BCO § 18-59 is constitutional because an option to repair remains a possibility, even in regard to blameworthy owners, where BCO § 18-61 allows an appeal to the city council wherein the presumption created by BCO § 18-59 can be overcome and the council can allow the owner an opportunity to make repairs. We earlier acknowledged that an owner can appeal to the city council and, although the dissent does not mention it, we even noted that a property owner could attempt to overcome the presumption by pleading his or her case directly to the city manager or the manager's designee under BCO § 18-59. However, and this point is not addressed by the dissent despite its being the linchpin of our holding, in order to overcome the presumption — a presumption that repairs are unreasonable — when appealing to the city council or pleading to the city manager, the property owner would necessarily have to establish that the act of making repairs is reasonable before being granted an opportunity to make repairs. The constitutional defect is the reasonableness requirement associated with repairs; a property owner should be entitled to make repairs even if others would find it economically unreasonable to do so. The city council rejected plaintiffs' request to make repairs, finding, in part, that it was unreasonable to repair the structures (Opinion, p. 19, **Appellant's Apx** 207a) (emphasis supplied).

Other Michigan case law supports the Bonners' argument that the City of Brighton's Unreasonable Repairs Ordinance, Article III Sec. 18-59 is unconstitutional. In *Childs v Anderson*, 344 Mich. 90, 73 N.W.2d 280 (1955), the Commissioner of the Michigan State Police wanted two homes owned by Anderson demolished due to allegedly being fire hazards. This court stated:

> *"When repairs or alterations can be made lawfully on a building to eliminate the special dangers arising from its condition an location to surrounding property and to persons, such repairs or alterations should be ordered, rather than the destruction of the building."*

This Court stated further:

> *"It has been decided in a number of cases that something less than destruction of the entire building should be ordered where such will eliminate the danger or hazard. See 14 ALRd 92; 9 Am Jur, Buildings, § 40, p 236. The need for repairs and alternations does not in this case constitute the fire hazard and therefore it is not necessary that we order them. The purpose of the statue is to eliminate the hazard, not to make the houses tenantable.* ***This purpose can best be achieved in this instance by action less drastic than razing."*** (emphasis supplied)

See also: *Charter Township of Orion v Burnac Corporation* 171 Mich. App. 450; 431 N.W.2d 225 (1988). In this case Plaintiff Township filed a complaint against defendant property owners, alleging that defendants' condominium complex constituted a nuisance. The trial court issued an order permitting demolition. The property owners appealed. The Court of Appeals held that the remedy of demolition was not inappropriate because the trial court gave the property owners an opportunity to avoid demolition by making repairs but they failed to take any of the measures the trial court ordered. In this case, the Bonners were never given an opportunity to repair; City Code 18-59 prevented that. The record shows that the Bonners would have made any necessary repairs but that they were prevented from doing so by the City.

PERSUASIVE AUTHORITY

There is a plethora of authority found in case law of other states that have addressed the constitutionality of the same or similar code provisions found in the City of Brighton. Sec. 18-59.

See *Herrit v Code Mgmt.* Appeal Bd of the City of Butler, 704 A2d 186 (Pa Commw Ct 1997). The Herrit case posed the same exact facts and ordinance language as presented in this case. The Herrit Court relying on other authority stated:

> While no Pennsylvania cases have addressed whether a property owner can be precluded from abating the nuisance because of the expense involved, the Kentucky Court of Appeals in Washington v. City of Winchester, 861 S.W.2d 125 (Ky. Ct. App. 1993) dealt with the constitutionality of the same provision at issue here. In Washington, the property owner was advised that her property was a public nuisance as defined by the 1990 BOCA Property Maintenance Code adopted by Kentucky and the property was ordered demolished. Because the costs of repair exceeded 100 percent of the property's appraised value in accordance with Section PM-110.2, the City of Winchester did not allow the property owner the opportunity to repair the property. **Holding that Section PM-110.2 was unconstitutional because it did not give the property owner the chance to make repairs and abate the nuisance, the Kentucky Court of Appeals reasoned that the "failure to give the owner the choice was arbitrary . . . and requiring demolition without compensation amounts to a taking of property rights."** Washington, 861 S.W.2d at 126127 (citing Johnson v. City of Paducah, Ky., 512 S.W.2d 514, 516 (Ky. 1974)). It went on to state that, "just as the cost of . . . compliance is a property owner's problem; the method of compliance is also the property owner's decision. It's his/her money and far be it for the City to say how a reasonable person should spend his/her money. . . . [If the property owner] wants to pour huge sums of money into her unfit [property], she has that option." 861 S.W.2d at 127.
>
> We agree with the Kentucky Court of Appeals that Section PM-110.2 is not rationally related to the public health, safety or general welfare because there is no rational reason for the City of Butler not to allow a property owner the ability to abate a nuisance on his/her property. If Herrit wants to spend unreasonable amounts of money to bring his property into compliance, that is only his concern. Accordingly, we reverse the order of the court of Common Pleas of Butler County affirming the decision of the Code Management Appeal Board of the City of Butler denying Herrit's appeal. (Opinion, **Apx** 128B-133B) (emphasis supplied)

