STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal From The Michigan Court Of Appeals
Hon. Jane E. Markey, Presiding Judge

LEON V. BONNER and MARILYN E. BONNER,
Plaintiffs/Counter-Defendants/
Appellees,
v
CITY OF BRIGHTON,
Defendant/Counter-Plaintiff/
Appellant.
_____/

Supreme Court Case No: 146520

Court of Appeals Case No: 302677

Livingston County Circuit Court Case No: 09-024680-CZ

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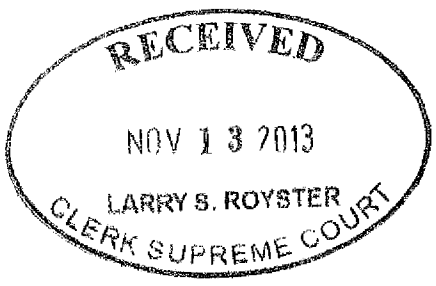

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STATEMENT OF JURISDICTION

This Court granted the City of Brighton's Application for Leave to Appeal the December 4, 2012 Judgment of the Court of Appeals and has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE BRIGHTON CODE OF ORDINANCES §18-59 IS FACIALLY UNCONSTITUTIONAL, IN VIOLATION OF SUBSTANTIVE DUE PROCESS, WHERE IT CREATES A PRESUMPTION THAT AN UNSAFE STRUCTURE SHALL BE DEMOLISHED AS A PUBLIC NUISANCE IF THE COST TO REPAIR THE STRUCTURE WOULD EXCEED 100% OF THE STRUCTURE'S TRUE CASH VALUE AS REFLECTED IN ASSESSMENT TAX ROLLS BEFORE THE STRUCTURE BECAME UNSAFE AND DOES NOT AFFORD THE OWNER OF SUCH A STRUCTURE AN OPTION TO REPAIR AS A MATTER OF RIGHT?

The Court of Appeals answered, "Yes."

The Circuit Court answered, "Yes."

Plaintiffs/Appellees, Leon and Marilyn E. Bonner, answered, "Yes."

Defendant/Appellant, City of Brighton, answered, "No."

Amicus Curiae, the Michigan Association of REALTORS®, answers, "Yes."

II. WHETHER THE BRIGHTON CODE OF ORDINANCES §18-59 IS FACIALLY UNCONSTITUTIONAL, IN VIOLATION OF PROCEDURAL DUE PROCESS, WHERE IT CREATES A PRESUMPTION THAT AN UNSAFE STRUCTURE SHALL BE DEMOLISHED AS A PUBLIC NUISANCE IF THE COST TO REPAIR THE STRUCTURE WOULD EXCEED 100% OF THE STRUCTURE'S TRUE CASH VALUE AS REFLECTED IN ASSESSMENT TAX ROLLS BEFORE THE STRUCTURE BECAME UNSAFE AND DOES NOT AFFORD THE OWNER OF SUCH A STRUCTURE AN OPTION TO REPAIR AS A MATTER OF RIGHT?

The Court of Appeals answered, "Yes."

The Circuit Court did not answer this question.

Plaintiffs/Appellees, Leon and Marilyn E. Bonner, answered, "Yes."

Defendant/Appellant, City of Brighton, answered, "No."

Amicus Curiae, the Michigan Association of REALTORS®, answers, "Yes."

I. INTRODUCTION/STATEMENT OF INTEREST

The Michigan Association of REALTORS® (the "Association") is Michigan's largest non-profit trade association, comprised of 48 local boards and a membership of more than 26,000 brokers and salespersons licensed under Michigan law. Each day, the Association's members are involved in hundreds of real estate transactions, many of which involve the sale of vacant lots and newly constructed homes in new developments. One of the primary goals of the Association is to provide the opportunity for all Michigan residents to own or rent affordable housing. To promote this goal and others, the Association seeks to oppose laws and court decisions which delay, restrict, or otherwise impede the ability of the Association's members to sell affordable housing in Michigan.

At issue in this appeal is the constitutionality of §18-59 of the Brighton Code of Ordinances ("BCO"). The circuit court determined that §18-59 violates substantive due process by permitting the City of Brighton (the "City") to order the demolition of unsafe structures as public nuisances, without affording the property owners the option to repair, if the structure is deemed unreasonable to repair. Under §18-59, a structure is presumed unreasonable to repair when repair costs would exceed the true cash value of the structure as reflected in the assessment tax rolls prior to the structure becoming unsafe.

The majority of the Court of Appeals panel affirmed the opinion of the circuit court, stating:

> 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. But BCO § 18–59 does not bear a reasonable relationship to this permissible legislative objective.

Bonner v City of Brighton, 298 Mich App 693, 714-715 (2012) (footnotes omitted). In addition, the Court of Appeals found that BCO §18-59 violated procedural due process, stating:

> We also determine that 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.

Bonner, 298 Mich App at 716-717 (footnotes omitted). These decisions of the Court of Appeals should be affirmed by this Court. Property rights are of paramount importance – both to REALTORS® and the general populace. Since the days of the founding fathers, this Country and this State, have been particularly mindful of protecting their citizens from unnecessary government interference in private property rights. Indeed, the policy of this State, as stated by this Court, is in favor of repair over demolition.

> To say that the houses are old and dilapidated does not alone justify their razing or make them a nuisance.

* * *

> 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.

State Police Comm'r v Anderson, 344 Mich 90, 95-96; 73 NW2d 280 (1955).

The primary issue raised in this case, the deprivation of a real property interest, is critical to Association members. In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." The Association believes that this is a case of important public interest, and the outcome of this case is of continued and vital concern to the Association and its members. The Association's experience and expertise could be beneficial to this Court in the resolution of the issues presented by this appeal.

Therefore, the Association now files this Brief Amicus Curiae in Support of the Position of Plaintiffs/Appellees, Leon and Marilyn Bonner (the "Bonners") and respectfully requests that this Court grant its Motion for Leave to file this Amicus Brief, and affirm the majority Opinion of the Court of Appeals.

