STATE OF MICHIGAN

IN THE SUPREME COURT

LEON V. BONNER and
MARILYN E. BONNER,

Plaintiffs-Appellees,

v

CITY OF BRIGHTON,

Defendant-Appellant.

______________________________/

Michigan Supreme Court
Case No. 146520

Court of Appeals
Case No. 302677

Livingston Circuit Court
Case No. 09-24680-CZ

CITY OF BRIGHTON,

Plaintiff-Appellant,

v

LEON V. BONNER and
MARILYN E. BONNER,

Defendants-Appellees.

______________________________/

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

APPELLANT CITY OF BRIGHTON'S
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

MICHAEL M. WACHSBERG (P28646)
PEDERSEN, KEENAN, KING,
WACHSBERG & ANDRZEJAK. P.C.
Co-Counsel for Appellant City of Brighton

PAUL E. BURNS (P31596)
BRADFORD L. MAYNES (P68319)
LAW OFFICES OF PAUL E. BURNS
Co-Counsel for Appellant City of Brighton

ROSALIND ROCHKIND (P23504)
CARYN A. GORDON (P68590)
GARAN LUCOW MILLER, P.C.
Attorneys for Appellant City of Brighton
1000 Woodbridge Street
Detroit, MI 48207-3108
Telephone: 313.446.1530
Email: rrochkind@garanlucow.com
Email: cgordon@garanlucow.com

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Attorneys for Appellant City of Brighton
1000 Woodbridge Street
Detroit, MI 48207-3108
Telephone: 313.446.1530
Email: rrochkind@garanlucow.com
Email: cgordon@garanlucow.com

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STATEMENT OF JURISDICTION

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

STATEMENT OF QUESTIONS PRESENTED

I. Under a facial substantive due process challenge to an ordinance a court must uphold the law if there are *any* circumstances under which it could be valid. BCO § 18-59 is not a flat prohibition precluding all property owners an opportunity to repair an unsafe structure. It merely creates a rebuttable presumption of demolition which can be overcome by a showing that repairs are reasonable. Where there are circumstances in which the ordinance may be constitutionally applied, did the Court of Appeals err in determining that the ordinance was facially unconstitutional on substantive due process grounds?

Plaintiffs-Appellees Leon and Marilyn Bonner would likely answer, "No."

Defendant-Appellant City of Brighton answers, "Yes."

II. The Court of Appeals should not have decided the issue of procedural due process since it was not decided by the trial court and it was not raised on appeal. Even if it were properly before the Court, an ordinance does not violate procedural due process rights if it provides notice and an opportunity to be heard before an impartial decision maker, all of which are afforded in BCO 18-59. Thus, even if the Court of Appeals had authority to consider this issue, did it err when it held the ordinance facially unconstitutional on procedural due process grounds when it concluded that procedural due process requires not only notice and an opportunity to be heard before an impartial decision maker, but also an opportunity to repair?

Plaintiffs-Appellees Leon and Marilyn Bonner would likely answer, "No."

Defendant-Appellant City of Brighton answers, "Yes."

INTRODUCTION

In a published opinion, with a significant and compelling dissent, the Court of Appeals has drastically changed the standard for determining whether an ordinance is facially constitutional under both substantive and procedural due process grounds. (12/03/12 Opinion, Apx 189a-216a). An ordinance is necessarily found to be facially constitutional under substantive due process grounds if it is rationally related to a legitimate governmental interest. Rather than applying this well-established standard, the Court of Appeals ignored it and, instead, engaged in a weighing analysis which questioned whether other means, not chosen by the legislative body, would be just as rational. In doing so, the Court of Appeals usurped the legislative policy-making power of the Brighton City Council, stepped beyond its appropriate role, and created a new standard for determining whether an ordinance is rationally related to a legitimate governmental interest. Had the majority followed the well established precedent for determining whether an ordinance is facially constitutional under substantive due process grounds, the only conclusion it could have reached is that Brighton Code of Ordinance ("BCO") 18-59 is facially constitutional where there are circumstances under which it can be constitutionally applied. (BCO §18-59, Apx 231a).

Likewise, the Court of Appeals majority ignored the rule that an ordinance will be held facially constitutional under procedural due process grounds if it provides notice, an opportunity to be heard, and an impartial decision maker. Instead, it held that the City should have *also* provided for a reasonable opportunity to repair the unsafe structure in order for the ordinance to pass constitutional scrutiny. The dissent recognized that this position taken by the majority is not sustainable under procedural due process grounds, noting that the majority erroneously placed the focus on the standards that it thought should be applied by the council, rather than *the process* provided by the ordinance to persons who exercise their right to contest the presumption of demolition. (12/04/12 Opinion, dissent, p 4, Apx 212a).