City of Brighton Code Article III Sec. 18-59 has the same exact wording as Code PM-110-2 of the City of Winchester, Kentucky. The code is arbitrary and has no substantial relation to the promotion of the public health, safety or general welfare and therefore it is unconstitutional on its face. To the contrary, City of Brighton Code 18-59 actually prevents repair of unsafe conditions and insures continuance of known dangerous conditions.

Many states have followed the reasoning outlined in *Herrit*. The Supreme Court of North Carolina has held that a city ordinance that permits demolition of property without giving the owner the opportunity to repair is unconstitutional.

> The North Carolina Supreme Court held that where there was no demonstrable emergency an owner of real property and improvements located on it was deprived of due process of law when he was mandatorily ordered to destroy the property or suffer destruction by the public authority at his expense where the cost of repairs exceeded 60 percent of the value of the un-repaired building. The court noted that the city had neither relied upon nor found any threat to the safety of persons or property so imminent that immediate destruction of the building was necessary. The court concluded: "**To require its destruction, without giving the owner a reasonable opportunity thus (by repair) to remove the existing threat to the public health, safety and welfare, is arbitrary.** (Emphasis supplied)

(Opinion, *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885, 43 A.L.R.3d 905 (1970), **Apx** 57B-66B).

City of Brighton Ordinance Article III Sec. 18-59 is also unconstitutional because it violates the protections of the Michigan and Federal constitutions that prohibit the unlawful taking of private property without just compensation.

> "No court can say the City cannot enforce reasonable housing codes such as the BOCA Basic Property Maintenance Code of a certain year, for the protection of the public health and welfare. However, just as the cost of such compliance is a property owner's problem, the method of compliance is also the property owner's decision. It's his/her money and **far be it from the City to say how a reasonable person should spend his/her money**". (emphasis supplied)

(Opinion, *Washington v City Winchester*, 861SW2d 125 (Ky Ct App (1993), p. **Apx** 134B-137B)

Additionally, there is a myriad of out-of-state authorities that similarly have concluded that such ordinances are unconstitutional. By contrast, notice how the City of Brighton has been unable to cite one, single, case (either in Michigan or anywhere else) that has found a similar

ordinance to be constitutional. Please also note the following authorities:

In *Echave v. Grand Junction*, 118 Colo 165; 193 P2d 277 (1948), **Apx** 51B-56B), on a petition by the city for an injunction to compel demolition of a building for lack of repair, defective wiring, and unsanitary plumbing, the Supreme Court of Colorado stated:

> It is a general rule of law that in cases similar to the instant one, courts will never go further than is absolutely necessary to protect the rights of the public. If the premises here in question can be repaired and put in a sanitary condition so as not to be a menace to the health of the public and a fire hazard, their removal should not be ordered. Here, it is the use of the premises that is objectionable, and courts are authorized to prohibit the use which creates the nuisance. It is only in cases where an absolute necessity exists that judicial tribunals are authorized to adopt the harsh, drastic and unusual method of correction by decreeing the destruction of the property.
>
> * * *
>
> Property may be ordered destroyed under certain conditions, but only if the nuisance cannot be abated in any other way.
>
> * * *
>
> Defendants should have been afforded an opportunity and reasonable time within which to repair the buildings and remove the conditions which allegedly cause the premises to be unsanitary, and, without such opportunity being given, the court erred in adjudging and decreeing that the premises be vacated and the buildings destroyed.

Id. at 171-172

In *Monroe v. City of New Bern*, 158 N.C. App. 275; 580 S.E.2d 372 (2003) (**Apx** 97B-103B), the North Carolina Court of Appeals ruled that as a general rule, due process of law requires that a municipality must, before destroying a building, give an owner sufficient notice, a hearing and ample opportunity to demolish the building or to do what suffices to make it safe or healthy for use and occupancy. Likewise, the Supreme Court of Minnesota called a similar ordinance "drastic," "arbitrary," and "unreasonable" in *State Fire Marshal v. Anna Fitzpatrick*, 149 Minn. 203, 205-206;183 N.W. 141 (1921).