II. STATEMENT OF MATERIAL FACTS

The Association accepts the Statement of Facts contained in the Bonners' Brief on Appeal as highlighted by the following:

The Ordinance

1. The provision of the BCO at issue in this appeal provides:

> 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**. This section is not meant to apply to those situations where a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood or other Act of God. If a structure has become unsafe because of an event beyond the control of the owner, the owner shall be given by the city manager, or his designee, reasonable time within which to make repairs and the structures shall not be ordered demolished without option on the part of the owner to repair. If the owner does not make the repairs within the designated time period, then the structure may be ordered demolished without option on the part of the owner to repair. The cost of demolishing the structure shall be a lien against the real property and shall be reported to the city assessor, who shall assess the cost against the property on which the structure is located.

BCO §18-59 (emphasis supplied), Appx 231a.

2. An "unsafe structure" is:

(1) A structure, because of dilapidation, decay, damage, faulty construction, or otherwise which is unsanitary or unfit for human use;

(2) A structure that has light, air, or sanitation facilities which are inadequate to protect the health, safety, or general welfare of those who live or may live within;

(3) A structure that has inadequate means of egress as required by this Code;

(4) A structure, or part thereof, which is likely to partially or entirely collapse, or some part of the foundation or underpinning is likely to fall or give way so as to injure persons or damage property;

(5) A structure that is in such a condition so as to constitute a nuisance, as defined by this Code;

(6) A structure that is hazardous to the safety, health, or general welfare of the people of the city by reason of inadequate maintenance, dilapidation, or abandonment;

(7) A structure that has become vacant, dilapidated, and open at door or window, leaving the interior of the structure exposed to the elements or accessible to entrance by trespassers or animals or open to casual entry;

(8) A structure that has settled to such an extent that walls or other structural portions have less resistance to winds than is required in the case of new construction by this Code;

(9) A structure that has been damaged by fire, wind, flood, or by any other cause to such an extent as to be dangerous to the life, safety, health, or general welfare of the people living in the city;

(10) A structure that has become damaged to such an extent that the cost of repair to place it in a safe, sound, and sanitary condition exceeds 50 percent of the assessed valuation of the structure, at the time when repairs are to be made.

BCO §18-46, Appx 218a.

3. The city manager, or his designee, are charged with the enforcement of the above-stated provisions of the BCO. BCO §18-49, Appx 221a.

4. In the event that the city manager, or his designee, determines that a structure is "unsafe:"

(a) The city manager, or his designee, shall issue a notice of unsafe structure when it is determined that the structure is unsafe.

(b) Service of the notice shall be made upon the owner or agent registered with the city and if not registered as indicated by the records of the city assessor by:

(1) Personally delivering a copy to the owner or agent;

(2) Mailing a copy by certified mail, postage prepaid, return receipt requested to the owner as indicated by the records of the city assessor and posting a copy of the notice upon a conspicuous part of the structure; or

(3) When service cannot be made by either of the above methods, by publishing the notice in a local newspaper of general circulation once a week for

three consecutive weeks and by posting a copy of the notice upon a conspicuous part of the structure.

(c) The notice shall:

(1) Be in writing;

(2) Include a description of the real estate sufficient for identification;

(3) Specify the repairs and improvements required to be made to render the structure safe or if the city manager, or his designee, has determined the structure cannot be made safe, indicate that the structure is to be demolished;

(4) Specify a reasonable time within which the repairs and improvements must be made or the structure must be demolished;

(5) Include an explanation of the right to appeal the decision to the city council within ten calendar days of receipt of the notice in accordance with section 18-61;

(6) Include a statement that the recipient of the notice must notify the city manager within ten calendar days of receipt of the notice of his intent to accept or reject the terms of the notice.

BCO §18-52, Appx 224a.

5. The "Notice of Unsafe Structure" may be appealed by the aggrieved property owner to the city council. The appeal must be in writing, state the basis for the appeal and be filed within ten (10) calendar days of receipt of the Notice of Unsafe Structure. The property owner is granted "the opportunity to be heard" at the next regularly scheduled city council meeting. BCO §18-61, Appx 233a.

6. If no action is taken by the property owner, to appeal or demolish, the City may issue and serve upon the property owner, an order to show cause at a public hearing why the structure

should not be demolished or "otherwise made safe" as recommended by the city manager or his designee. BCO §18-58, Appx 230a.

7. If the property owner fails to follow the decision of the city council made at the show cause hearing, the city council may, by resolution, authorize the city attorney to file a lawsuit. BCO §18-62, Appx 234a.

The Administrative Proceedings

8. The Bonners are the owners of two residential lots located in Brighton; specifically, 116 East North Street and 122 East North Street (collectively, the "Bonner Property"). Opinion and Order on Plaintiffs' Motion for Partial Summary Disposition, 11/23/10 ("Cir Ct Op"), Appx 167a. *See also*, photos of the Bonner Property, Appx 1B.

9. Each lot contains a historic, 150-year old residential structure which the City determined to be "unsafe structures" within the meaning of BCO §18-46. Cir Ct Op, p 1, Appx 167a.

10. The City further determined that the cost of repairs exceeded the true cash value of the structures and ordered that they be demolished (the "Order to Demolish"). Cir Ct Op, p 1, Appx 167a.

11. The Bonners appealed the Order to Demolish to the city council which conducted hearings on June 4 and June 18, 2009, receiving various reports, repair estimates and affidavits. Cir Ct Op, p 2, Appx 168a.

12. In conjunction with their appeal, the Bonners hired a structural engineer and various contractors, who determined that the structures were repairable, and filed the affidavits and repair

estimates of the engineer and contractors with the city council. Court of Appeals majority Opinion ("COA Op"), Appx 190a-191a.

13. In response, the City issued a stop-work order and denied the Bonners' requested building permits. COA Op, Appx 191a and Stop-Work order, Appx 18B.

