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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REAL PROPERTY LAW SECTION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF THE POSITION OF PLAINTIFFS/COUNTER-DEFENDANTS/ APPELLEES, LEON V. BONNER AND MARILYN E. BONNER

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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, Real Property Law Section 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, Real Property Law Section, answers, "Yes."

I. INTRODUCTION/STATEMENT OF INTEREST

In this appeal, the City of Brighton (the "City") challenges the finding of the circuit court, affirmed by the Court of Appeals, that § 18-59 of the Brighton Code of Ordinances ("BCO") deprives the Bonners of due process by authorizing an order to demolish structures found to be unsafe as public nuisances, without allowing the owners to repair, if, under the terms of the ordinance, repair is "unreasonable." Under § 18-59, repair is presumed to be unreasonable if the cost of repair would exceed the true cash value of the structure as reflected in the assessment tax roll 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 violates 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).

The Real Property Law Section is a voluntary membership society of the State Bar of Michigan. Membership in the Real Property Law Section is open to all members of the State Bar of Michigan, but generally comprises attorneys who practice and are interested in real property law. There are 3,939 members of the Real Property Law Section. In its order granting leave to appeal from the decision of the Court of Appeals, this Court invited the Section to file an *amicus curiae* brief.

One mission of the Real Property Law Section is too provide information to the public and the courts on issues involving real property law. The Real Property Law Section Council authorized preparation of an *amicus curiae* brief at its meeting on September 19, 2013, as required by the bylaws of the Real Property Law Section and the bylaws of the State Bar of Michigan after discussion and vote at a scheduled meeting, in support of the holding of the Court of Appeals, with the reservation described below, that government action need not "shock the conscience" to violate substantive due process. Of the 17 voting members of the Real Property Law Section Council, four were absent, 13 voted in favor, none voted against, and none

abstained. The State Bar of Michigan has no position on this matter; the positions expressed are those of the Real Property Law Section only.

Brighton's building official determined that the Bonners' two houses and an accessory garage or barn were unsafe and further found that it was unreasonable to repair the structures under the city ordinance that presumes that to be the case where the cost of the repairs would exceed 100% of the true cash value on the assessment roll prior to the building becoming unsafe. The proceedings at the city, including an appeal to the City Council, addressed only the issue of the cost of repairs. The owner engaged a structural engineer and a contractor who said the necessary repairs would not cost that much, but the City Council adopted the findings of the building official from his inspection, accepted his repair estimates, and found the owner's reports and cost estimates lacked credibility. The City Council ordered the structures demolished within 60 days. The owner then sued.

The Court of Appeals, echoing the trial court, concluded 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 interests by forbidding it. There may be any number of reasons a property owner would repair a structure, whether sentimental, familial, or historic, which may not be measured by an economic formula. The owner's reasons for desiring to repair a structure, however costly, are entirely irrelevant and of no concern to the municipality. Although the municipality has a legitimate interest in ensuring public safety, repair would serve that goal just as well as demolition.

The Court further determined that the ordinance does not provide adequate procedural safeguards by providing the owner 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, hearing, and an impartial decision-maker, which are provided for in the code, the City should also have 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 the structure's value or that making repairs is otherwise unreasonable can result in an erroneous and unconstitutional deprivation of a property interest. Giving the property owner the procedural protection of a repair option is the only way the City's ordinances could withstand a procedural due process challenge. In short, rather than limiting the procedural remedy to evaluating why an owner should be able to repair, the ordinance should offer the owner the option simply to repair to avoid the loss of a property interest.

The Court of Appeals majority offers support from both Michigan cases and other states in support of its holdings. The substantive due process analysis in particular is well-grounded in Michigan law that bears repeating. The Court of Appeals does, however, recite the statement of the Court in its opinion in *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197 (2008) that

> In the context of government actions, a substantive due process violation is established only when 'a governmental conduct [is] so arbitrary and capricious as to shock the conscience.'

This repetition of an erroneous standard which arose out of police brutality cases, as described in great detail in Susan Friedlaender's article in the Spring 2011 edition of the Michigan Real Property Review, is not necessary to the decision of the Court of Appeals, and, as further explained below, the Section urges the Court to take this opportunity to correct it.

The Real Property Law Section possesses the ability to provide unique information and perspective on the issues in this case. Its membership includes attorneys who focus their practice

in zoning and land use actions, offering a depth of experience and familiarity with the issues before the Court.

II. STATEMENT OF MATERIAL FACTS

The Section accepts the Statement of Facts contained in the Bonners' Brief on Appeal, but notes the following:

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. The city manager, or his designee, are charged with the enforcement of the above-stated provisions of the BCO. BCO § 18-49, Appx 221a. In the event that the city manager, or his designee, determines that a structure is "unsafe," the city manager, or his designee, issues a notice of unsafe structure. The "Notice of Unsafe Structure" may be appealed by the property owner to the city council within ten (10) calendar days. The property owner is granted "the

opportunity to be heard" at the next regularly scheduled city council meeting. BCO §18-61, Appx 233a. 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.

3. The Bonners own two lots located in Brighton (collectively, the "Bonner Property"). Opinion and Order on Plaintiffs' Motion for Partial Summary Disposition, 11/23/10 ("Cir Ct Op"), Appx 167a, each with a 150-year old house which the City determined to be "unsafe structures" within the meaning of BCO §18-46. Cir Ct Op, p 1, Appx 167a. The City further determined that the cost of repairs exceeded the true cash value of the structures, that, under BCO § 18-59, repair would be unreasonable, and therefore ordered that they be demolished (the "Order to Demolish"). Cir Ct Op, p 1, Appx 167a.

4. The Bonners appealed the Order to Demolish, 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 Opinion ("COA Op"), Appx 190a-191a. The City Council conducted hearings at two meetings and on July 16, 2009 affirmed the Order to Demolish. City Council Meeting Minutes, 7/16/09, Appx 20B-21B. The Bonners' expert witness opined that the cost to repair was $40,000 or less for each house. The City Council found that the cost to repair was $158,000 whereas the true cash value of the structures was only $85,000.

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

In proceedings before the City Council, COA Op, Appx 192a and 230a, and 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.

The circuit court granted the Bonners' motion for partial summary disposition in part, finding that BCO § 18-59, on its face, violates substantive due process:

> 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.

In a 2-1 published opinion, the Court of Appeals affirmed the decision of the circuit court that the provision of BCO § 18-59 that 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 violates substantive due process. *Bonner*, 298 Mich App at 713.

The Court of Appeals also found that the failure 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.

III. ARGUMENT

A. Standard of Review

This Court reviews *de novo* constitutional 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 City Ordinance Violates Due Process Principles

1. The City May Not Deprive the Bonners of Their Property Without Due Process

The federal and 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).

The local power to regulate property is not absolute. *Kropf v Sterling Heights*, 391 Mich 139 (1974). *Kyser,* 486 Mich at 521. Substantive due process protects citizens' property interests and rights from arbitrary government action. *Id.* Substantive due process demands that land use regulations bear a reasonable 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 it does so unreasonably. *Landon Holdings v Grattan Twp*, 257 Mich App 154; 667 NW2d 93 (2003); *Hecht v Niles Twp*, 173 Mich App 453, 461; 434 NW2d 156 (1988). The reviewing court gives considerable weight to the findings of the trial judge. *Id.* Although "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).