This Court has granted leave to appeal to review the majority's opinion and determine whether, on its face, BCO § 18-59 violates substantive and/or procedural due process rights. (07/01/13 Order, Apx 217a). When each due process right is analyzed under the established federal standard, the law mandates a conclusion that the ordinance is facially constitutional. In ruling to the contrary, the Court of Appeals erred in several respects, including its conflation of the standards for establishing substantive and procedural due process into one standard. Indeed, it summarily concluded that the "ordinance infringes on plaintiffs' due process rights, whether denominated procedural or substantive, thereby making it unnecessary to determine which due process principle is actually embodied in plaintiffs' argument." (12/04/12 Opinion, p 9, Apx 197a). Yet, case law establishes that procedural due process and substantive due process are two, separate rights with two separate tests applied to establish a violation of each. When each due process protection is examined pursuant to the proper test, it is apparent that the ordinance does not violate either protection on its face.

BCO § 18-59 creates a rebuttable 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 the assessment tax rolls before the structure became unsafe. The property owner, however, can appeal this determination and present evidence to the City Council to overcome the rebuttable presumption of demolition and thereby has the opportunity to demonstrate that repair would be reasonable. With respect to substantive due process, the essential error in the Court of Appeals decision is that it determined that the ordinance only allows the exercise of an option to repair when a property owner overcomes or rebuts the presumption of unreasonableness by proving that it is *economical* to do so. The ordinance, however, does not impose a showing of economical reasonableness to overcome the rebuttable presumption; rather it requires a showing of "reasonableness" which could be established through the demonstration of a myriad of reasons supporting a reason to repair and viable plans to repair besides economic profitability, including, *inter alia,* recent acquisition of property, investment opportunity, a historical interest, or familial concerns. It was error to find that this standard was either arbitrary or unreasonable where circumstances exist where application of the ordinance would not violate the property owners' substantive due process rights, as where the owner is given the opportunity to overcome the presumption of demolition by demonstrating that the option to repair is reasonable *either* for financial reasons or other reasons that cannot be measured economically. Thus, it cannot be held facially unconstitutional.

Likewise, the ordinance cannot be held facially unconstitutional under procedural due process grounds. There is no dispute that if the City orders a structure to be demolished under BCO § 18-59, a party can appeal that determination to the City Council under BCO § 18-61. (BCO §§ 18-59 and 18-61, Apx 231a, 233a). The ordinances provide notice of demolition, an opportunity to be heard at a hearing before City Council before demolition occurs, and a decision from an impartial decision maker. Accordingly, there is no facial procedural due process violation.

The City of Brighton requests this Court to determine that BCO § 18-59 withstands a facial constitutional challenge.

STATEMENT OF FACTS

This case presents a facial challenge to the constitutionality of a city ordinance. A recitation of the events leading up to this facial challenge is appropriate to put the issue presented in context, but the particular facts of this case are ultimately irrelevant to the dispositive issue of whether BCO § 18-59 is constitutional on its face.

Plaintiffs own two residential properties located in downtown Brighton at 116 and 122 East North Street. There is a house on one parcel and a house with a garage or barn on the other. These structures have stood unoccupied and largely not maintained for a period of over 30 years. On January 29, 2009, James Rowell, building official and code enforcement official for the City of Brighton, notified Plaintiffs that the structures located on the property were determined to be unsafe structures as defined by the BCO § 18-46 and the International Property Maintenance Code. (*City of Brighton v Bonner* Complaint, Case No. 09-24900-CZ, "Complaint", ¶ 18 and Exhibit E, Apx 36a, 60a-63a). Specifically the property was in violation for the following defects and/or conditions: "collapsing porch structure and foundations for same; collapsing porch roof structure; damaged or missing shingles; rotted roof sheathing; lacking platform at front door; rotted and damaged wood siding; damaged/collapsing rear porch roof structure; damaged or missing stairs, handrails, guardrails at rear porch; damaged/missing footings for rear porch; rotted rafters; fascia and exterior trim; damaged and/or lacking foundations; and repair damaged chimney." (Complaint, Exhibit E, Apx 60a). This list only included violations observable from the outside of the structures. Section 18-46 sets forth ten defects and/or conditions that will render a structure "unsafe". (BCO § 18-46, Apx 218a). While a structure only needs to meet one of the criteria under section 18-46 to be rendered "unsafe", Plaintiffs' structures met all ten criteria contained in the ordinance.

The January 29, 2009 letter further informed Plaintiffs that it had been determined that it was unreasonable to repair the structures as set forth in BCO § 18-59 and, thus, the structures were ordered to be demolished. (Complaint, Exhibit E, Apx 60a-63a). BCO § 18-59 provides in its entirety as follows:

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair. 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 structure 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, Apx 231a).

On February 16, 2009, Plaintiffs appealed this determination to the Brighton City Council pursuant to BCO § 18-61, which provides as follows:

> An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal . . . . The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting. The city council may

affirm, modify, or reverse all or part of the determination of the city manager, or his designee.

(BCO § 18-61, Apx 233a).