14. Ultimately, the city council passed a resolution on July 16, 2009 affirming the Order to Demolish. City Council Meeting Minutes, 7/16/09, Appx 20B-21B. The city council found that the cost to repair the structure was $158,000 whereas the true cash value of the structures was only $85,000. By contrast, the Bonners' expert witness opined that the cost to repair was less than $40,000 per structure. COA Op, Appx 191a.

Circuit Court Proceedings

15. The Bonners then filed this lawsuit claiming, in part, that BCO §18-59 was unconstitutional; specifically, violating procedural and substantive due process. COA Op, Appx 191a-192a.

16. Subsequent to the filing of this lawsuit, the City issued to the Bonners an order to show cause and conducted a show cause hearing pursuant to BCO §18-58 in which the city council again rejected the Bonners' position against demolition. COA Op, Appx 192a and 230a.

17. The City then filed its own complaint in a separate action requesting an injunction enforcing BCO §18-59 and the Order to Demolish. The City's case was consolidated with the Bonner case by the circuit court. COA Op, Appx 192a.

18. Throughout this litigation, the Bonners filed "numerous motions seeking court authorization to make various repairs and to abate the public nuisances," which were denied. Appx 193a; Orders, Appx 36B, 37B and 38B.

19. Eventually, however, the circuit court granted in part, the Bonners' motion for partial summary disposition, finding that BCO §18-59, on its face, violated substantive due process. In relevant part, the circuit court stated:

> Two rationales for this provision of the ordinance have been proffered, but neither the proffered rationales nor any other conceived of by this Court can support the contested provision of this ordinance. The City argues that there is a legitimate interest advanced by the ordinance because the demolition of unsafe buildings promotes the public safety. Certainly, the demolition of unsafe structures promotes the legitimate interest of public safety. However, public health and safety is not advanced any more by the provision denying property owners an opportunity to repair than the interest in public health and safety would be advanced if the ordinance required the City to permit a reasonable opportunity to make such repairs. If an owner voluntarily repairs the home and brings it up to code, then the property is no longer a public health and safety hazard. Therefore, the interest is no more advanced if the property is demolished by the City than if the property is repaired by the owner to the City's standards. Because due process demands that "the means selected shall have a real and substantial relation to the object sought to be attained," *McAvoy v HB Sherman Co,* 401 Mich 419, 435-436; 258 NW2d 414 (1977), and withholding from the owner the option to repair does not advance the proffered interest any more than permitting the owner to repair it themselves, there is not a rational basis for the requirement and the deprivation of a property owner's interest in a building by the demolition of that building without the option of repair is entirely arbitrary such that it shocks the Court's conscience.
>
> The City also stated at oral argument on the Bonner's first motion, however, that if the property owner is given an opportunity to repair buildings that qualify for demolition then the buildings will remain a hazard throughout the course of prolonged disputes between the City and property owners about whether the repairs done are sufficient or not. The City's argument in this respect still does not amount to a rational interest justifying this particular aspect of the ordinance. For this Court or any other to state that the ordinance is unconstitutional for failing to provide a reasonable option to repair is not to imply that the City is required to let the property fester in disrepair interminably. To the contrary, various decisions by other courts have distinguished the authority cited above and held ordinances constitutional after finding that a reasonable opportunity

> to make repairs had been granted. *See, e.g., Village of Lake Villa v Stokovich,* 211 Ill2d 106; 810 NE2d 13 (2004) (upholding an ordinance providing a 15-day notice to repair or demolish before the municipality could demolish buildings). The deficiency with the ordinance in this case is that it provides *zero* opportunity for a property owner to make repairs not that it does not permit a property owner an opportunity for unending evasion of an inevitable demolition, and this rationale offered by the City similarly fails. The Court acknowledges that a party challenging an ordinance must negate every conceivable basis supporting it; however, beyond the reasons already discussed, the Court cannot conceive of any reasonable basis for withholding from a property owner the opportunity to repair a hazard in order to avoid demolition. *Conlin,* 262 Mich App at 391 (citing *Lehnhausen v Lake Shore Auto Parts Co,* 410 US 356, 364 (1973)). Accordingly, there is no rational interest advanced by withholding an opportunity to repair the property, and this provision of the ordinance violates due process.

Cir Ct Op, pp 8-10, Appx 174a-176a.

Appellate Proceedings

20. In a 2-1 published opinion, the Court of Appeals affirmed the decision of the circuit court that the provision of BCO §18-59 which presumes structures to be public nuisances which may be ordered demolished without the option of repair where the city official has determined that the cost of repair will exceed the true cash value of the structure, violates substantive due process. In particular, the Court of Appeals found unconstitutional the requirement of the ordinance that, in order to overcome the presumption that allows the City to order demolition without option of repair, the property owner must show that making repairs is reasonable *Bonner*, 298 Mich App at 713.

21. In addition, the Court of Appeals found in the majority opinion that BCO §18-59, by failing to offer an option to repair, fails to provide adequate procedural safeguards and violates procedural due process, stating:

> 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.

Bonner, 298 Mich App at 716-717.

For the reasons discussed below, the majority opinion of the Court of Appeals should be affirmed.

III. ARGUMENT

A. Standard of Review

This Court reviews *de novo* constitutional issues, questions concerning the proper construction of an ordinance and rulings on motions for summary disposition. *Kropf v City of Sterling Heights,* 391 Mich 139, 152; 215 NW2d 179 (1974) (Supreme Court would review *de novo* the record on appeal from Court of Appeals' reversal of trial court's finding that city zoning ordinance was unconstitutional); *Soupal v Shady View, Inc,* 469 Mich 458, 462; 672 NW2d 171 (2003) (An appellate court reviews *de novo* matters of statutory construction, including the interpretation of ordinances); *Kuznar v Raksha Corp,* 481 Mich 169, 175; 750 NW2d 121 (2008) (Supreme Court reviews *de novo* rulings on motions for summary disposition).