In *The First National Bank of Mt. Vernon et al. v. Sarlls et al.*, 129 Ind. 201; 28 N.E. 434 (1981), the Supreme Court of Indiana stated:

> Tried by these tests, the second section of the ordinance in question, in so far as it relates to the repair of wooden buildings, is clearly invalid. It arbitrarily attempts to take from the owner of property all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property, or upon the rights of others;
>
> * * *
>
> It will not be contended by any one that the establishment of fire limits will justify the condemnation and removal of wooden buildings previously constructed, simply because they are wooden buildings. Before their destruction or compulsory removal can be justified they must become nuisances.
>
> Yet this ordinance, by forbidding repairs, would accomplish by indirection what could not be done directly. It would first compel the owner to allow it to become and remain a nuisance, and then punish him for so doing by destroying or removing his property.

Id. at 213-214

In *Abraham v City of Warren*, 67 Ohio App. 4921 37 N.W.2d 390 (1940), the Ohio Court of Appeals, concluded the following:

> It is not the province of this court, and this court will not undertake to decide as an economic proposition whether it would be more desirable for plaintiff to raze the present structure to the foundation and use the material and the cost of repair for the erection of another structure upon that foundation, or to repair and rebuild the present structure. That is a matter in which the plaintiff is entitled to act upon her own choice and judgment ...
>
> * * *
>
> As the result of a careful reading of the record and search of the law applicable, we are of opinion that, under all the circumstances of this case, plaintiff should have been given an opportunity to repair the building and to reconstruct and repair the stairway and the sanitary facilities and the rest of the building to the satisfaction of the building inspector and make it safe for the occupancy of tenants thereof and the general public.

Id. at 498

See also, Johnson v City of Paducah, 512 SW2d 514 (Ky 1974), **Apx** 67B-72B). (Requiring demolition without compensation amounts to a taking of property rights); *Appeal of*

Branham, 70 Ohio L. Abs. 491, 128 N.E.2d 671 (Ct. App. 2d Dist. Franklin County 1953, **Apx** 73B-74B) (Statute providing that if certain officers found building a fire hazard or endangering life or other buildings or property, such officer should order building repaired or demolished, is in derogation of rights of private property, must be strictly construed, requires exercise of sound discretion, and order to destroy should issue only as final resort.); *First Nat. Bank v. Sarlls* (1891) 129 Ind 201, 28 NE 434, 13 LRA 481, 28 Am St Rep 185; *Crossman v. Galveston* (Tex) supra **Apx** 111B-121B);

See also, *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885, 43 A.L.R.3d 905 (1970), **Apx** 57B-66B). (An ordinance, even for fire protection purposes, cannot forbid all repairs to existing wooden buildings. City could not, upon finding that dwelling house was unfit for human habitation and that repairs sufficient to bring it into compliance with city's housing code would cost 60%or more of value of un-repaired building, demolish building without paying compensation to owner, and fasten a lien upon lot for cost of demolition, without giving owner reasonable opportunity to bring building into conformity with housing code. On appeal from an order of the fire marshal the court should annul the order if it appears on the evidence that the dangerous condition of the building can be eliminated by reasonable alterations or repairs. (Opinion **Apx** 107B-110B); *Crossman v. Galveston* (1923) 112 Tex 303, 24 SW 810, 26 ALR 1210, **Apx** 75B-86B.) (A building is susceptible of repair; the owner is entitled to repair it, even as against prohibitions in a fire limit ordinance, unless the repair would amount to a substantial reconstruction of the building. "In so far as this ordinance denies the plaintiffs in error the right to repair their wooden building, lawfully erected prior to the inclusion of the territory in which it is located within the fire limits of the city, it takes their property without due process of law, and is null and void."); *City of Poughkeepsie v. Clifford*, 120 A.D.2d 695, 502 N.Y.S.2d 768 (2d Dep't 1986). (Opinion **Apx** 104B-106B) (In action brought by municipality seeking authorization