On April 2, 2009, a hearing was held before the Brighton City Council on Plaintiffs' appeal. (Complaint, ¶ 22, Apx 237a). At that hearing, counsel on behalf of the Plaintiffs agreed to allow access to the structures for an interior inspection. The matter was tabled pending such an inspection. Plaintiffs, however, then declined access to the structures which led to the City of Brighton petitioning for and obtaining administrative search warrants from Judge L. Suzanne Geddis on April 29, 2009, allowing access for interior inspections. (Complaint, Exhibit G, Apx 68a).

On May 27, 2009, representatives of the City of Brighton, including Jim Rowell, Building Official; Greg Calme, Electrical Inspector; John Marr, Mechanical Inspector; Michael Kennedy, City Architect; and Ted Dombrowski, City Engineer, inspected the structures and found over 45 unsafe conditions in violation of the Michigan Building Code and city ordinances. (Complaint, Exhibits H-L, Apx 70a-108a).

On June 4, 2009, the hearing before the Brighton City Council resumed where argument was heard from both sides. (Complaint, Exhibit M, Apx 110a -113a). Reports were received from Rowell, Calme, Marr, Dombrowski, and Kennedy documenting their findings and conclusions pursuant to the internal and external inspection of the premises. (*Id.*, Apx 110a-113a). Oral testimony was taken on behalf of both parties. (*Id.*, Apx 110a-113a). The hearing resumed on June 18, 2009, wherein written costs estimates were presented and oral testimony was taken, again on behalf of both parties. (*Id.*, Apx 110a-

113a). The City Council was informed that it could either order the structures repaired or demolished. But Plaintiffs never presented an all-encompassing plan to address and repair the exhaustive list of unsafe conditions identified by the city inspectors.

At its next regularly scheduled meeting, on July 16, 2009, the Brighton City Council passed an unanimous Resolution affirming the determinations made by the Building Official that the structures were unsafe under BCO § 18-46; that the Plaintiffs are maintaining unsafe structures; that the structures are unreasonable to repair under BCO § 18-59; and that the structures shall be demolished within sixty days of the decision.[1] (*Id.*, Apx 110a-113a).

On September 24, 2009, when Plaintiffs failed to demolish the structures by September 14, 2009, Plaintiffs were ordered to appear at the October 1, 2009 City Council meeting and show cause why they had failed to comply with the July 16, 2009 order of the City Council. (Complaint, Exhibit N, Apx 115a-118a). After the show cause hearing on October 1, 2009, the City Council, again, determined that cause had not been shown to

[1] In this Resolution, the City also determined that the property lost its non-conforming use under Ordinance 98-106(4). The structures are located on property now zoned "Downtown Business District". (Complaint, ¶ 7, Apx 34a). Prohibited uses in the Downtown Business District include single-family ground floor residences. The City of Brighton Nonconforming Use Ordinance, 98-106(4) provides, in relevant part, that: "if a nonconforming use of any building or premises is discontinued or its normal operation stopped for a period of one year, the use of the same shall thereafter conform to the regulations of the district in which it is located." The use of the structures as detached single-family ground floor residences had been discontinued and/or its normal operation stopped since the 1970s. In its July 16, 2009 Resolution, City Council found that the structures lost their nonconforming use status. On October 1, 2012, the Circuit Court affirmed this decision and determined that Plaintiffs' procedural due process rights were not violated when the properties lost their right to a non-conforming use. Plaintiffs have appealed this decision and the Court of Appeals has held the appeal in abeyance pending the outcome of this appeal.

prevent demolition and ordered that the structures be demolished. (Complaint, Exhibit O, Apx 120a-125a).

To date, no demolition has occurred. On September 3, 2009, Plaintiffs filed the instant action against the City, alleging a violation of procedural and substantive due process, a violation of equal protection, inverse condemnation or a regulatory taking, contempt of court, common-law and statutory slander of title, and a violation of Michigan housing laws under MCL 125.540. (Plaintiff's Complaint, Apx 5a-32a). The City thereafter filed its own complaint requesting injunctive relief in the form of an order enforcing BCO § 18-59 and allowing demolition of the structures. (City of Brighton's Complaint, Apx 33a-125a) The trial court consolidated the cases. (Relevant docket entries, 2a, 3a).

Plaintiffs eventually filed a motion for partial summary disposition arguing that BCO § 18-59 was facially unconstitutional, including only an argument that the ordinance violated substantive due process. The trial court agreed with Plaintiffs and held that BCO § 18-59, on its face, violated substantive due process. In reaching this decision, the trial court held that "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." (11/23/10 Opinion and Order, p 9, Apx 175a). The trial court denied the City's Motion for Reconsideration on February 1, 2011. (02/01/11 Order denying Motion for Reconsideration, Apx 187a-188a).