Rules governing the construction of statutes apply with equal force to the interpretation of municipal ordinances. *Gora v City of Ferndale,* 456 Mich 704, 711; 576 NW2d 141 (1998). Assuming the Legislature acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature. *Bush v Shabahang,* 484 Mich 156, 166; 772 NW2d 272 (2009). When construing a statute, courts may not speculate

about an unstated purpose where the unambiguous text plainly reflects the Legislature's intent. *Pohutski v City of Allen Park,* 465 Mich 675, 683; 641 NW2d 219 (2002).

B. The Policy Of This State Is To Favor Repair Before Demolition

1. The Common Law Promotes Repair Before Demolition

Public policy is properly considered by Michigan courts in cases involving property rights. *Terrien v Zwit,* 467 Mich 56, 70-71; 648 NW2d 602 (2002). The policy of this State can be derived from "objective legal sources," including constitutional provisions, statutes and the common law. *Id.* See also, *Vagts v Perry Drug Stores, Inc,* 204 Mich App 481, 485-486; 516 NW2d 102 (1994). In this case, public policy concerns weigh heavily in favor of repair over demolition.

The policy advanced by the lower courts – that the least destructive and least invasive means should be used to achieve the legitimate goal of eliminating hazards and providing for public safety – is found in this Court's opinions; specifically, *Childs v Anderson,* 344 Mich 90; 73 NW2d 280 (1955) and *City of Saginaw v Budd*, 381 Mich 173; 160 NW2d 906 (1968).

In *Childs*, the Commissioner of State Police filed a petition for an order to show cause why defendant should not abate a fire hazard by razing the building and removing all rubbish and debris from the premises. The Commissioner alleged that the building constituted a fire hazard under the Fire Prevention Act. The trial court ordered demolition. This Court reversed, stating:

> Upon consideration of this statute and its purpose we are of the opinion that the facts in this case do not justify an order that the buildings be razed.
>
> As plaintiff concedes, this statute must be administered with caution. **The remedy prescribed should be no greater than is necessary to achieve the desired result.** It was shown that the principal and only source of fire would be from trespassers or vandals. **To say that the houses are old and dilapidated does not alone justify their razing**

> **or make them a nuisance.** See 9 Am.Jur., Buildings, § 40; 39 Am.Jur., Nuisances, § 77.
>
> * * *
>
> 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 A.L.R.2d 92; 9 Am.Jur., Building, § 40. The need for repairs and alterations does not in this case constitute the fire hazard and therefore it is not necessary that we order them. The purpose of the statute 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.

Childs, 344 Mich at 95-96 (emphasis supplied).

In *City of Saginaw*, this Court invalidated an ordinance which provided as follows:

> All buildings or structures which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing use constitute a hazard to safety or health, or public welfare, by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment as specified in this code or in any other effective ordinance, are for the purpose of this section, unsafe buildings. All such unsafe buildings are hereby declared to be public nuisances and shall be abated by alteration, repair, rehabilitation, demolition or removal, in accordance with the procedure of this section or of article 1 of chapter 3 of the Saginaw general code.

City of Saginaw, 381 Mich at 176-177. This Court found the ordinance to be an improper delegation of legislative authority to an administrative official without definable standards. *City of Saginaw,* 381 Mich at 178. In doing so, this Court quoted from the *Childs* case discussed above:

> To say that the houses are old and dilapidated does not alone justify their razing or make them a nuisance.

City of Saginaw, 381 Mich at 177, quoting *Childs, supra.* See also *Orion Charter Twp v Burnac Corp,* 171 Mich App 450; 431 NW2d 225 (1988), in which the Court of Appeals, citing and quoting this Court's decision in *Childs*, stated:

> While we agree with appellants that demolition is a drastic remedy and should be ordered in those circumstances where it is necessary to eliminate the hazard, we do not find that, in this case, the remedy was inappropriate. Before demolition was ordered, the trial judge initially gave appellants the opportunity to avoid demolition by making certain repairs as prescribed by the court's September 29, 1987, opinion.

Orion, 171 Mich App at 461-462.

Like the statute at issue in *Childs*, the purpose of BCO §18-59 is to eliminate hazards, not make houses tenantable. This purpose can be achieved either through repair or demolition -- both eliminate the hazard. There is no rational basis to require one remedy to the exclusion of the other when both achieve the same end result and both fulfill the purpose of the ordinance. As stated in *Childs*, "[t]he remedy prescribed should be no greater than is necessary to achieve the desired result." *Childs*, 344 Mich at 95. Repair before demolition preserves the housing in this State and, as in this case, preserves *historic* housing. Repair before demolition thus constitutes, in and of itself, a legitimate goal and a legitimate public policy concern. The public policy espoused in the common law, therefore, supports the decisions of the lower courts and weighs in favor of affirming those decisions.

2. The Building And Maintenance Codes Of This State Promote Repair Before Demolition

The relevant building and maintenance codes offer repair before demolition with regard to "unsafe structures." In particular, the Michigan Building Code and the International Property Maintenance Code, like the Brighton Ordinance, provides for a statutory scheme for the inspection,

notification and reparation of unsafe buildings or structures with one important exception – the property owner is afforded an opportunity to repair.

The Michigan Building Code, with regard to "unsafe structures," provides, in relevant part:

SECTION 115
UNSAFE STRUCTURES AND EQUIPMENT

> **115.1 Conditions.** Structures or existing equipment that are or hereafter become unsafe, insanitary or deficient because of inadequate means of egress facilities, inadequate light and ventilation, or which constitute a fire hazard, or are otherwise dangerous to human life or the public welfare, or that involve illegal or improper occupancy or inadequate maintenance, shall be deemed an unsafe condition. Unsafe structures shall be taken down and removed or made safe, as the building official deems necessary and as provided for in this section. A vacant structure that is not secured against entry shall be deemed unsafe.
>
> * * *
>
> **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.

Michigan Building Code, §115, Appx 237a-238a. The Michigan Building Code defines "unsafe structure" in a similar fashion as the Brighton Ordinance – common themes include inadequate maintenance resulting in dangerous conditions hazardous to public welfare. Yet, the Michigan Building Code allows for repair and contains no presumption of demolition based on an economic analysis of the reasonableness of repairs.