BCO § 18-59 expressly creates a presumption that repair is unreasonable if 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. That presumption is arbitrary and violates due process. Repair, as well as demolition, achieves the stated purpose, of the legitimate legislative objective of BCO § 18-59.

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. The appeal provided in the ordinance – the only opportunity for a hearing after notice – is so limited by the ordinance that it violates **both** substantive and procedural due process and the judgments of the lower courts should be affirmed.

2. The City's Presumption Against Repair Does Not Reasonably Advance the Otherwise Legitimate Interest in Preserving Public Safety

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. Excluding repairs, however, a means to the same end, does not have a "real and substantial relation" to the elimination of hazards and the 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.

BCO § 18-59 fails the rational basis test by focusing solely on a simplistic economic formula comparing the cost of repairs with the former value of the property. As the Court of Appeals explained:

> 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.

Putting aside the myriad other reasons that an owner might wish to rebuild, the ordinance presumes that the property's value sometime in the past is the correct measure of whether repair is reasonable. The value at some time in the past, especially in a changing market, as the last few years of property values demonstrate, may be a poor measure of future economic value.

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 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 contention is not supported by the language of BCO § 18-59. An economic formula is the sole basis by which the presumption may arise. Therefore, on appeal, the economic formula forms the sole issue for appeal. The City's argument on this issue suggests unstated legislative purposes not found in the ordinance language. By law, those 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. The court does not review the decision of the legislative body to determine whether its legislative action rested upon sufficient evidence or whether it was done for the proper motives. Both are irrelevant. See, *e.g.*, *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525, 528; 656 NW2d 212 (2002) ("the validity of a law has nothing to do with the motivation of the legislators who enact it"). See, *Arthur Land Company v Otsego Co*, 249 Mich App 650; 645 NW2d 50 (2002).

In response to the holding of the Court of Appeals, the City also argues that the validity of the ordinance must be judged solely as a standard on which to order demolition, without reference to repair as an alternative. City's Brief on Appeal, p 19.[1] This argument fails on a reading of the ordinance itself. In fact, the text of BCO § 18-59 itself addresses repair as an alternative to demolition. Indeed the very phrases at issue – the standard for demolition – invokes repair and is based on the cost of repair, to create a presumption against repair based on an arbitrary economic standard.

Moreover, the existence of alternative methods of achieving the same end necessitates a finding of unconstitutionality: 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.

[1] The City's brief apparently seeks to better align its position with other cases, distinguished by the Court of Appeals, that did not consider the alternative of repair. See, *Bonner*, at 723.

In fact, the City itself supports the contention that repair, rather than demolition, adequately 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. The difficulty with the City's position is that if repairs are a legitimate means to the end of eliminating a public safety hazard where the cause is an Act of God, it is an equally rational means where the structure deteriorated for any reason during the time the current owner or a prior owner held or occupied the property. That is, who or what caused the state of repair is wholly unrelated to serving the goal of eliminating the public safety hazard. The cause of damage is an arbitrary basis for ruling out equally effective means of ending a public safety hazard. The 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.

3. Presumptions as to the Moral Culpability of the Owner Do Not Reasonably Advance the Otherwise Legitimate Governmental Object or Constitute a Wavier of a Protected Right

Moreover, the line drawn by the ordinance is arbitrary and punitive. BCO § 18-59 allows repairs for damage "beyond the control of the owner" and provides as examples "fire, windstorm, tornado, flood or other Act of God." The phrase, "beyond the control of the owner,"

however, is not otherwise defined. The language suggests that the repair exception is limited to natural disasters. Other circumstances, however, such as injury, poor health, loss of employment, and military service, are not stated or suggested. In effect, the exception states a moral or punitive dimension to the regulation that is likewise not related to the legitimate object of avoiding hazard and securing public safety.

The City suggests that the exception for damage "beyond the control of the owner" standard in effect "serves the owner right" for having neglected the 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 it. 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). In that respect, if the City's suggestion is correct, 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 the waiver was "intelligently and knowingly" made.

4. Michigan Law Supports Repair as a Reasonable Means to Advance the Same Interest

Moreover, Michigan cases directly addressing repair or demolition as alternatives for addressing hazards make clear that BCO § 18-59 is 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. *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. 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.

5. Substantive Due Process Does Not Require the Ordinance to "Shock the Conscience" to Constitute a Violation of the Owner's Rights

The ordinance standard need not "shock the conscience" to be held a violation of substantive due process. In enunciating the standard for its decision on the Bonners' substantive due process claim, the Court of Appeals said in part:

> In the context of government actions, a substantive due process violation is established only when 'the governmental conduct [is] so arbitrary and capricious as to shock the conscience.' *Mettler Walloon*, 281 Mich App at 198; 761 NW2d 293; see also, *In Re Beck*, 287 Mich App 400, 402; 788 NW2d 697 (2010), aff'd 488 Mich 6; 793 NW2d 562 (2010).

Bonner, 298 Mich App at 706.

The "shocks the conscience" standard does not apply to a substantive due process challenge to an ordinance. As the *Mettler* court made clear, its invocation applied to executive, not legislative, action of a local government. The claim in *In Re Beck* also addressed executive action.

In any event, the test discussed and applied by the *Mettler* court is not properly applied to land use regulation. As discussed at length in Friedlaender, Deliberate Indifference to Property Rights: The Proper Application of the "Shocks the Conscience" Standard in Executive Abuse Zoning Cases, 38 Mich Real Property Review 18 (Spring 2011) (Exhibit A, attached), the purpose of the standard was carefully considered by the United States Supreme Court in *County of Sacramento v Lewis*, 523 US 833 (1998) in terms that preclude the application employed by the court in *Mettler*. In *Lewis*, the court held that

> The criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer is at issue.

523 US at 846. Legislation is arbitrary if it lacks a legitimate purpose or uses unreasonable means to achieve a legitimate end. *Lingle v Chevron US, Inc*, 544 US 528, 542 (2005). The "shocks the conscience" standard of conduct applies to determine whether executive action violates due process guaranties did not arrive in property and land use cases and is expressly addressed to the concern with turning the constitutional into a "font of tort law," as in the police misconduct case that gave rise to the rule. Those concerns have no application here, and the use of the "shocks the conscience" standard, as though to emphasize the arbitrary nature of government action that is required to violate due process, is unwarranted.

C. The Ordinance Violates Procedural Due Process

The holding of the Court of Appeals that BCO § 18-59 violates procedural due process is well-founded and should be affirmed. It is well established that a possessory interest in property invokes procedural due process, requiring adequate notice and a meaningful hearing before depriving the interest holder of rights. *Hamby v Neel*, 368 F3d 549, 560 (2004), citing *Thomas v Cohen*, 204 F3d 563, 576 (CA 6, 2002); *Fuentes v Shevin*, 407 US 67, 87 (1972); see also, *Mathews v Eldridge*, 424 US 319 (1976).

As summarized by this Court in *Mudge v Macomb Co*, 458 Mich 87, 101 (1998):

> The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard 'in a meaningful manner' (citations omitted). Many procedural due process claims are grounded on violations of state-created rights as is the case here, rights that do not enjoy constitutional standing. However, the right to a hearing prior to the deprivation is of a constitutional stature and does not depend upon the nature of the right violated [*Howard v Grinage*, 82 F3d 1343, 1349 (CA 6, 1996)].