which had been found to be nuisance, trial court improperly granted authorization to demolish building where owners' failure to comply with earlier court order to renovate building was due to municipality's delay and refusal to grant them building permit.); *Inman v. Town of New Hartford, Oneida County*, 116 A.D.2d 998, 498 N.Y.S.2d 618 (4th Dep't 1986), **Apx** 96B). (Town erred in ordering demolition of owner's building, where code provided that owner should have 30 days in which to repair or remove building or structure determined to be unsafe or dangerous and town ordered owner to remove building within 30 days, without providing him opportunity for repair.); *Application of Village of Suffern*, 12 A.D.2d 769, 209 N.Y.S.2d 599 (**Apx** 87B-88B) (Where there was agreement among witnesses, who testified that building could be repaired so as to be made safe to the public, it was error to direct demolition without giving owner opportunity to make it safe by effecting necessary repairs.); *Groff v. Borough of Sellersville*, 12 Pa. Commw. 315, 314 A.2d 328 (1974), **Apx** 172B-177B) (Under statutory remedy available to abate public nuisances, where evidence at hearing established that building constituted public nuisance and that building was not beyond repair, court should not have ordered building demolished without making further determination that owner could not or would not abate nuisance through repairs.); *Cosette Faust Newton v. Town of Highland Park*, 282 S.W.2d 266 (Tex. Civ. App. Dallas 1955), **Apx** 138B-141B) (Courts will not order destruction of entire building as nuisance or fire hazard if condition can be corrected by alterations or repairs.); *City of Aurora v Meyer*, 38 III.2d 131, 230 N.E.2d 200 (1967), **Apx** 167B-171B) (Property may be ordered destroyed under certain conditions but generally only if the danger cannot be abated in any other way.); *Fifth Urban Inc. v Bd of Bldg. Standards*, 40 Ohio App. 2d 389, 69 Ohio Op. 2d 355, 320 N.E.2d 727 (8th Dist. Cuyahoga County 1974). (Opinion, **Apx** 142B-157B)(When a building can be repaired and the danger to the public is not so imminent as to require its immediate demolition, the owner must be given a reasonable time in which to repair the building, if the owner so desires.); *Albert v. City*

of Mountain Home, 81 Idaho 74, 337 P.2d 377 (1959), (**Apx** 89B-95B) (When a hazardous condition may be remedied by cleaning and repairs, without major reconstruction, the building may not be destroyed as a nuisance.); *Polsgrove v. Moss*, 154 Ky. 408, 157 S.W. 1133. (**Apx** 158B-166-B) (While the right exists in the exercise of the police power to destroy property which is a menace to public safety or health, public necessity is the limit of the right and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way.)

Again, it is worth repeating that the City of Brighton has been unable to locate a single case in Michigan or elsewhere that found a similar ordinance to be constitutional.

A. The Court of Appeals correctly concluded that an "arbitrary and unreasonable standard" exists in the Ordinance because it only allows the exercise of an option to repair when a property owner overcomes or rebuts the presumption of unreasonableness by proving that it is economical to do so, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs.

The Michigan Court of Appeals correctly concluded that an arbitrary and unreasonable standard exists within City Code 18-59. The Court stated:

> We interpret BCO § 18-59 as only allowing the exercise of an option to repair when a property owner overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. We conclude that this standard is arbitrary and unreasonable. While police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe, the ordinance's exclusion of a repair option when repairs are deemed economically unreasonable bears no reasonable relationship to this legislative objective. Demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even ones more costly than the present value of the structure and which an owner is willing and able to timely incur. Therefore, we hold that the ordinance violates substantive due process (Opinion, p. 20, **Appellant's Apx** 208a)

In the City's brief, it boldly asserts that the Michigan Building Code has a lower standard of what is required before a building can be ordered demolished than does City Building Code 18-59. That is not true. The City states: "As a matter of comparison, the Michigan Building Code contains a provision requiring demolition of unsafe structures without even creating a rebuttable presumption of demolition. Section 115.1 or the Michigan Building Code provides that "unsafe structures shall be taken down or removed or made safe as the building official deems necessary as provided for in this section" (City Brief, page 24). The City attempts to mislead this Court by citing only a portion of the Michigan Building Code.

The key element stated in Section 115.1 is that unsafe structures shall be taken down or made safe as provided for in this section. The City does not inform this Court what other requirements and alternatives are provided for in Section 115 of the Michigan Building Code.

Specifically, Section 115.5 of the Code states the following:

> 115.5 Restoration. **The structure or equipment determined to be unsafe by the building official is permitted to be restored to a safe condition.** To the extent that repairs, alterations or additions are made or a change of occupancy occurs during the restoration of the structure, such repairs, alterations, additions or change of occupancy shall comply with the requirements of Section 105.2.2 and Chapter 34. (Brighton Code, **Appellants' Apx** 238a) (emphasis supplied)

When the City was given the opportunity to explain the reasoning why it will not give the Bonners permission to repair their homes, Counsel for the City, Mr. Bradford Maynes, stated that the City of Brighton would rather "cut to the chase" with demolition instead of litigating later over repairs that might not be done right. The statement was made in open court as follows:

> THE COURT: All Right. So the City doesn't have to give 'em an opportunity to repair?
>
> MR. MAYNES: That's correct, Judge. And the reason for that is that while -- while you and I or you and the Bonner's may think that that's a better ordinance the City doesn't have an obligation to write the ordinance that is most favorable to home owners or that's most likeable by the majority of the population. The City only has an obligation to write an ordinance which is rationally related to a legitimate government purpose. And if the City makes the determination that you know what, when we give people a chance to repair what happens is you get somebody putting a four by sheet of plywood over a big hole in a structural

> wall and claiming that that's done and then we fight with them. **You know what, we're better off cutting to the chase and just having the fight to have the thing knocked down instead of litigating whether it's fixed or not for 15 years.** (Transcript of 10-28-10, p. 26-27, **Appellants' Apx** 151a-152a)

The City's denial of opportunity to repair because it wants to "cut to the chase" with demolition has been indirectly addressed by this court. *See Childs v Anderson*, 344 Mich. 90, 73 N.W.2d 280 (1955).

CITY OF BRIGHTON CODE 18-59 CONTRAVENES THE MICHIGAN BUILDING CODE

The Michigan Building Code allows repairs of alleged unsafe structures. Specifically, Section 115.5 of the Code states the following:

> 115.5 Restoration. **The structure or equipment determined to be unsafe by the building official is permitted to be restored to a safe condition.** To the extent that repairs, alterations or additions are made or a change of occupancy occurs during the restoration of the structure, such repairs, alterations, additions or change of occupancy shall comply with the requirements of Section 105.2.2 and Chapter 34. (**Appellants' Apx** 238a) (emphasis supplied)

Larry Lehman, Chief of the State of Michigan Building Division, testified that the State has never notified a property owner of a dangerous condition and then prevented repair of that danger. (Transcript testimony of Larry Lehman, 3-12-10 p. 101-102, **Apx** 8B-10B). Further, the City's inspectors recommended repair of the Bonners homes, not demolition.

> (City Electrical Inspector Report, Greg Calm, **Appellants' Apx** 80a)
> (City Heating and Plumbing Inspector John Marr report, **Appellants' Apx** 85a-86a)
> (City Structural Engineer Ted Dombrowski report, **Appellants' Apx** 102a-108a)

City Code 18-59 has prevented those repairs and therefore contravenes the Michigan Building Code. City Code 18-59 is not related to a legitimate government interest.

CITY OF BRIGHTON CODE 18-59 CONTRAVENES THE INTERNATIONAL PROPERTY MAINTENANCE CODE (IMPC)

The City of Brighton has adopted the Michigan Building Code and the International Property Maintenance Code regarding regulation governing existing structures. The International Property Maintenance Code addresses unsafe structures. Pursuant to the IMPC, the decision to repair or demolish is the owner's option, not the City's option.

> 110.1 General. The *code official* shall order the *owner* of any *premises* upon which is located any structure, which in the *code official* judgment after review is so deteriorated or dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, to demolish and remove such structure; **or if such structure is capable of being made safe by repairs, to repair and make safe and sanitary, or to board up and hold for future repair or to demolish and remove at the owner's option**; or where there has been a cessation of normal construction of any structure for a period of more than two years, the *code official* shall order the *owner* to demolish and remove such structure, or board up until future repair. Boarding the building up for future repair shall not extend beyond one year, unless approved by the building official. (emphasis supplied)
> (IMPC **Apx** 181-182B)

The evidence in this case has shown that the Bonner homes are readily capable of being made safe. However, City Code 18-59 prevents repair on the presumption that repair would be unreasonable. City Code 18-59 contravenes International Property Maintenance Code 110.1 which allows repair, and instead prevents repair.

NOTICE AND OPPORTUNITY TO REPAIR

Section 107.1 of the International Property Maintenance Code specifically requires that the property owner be provided notice and opportunity to repair whenever a code official determines that there has been a violation as follows:

> 107.1 Notice to person responsible. Whenever the *code official* determines that there has been a violation of this code or has grounds to believe that a violation has occurred, notice shall be given in the manner prescribed in Sections 107.2 and 107.3 to the person responsible for the violation as specified in this code. Notices for condemnation procedures shall also comply with Section 108.3.

107.2 Such notice prescribed in Section 107.1 **shall be in accordance with all of the following**:

1. Be in writing.
2. Include a description of the real estate sufficient for identification.
3. Include a statement of the violation or violations and why the notice is being issued.
4. **Include a correction order allowing a reasonable time to make the repairs and improvements required to bring the *dwelling unit* or structure into compliance with the provisions of this code.**
5. Inform the property *owner* of the right to appeal.
6. Include a statement of the right to file a lien in accordance with Section 106.3.