The International Property Maintenance Code ("IPMC"), like the Brighton Ordinance, contains a lengthy list of conditions within structures that render the structure unsafe or "dangerous."

IPMC, §108.1.5, Appx 180B. Such conditions may be abated and repaired or the structure may be demolished – at the owner's option.

> **108.6 Abatement methods.** The *owner, operator* or *occupant* of a building, *premises* or equipment deemed unsafe by the *code official* shall abate or cause to be abated or corrected such unsafe conditions either by repair, rehabilitation, demolition or other *approved* corrective action.

IPMC, §108.6, Appx 181B.

SECTION 110
DEMOLITION

> **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, insanitary 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.

IPMC, §110.1, Appx 181B-182B. Again, similar to the Michigan Building Code, IPMC permits to owner to repair and does not make a presumption of demolition based on an economic analysis of the reasonableness of repairs.

The Brighton Ordinance is upside-down in relation to the Michigan Building Code and IPMC (collectively, the "Codes"). The Brighton Ordinance is premised on the denial of the right of repair where the cost of the repairs will exceed the true cash value of the structure. The Codes, by contrast, are premised on the notion of repair first – demolition last. Stated another way, the Brighton

Ordinance presumes demolition whereas the Codes presumes repair. And, under the Brighton Ordinance, the burden of proving reasonableness and being able to repair rather than demolish is placed on the property owner. Under the Codes, there are no such presumptions and, therefore, no shifting burden of production.

The Codes represent this State's position on the policy of repair before demolition. Again, this policy, followed by the lower courts in this case, should be affirmed by this Court.

C. The City Ordinance Violates Due Process Principles Applicable To A Facial Challenge To An Ordinance

The federal and State of Michigan Constitutions guarantee that no person shall be deprived of life, liberty or property without due process of law. US Const, Am XIV; Const 1963, art 1, §17. A citizen is entitled to due process of law when a municipality, in the exercise of its police power, enacts an ordinance that affects the citizens' due process rights. *Kyser v Kasson Twp,* 486 Mich 514, 521; 786 NW2d 543 (2010). In a facial (as opposed to "as applied") challenge to the constitutionality of an ordinance, the plaintiff alleges that the very existence of the provision of the ordinance at issue, or decision under such provision, "adversely affects or infringes upon" the property values or rights of all landowners within the governed community. *Hendee v Putnam Twp*, 486 Mich 556, 568, n 17; 786 NW2d 521 (2010).

Here, the challenge to the Brighton Ordinance is a facial challenge; that is, the mere existence of that provision of §18-59, which deprives a landowner of the opportunity to repair unless the owner can rebut the presumption that repairs are unreasonable, materially and adversely affects property values and curtails the repair opportunities of all property owners within the City. BCO §18-59 violates due process and is unconstitutional on its face in a variety of ways.

BCO §18-59 expressly provides for presumptions of unreasonableness of repair and public nuisance where the cost of repair is greater than the assessed true cash value of the structure as of the date just prior to the structure becoming unsafe. The presumption of unreasonableness of repair is arbitrary and violates due process in the sense that repair, as well as demolition, both achieve the stated purpose, or legitimate legislative objective of BCO §18-59. Further, according to the City, BCO §18-59 "creates a ***rebuttable*** presumption that an unsafe structure shall be demolished as a public nuisance if the cost to repair to structure would exceed 100% of the structure's true cash value as reflected in the assessment tax rolls before the structure became unsafe." City Brief on Appeal, p 4 (emphasis supplied). The Court of Appeals agreed with the City's characterization of BCO §18-59 for "purposes of [its] analysis." *Bonner*, 298 Mich App at 712. Thus, under Michigan's evidentiary rules, based on a single inspection by a single individual, BCO §18-59 shifts "the burden of going forward with evidence to rebut or meet the presumption" to the property owner. MRE 301. The property owner must meet this burden and overcome this presumption in an appeal to the very body that enacted the ordinance at issue and employs the initial decision-maker who determined the structure to be "unsafe" and ordered the structure demolished. BCO §18-59's only express standard by which the property owner may overcome the presumption is economic; that is, that the cost of repairs does not exceed the assessed true cash value of the property as of the date prior to the property becoming "unsafe." This economic standard is itself arbitrary and is not rationally related to when repairs made be permitted versus when demolition is necessary. Accordingly, for the reasons discussed below, BCO §18-59 violates substantive and procedural due process and the judgments of the lower courts should be affirmed.

D. The City Ordinance Violates Substantive Due Process

The local power to zone is not absolute. *Kyser,* 486 Mich at 521. Substantive due process protects citizens' property interests/rights from arbitrary government action. *Id.* Substantive due process demands that zoning regulations must bear a reasonable or rational relationship to a legitimate and permissible legislative objective. *Id.* An ordinance is presumed valid. However, this presumption may be overcome by demonstrating that either: (1) there is no reasonable governmental interest being advanced by the ordinance; or (2) that the ordinance is an unreasonable and arbitrary restriction upon the owner's use of his/her property. *Twp of Yankee Springs v Fox,* 264 Mich App 604, 609; 692 NW2d 728 (2005). The reviewing court gives considerable weight to the findings of the trial judge. *Id.* And, while "line-drawing" is a legislative function, "the task of deciding whether the line itself is reasonably related to the object of the line drawing is a judicial function. *Charter Twp of Delta v Dinolfo,* 419 Mich 253, 273; 351 NW2d 831 (1984).

1. The Presumption Against Repair Is Arbitrary And Lacks A Rational Basis To Achieve BCO §18-59's Purpose

Substantive due process analysis evaluates two components of a law – the means and the ends. As stated by this Court, ". . . the guaranty of due process, as has often been held demands . . . that the means selected shall have a real and substantial relation to the object sought to be attained." *McAvoy v HB Sherman Co,* 401 Mich 419, 436; 258 NW2d 414 (1977), quoting *Nebbia v New York,* 291 US 502, 525; 54 S Ct 505; 78 LEd 940 (1934).