Similarly, the United States Supreme Court has stated:

> Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the court in *Mullane v Central Hanover Trust Co*, 339

> US 306 (1950), 'there can be no doubt that at a minimum they require the deprivation of life, liberty, or property by adjudication be proceeded by notice and opportunity for a hearing appropriate to the nature of the case.' *Id.* at 313 ... In short, 'within the limits of practicability,' *id.* at 318, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the due process clause.

In this case, the due process afforded the Bonners prohibited them from showing a willingness or ability to repair the structures the City deemed unsafe. That bar, as recognized by the Court of Appeals, effectively prevented them from an opportunity to be heard in a meaningful manner.

In like manner, in *Hamby v Neel*, 368 F3d 549, 562-64 (CA 6, 2004), the plaintiffs, who were denied coverage under a state healthcare program for uninsurable persons, were not allowed to show an existing medical condition that made them unable to obtain health insurance, thus evidencing their "uninsurable" status, because they failed to indicate on their initial applications that they had been denied health insurance and failed to attach insurance denial letters, even when they did so in subsequent applications. The Court of Appeals affirmed the District Court's holding that the requirement violated procedural due process. *Hamby*, at 562, citing *Friedrich v Sec'y Health & Human Servs*, 894 F2d 829, 837 (CA 6, 1990) (finding that the touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard in a meaningful manner).

The determination that the structures are unsafe and that repair is unreasonable because the cost of the repairs would exceed 100% of the true cash value of the structure as reflected on the City's assessment tax rolls is made by the City Manager without notice or a hearing. The hearing provided by an appeal to the City Council addressing that determination does not address the presumption, only whether the conditions to meet the presumption are met. The owner cannot otherwise show the ability or readiness to repair. In this case, the City straightforwardly

acted during the pendency of the appeal to prevent repairs, contrary to the interests it proposes in favor of the ordinance: public safety. As in *Hamby*, the fact that the plaintiffs were given notice, were represented by counsel, and given the opportunity to introduce evidence does not ensure an opportunity to be heard in a meaningful manner where the ordinance, by presumption, prevents them from providing evidence that would permit them to repair the structures and avoid demolition as the only means to make the property safe.

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. In this context, procedural due process requires that the ordinance offer an option to repair an unsafe structure before it is ordered demolished.

IV. CONCLUSION

This Court should affirm the holding of the Court of Appeals that BCO § 18-59 violates the Bonners' rights to substantive due process and procedural due process. The Court need not, and expressly should not, rely upon a requirement that it "shock the conscience."

Respectfully submitted,

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Deliberate Indifference To Property Rights: The Proper Application of the "Shocks the Conscience" Standard In Executive Abuse Zoning Cases

by Susan K. Friedlaender

Introduction

In *Mettler Walloon LLC* v *Melrose Twp*,[1] the plaintiff claimed that the Township violated its substantive due process rights by denying approval of a site plan. The plaintiff sought damages under the Civil Rights Act.[2] The Michigan Court of Appeals held that "[t]o sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience."[3] No published Michigan appellate opinion before *Mettler* had applied the "shocks the conscience" standard in a zoning case. *Mettler* primarily relied on the United States Supreme Court's decision in *County of Sacramento v Lewis*[4] as authority for adoption of the standard. The *Lewis* Court reformulated the standard in a case concerning a high-speed police chase during which one of the fleeing suspects died. The U.S. Supreme Court has not applied the "shocks the conscience" standard in a zoning or land use case.

Mettler's adoption of the standard is flawed for several reasons. First, the *Mettler* court misperceived the purpose of the "shocks the conscience" standard. *Mettler* wrongly believed that the policy underlying the standard is deference to local decision-making. The purpose of the standard, however, is to set boundaries between ordinary tort law claims and violations of the due process clause.

Mettler is also flawed because it failed to follow *Lewis'* guidelines. The "shocks the conscience" standard is not a single and static test of fault in a constitutional tort case. The standard covers a continuum of potentially culpable conduct that ranges from something more than ordinary negligence to the intentional infliction of harm. The exigency of the situation under which the government official acts determines the point at which executive conduct passes the "shocks the conscience" threshold. The Court applies the less demanding "deliberate indifference" degree of the standard when the official has time to contemplate and correct course before embarking on the action that ultimately results in harm. *Mettler* erroneously applied the degree of the standard reserved for exigent circumstances without acknowledging the inconsistency with *Lewis'* holding.

Finally, *Mettler* is flawed because even if the "shocks the conscience" standard could apply in some zoning cases, it had no application to *Mettler*. The court easily could have affirmed the dismissal of the plaintiff's substantive due process claim based on non-constitutional grounds without recourse to the "shocks the conscience" standard. The discussion of the standard, therefore, is best regarded as *dicta*.

1 281 Mich App 184 (2008).

2 42 USC 1983.

3 281 Mich App at 198.

4 523 US 833 (1998).

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Despite *Mettler's* flaws, it is a published decision that landowners must navigate. This article posits that if the "shocks the conscience" standard has any utility in certain zoning cases, the courts must adhere to *Lewis'* guidelines and apply the standard only to executive zoning actions under the "deliberate indifference" degree of the standard.

The History and Evolution of the "Shocks the Conscience" Standard to Determine Whether Governmental Conduct Violates Implicit 14th Amendment Substantive Due Process Guarantees

The Substantive Component Of the Due Process Clause Limits The Arbitrary Exercise Of Governmental Power

The U.S. Supreme Court primarily has applied the "shocks the conscience" standard to state action. The 14th Amendment to the Federal Constitution prohibits State actors from depriving persons of life, liberty, or property without due process of law.[5] "The touchstone of due process is the protection of the individual against the arbitrary action of government."[6] The Due Process Clause has both procedural and substantive components. The substantive component prevents the government from taking, or interfering with, an individual's protected rights despite the use of fair procedures.[7]

The antecedent question in many substantive due process cases is whether any right or freedom exists that the government could have violated. Following the adoption of the 14th Amendment, the Supreme Court held that the Due Process Clause incorporated and applied to the States certain provisions from the Bill of Rights that originally only limited federal power.[8] The Due Process Clause contains the least "specific and most comprehensive protection of liberties."[9] Thus, the Due Process Clause also protects other unarticulated liberties that the Supreme Court deems fundamental. These rights are based on "immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard ...."[10] The Due Process Clause contains the least "specific and most comprehensive protection of liberties."[11] The Court attempts through historical examples to objectively assess whether an asserted liberty interest is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[12] The Court cautiously analyzes whether an asserted right with no textual basis in the Bill of Rights is fundamental to avoid making subjective policy judgments.[13]

The Due Process Clause applies to legislative, executive, and judicial actions.[14] This article addresses substantive due process limitations on the use of executive powers.[15] In *Lewis*, the Supreme Court held for the first

5 The 14th Amendment to the U.S. Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law...."

6 *Dent v W. Virginia*, 129 US 114, 123 (1889).

7 *Daniels v Williams*, 474 US 327, 331 (1986).

8 *Rochin v California*, 342 US 165, 169 (1952). *See also Twining v New Jersey*, 211 US 78, 99 (1908), in which the Court explained:

> It is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. [*Chicago, Burlington & Quincy RR v. Chicago*, 166 U.S. 226.] If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.