The City then filed an application for leave to appeal to the Michigan Court of Appeals which was granted on May 17, 2011. On December 4, 2012, the Court of Appeals in a 2-1 decision, issued a published decision affirming the trial court's order determining that BCO § 18-59 is unconstitutional on its face. In reaching this decision, the Court determined that the ordinance violated substantive due process rights, as well as procedural due process rights (which had not been at issue):

> We interpret the ordinance as only allowing the exercise of an option to repair when a property owner overcomes or rebuts the presumption of unreasonableness by proving that it is economical to do so, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. We conclude that this standard is arbitrary and unreasonable. We additionally find that while police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe and free from harm, the ordinance's exclusion of a repair option when city officials deem repairs unreasonable on the basis of expense the owner is able and willing to incur bears no reasonable relationship to the legislative objective. This is true because demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even unreasonable ones. Therefore, we hold that the ordinance violates substantive due process. Moreover, by not providing a procedure to safeguard an owner's right to retain property by performing what others might consider unreasonably expensive repairs, which safeguard would burden the city to a lesser extent than demolition, the city's ordinance violates procedural due process.

(12/04/12 Opinion, p 1, Apx 189a).

The dissenting opinion of Judge Murray, however, concluded that the ordinance did not violate Plaintiffs' substantive or procedural due process rights:

> The majority's decision to affirm that decision [of the trial court that the ordinance violated plaintiffs' right to substantive due process] is in error because there are circumstances under which the ordinance is valid. Additionally, the majority should not address whether this same section violates plaintiffs' rights to procedural due process, as the trial court did not rule on that issue. And, even if it was an issue properly before us, the

> ordinance does not violate plaintiffs' rights to procedural due process under the United States Constitution.

(12/04/12 Opinion, dissent, p 1, Apx 209a).

Defendant-Appellant City of Brighton filed an application for leave to appeal with this Court, which was granted on July 1, 2013. The order granting leave provided as follows:

> The Brighton Code of Ordinances § 18-59 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 parties shall address whether § 18-59 is facially unconstitutional on the basis that the ordinance violates: (1) substantive due process; and/or (2) procedural due process. These issues are to be briefed separately by the parties.

(07/01/13 Order, Apx 217a).

STANDARD OF REVIEW

The Court of Appeals' ruling being challenged is its decision to affirm the trial court's order granting summary disposition in favor of Plaintiffs on the issue of whether the city ordinances are constitutional. Rulings on such motions are reviewed on appeal under the de novo standard of review. *Spiek v Transportation Dep't,* 456 Mich 331, 337; 572 NW2d 201 (1998).

ARGUMENT

After reciting standards for both procedural and substantive due process, the Court of Appeals decidedly ignored both and, in essence, molded substantive due process and procedural due process requirements into each other to reach its results oriented decision that BCO § 18-59 violated Plaintiffs' "due process" rights on its face. Indeed, the Court of Appeals summarily concluded that the "ordinance infringes upon plaintiffs' due process rights, whether coined procedural or substantive, thereby making it unnecessary to determine which due process principle is actually embodied in plaintiffs' argument." (12/04/12 Opinion, p 9, Apx 197a). The Court of Appeals reversibly erred because, as this Court has recognized, procedural due process and substantive due process are two, separate rights with two, separate tests to establish a violation of each. They cannot be molded into one right, with one standard as in the opinion of the Court of Appeals.

When each due process right is separately analyzed under the settled standards for establishing a violation, it is clear that the ordinance is facially constitutional because there are circumstances under which application of the ordinance is valid. It does not violate substantive due process rights since it is rationally related to the legitimate government interest of public safety, and it is not arbitrary and unreasonable where the property owner has the opportunity to overcome the rebuttable presumption of demolition. Moreover, the trial court never ruled on the issue of whether the ordinance violates Plaintiffs' procedural due process rights and, thus, the Court of Appeals should not have addressed this issue. Notwithstanding this fact, even if the issue of procedural due process had been properly before the Court, the ordinance does not violate Plaintiffs' rights to procedural due process because it provides persons aggrieved with notice, an opportunity to be heard at a hearing before City Council, and a decision from an impartial decision maker. Thus, the ordinance is also facially constitutional under a procedural due process analysis.

Plaintiffs simply cannot sustain their facial challenge to the ordinance. A facial challenge to a law's constitutionality is an effort "to invalidate the law in each of its applications, to take the law off the books completely." *Connection Distrib Co v Holder*, 557 F3d 321, 335 (6th Cir 2009) (en banc). "In contrast to an as-applied challenge, which argues that a law is unconstitutional as enforced against the plaintiff before the court, a facial challenge 'is not an attempt to invalidate the law in a discrete setting but an effort to leave nothing standing.'" *Speet v Schuette*, No 12-2213, ___ F3d ____ (6th Cir 8/14/13); *quoting Connection Distrib*, 557 F3d at 335. "A party challenging the facial constitutionality of a statute faces an extremely rigorous standard," *Keenan v Dawson*, 275 Mich App 671; 739 NW2d 681 (2007), such that the defendant "must establish that no circumstances exist under which it would be valid." *Id.* It is presumed that an ordinance is constitutional. *Hammond v BH Building Inspector*, 331 Mich 551 (1951). The fact that the "[a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . ." *Council of Organizations and Others for Education about Parochiad, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997). A court must uphold the law if there are any circumstances under which it could be valid. *Keenan*, 275 Mich App at 680.