According to the City, the legitimate interest advanced by BCO §18-59 is public safety. Demolition advances that interest by eliminating hazardous conditions. However, so do repairs. Demolition being the only means to the end (eliminating hazards), to the exclusion of repairs

(which would also eliminate hazards), does not have a "real and substantial relation" to the elimination of hazards/protection of public safety. As stated by the Court of Appeals:

> 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.

Bonner, 298 Mich App at 715.

In response to this holding of the Court of Appeals, the City argues that the validity of an ordinance is based solely on the existing text of the ordinance and not upon proposed alternatives; namely, repair. City's Brief on Appeal, p 19. This argument lacks merit. The text of BCO §18-59 itself discusses repair as a option or alternative to demolition. BCO §18-59 does so, however, in the unconstitutional manner of, among other things, creating a presumption against repair based on an arbitrary economic standard. See, *infra*, §D.3. Moreover, the existence of alternative methods of achieving the same end necessitates a finding of unconstitutionality since whenever methods of achieving the same end exist, the method least destructive to constitutional rights must be employed. *Shelton v Tucker*, 364 US 479, 488; 81 S Ct 247 (1960); see also, *Johnson v City of Paducah*, 512 SW2d 514, 516 (1974) (the means of implementation of an ordinance may extend no further than public necessity requires). Accordingly, the presumption against repair is arbitrary and lacks a rational basis to achieve BCO §18-59's purpose of protecting public safety.

2. Allowing Or Not Allowing Repairs Based On Causation Is Arbitrary And Lacks A Rational Basis To Achieve BCO §18-59's Purpose

The lack of rational relation is perhaps best illustrated by the City's concession that repairing (rather than demolishing) an unsafe structure adequately abates the nuisance and eliminates the hazard where the cause of the "unsafeness" is something other than the owner's neglect. As noted by the Court of Appeals:

> BCO §18-59 provides an exception [to the presumption of demolition] when "a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood or other Act of God." In such situations, "the owner shall be given . . . reasonable time within which to make repairs and the structure shall not be ordered demolished without option on the part of the owner to repair." BCO §18-59. Thus, even if the cost of repairs exceeds the property's value, a right to repair exists when a structure is made unsafe through events that the owner could not control. Stated otherwise, repairs are permissible even though they are otherwise unreasonable.

Bonner, 298 Mich App at 715, n 13. However, simply put, if repairs as a means to the legitimate end of eliminating a hazard is rational in one situation (non-owner caused damage), it is rational in the other (owner caused damages). That is, who or what caused the state of repair is wholly unrelated to the adequacy of the means chosen to eliminate the public safety hazard. Causation of damage to a structure is an arbitrary basis upon which to differentiate between permitted means of accomplishing abatement of a public safety hazard. Stated another way, BCO §18-59's distinction between when repairs are permissible as a matter of right, based on causation, is irrational as it relates to achieving the objective of abating a nuisance.

Moreover, not only is the "line-drawing" between owner-caused and non-owner-caused damages arbitrary, but so is the standard itself for determining owner-caused versus

non-owner-caused. BCO §18-59 allows repairs for damage "beyond the control of the owner." BCO §18-59 provides some examples of "beyond the control of the owner," such as "fire, windstorm, tornado, flood or other Act of God." The phrase, "beyond the control of the owner," however, is not adequately defined. The express language may lead to the conclusion that the repair exception to demolition is limited to natural disasters. Other circumstances, however, may be "beyond the control of the owner" such as health issues physically prohibiting the owner from making repairs, economic issues such as loss of employment which fiscally prohibits the owner from making repairs, military service, incarceration, insect and rodent infestation, etc. The lack of definitive standards as to what is "beyond the control of the owner" renders BCO §18-59 facially unconstitutional on this basis as well.

Finally, on the issue of causation, the City tries to justify the "beyond the control of the owner" standard by intimating that demolition somehow "serves the owner right" for having neglected his/her property. However, the punitive nature of the City's Ordinance and its implied waiver of the right to repair do nothing to promote the constitutionality of BCO §18-59 and, in fact, weigh against the constitutionality of BCO §18-59. Under Michigan law, waiver of a constitutional right is not readily found. As succinctly summarized by the Court of Appeals:

> Waiver of a right or privilege consists of (1) specific knowledge of the constitutional right and (2) an intentional decision to abandon the protection of the constitutional right. *People v Grimmett,* 388 Mich 590, 598; 202 NW2d 278 (1972), citing *Johnson v Zerbst,* 304 US 458, 464; 58 S Ct 1019, 1022; 82 Led 1461 (1938). Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. *Id.* The determination whether a waiver was intelligently and knowingly made depends upon the facts and circumstances of each particular case. *People v McKinley,* 383 Mich 529, 536; 176 NW2d 406 (1970).

Verbison v Auto Club Ins Ass'n, 201 Mich App 635, 641-642; 506 NW2d 920 (1993). Here, BCO §18-59 unconstitutionally presumes a waiver of the right of repair based on the perceived negligent conduct of the property owner without the safeguard of a determination as to whether said waiver was "intelligently and knowingly" made.

BCO §18-59 is facially unconstitutional. Allowing or not allowing repairs based on who or what caused the damage is arbitrary and lacks any reasonable relationship to the goal of eliminating public safety hazards.

3. The Presumption Of Unreasonableness Based Solely On Economics Is Arbitrary And Lacks A Rational Basis To Achieve BCO §18-59's Purpose

In addition, BCO §18-59 fails the rational basis test by focusing solely on the economic and financial reasonableness of the cost of repairs and the value of the property. As again noted by the Court of Appeals:

> We conclude that if the owner of an unsafe structure wishes to incur an expense that others might find unreasonable to repair a structure, bring it up to code, and avoid a demolition order, the city should not infringe upon the owner's property interest by forbidding it. There may be myriad reasons why a property owner would desire to repair a structure under circumstances in which it is not economically profitable to do so, including sentimental, nostalgic, familial, or historic, which may not be measurable on an economic balance sheet. Ultimately, the owner's reasons for desiring to repair a structure to render it safe when willing and able even though costly, are entirely irrelevant and of no concern to the municipality.