In *Chicago, Burlington & Quincy RR*, the Court held that the 14th Amendment's Due Process Clause required that States provide a compensation remedy for the taking of property for a public purpose.

9 *Rochin*, 342 US at 170.

10 *Holden v Hardy*, 169 US 366, 389-90 (1898).

11 *Rochin*, 342 US at 170.

12 *Washington v Glucksburg*, 521 US 702, 710, 721 (1997) (citing *Snyder v Mass*, 291 US 97, 105 (1934)). In addition to the explicit freedoms protected under the Bill of Rights, the Court has held that the Due Process Clause protects personal liberties such as the right to marry, procreate, raise and educate children and make other decisions that involve "'the most intimate and personal choices a person may make in a lifetime.'" *Id* at 720, 726 (internal citation omitted).

13 "Substantive due process has at times been a treacherous field for this court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights." *Moore v East Cleveland*, 431 US 494, 502 (1977).

14 *Holden*, 169 US at 390 (citing *Murray's Lessees v Hoboken Land Co*, 18 How 271, 276 (1855).

15 Courts often distinguish legislative and executive action based

time that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer is at issue."[16] Legislation is arbitrary if it lacks a legitimate purpose or uses unreasonable means to achieve a legitimate end.[17] By contrast, the *Lewis* Court held, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[18] The "shocks the conscience" standard of conduct applies to determine whether executive action violates due process guarantees.[19] The Civil Rights Act,[20] in part, provides a damage remedy against state actors for violations of the 14th Amendment.[21] As discussed in this article, the purpose of the "shocks the conscience" standard is to distinguish unreasonable conduct that violates constitutional duties from unreasonable conduct that violates tort law duties of care.[22] Although *Lewis* held that different criteria applied to determine whether executive action is arbitrary, the court essentially adopted a variant of the legislative means and ends test as the ultimate measure of shocking executive conduct.

The Origin Of The "Shocks The Conscience" Standard

The U.S. Supreme Court first articulated the "shocks the conscience" standard of conduct in *Rochin v California*[23] as a substantive due process limitation on State criminal proceedings. In *Rochin*, three deputy sheriffs acting on a tip that the petitioner was selling narcotics broke into his home. Upon seeing the officers, the petitioner swallowed several pills. After the officers failed to forcibly get the petitioner to disgorge the pills, the officers took the petitioner to a hospital and had his stomach pumped. Based on the recovered evidence, the petitioner was convicted of drug possession and sentenced to 60 days' imprisonment.

The Court analyzed the case under due process principles because the 5th Amendment's proscription against self-incrimination did not apply to the States.[24] The Court emphasized that its analysis of whether the officers' conduct violated due process protections required objectivity and restraint. The "vague contours" of

on whether the action applies to a broad group of persons or a single individual. *Nicholas v Pennsylvania State Univ*, 227 F3d 133, 139, n1 (CA 3, 2000) ("[E]xecutive acts, such as employment decisions, typically apply to one person or to a limited number of persons, while legislative acts, generally (sic) laws and broad executive regulations, apply to large segments of society.") (citations omitted). In Michigan, the zoning of a single parcel of land is a legislative act. *See Kropf v Sterling Hts*, 391 Mich 139, 166-69 (1974) (Levin, J., concurring) (discussing distinctions between administrative and legislative zoning actions). Michigan zoning cases refer to non-legislative zoning actions not as "executive" action but typically either administrative (e.g., site plan approval), ministerial (e.g., approval of building permit),or quasi-adjudicative (e.g., grant of variance).

16 *Lewis*, 523 US at 846.

17 *See, e.g., Lingle v Chevron USA, Inc*, 544 US 528, 542 (2005). The question whether a land use regulation substantially advances a legitimate public interest "asks in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id* (citing *Lewis*, 523 US at 846). *See also Lawton v Steele*, 152 US 133, 137 (1894), which contains the "classic statement" of the due process restraint on the police power:

> To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.

18 *Lewis*, 523 US at 846 (internal citation omitted).

19 As further discussed in this article, the question in *Lewis* was whether a police officer violated a suspect's substantive due process rights "by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Lewis*, 523 US at 836.

20 42 USC § 1983.

21 Section 5 of the 14th Amendment required Congress to adopt appropriate legislation to enforce the provisions of the Amendment. Congress enacted § 1983, which provides damage and other remedies for the violation of rights protected by the 14th Amendment.

22 *See* Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA L. REV 201, 203 (1984) ("The Supreme Court has labored to develop a doctrinal basis to exclude from the scope of constitutional tort those due process claims traditionally controlled by common law tort.").

23 342 US 165 (1952).

24 *Id* at 174-75 (Black, J. concurring).

the Due Process Clause, however, prevented the Court from identifying specific standards that state actors must follow when pursuing convictions. The Court could only evaluate the officers' conduct under the broad principles of fairness that characterize due process of law. The Court held that the officers' conduct "shocked the conscience" because their methods for obtaining a conviction offended "a sense of justice."[25] The "sense of justice" that the officers offended was not based on the Court's subjective beliefs, but reflected the Nation's values as demonstrated by its history and traditions.[26] Although the officers were pursuing a legitimate end, the means employed violated the essential due process protection against abusive government action.

The Reformulation Of The "Shocks The Conscience" Standard

Mettler relied on *Lewis* as authority for adopting the "shocks the conscience" standard in a zoning case. A careful reading of *Lewis* demonstrates not only that its reliance was misguided, but also that *Mettler* failed to follow *Lewis'* guidelines for applying the standard. In *Lewis*, the respondents filed a § 1983 damage claim against the County after the respondents' son died during a high-speed police chase. The respondents' son was a passenger on the back of a motorcycle. The chase ensued after the motorcyclist defied the police officer's order to stop. The respondents' son was thrown from the motorcycle during the chase and died from injuries after being hit with the police officer's vehicle. The narrow question in *Lewis* was whether the officer took the son's life without substantive due process.[27] As further discussed *infra*, the Supreme Court held that the officer did not violate substantive due process guarantees because he was pursuing a legitimate law enforcement objective without any intent to harm the suspect. Although invoking *Rochin*, the *Lewis* Court outlined new and more concrete guidelines for courts to apply in due process cases alleging executive abuse claims.

The *Lewis* Court held that in an executive abuse case, the initial question is not whether the asserted due process interest is based on a fundamental right that requires the Court to engage in a historical analysis to find justification for substantive protection.[28] Rather, the Court must first determine whether the government actor's conduct was sufficiently egregious. If so, the Court then determines under the historical analysis whether a substantive due process right even exists "to be free of such executive action."[29]

The *Lewis* Court held that executive abuse cases required this two-tiered approach because such "challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[30]

Section 1983 Liability And Protection Against Tortious Government Conduct

Lewis' concern with turning the Constitution into a "font of tort law" is the key to understanding the meaning of egregious conduct in this context and applying the "shocks the conscience" standard of conduct.[31] Section 1983 "creates a species of tort liability" for the violation of constitutional rights protected under the 14th Amendment.[32] Section 1983, however, does not provide liability "for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law principles."[33] Although the Due Process Clause requires that government officials employ reasonable rather than arbitrary means to execute their functions, the "reasonableness" requirement should not be confused with the reasonable person standard used to define

25 *Id* at 172, 173.