(emphasis supplied)

City Code 18-59 is in direct conflict with the International Property Maintenance Code because it does not provide for a correction order allowing a reasonable time to make repairs as required by Sections 107.1 and 107.2 of the IMPC (International Property Maintenance Code **Apx** 179B). To the contrary, the City's Code 18-59 prevents repair of the alleged unsafe conditions.

The City in referring to Code 18-59 states:

> "The Ordinance, however, does not impose a showing of economical reasonableness to overcome the rebuttable presumption; rather it requires a showing of "reasonableness" which could be established through the demonstration of a myriad of reasons supporting a reason to repair and viable plans to repair besides economic profitability, including, *inter alia*, recent acquisition of property, investment opportunity, a historical interest, or familial concerns". (**City Brief on appeal**, p. 5)

The City's argument is disingenuous. There is no language in City Code 18-59 that would allow a property owner of an unsafe structure any means to avoid demolition other than to show that the cost to repair would not exceed 100% of the value of the structure. The Ordinance states in pertinent part:

Sec. 18-59 **Unreasonable repairs**.

> *Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as*

> *reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure,* ***such repairs shall be presumed unreasonable*** *and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.* (Code, **Appellant's Apx** 231a) (Emphasis supplied)

It is important to note that the presumptions made in Code 18-59 are exercised subjectively by the Building Official without notice or a hearing and in this case by a drive by inspection (Demolition Orders, **Apellant's Apx** 60a-63a).

The evidence in this case shows that the Bonners repeatedly argued to the City that the homes were over 150 years old and had significant historical and cultural value and that they wanted to restore them. Indeed, even the Bonners' 9-4-09 complaint cites "unique historical value of the homes" (Verified Complaint, p. 3, **Appellants' Apx** 7a,) The Bonners' argument fell on deaf ears. This was partly because the City Council is not an impartial decision maker but mostly because the Brighton City council had no obligation, under City Code 18-59 to consider any arguments against demolition other than the cost of repair. The Council was advised by the City lawyers that to order demolition or repair of the Bonner homes was at their pleasure. The trial court held four days of evidentiary hearings on nothing but the cost of repairs. See transcripts of 3/12/10, 4/7/10, 6/18/10 and 6/23/10.

The City argues to this Court that: "The Ordinance is facially constitutional where there are circumstances under which application of the Ordinance will not violate a property owner's substantive due process rights" (City Brief on appeal, page 17).

The City has made this same argument in the trial court and in the Court of Appeals. However, the City has never provided one example of how 18-59 could be applied constitutionally. That is because there is none.

The Ordinance if applied only has three components.

First, the ordinance allows a building official to arbitrarily order demolition without providing opportunity to repair.

Second, the Ordinance imposes a cost restraint on how much a homeowner can spend on repairs in order to avoid the official's demolition order.

Third, the ordinance when applied, allows a taking without just compensation.

(Ordinance, **Appellants' Apx** 231a).

The City argues that the building official's order of demolition can be appealed to the City Council as a rebuttable presumption. However, opportunity to appeal has no effect on the constitutionality of the Ordinance. The fact that the City Council can decide in certain cases not to apply the Ordinance does not make the ordinance constitutional. Such a decision simply leaves an unconstitutional ordinance not applied. This aspect of the ordinance only makes the situation worse because even the application of the Ordinance itself becomes arbitrary. The decision to repair or demolish is at the pleasure of the City Council; that is arbitrary.

Property owners only have the opportunity to argue as to whether or not the building official was wrong on his assessment of costs to repair or reasonableness to repair. The Ordinance is clear. In order to avoid demolition, the property owner must prove that repair costs would not exceed the value of the home as assessed on the City's tax rolls or the repairs are presumed unreasonable and not permitted.

If the City Council is not convinced by the property owner that repair cost would not exceed the value of the home, the Council can arbitrarily uphold the building official's demolition order, as was the case here with the Bonners' homes. On the other hand, the City can choose not to apply the ordinance and allow repairs. The decision to repair or demolish is at the Council's pleasure. It is arbitrary.

If the City needs a parking lot again, as it did when it took 131 E. North Street from the Bonners, then it can order the homes demolished as unreasonable to repair. If the City has no need for the property, it can simply choose not to apply code 18-59 and allow repairs at any cost. However, such action would have no relation to the constitutionality of the ordinance.

B. Because demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even unreasonable ones, the Court of Appeals correctly concluded that the ordinance's exclusion of a repair option, when city officials deem repairs unreasonable on the basis of expense the owner is able and willing to incur, bears no reasonable relationship to its legislative objective.