It is respectfully submitted that while the dissenting opinion of Judge Murray employed an analysis that was faithful to these principles, the majority opinion ignored each, including, ironically the presumption of constitutionality. Under the principles set forth above, the Court of Appeals, as well as the trial court, reversibly erred in determining that BCO § 18-59 is facially unconstitutional under the Due Process Clauses of the United States Constitution. This Court should reverse the circuit court and Court of Appeals' decisions and determine that BCO § 18-59 is facially constitutional.

A. THE ORDINANCE IS FACIALLY CONSTITUTIONAL WHERE THERE ARE CIRCUMSTANCES UNDER WHICH APPLICATION OF THE ORDINANCE WILL NOT VIOLATE A PROPERTY OWNER'S SUBSTANTIVE DUE PROCESS RIGHTS.

When raising a challenge to an ordinance on substantive due process grounds, judicial review requires application of three rules:

> (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge.

Township of Yankee Springs v Fox, 264 Mich App 604; 692 NW2d 728 (2004).

Under this framework, the Court of Appeals erred in determining that BCO § 18-59 violated Plaintiffs' substantive due process rights because Plaintiffs cannot show that the ordinance is an arbitrary and unreasonable restriction upon an owner's use of property. Plaintiffs cannot avoid the strong presumption in favor of the constitutionality of a zoning regulation. *Hammond v BH Building Inspector*, 331 Mich 551 (1951); *Bassey v Huntington Woods*, 344 Mich 701 (1956). A land use regulation is unconstitutional on its face only if (1) there is no reasonable governmental interest being advanced by the present zoning classification; or (2) it is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question."

Dorman v Clinton Township, 269 Mich App 638, 650-51; 714 NW2d 350 (2006), *quoting Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Plaintiffs cannot make either showing.

1. The ordinance is rationally related to a legitimate governmental interest of public safety.

Plaintiffs have the burden of showing that the regulation has "no real substantial relationship to the public health, morals, safety or general welfare." *Hammond*, 331 Mich at 555. In order for BCO § 18-59 to be constitutional, it need only have some rational relation to a legitimate state interest:

> All other regulations are subject to "rational basis" review, requiring only that the regulation bear some rational relation to a legitimate state interest. Even foolish and misdirected provisions are generally valid if subject only to rational basis review. As we have said, a statute is subject to a "strong presumption of validity" under rational basis review, and we will uphold it "if there is any reasonably conceivable state of facts that could provide a rational basis." Those seeking to invalidate a statute using rational basis review must "negate every conceivable basis that might support it." Our standards for accepting a justification for the regulatory scheme are far from daunting. A profferred explanation for the statute need not be supported by an exquisite evidentiary record; rather we will be satisfied with the government's "rational speculation" linking the regulation to a legitimate purpose, even "unsupported by evidence or empirical data." Under rational basis review, it is " 'constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.' "

Craigmiles v Giles, 312 F3d 220, 223-24 (6th Cir 2002) (citations omitted).

"An ordinance which represents an exercise of the municipality's police powers is presumed to be constitutionally valid, with the burden of showing unreasonableness being cast upon those who challenge the ordinance." *Curto v City of Harper Woods,* 954 F2d 1237, 1242 (6th Cir 1992). There is no dispute in this case that demolition of a structure rendered unsafe due to the owner's own neglect, is rationally related to the legitimate governmental interest of public safety. The trial court recognized that, "[c]ertainly, the demolition of unsafe structures promotes the legitimate interest of public safety." (11/23/10 Opinion and Order of the Trial Court, pp 8-9, Apx 174a-175a). And the majority below even recognized that "a permissible legislative objective of the city under police powers is to protect citizens from unsafe and dangerous structures and that one mechanism for advancing that objective can entail demolishing or razing unsafe structures." (12/04/12 Opinion, p 11, Apx 199a). Accordingly, there are circumstances where application of the ordinance will not violate a property owner's substantive due process rights since the act of demolition of a structure deemed unsafe is rationally related to the legitimate governmental interest of public safety.

This conclusion should be the end of the inquiry as to whether this ordinance is facially constitutional. Yet, the Court of Appeals, as well as the trial court, determined it necessary to question whether there was a rational reason for leaving out what was not in the ordinance – an option to repair. The Court of Appeals concluded that "demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even ones more costly than the present value of the structure and which an owner is willing and able to timely incur." (12/04/12 Opinion, p 20, Apx 208a). This approach is a striking break from the traditional application of the rational-basis test and opens the door to essentially a weighing analysis of what else is just as rational as demolition. There is no legal basis to do so. The focus in a substantive due process analysis is on the reasonableness and constitutional validity of the existing ordinance, not on the reasonableness of some proposed alternative ordinance. *See Charter Twp of Delta v Dinolfo*, 419 Mich 253, 269; 351

NW2d 831 (1984) (recognizing that "our task here is not to evaluate the reasonableness of the township's designation of one land use as opposed to another, but, rather, to evaluate whether the existence of the distinction made is permissible").