26 *Id* at 169 (citation omitted).

27 The Court granted certiorari "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." *Lewis*, 523 US at 839.

28 *Id* at 847.

29 *Id.*

30 *Id.*

31 Wells & Eaton, *supra* note 22, at 203.

32 *Owens v Independence*, 445 US 662, 635 (1980).

33 *Baker v McCollan*, 443 US 137, 146 (1979).

unreasonable conduct under negligence theories of damage liability.[34] The Constitution "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[35]

The "shocks the conscience" standard is meant to discourage turning state tort damage claims into constitutional actions merely because the government is the defendant.[36] The intent of the Due Process Clause is to prevent government actors from abusing their powers or using them "as an instrument of oppression."[37] Tort law standards of due care are inapt because government officials owe a different kind of duty to the citizens that they serve. "A fundamental aspect of the government as servant is that the government must treat individuals with some minimum level of concern and respect for their well-being."[38] The "shocks the conscience" standard balances the government's need for flexibility in performing its functions against its obligation to avoid breaches of its duty to serve without oppression.

The "Shocks the Conscience" Test Provides a Variable Standard of Conduct Depending on the Exigencies of the Situation

Reckless or Deliberately Indifferent Conduct That Causes Injury Does Not 'Shock The Conscience' When An Official Is Pursuing Legitimate Objectives Under Circumstances That Require Quick Action Without Time For Reflection

Lewis held that "only the most egregious official conduct [is] arbitrary in the constitutional sense."[39] The Court, however, cautioned lower courts against mechanically applying the "shocks the conscience" standard because the definition of egregious conduct can vary depending on the exigencies of the circumstances and the interplay of other factors.[40]

Lewis built on the Supreme Court's earlier constitutional tort cases to construct its continuum of egregious conduct that could "shock the conscience." The first guidepost distilled from these cases is that the deliberate abuse of power is the essential element of a constitutional tort. At the lowest non-actionable degree of the standard, therefore, an actor's ordinary negligence under any circumstances, even if it causes great harm, does not approach the egregious conduct threshold because it lacks the element of deliberate abuse.[41]

Even if an official's conduct is reckless or deliberately indifferent to causing harm, there is no liability when the official is pursuing legitimate objectives in high-pressure situations. Executive officials who must make "split second judgments--in circumstances that are tense, uncertain, and rapidly evolving'" do not violate constitutional duties even if their conduct causes injury.[42] Although the means used to pursue the lawful objective might be unreasonable under tort concepts because of the high risk of injury, they are not arbitrary

34 *Collins v Harker Hgts*, 503 US 115, 128 (1992). *See also* Wells & Eaton, *supra* note 22, at 201 ("Ever since the birth of constitutional tort in *Monroe v. Pape*, [365 US 167 (1967)], courts have recognized that many harms inflicted by government may amount to constitutional violations as well as ordinary torts and have struggled to define the appropriate boundary between the two.").

35 *Lewis*, 523 US at 848 (citing *Daniels v Williams*, 474 US 327, 332 (1986)).

36 *Paul v Davis*, 424 US 693, 699-701 (1976) (the Court has resisted finding damage liability under § 1983 for conduct that is traditionally actionable as a tort); *Lewis*, 523 US at 848.

37 *Lewis*, 523 US at 840 (internal citations omitted).

38 Wells & Eaton, *supra* note 22, at 229-30. The authors posit that the special relationship between the people and the government they authorized requires accountability. The Framers were very influenced by English political and social philosopher John Locke and his theory of government as a social compact. Locke argued that citizens give up some measure of inherent freedoms by creating and ceding control to governments in exchange for the protection of their "life, liberty and estates." Locke advocated revolution against government that became despotic. *See, e.g., Vanhorne v Dorran*, 62 US 388, 394, 308-13 (1795). *See also Loan Assoc v Topeka*, 87 US 655, 663 (1875) ("The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.").

39 *Lewis*, 523 US at 846.

40 *Id* at 850.

41 A state actor's negligent deprivation of protected rights does not violate the Due Process Clause and give rise to a § 1983 claim for damages because the Clause only protects against deliberate abuses of power. *Daniels*, 474 US at 332.

42 *Lewis*, 523 US at 853 (citation omitted).

or a breach of duty in the constitutional sense. The police officer's conduct in *Lewis* was not actionable, even though his actions were unreasonably dangerous and consequently led to the suspect's death, because the officer was pursuing the legitimate objective of arresting a suspect without time for reflection.[43] Moreover, the suspect took flight and the officer would have failed to perform his duties if he did not give chase. There was no due process violation because the officer did not cause a fatal injury through an abuse of power.

At the opposite end of the spectrum, however, even when acting under exigent circumstances, an official's conduct "will satisfy the element of arbitrary or shocking conduct necessary for a due process violation" if he or she had a purpose to cause injury unrelated to accomplishing a legitimate objective.[44] An emergency does not excuse deliberately abusive conduct that causes injury. The official's conduct "shocks the conscience" whenever it pursues an illegitimate objective that causes harm regardless of the means employed.

The "Deliberate Indifference" Standard Applies When Time For Reflection Exists

There is a middle range between negligence and intentional conduct that can "shock the conscience." Conduct that is deliberately indifferent to a person's welfare or rights can meet the "shocks the conscience" threshold in unpressured circumstances.[45] Deliberate indifference "entails something more than mere negligence" but "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."[46] "Deliberate indifference" is a lesser degree of egregious conduct that can "shock the conscience."[47] This degree of the "shocks the conscience" standard applies "when actual deliberation is practical."[48] The rationale for applying the "deliberate indifference" degree when no pressure exists is that it is shocking when officials have the opportunity "to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligation" but fail to remedy the situation or even care if harm results.[49]

The pursuit of a legitimate objective does not seem to factor into the actor's culpability under the "deliberate indifference" degree of the standard. An official can be liable for injuries under the "deliberate indifference" degree if it acted or failed to act when an obvious and high risk of harm existed of which it was actually or constructively aware but to which it was indifferent. *Lewis* cited *City of Canton v Harris*[50] as an example of the "deliberate indifference" degree of the standard. In *Canton*, the Supreme Court held that a City could have § 1983 liability for a due process violation when the City gives its officials the sole discretion to make decisions that could harm citizens but fails to adequately train the officials in the exercise of that discretion. The Court held that the failure to provide adequate training was actionable because it "reflect[ed] deliberate indifference to the constitutional rights of its inhabitants."[51] Under *Canton*, official conduct may reach the egregious threshold when the government actor disregards its duty to serve and that disregard causes injury.

43 *Id* at 836.

44 *Id.*

45 "Whether the point of the conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but 'less than intentional conduct, such as recklessness or 'gross negligence,'"... is a matter for closer calls." *Lewis*, 523 US at 849 (internal citation omitted).

46 *See, e.g., Farmer v Brennan*, 511 US 825, 835-36 (1994) ("Deliberate indifference lies somewhere between the poles of negligence at one end and purpose or knowledge at the other."). In *Farmer*, an 8th Amendment case, the Court applied a subjective deliberate indifference standard. Under the subjective standard, the government official must be aware that the risk exists. *Id* at 840-41. In contrast, the Court applied an objective deliberate indifference standard in *Canton v Harris*, 489 US 378, 389, 392 (1989), which was a § 1983 due process case. *See infra* note 50.