Bonner, 298 Mich App at 713-714.

The City challenges this holding of the Court of Appeals claiming that the "plain language of the ordinance, however, does not impose [an economic] standard" and that there are other

(apparently unwritten) bases within BCO §18-59 upon which a property owner may rebut the presumption of demolition such as "historical interest and sentimental or familial concerns." City's Brief on Appeal, p 23. First, this is untrue based on the express language of BCO §18-59. An economic formula is the sole basis by which the presumption may arise. Therefore, the economic formula is the sole basis by which the presumption may be rebutted. Second, the City's argument on this issue is, at best, mere speculation about unstated legislative determinations which, by law, simply cannot replace the unambiguous, plain language of BCO §18-59. *Twp of VanBuren v Garter Belt, Inc*, 258 Mich App 594, 606; 673 NW2d 111 (2003), citing *Gladych v New Family Homes, Inc,* 468 Mich 594, 597; 664 NW2d 705 (2003) (speculation about an unstated legislative purpose may not replace the unambiguous, plain text of a statute). BCO §18-59's presumption that repairs are unreasonable based solely on repair cost versus property value is arbitrary.

4. The Use Of The "Prior" Value Of The Property Is Arbitrary And Lacks A Rational Basis To Achieve BCO §18-59's Purpose

At pages 25-26 of its Brief, the City attempts to distinguish out-of-state case law relied on by the Court of Appeals; specifically, *Washington v City of Winchseter,* 861 SW2d 125 (1993) and *Herrit v City of Butler Code Mgt Appeal Bd*, 704 A2d 1861 (Pa Commw Ct 1997), in which the courts in Kentucky and Pennsylvania invalidated an ordinance and a code provision similar to BCO §18-59. In *Washington*, the ordinance at issue stated:

> Whenever the code official determines that the cost of such repairs would exceed 100% of the current value of such structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this section that such structure is a public nuisance which shall be ordered razed without option on the part of the owner to repair.

Washington, 861 SW2d at 126. The Kentucky court found the ordinance unconstitutional, stating:

> 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. Section 1 of our Kentucky Constitution recognizes that as free men and women, we can spend our own money as we see fit, that if we want to pour endless dollars, sweat, etc., into some historic building, or personally appealing project, we may—even if the ultimate cost would be ten fold over the cost of demolition and rebuilding. So, too, with the City of Winchester and the appellant herein, if she wants to pour huge sums of money into her unfit buildings, she has that option. A reasonable person may very well choose demolition, but it's her money and her choice.

Washington, 861 SW2d at 127.

Similarly, the Code provision at issue in *Herrit* provided:

> PM-110.2 Unreasonable repairs: Whenever the code official determines that the cost of such repairs would exceed 100 percent of the current value of such *structure*, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this section that such *structure* is a *public nuisance* which shall be ordered razed without option on the part of the *owner* to repair. (Emphasis in original).

Herrit, 704 A2d 186, 188 (1997). The Pennsylvania court also concluded that the code provision was unconstitutional reasoning that there was no rational basis not to permit the property owner with the option to repair. *Herrit*, 704 A2d at 189.

The City argues that *Washington* and *Herrit* are not applicable to this case because the ordinances involved therein created a presumption against repairs when the cost of the repairs exceeded 100% of the *current* value of the structure as opposed to the value of the structure just

prior to the structure becoming unsafe. The City concludes that because its ordinance uses an assessed value "prior" to the structure becoming unsafe, it provides "further protection" than did the ordinances at issue in *Washington* and *Herrit* and is, therefore, constitutional. This is untrue. Simply moving the point in time at which the structure is valued for purposes of determining whether its value exceeds the cost of repairs does not eliminate the arbitrariness of: (1) the use of an economic analysis; (2) the use of causation as the determining factor for imposing or not imposing the presumption against repairs; or (3) eliminating repairs as an option to achieve the same goal as demolition – nuisance abatement. To the contrary, BCO §18-59's use of the point in time of just prior to the structure being unsafe illustrates yet another problem with the ordinance. The ordinance is silent as to who makes the determination of when the structure became unsafe, how it is made and whether it is rebuttable or definitive. Obviously, the date of the inspection is a logical choice for the date upon which the structure became unsafe. However, the ordinance does not require use of the inspection date allowing for the possibility of the manipulation of this date in order to garner the lowest property value. This is yet another constitutional infirmity present in BCO §18-59.

5. Conclusion - Substantive Due Process

In conclusion, BCO §18-59 violates substantive due process as follows:

1. The Presumption Against Repair Is Arbitrary And Lacks A Rational Basis To Achieve BCO §18-59's Purpose
2. Allowing Or Not Allowing Repairs Based On Causation Is Arbitrary And Lacks A Rational Basis To Achieve BCO §18-59's Purpose
3. The Presumption Of Unreasonableness Based Solely On Economics Is Arbitrary And Lacks A Rational Basis To Achieve BCO §18-59's Purpose

4. The Use Of The "Prior" Assessed Value Of The Property Is Arbitrary And Lacks A Rational Basis To Achieve BCO §18-59's Purpose

Accordingly, this Court should affirm the decisions of the lower courts and find BCO §18-59 unconstitutional on its face.

E. The City Ordinance Violates Procedural Due Process[1]

1. Procedural Due Process Requires The Option To Repair

The minimal requirements of procedural due process are satisfied when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). In addition, procedural due process requires fundamental fairness. *Id.* And, procedural due process is flexible. *Id.* Thus, procedural due process requires not only the minimum requirements of notice and opportunity to be heard but may also require something in addition based upon:

> (1) the private interest at stake or affected by the governmental action;
>
> (2) the risk of an erroneous deprivation of the interest under existing procedures and the value of additional safeguards; and
>
> (3) the adverse impact on the government of requiring additional safeguards, including the consideration of fiscal and administrative burdens.