The proper conclusion is that the ordinance at issue, which creates a rebuttable presumption of demolition for certain structures deemed unsafe due to the owner's failure to maintain the structure to the point that the structure has become so damaged as to render it unfit for human use, is rationally related to the legitimate governmental interest of protecting the safety, health, and welfare of the general public. The City has a legitimate interest in seeing such structures demolished sooner rather than later in order to protect the public safety. Plaintiffs have not and cannot show otherwise. BCO § 18-59, therefore, is facially constitutional where circumstances exists under which it can be constitutionally applied.

2. *The ordinance is not arbitrary and unreasonable where the property owner has the opportunity to overcome the rebuttable presumption of demolition.*

The Court of Appeals ignored the well settled law set forth above governing whether an ordinance is facially constitutional under a rational basis standard and instead determined that BCO § 18-59, on its face, is unconstitutional because, according to the majority, the ordinance imposes a showing of *economic* unreasonableness to overcome the rebuttable presumption of demolition. This analysis, however, is not accurate and represents a misinterpretation of the language of the ordinance which is presumed constitutional. The ordinance does not impose a showing of economic reasonableness to overcome the presumption that demolition is required to protect the public safety and welfare; rather a showing of reasonableness can be established through a reliance on a myriad of reasons to repair that are not necessarily economically profitable. This reasonableness standard is neither arbitrary nor unreasonable.

BCO §18-59 is titled "Unreasonable repairs" and provides in relevant part as follows:

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

(BCO § 18-59, Apx 231a).

The majority recognized that once a determination is made that an unsafe structure exists and that the cost to repair exceeds the structure's value before it became unsafe, it is *presumed* that the repairs are unreasonable and that the structure is a public nuisance subject to demolition without the option to repair. In evaluating the lack of an opportunity to repair, there are two important qualifications to trigger the "demolition without option to repair" contained in BCO § 18-59. The only structures that trigger the *rebuttable presumption* of demolition are those structures that not only pose a danger to the health, safety, and welfare of the public, but (1) are so unsafe that it would cost more than 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 to repair; and (2) have come to be in this state through actions within the owner's control. On the other hand, structures that were rendered unsafe and unreasonable to repair by acts beyond the owners control, such as weather related damages, are not subject to the presumption of demolition, unless the owner has already failed to repair them in a reasonable time. Indeed, Judge Murray, in his dissenting opinion, properly recognized that "the ordinance is not a flat prohibition precluding all property owners within Brighton city limits an opportunity to repair an unsafe structure." (12/04/12 Opinion, dissent, p 7, Apx 215a).

Thus, absent a situation beyond the control of the owner, the only two ways that a structure could become so deteriorated as to cost more to repair than it is worth is by either years and years of neglect by the owner or active destruction of the structure by the owner. Here, the owners have chosen not to repair in any meaningful way for almost four decades. If repairs were made on a regular or as needed basis the structure would not become unsafe. Under such circumstances, it is not unreasonable to fail to automatically offer an opportunity to repair "unsafe" structures, and instead create a rebuttable presumption of demolition, when the owners had the opportunity to repair for years, have not exercised it of their own free will, and such repairs cost more than the true cash value of the structure as reflected on the city assessment tax rolls in effect before the building became an unsafe structure. Under these circumstances, it is reasonable to "presume" that no desire to repair exists.

Once it is presumed that the property is a public nuisance subject to demolition without the option to repair, the property owner has the option to appeal this decision to the City Council under BCO §18-61. Importantly, the ordinance does not automatically mandate demolition. Instead, the ordinance allows the property owner to file an appeal and overcome the presumption of demolition or appear at a show cause hearing under BCO § 18-58, Apx 230a).

A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption. Black's Law Dictionary (8th ed). The majority recognized that "under BCO § 18-59, a property owner may, regardless of the fact that repair costs would exceed a structure's true cash value, avail himself or herself of an opportunity to overcome or rebut the presumption by showing that making repairs would nonetheless be reasonable under the circumstances." Notwithstanding this statement, the Court of Appeals proceeded to create an *economical* reasonableness standard. The plain language of the ordinance, however, does not impose such a standard.