47 *Id* at 852-53.

48 523 US at 851.

49 *Id* at 853.

50 489 US 378, 389, 392 (1989). *Canton* is consistent with Wells & Eaton's position that a government actor's reckless or deliberately indifferent conduct should be actionable because the government owes a duty of respect to the citizens that it serves. *See* Wells & Eaton, *supra* note 22, at 244-45.

51 *Canton*, 489 US at 392.

Application of the "Shocks The Conscience" Standard to Executive Zoning Actions

Background Facts And Proceedings In *Mettler*

Mettler, in part, concerned a substantive due process challenge to executive action. The *Mettler* plaintiff wanted to develop waterfront boathouses with living spaces above them. The zoning ordinance permitted apartments above boathouses in the commercial zoning district. The planning commission believed that the plaintiff wanted to market the boathouse and upper living spaces as residential condominium units. The Township apparently had an unwritten policy against allowing condominiums in the commercial district despite allowing residential rental units constructed over boathouses as a permitted use. The Michigan Zoning Enabling Act[52] mandates the approval of a site plan that meets the applicable requirements.[53] The planning commission denied approval because the boathouse condominium was not a permitted use in the commercial zoning district.[54]

The plaintiff sued on various constitutional grounds. The case was partially settled, allowing development under a revised site plan. The plaintiff, however, still pursued a damage claim asserted under § 1983, in relevant part, for the violation of its substantive due process rights. The trial court dismissed the plaintiff's substantive due process claim for failure to state a cause of action. According to the appellate court, the plaintiff contended that the lower court applied an incorrect standard when it found that the plaintiff failed to prove that the Township officials' adverse decisions were motivated by personal pecuniary gain. The appellate court upheld the dismissal of the plaintiff's due process claim. The court concluded that the plaintiff failed to produce evidence of conscience-shocking conduct. The court found that the evidence only revealed that the officials acted to promote the Township's legitimate land use and planning goals.[55]

52 MCL 125.3101 *et seq* ("MZEA").

53 MCL 125.3501(5).

54 It does not appear that the plaintiff challenged as unreasonable the unwritten policy against developing residential condominiums in the zoning district.

55 *Mettler,* 281 Mich App at 213.

The Supreme Court has not applied the "shocks the conscience" standard in land use cases.[56] *Mettler* canvassed and quoted extensively from federal and state cases that applied the "shocks the conscience" standard in zoning cases. The *Mettler* court failed to critically analyze the lower court cases upon which it relied and missed, for example, that several of the cases were decided before *Lewis.* The pre-*Lewis* cases contain many inconsistencies with the prevailing standard. *Mettler* also cited land use cases from other jurisdictions that were decided after *Lewis* but ignored *Lewis'* directive against mechanical application. *Mettler* unfairly criticized a case that properly followed Lewis by not applying the "shocks the conscience" standard in a legislative challenge to a zoning action. *Mettler* questioned the validity of *Co Concrete Corp v Roxbury Twp,*[57] asserting that the court failed to follow a prior Third Circuit case that adopted the standard in zoning cases. *Mettler* overlooked *Co Concrete's* explanation that, consistent with *Lewis,* the Third Circuit did not apply the "shocks the conscience" standard to legislative due process challenges.[58]

56 *See* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test,* 13 CAP L. REV. 307 (2010). The author contends that *Lewis* created significant confusion and division in the federal appellate courts. *Id* at 307. She argues that *Lewis* has severely restricted certain classes of plaintiffs, which include landowners, from challenging arbitrary government action. *Id.* Levinson cited *Cuyahoga Falls v Buckeye Community Hope Foundation,* 538 US 188, 191-93, 198 (2003), as an example of a case causing the federal courts' confusion. In this land use case, a city engineer refused to issue a building permit because of a pending referendum petition, which had not yet been submitted to the city. The developer in part alleged a substantive due process claim. The Court briefly addressed the claim "citing *Lewis* for the proposition that 'the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct.'" Levinson observed that the Court "[b]latantly omitted [*Lewis'*] shocks the conscience language." Levinson contends, "[a]lthough the Court cited *Lewis* for the proposition that 'only the most egregious official conduct can be said to be "arbitrary in the constitutional sense,"' the next sentence explained that the challenged mandate to deny the permits while the petition was pending "represented an eminently rational directive," thereby creating confusion in the appellate courts as to whether land use regulation decisions should be analyzed under the legislative (rational basis) or executive (shocks the conscience) test." Levinson, *supra,* at 337. Levinson discussed land use cases to illustrate the lower federal courts generally confused and inconsistent application of *Lewis.*

57 442 F3d 159, 170 (CA 3 2006).

58 The *Co Concrete* plaintiff challenged the township's rezoning of

Moreover, *Mettler*'s adoption of the standard was unnecessary to affirm the trial court's decision. The court's most relevant finding, which would have sufficed as the holding, is buried in footnote 4 of its opinion. The court observed that the plaintiff might have lacked any reasonable expectation or entitlement to site plan approval because the boathouse was a prohibited residential use in the commercial zoning district.[59] The court's off-handed observation contained the crux of the case: the plaintiff's residential boathouse was not a permitted use in the zoning district. The *Mettler* court simply could have found as a matter of law that the planning commission could not have abused its zoning power by denying approval of a site plan for a use not permitted in a zoning district. The court's protracted, yet superficial, discussion of the "shocks the conscience" standard, therefore, was superfluous.

Lewis' Application to Zoning Cases

Mettler Misperceived The Purpose Of The Standard

The *Mettler* court failed to analyze and misperceived the purpose of the "shocks the conscience" standard and the distinctions that exist between most constitutional torts and executive zoning actions. The court did not analyze whether zoning cases fit into the constitutional tort category and if so, which kinds of zoning cases could be classified in that category.

If "shocks the conscience" could serve as the appropriate standard of conduct in a § 1983 executive action case, that involves "tortious" acts then the question is not whether the deprivation was reasonable in the legislative sense. The question under *Lewis* is whether the municipality caused the plaintiff injury by its deliberate indifference to the plaintiff's plight or rights. *Mettler* mistakenly believed that the intent of the standard was deference to local decision-making.[60] A court's deference in the latter situation is based on the separation of powers doctrine, which is a concern when reviewing local legislation but is not the underlying concern in § 1983 executive abuse cases.[61] As stated, the Supreme Court's concern in constitutional tort cases is not trivializing the Due Process Clause as a "font of tort law" rather than second-guessing local decision-makers.[62] Most of the executive abuse cases mirror common law tort claims. *Lewis* attempted to craft concrete standards to prevent transforming common-law torts, such as slip and fall actions, into constitutional claims merely because the government is the tortfeasor.

its property, which the *Co Concrete* court found was a legislative action. The rezoning of property is also a legislative act under Michigan law.

59 It is beyond the scope of this article to discuss the competing theories regarding the rank and protection of property rights. *Mettler* obliquely referenced the argument that no due process right exists in site plan or other zoning approvals absent a protected property interest in the approval. In *Board of Regents v Roth*, 408 US 564 (1972), the issue concerned the procedural due process protection of so-called "new" property rights, which include, for example, government benefits such as welfare payments. *Roth* held that no entitlement to the benefit existed if the government retained any discretion to deny the benefit. The Supreme Court has not applied *Roth's* entitlement analysis outside of procedural due process cases or in cases concerned with "old" property rights such as real estate. Regardless, many courts apply *Roth's* procedural due process test in substantive due process cases concerning permits for the use of "old property." The closest the Supreme Court has approached the topic in a land use case was in a footnote in *Nollan v California Coastal Comm'n*, 483 US 825 (1986).