In re: Brock, 442 Mich 101, 111; 499 NW2d 752 (1993), citing *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 LEd2d 18 (1976).

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[1]The Court of Appeals was correct to consider and rule on the constitutionality of BCO §18-59 on the basis of procedural due process. If an issue is one of law and the record is factually sufficient, the Court of Appeals may properly consider the question. *Verbison*, 201 Mich App at 641.

Here, the Court of Appeals correctly analyzed these factors and correctly concluded that BCO §18-59 violates procedural due process. The Court of Appeals stated:

> The nature of the private interest at stake in this case is substantial – plaintiffs' property interest as owners of three structures [2 houses and a barn]. Next, the risk of an erroneous deprivation of the property interest under BCO § 18–59 is significant as it allows for the demolition of unsafe structures when repairs are considered unreasonable despite an owner's willingness and ability to make timely repairs. The added safeguard of a repair option would eliminate the risk of an erroneous deprivation of the property interest. Finally, adding the safeguard of a repair option would minimally affect the city's interest in the health and welfare of its citizens, as well as not cause any fiscal or administrative burdens beyond those that would be associated with demolition of the property. Under BCO § 18–59, the cost to the city if it demolishes an unsafe structure may be assessed as a lien against the real property. If repairs are undertaken by a property owner pursuant to a repair option, the owner and not the city bears the cost of those repairs, and the city's only function would be to determine what repairs are necessary and monitor their timely completion. With forced demolition by the city, the city would incur the costs and then have to seek reimbursement of expenses incurred, possibly requiring lien-foreclosure proceedings.

Bonner, 298 Mich App at 717-718. Accordingly, based on the pertinent factors in this case, procedure requires that a property owner have an option to repair an unsafe structure before it is ordered demolished.

2. BCO §18-59 Is Fundamentally Unfair by Placing The Burden Of Going Forward With Evidence On The Property Owner

MRE 301 governs presumptions in civil proceedings.

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which

> remains throughout the trial upon the party on whom it was originally cast.

MRE 301. A presumption is a procedural device which shifts the burden of going forward with evidence to the responding party and is dissipated only "when substantial evidence is submitted by the opponents to the presumption." By contrast, the burden of proof may not shift. *In re Estate of Mortimore,* 491 Mich 925, 927; 813 NW2d 288 (2012) (Young, CJ, dissenting).

In cases where the cost of repairs exceeds the assessed value of the property, BCO §18-59 *ipso facto* creates the presumption of unreasonableness effective immediately upon notice of a violation – such violation and order of demolition being based upon as little substantive evidence as one inspection by one inspector. There is no requirement that, prior to notice of a violation and order of demolition, the City obtain cost estimates, engineering reports or any other expert testimony or reports. Rather, a single inspection provides the City with a prima facie case that the structure at issue must be demolished. This, in turn, effectively shifts the burden of proof by requiring property owners to establish, through contractors, appraisers, engineers, and other expert testimony and reports, the cost of repair and/or value of the property. Not only is this shifting of the burden of proof contrary to Michigan law, but the affect upon citizens incapable of rebutting this prima facie case is both devastating and fundamentally unfair. That is, those who cannot rebut the City's prima facie case of demolition, due to financial reasons or unavailability (*e.g.,* they are ill, out-of-state, etc.), will suffer demolition of their property based on a single inspection by a single inspector. For these reasons, BCO §18-59 violates procedural due process.

3. BCO §18-59 Is Fundamentally Unfair By Failing To Provide Precise Standards

BCO §18-59 creates presumptions of unreasonableness and public nuisance and, ultimately, demolition any time a City inspector opines that the cost to repair a structure exceeds the assessed true cash value of the structure as of the date just prior to the structure becoming unsafe. BCO §18-59 does so without providing any guidance or standards for determining cost of repairs. Inspectors are not, for example, required to consult builders, contractors or engineers. They are not required to prepare cost estimates. Apparently, they are not even required to do an interior inspection. Instead, as was done in this case, the City inspector determined that the structures on the Bonner Property were unsafe, and in need of repairs in an amount in excess of the assessed value of the structures, based on a single inspection conducted through outside observations only, in which the investigator speculated as to inside damage and neither prepared nor obtained cost of repair estimates. Transcript, 4/7/10, pp 319-320, Appx 50B and 49B. In short, the standard should not be that testified to by the City's inspector in this case –

> If it looks like a duck, quacks like a duck, it's probably a duck.

Transcript, 4/7/10, p 319, Appx 49B. Such a standard is arbitrary and violates due process. *Westervelt v Natural Resources Comm*, 402 Mich 412; 263 NW2d 564 (1978).

4. The Ability To Appeal A Decision Made Under BCO §18-59 To The City Council Has No Effect On The Unconstitutionality Of The Ordinance

The City argues that BCO §18-59 is constitutional because decisions rendered under it can be appealed to the city council. City's Brief on Appeal, p 24. Procedural due process, however, requires the opportunity to be heard by an *impartial body*. *Reed*, 265 Mich App at 159. Bias and

impartiality may be present where the decision-maker might have prejudged the case because of prior participation as an accuser, investigator, fact-finder or initial decision-maker. *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). The City Council enacted BCO §18-59. The City Council has an interest in the subject matter of the appeal. The City Council is reviewing a determination/ruling made by its own employee. The City Council can hardly be said to be completely unbiased and impartial. To the contrary, there exists at least the potential for the City Council to have prejudged the case because of the City's prior participation, fact-finding and decision-making in the case by its employee. Thus, a property owner's ability to appeal the order to demolish of the property inspector does not render BCO §18-59 constitutional.

IV. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, the Association respectfully requests that this Court grant the Association leave to file this Amicus Curiae Brief in Support of the Position of Plaintiffs/Appellees, Leon and Marilyn Bonner, and affirm the majority Opinion of the Court of Appeals.

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