The Court of Appeals reversibly erred when it concluded that there is only one mechanism – economic reasonableness – to overcome the presumption of unreasonableness. The language of the ordinance only creates a rebuttable presumption of unreasonableness and does not restrict the manner of overcoming this presumption. Indeed, there is a universe of possibilities that could exist to overcome this presumption, so long as the property owner comes forward with sufficient evidence to meet his burden. This could include, *inter alia,* a historical interest, and sentimental or familial concerns which may not be measured economically. In this context, if a property owner presented sufficient evidence showing historical ties or familial ties to a property, a concrete plan detailing how the property owner plans to bring the property to code in a timely manner, and an explanation of why it was not done before, the presumption of unreasonableness could easily be rebutted even if the cost to bring the property to code exceeded the true cash value of the structure. The ordinance does not preclude such a determination.

Likewise, a property owner could even come forward and present evidence that it is economically reasonable to allow a repair and, thus, rebut the presumption of demolition. In such a situation, a property owner could present concrete plans showing the type of repairs necessary to make the property safe, a breakdown-analysis of the costs of the repairs from a reputable construction firm, and that such costs do not outweigh the true cash value of the property before it became unsafe. City Council could then decide after being presented with such information that the property owner overcame the presumption of demolition and should have an opportunity to repair before demolition occurs.

On the other hand, it would not be unreasonable, and would not violate constitutional protection, if the appealing property owner had ignored the deteriorating property for a long period of time, failed to explain why the property had been allowed to go unrepaired, and failed to present a viable plan for repair regardless of the cost of those repairs. Indeed, the majority even recognized such a circumstance when it noted that "there may occasionally be unique circumstances in which repair efforts cannot be allowed, despite a willingness by the property owner to do so, such as where repairs necessary to meet code requirements cannot be designed or cannot be accomplished in a safe or timely manner." (Fn 14).

As a matter of comparison, the Michigan Building Code contains a provision requiring demolition of unsafe structures without even creating a rebuttable presumption of demolition. Section 115.1 of the Michigan Building Code provides that "unsafe structures shall be taken down or removed or made safe as the building official deems necessary as provided for in this section." (Michigan Building Code, Section 115.1, Apx 237a). The standard of what is required before a building can be ordered demolished is far greater under BCO § 18-59 (i.e., that the repair costs exceed 100 percent of the pre-unsafe value of the structure before demolition can be ordered and that only a rebuttable presumption of demolition is created) as compared to Section 115.1 of the Building Code which only requires the building official's discretion. The Michigan Building Code is certainly less restrictive then BCO § 18-59. BCO § 18-59 provides substantially more protection to the property owner where it sets parameters of when a property can be deemed demolished and creates a rebuttable presumption that can be overcome by showing that demolition is unreasonable.[2]

Finally, the majority's reliance on case law from other jurisdictions to further support its decision is either inapplicable or unpersuasive. The majority relies significantly on *Washington v City of Winchester*, 861 SW2d 125 (1993) which is both factually and legally distinguishable from this case. In *Washington*, a property owner appealed the lower court's order upholding orders of the city building inspector and city code appeals board requiring the property owner to demolish the building. The ordinance at issue in *Washington* appears similar to BCO 18-59 in that it provides that when it is determined that such repairs would exceed 100% of the *current* value of the structure, such repairs shall be presumed unreasonable and it is presumed that the structure is a public nuisance which shall be ordered razed without the option on the part of the owner to repair. One key distinction, however, is that the ordinance in *Washington* relies on the current value of the structure to determine

[2] The constitutionality of this ordinance has statewide impact. As set forth in the amicus brief submitted on behalf of the Michigan Municipal League in support of the City's Application for Leave to Appeal to this Court, several municipalities have similar ordinances across this state. These ordinances allow municipalities to effectively and efficiently protect the public from the danger of unsafe and abandoned structures. *See MML's Amicus Brief*, pp 2, 5.

if the repairs would be reasonable whereas the ordinance at issue provides further protection to the property owner by relying on 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" when creating the rebuttable presumption of demolition.

Of greater import, the *Washington* Court ultimately determined that the property owner should be given the option to repair the building within a reasonable time without engaging in a determination of whether the ordinance was facially constitutional. Instead it relied on *Johnson v City of Paducah*, 512 SW2d 514 (1974) wherein that court determined that a separate housing code provision was unconstitutional. The provision at issue in *Johnson* compelled destruction when the cost of repair exceeds 50 percent of the value with no option to repair. Without engaging in any analysis of whether the provision violated the federal due process rights at issue in the case at bar, the *Johnson* Court determined that it violated Section 2 of the Kentucky Constitution and that failure to give the owner the choice to repair was arbitrary. *Johnson* is completely distinguishable because the provision at issue in *Johnson* did not create a presumption of demolition that could be overcome by showing that such repair is reasonable. Instead, the provision called for an outright demolition if the repairs cost more than fifty percent of the value of the structure. *Johnson*, therefore, is materially distinguishable and inapplicable.[3]

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[3] The majority also cites to *Horton v Gulledge*, 177 SE2d 885 (NC Sup Ct 1970), overruled in part on other grounds by *State v Jones*, 290 SE2d 675 (NC Sup Ct 1982), to support its holding. The provision at issue in *Horton*, however, was nearly identical to the provision at issue in *Johnson* in that it did not create a presumption of demolition and instead was an outright declaration for demolition. Accordingly, *Horton* is also unpersuasive.