The Court stated: "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Id* at 833 n 4.

60 Deference to local decision-making should not be the driving force behind the standard as applied to municipalities in a § 1983 executive abuse case. In *Owens*, 445 US at 649-50, the Court rejected incorporating into § 1983 the common-law doctrine of good faith immunity for a municipality's discretionary decision making. The Court found that good faith immunity was premised on "prevent[ing] courts from substituting their own judgment on matters within the lawful discretion of the municipality." *Id* at 649. The Court rejected the deference rationale as a basis to immunize municipalities from liability under § 1983 because a municipality has no "discretion to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the reasonableness of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Id* at 649.

61 *See generally Kyser v Kasson Twp*, 486 Mich 514 (2010).

62 *Daniels v Williams*, 474 US 327, 332 (1986). In *Daniels*, the prisoner plaintiff slipped on a pillow negligently left on a prison staircase. The Court held: "To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law."

Cases concerning the deprivation of property rights do not neatly fit into the *Lewis* category of substantive due process cases. For example, although trespass is a common law tort, the claim inherently takes on constitutional dimensions when the government is the tortfeasor. It is not like a slip and fall claim that only becomes a colorable § 1983 claim because a state actor committed the common law tort. The Takings Clause of the Federal and State Constitutions impose strict liability for taking or invading property without the payment of just compensation.[63] Even a minor physical occupation of land is a *per se* taking under the Federal Constitution.[64]

Another conceptual difficulty with applying the "shocks the conscience" standard in zoning cases is that the premise for its application does not exist. *Lewis* held that "shocks the conscience" inquiry preceded any determination whether a due process right existed to be free from the particular governmental action that caused harm. As discussed, most of the Court's substantive due process jurisprudence concerns whether the 14th Amendment's Due Process Clause incorporates certain freedoms from the Bill of Rights or, if not, whether the Due Process Clause protects rights not mentioned in the Constitution but that are implicit in the Nation's conception of justice, liberty, and fairness.

The issue in *Lewis* was whether the decedent had a due process right to be free from reckless police chases that are likely to cause fatal injuries. The constitutional tort claims to which the Court referred in *Lewis* typically have no textual basis in the Bill of Rights. The Bill of Rights explicitly protects property rights under the 5th Amendment. The Supreme Court long ago held that the 5th Amendment's Just Compensation Clause applied to the States through the 14th Amendment's Due Process Clause.[65] It should be beyond debate that the Framer's explicit protection of property rights reflects the Nation's deeply rooted values to protect real property interests. [66]

In addition to incorporating the Just Compensation Clause into the 14th Amendment's Due Process Clause, the Supreme Court has held that the Due Process Clause protects an individual's right to "devote [his or her] land to any legitimate use."[67] In *Arlington Heights v Metropolitan Housing Dev Corp*,[68] the Court emphatically recognized the existence of a right to be free of arbitrary or irrational zoning actions. The *Arlington Heights* Court cited two seminal zoning cases, *Euclid v*

63 *See, e.g., Buckeye Union Fire Ins Co v State*, 383 Mich 630 (1970) (the State was liable under the Michigan Constitution for its negligent destruction of property caused by a fire). *See also Peterman v DNR*, 446 Mich 177, 201-05 (1994).

64 *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419, 427 (1982).

65 *Chicago, Burlinton & Quincy RR v. Chicago*, 166 US 226, 235-36 (1897). In *Chicago B&Q RR*, the Court held:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

Id at 235-36.

66 In *Twining v New Jersey*, 211 US 78, 113 (1908), the Court rejected the argument that the 14th Amendment incorporated the 5th Amendment's proscription against self-incrimination because the Court found that it was not "an immutable principle of justice which is the inalienable possession of every citizen of a free government." According to the Court, it could not "be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and *the inviolability of private property*." (Emphasis added).

67 *Seattle Trust Co v Roberge*, 278 US 116, 121 (1928) (Court invalidated zoning ordinance that delegated authority to neighbors to deny land use).

68 492 US 252 (1977). The Court held that the respondent developer, MHDC, had standing to assert its own rights in a zoning case that concerned affordable housing. "Foremost among [MHDC's rights] is MHDC's right to be free of arbitrary or irrational zoning actions." *Id* at 263. In *Washington v Glucksburg*, 521 US 702, 721 (1997), the Court explained that it requires a "careful description of the asserted fundamental liberty interest." The Court requires a concrete example because if the right is fundamental it has broad application and is not confined to the case in which it is articulated. The right to be free of arbitrary or irrational zoning actions is a concrete and careful description of the protected interest.

Amber Realty Co[69] and *Nectow v City of Cambridge*,[70] for that legal proposition. The basic premise for applying the "shocks the conscience" standard, therefore, does not even exist in a zoning case. The Court has already recognized a due process right to be free of arbitrary and irrational zoning actions.[71]

Despite the questionable application of *Lewis* to zoning cases, the "shocks the conscience" standard could have some utility if restricted to cases in which the plaintiff seeks damages based on an official's tortious conduct that caused serious injury.[72] The courts, however, should apply the standard in a principled manner consistent with *Lewis'* guidelines.

Mettler Misapplied The "Shocks The Conscience" Standard

The Mettler court misapplied the standard by not following *Lewis'* explicit guidelines. *Mettler* held that the Township's conduct did not "shock the conscience" because it was intended to further the Township's legitimate land use and planning objectives. *Mettler* erroneously applied the degree of the standard reserved to immunize executive officials who cause injury while performing their duties under exigent circumstances. Most courts that apply the standard in zoning cases commit this oversight. The oversight is understandable because the highest degree of the *shocks the conscience* test sounds like the test that applies to legislative challenges and the test that courts traditionally applied in zoning actions whether classified as legislative or executive challenges. Under the highest degree of the "shocks the conscience" standard, executive conduct meets the egregious threshold, even in high-pressure situations, if the official intended to inflict injury and was not pursuing any legitimate governmental objective. As stated, legislative action might be fatally arbitrary if it lacks a legitimate purpose or is an unreasonable means to further a legitimate interest.

The *Mettler* court should have applied the "deliberate indifference" degree of the standard because the planning commission was not acting in a tense situation requiring "split second judgments." Under the "deliberate indifference" degree, the land use plaintiff does not have to prove that the zoning official or body purposely harmed the plaintiff or acted without any legitimate zoning and planning objective when inflicting that harm. The "deliberate indifference" standard does not require proof of actual bad faith, illicit motive, or malice. As stated, § 1983 does not immunize a municipality against liability, even if its policymakers acted in good faith.[73] The municipality's good faith belief that a zoning application does not comply with an ordinance, or its lack of subjective ill will, should not necessarily matter under *Lewis'* "deliberate indifference" standard. Under *Lewis*, executive conduct is egregious when it reflects the conscious disregard of an individual's constitutional rights without concern for the obvious risk of serious harm that is likely to result from the official's

69 272 US 365 (1926). The issue in *Euclid* concerned whether the enactment of zoning laws exceeded the State's police power. *Euclid* upheld the general validity of zoning laws against a facial due process attack. Under *Euclid's* due process test for challenging an ordinance on its face, the ordinance will pass muster as long as it is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id* at 395.