The majority panel of the Court of Appeals correctly concluded that the ordinance's exclusion of a repair option, when city officials deem repairs unreasonable on the basis of expense the owner is able and willing to incur, bears no reasonable relationship to its legislative objective:

> We hold that BCO § 18-59 violates substantive due process because it is arbitrary and unreasonable, constituting a whimsical ipse dixit; it denies a property owner the option to repair an unsafe structure simply on the basis that the city deems repair efforts to be economically unreasonable. When a property owner is willing and able to timely repair a structure to make it safe, preventing that action on the basis of the ordinance's standard of reasonableness does not advance the city's interest of protecting the health and welfare of its citizens. We do not dispute that a permissible legislative objective of the city under its police powers is to protect citizens from unsafe and dangerous structures and that one mechanism for advancing that objective can entail demolishing or razing unsafe structures.12 But BCO § 18-59 does not bear a reasonable relationship to this permissible legislative objective (Opinion, p.11, **Appellant's Apx** 199a)

City Code 18-59 makes an arbitrary presumption that if a structure poses as an inherent danger to the public, the conditions should not be repaired or corrected if it would cost more to eliminate the danger than the value of the structure itself (Brighton Code 18-59, **Appellants' Apx** 231a). Code 18-59 then if applied, as in this case, prevents the repairs and thus prevents the elimination of the danger.

The presumption not to allow repair itself is unconstitutional because it is not rationally related to a legitimate government interest. Prevention of repairs of dangerous conditions cannot be rationally related to a legitimate government interest. To presume that repair of a dangerous condition would be unreasonable due to cost is irrational. To argue as the City has here that the presumption is not unconstitutional because it is rebuttable is absurd. To prevent repair of a danger and instead invite rebuttal insures that the danger will continue unaddressed for an unknown length of time. It is not the repairs that are unreasonable; it is the prevention of those repairs that is unreasonable.

For the City to deny repairs or prevent repair of a dangerous condition, even for one day, would itself be unreasonable. To post a stop work order on the alleged dangerous property preventing repairs as was done here is unreasonable. To deny permits to repair the alleged danger as was done here is unreasonable. To cause four years of litigation in support of preventing repairs is unconscionable.

This Court should be very concerned with the City's complaint and its allegations regarding danger. The City alleged in December of 2009 imminent danger regarding the Bonner homes:

> "The Defendants' violations, as outlined above, will cause immediate and irreparable injury to the people of the City if not ceased immediately in that the potentially **imminent collapse of the Structure could cause physical injury and death** to the people of the City."
>
> **"Because of the inherent danger to the public**, it is imperative that a Preliminary Injunction be issued enjoining the Defendants from violating the ordinances of the City and the Building Code". (Verified Complaint, **Appellants' Apx** 39a-40a) (Emphasis added)

The presumption in City Code 18-59 is that the alleged dangerous conditions are unreasonable to repair. That presumption has caused the alleged dangerous conditions to remain un-corrected for over 4 years now. How can one argue that such an ordinance is in anyway

related to a legitimate government interest? What legitimate government interest is being served by an ordinance that only requires dangerous conditions to be corrected if the cost is reasonable?

CITY CODE 18-59 PERMITS ARBITRARY ACTION

Black's Law Dictionary defines arbitrary in several ways:

- In an unreasonable manner, as fixed or done capriciously or at pleasure.
- Not done or acting according to reason or judgment
- Without fair, solid, and substantial cause;
- Willful and unreasoning action, without consideration and regard for facts and circumstances presented.
- Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise ones judgment.

None of the Black's Law definitions are flattering but all describe the irrational actions of the City in this case. The trial court and Michigan Court of Appeals found City Code 18-59 to be arbitrary. Other states have also found similar ordinances to be arbitrary and unconstitutional. The Court of Appeals did not err in affirming the trial court in this matter.

II. THE CITY OF BRIGHTON'S ORDINANCE VIOLATES PROCEDURAL DUE PROCESS BECAUSE IT FAILS TO PROVIDE A PROCEDURE TO SAFEGUARD AN OWNER'S RIGHT TO RETAIN PROPERTY BY PERFORMING WHAT OTHERS MIGHT CONSIDER UNREASONABLY EXPENSIVE REPAIRS.