70 277 US 183 (1928). The *Euclid* Court cautioned that its decision was based on a facial attack and that in an "as applied" challenge, a court might find that some or many ordinances "may be found to be clearly arbitrary and unreasonable." *Euclid*, 272 US at 395. In *Nectow*, the Court held that an ordinance as applied to particular property violated the owner's due process rights. The Court stated in stronger terms than it had in *Euclid* that "[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare". 277 US at 188.

71 When the Court decided *Arlington Heights*, it had not yet held that different criteria applied to determine the arbitrariness of legislative and executive actions. Although an argument could exist that *Euclid* and *Nectow* only apply to legislative challenges, it seems illogical that a person has a due process right to be free of arbitrary legislative action but no such protection against arbitrary executive or administrative actions unless more egregious than merely unreasonable exercises of power.

72 A classic zoning "tort" case usually involves a zoning official's mistaken issuance or revocation of a permit. *See, e.g., Armstrong v Ross Twp*, 82 Mich App 77 (1978), for an example of a case applying tort and § 1983 standards to a "tortious" zoning decision. Read with caution, however, because *Armstrong's* immunity discussion is outdated.

73 Certain officials, however, might have such immunity. See *Owens v Independence*, 445 US 662, 637-38 (1980).

conduct. On the other hand, *Lewis* does not support a due process claim based on the negligent denial of site plan approval or revocation of a building permit.

A serious problem with *Mettler* from the landowner's perspective is that the court failed to properly apply or understand the purpose of the standard. *Mettler*, and many of the federal and state cases that it cited, erroneously applied the standard at its highest degree and in a purely subjective manner. These courts concluded, as did *Mettler*, that a municipality is immune from liability as long as it acted in the good faith pursuit of legitimate goals and did not shock the *judge's* conscience. Most courts look for behavior analogous to police brutality to shock their subjective sense of justice. *Lewis*, however, provides a reasonably objective standard for defining "egregious" conduct that does not rely on a judge's subjective sensibilities but on the government official's indifference to the citizen's plight. Moreover, *Rochin* emphatically disclaimed that it was applying a subjective test. *Rochin* held that the court's task was to find historical proof that the officer's conduct transgressed a commonly- and long-held sense of justice. *Lewis* also cautioned that egregious conduct depended on context. In zoning cases, the courts should not be looking for metaphorical equivalents of police brutality or coercion. The underlying policy of the "shocks the conscience" standard is not simply to protect government actors from liability or give them the proper latitude to perform their duties. The underlying policy is also to protect citizens against abusive governmental conduct even if no specific constitutional guarantee applies to the citizen's asserted liberty interest.

In the zoning context, egregious conduct is not the equivalent of pumping a suspect's stomach to recover incriminating evidence. Instead, it is conduct that causes injuries through something more than the lack of ordinary care, but less than a purpose to inflict harm without any legitimate objective. In any non-emergency context, the egregious level of conduct depends on the high risk of inflicting harm coupled with a low concern for causing the injuries. *Lewis* demonstrates that an executive zoning action can meet the egregious threshold without meeting the highest degree of the "shocks the conscience" standard. This does not mean that the standard is easily met but it does not impose the impossible hurdle of a vague and subjective "shocks the conscience" test.

A planning commission could face liability under a principled application of *Lewis'* guidelines. The *Mettler* plaintiff would have had a better case if: 1) its site plan met the requirements for approval; 2) the planning commission rejected the site plan without making any reasonable effort to determine whether it met the requirements or did not care whether it did; 3) the planning commission either knew or should have known that a reckless decision would cause the applicant serious consequences such as a forfeiture because the delay would lead to the loss of a user and funds necessary to keep the land; and 4) the planning commission nevertheless rejected the plan indifferent to the likely consequences and the applicant actually suffered the very predictable harm. Under these circumstances, any remedy such as an appeal would bring no relief.

Under the "deliberate indifference" degree of the standard, the planning commission could face liability even if it acted out of concern for preserving the integrity of the commercial zoning district. A police officer might be concerned with public safety but that does not authorize the officer to intentionally injure a suspect who has no weapon and is not resisting arrest. Under the "deliberate indifference" degree of the standard, the misuse of power, even if for pure motives, is abusive when the power is wielded without concern about the injury inflicted. The planning commission has a duty to approve site plans that meet applicable requirements despite unwritten policies or public pressure. Although officials are not held to tort standards of due care, the Constitution imposes a duty of caring about the rights of the persons for whom the officials serve.

If a Michigan court deems *Lewis* analogous authority in appropriate zoning cases, the court should follow the variable standards under *Lewis'* guidelines that are appropriate in zoning actions. First, the court should apply the "deliberate indifference" degree of the "shocks the conscience" standard. Second, the court should at least consider the following factors to determine whether executive action is sufficiently egregious to violate due process rights: (1) did the body or official at least have constructive knowledge, that its action or inaction

carried a high risk of inflicting substantial damages? (2) Was the body or official merely negligent or did it act in a reckless or wanton manner indifferent to whether the plaintiff would suffer serious or substantial damages? (3) Could the body or official have easily avoided inflicting serious harm but failed to even care whether any harm resulted? Additionally, to impose liability directly on a municipality based upon its policies, (4) does a pattern of conduct exist that reflects deliberate indifference to an individual's constitutional rights?

Conclusion

Even if *Lewis* could have some application to zoning cases when applied in a principled manner, it does not mean that *Mettler* should have adopted the standard. The court did not have to invoke the "shocks the conscience" standard to uphold the trial court's dismissal of the plaintiff's due process claim. The Township had a reasonable basis to deny site plan approval if the boathouse condominium was not a permitted use in the zoning district. It does not appear that the plaintiff challenged the Township's questionable policy regarding condominium developments on the waterfront. The application of the "shocks the conscience" standard, therefore, was merely superfluous. *Mettler* is frustrating because, despite its many analytical flaws, other panels have been mechanically citing it as authority. The panels also have been citing *Mettler* in cases that do not concern executive abuse.[74] *Mettler* demonstrates that it is too easy for, and the courts seem too eager to, misread the "shocks the conscience" label as requiring outrageous official conduct tantamount to pumping a suspect's stomach that shocks the court's subjective sensibilities rather than applying the "deliberate indifference" degree of the standard as required under *Lewis*. If the standard has any application, it must be confined to executive decision cases premised on tortious conduct and using the proper degree of the standard.

74 *See, e.g., Thomas v Genoa Twp*, Unpublished Decision of the Court of Appeals per curium docket no. 289434 (March 11, 2010); *Eureka Intl LLC v Romulus*, Unpublished Decision Court of Appeals per curium Docket No. 284 862 (Sept 15, 2009); *Chestnut Development LLC v Marion Twp*, Court of Appeals per curium unpublished Docket Nos. 287312, 292894 (June 22, 2010). In each of these cases, the plaintiffs challenged the zoning classification of their respective parcels on due process grounds. These were legislative challenges and not challenges to executive decisions. The respective court panels, however, cited *Mettler* as authority for application of the "shocks the conscience" standard in due process cases regardless of the governmental action.