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Zinermon v Burch*, 494 U.S. 113, 125; 110 S Ct 975; 108 L Ed 2d 100 (1990). "'Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.'" *Id.* at 125-126 (citation omitted). Procedural due

process differs from substantive due process in that "procedural due process principles protect persons from deficient procedures that lead to the deprivation of cognizable [property] interests." *Bartell v Lohiser*, 215 F3d 550, 557 (CA 6, 2000). A procedural due process violation occurs when the government unlawfully interferes with a protected property or liberty interest without providing adequate procedural safeguards. *Schiller v Strangis*, 540 F Supp 605, 613 (D Mass, 1982). To establish a violation of procedural due process, one must show that the action concerned a recognizable property or liberty interest, that there was a deprivation of that interest absent due process of law, and that the deprivation took place under the color of state law. *Id.*

The Court of Appeals correctly noted that the Ordinance also violates procedural due process. In this connection, the majority Opinion states:

> BCO § 18-59 does not provide adequate procedural safeguards to satisfy the Due Process Clause. Before potentially depriving plaintiffs or any city property owners of their constitutionally protected property interests through demolition predicated on a determination that a structure is unsafe, the city was constitutionally required to provide plaintiffs with a reasonable opportunity to repair the unsafe structure, regardless of whether doing so might be viewed as unreasonable because of its cost. In addition to notice, a hearing, and an impartial decision-maker, which are provided for in § 18 of the BCO, the city should have also provided for a reasonable opportunity to repair an unsafe structure, limited only by unique or emergency situations. Precluding an opportunity to repair on the basis that it is too costly in comparison with a structure's value or that making repairs is otherwise unreasonable can result in an erroneous and unconstitutional deprivation of a property interest, i.e., a deprivation absent due process of law. Giving a property owner the procedural protection of a repair option is the only way the city's ordinances could withstand a procedural due process challenge (Opinion, p.12 **Appellant's Apx** 200a).

The majority Opinion also cited a plethora of out-of-state authorities that considered similar ordinances and found them to violate procedural due process. The Bonners hereby adopt that portion of the Court of Appeals' decision and they urge this Court to affirm that well-reasoned decision.

As the majority panel noted in its opinion:

> Next, as to the dissent's claim that plaintiffs were accorded procedural due process by way of notice, a hearing, and an impartial decision maker, it must be emphasized that procedural due process is not always satisfied in full simply because notice, a hearing, and an impartial decision maker were provided (Opinion, p. 17, **Appellant's Apx** 205a).

DUE PROCESS / IMPARTIAL DECISION MATTER

The City argues to this Honorable Court that there is no dispute as to whether the City Council was an impartial decision maker.

> "There is no dispute that the City Council is an unbiased and impartial decision maker and no allegations or evidence to show any bias on the part of the City Council, which is comprised of seven individuals." (**City Brief on Appeal,** p. 32)

That is not true. The Bonners allege that the City of Brighton retaliated against them regarding their defense of an eminent domain action regarding a different home (Verified Complaint, p.4, **Appellants' Apx** 8a)

The Bonners' complaint further contained a separate count alleging that the City Council was not an impartial decision maker in this matter. (Verified complaint, Count V11, p. 26-27, **Appellants' Apx** 30a-31a)

Further, the Bonners allege in their complaint an equal protection claim accusing the City of Brighton Mayor/Council Member, Kate Lawrence, of being treated differently, allowing her to restore her centennial home while at the same time denying the Bonners that right. (Verified Complaint, p. 21, **Appellants' Apx** 25a). Kate Lawrence voted to demolish the Bonners' homes. The Bonners have argued repeatedly that they were not afforded a hearing before an impartial decision maker.

For the City to argue that there is no dispute regarding the City Council being impartial is a glaring misrepresentation.

CONCLUSION

The fact that City of Brighton's Code 18-59 has prevented the repair of dangerous conditions cited by the City four years ago shocks the conscience. On January 30, 2009, the City alleged imminent dangers to the health and safety of the general public regarding the Bonners' homes. The City's four year refusal to allow those dangers to be corrected or repaired was permitted by the presumption that the repairs were unreasonable found in City Code 18-59. The City's Code 18-59 contravenes the Michigan Building Code and the International Property Maintenance Code. Further, City Code 18-59 allows the taking of property without just compensation and allows a City to circumvent the requirements of eminent domain.

As a practical matter, one must wonder why the City would defend City Code 18-59 for four years, all the while keeping alleged dangerous conditions unaddressed. Who, other than the City's attorneys, have benefited from all of this? – It certainly was not the Bonners or the taxpayers.

WHEREFORE, the Bonners respectfully request that this Court affirm the decision of the Court of Appeals.

Dated: October 23, 2013

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of October, 2013, I have caused two copies of the foregoing Brief on Appeal to be served by first class United States mail, on the following:

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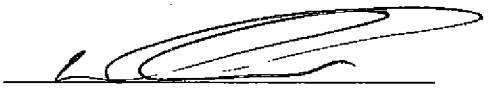

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