Likewise, *Washington* is also inapplicable and unpersuasive. Although the provision at issue in *Washington* created a similar presumption of demolition as is at issue in this case, the *Washington* Court did not recognize this presumption or the fact that it could be overcome, nor did it engage in a federal due process analysis, but, instead, it simply relied on *Johnson* which dealt with a separate housing code provision that did not contain a presumption of demolition and which relied on a provision of the Kentucky Constitution. Accordingly, neither *Johnson* nor *Washington* render any meaningful support to the issue in this appeal – whether BCO § 18-59 is facially constitutional under federal principles.

The holding in *Herrit v City of Butler Code Mgt Appeal Bd*, 704 A2d 186 (Pa Commw 1997) is also of little help in addressing the issue in this case. The *Herrit* panel relied exclusively on *Washington* and *Johnson* to support its conclusion that an identical provision as the one at issue in *Washington* was unconstitutional. The *Herrit* court did not engage in any analysis under federal due process law which could provide guidance to this Court. It ignored the fact that the ordinance was not a flat prohibition against repairing and instead only created a rebuttable presumption of demolition. Moreover, as was the case in *Washington*, the ordinance at issue in *Herrit* also examined the current value of the structure, when it was already deemed to be unsafe, rather than the value of the property before it was deemed unsafe.

None of these cases cited by the majority to buttress their holding supports a finding that BCO § 18-59 is arbitrary or unreasonable. The majority ignored the fact that the ordinance only creates a rebuttable presumption of demolition and such presumption can be overcome. The majority further erred in creating an economic reasonableness standard when no such standard exists in the ordinance. As set forth, there are multiple scenarios where a property owner could overcome the presumption of demolition without showing economic reasonableness. The ordinance, therefore, is facially constitutional because there are circumstances under which it could be constitutionally applied.

3. The City acted within its Legislative authority.

The power to govern a city and control its affairs is vested in an elected city council and neither the Supreme Court nor any other court may assume to direct the local policy of the city. *Warda v City Council of City of Flushing*, 472 Mich 326; 696 NW2d 671 (2005). Indeed, "the constitutional power of a law-making body to legislate in the premises being granted, the wisdom or expediency of the manner in which that power is exercised is not properly subject to judicial criticism or control." *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425 (1957).

Instead of determining if the ordinance served a legitimate governmental purpose and whether the means chosen by the existing ordinance were rational, the Court of Appeals determined that it was irrational for the City not to have offered a chance to repair, i.e., to not have chosen a different means and imposed an economical reasonableness standard to overcome, that does not exist in the ordinance. In doing so, the Court of Appeals usurped the legislative, policy-making power of the Brighton City Council and stepped beyond its appropriate role. The City's choice of enacting this ordinance, which provides for a rebuttable presumption of demolition under certain circumstances, was well within the City's legislative authority where it is not arbitrary or the result of some "whimsical ipse dixit." *Yankee Springs Twp*, 264 Mich App at 609.

In short, the Court of Appeals erred in concluding that BCO § 18-59, on its face, violates Plaintiffs' substantive due process rights. The ordinance is rationally related to the legitimate government interest of public safety, and it is not arbitrary and unreasonable where the property owner has the opportunity to overcome the rebuttable presumption of demolition. It is not a flat prohibition precluding all property owners an opportunity to repair an unsafe structure and it grants City Council the discretion to approve repairs instead of ordering demolition. There is no basis to conclude that the presumption is not rationally related to the legitimate governmental interest of safety and, therefore, the Court of Appeals erred in concluding that it is so arbitrary that it shocks the conscience.

B. THE COURT OF APPEALS SHOULD NOT HAVE DECIDED THE ISSUE OF PROCEDURAL DUE PROCESS SINCE IT WAS NOT RAISED ON APPEAL, BUT EVEN IF IT WERE PROPERLY BEFORE THE COURT, THE ORDINANCE DOES NOT VIOLATE PLAINTIFFS' PROCEDURAL DUE PROCESS RIGHTS WHERE IT PROVIDES PERSONS WITH NOTICE, AN OPPORTUNITY TO BE HEARD AT A HEARING BEFORE CITY COUNCIL, AND A DECISION FROM AN IMPARTIAL DECISION MAKER.

In reaching its decision that BCO § 18-59 is facially unconstitutional because it violates Plaintiffs' due process rights under the Fourteenth Amendment of the United States Constitution, the Court of Appeals concluded that the ordinance facially violated Plaintiffs' procedural due process rights. A procedural due process challenge, however, was not decided by the trial court and, thus, was not raised to the Court of Appeals. The Court of Appeals should not have addressed the issue of procedural due process. Appellate review is limited to issues decided by the trial court. *See Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348, 357 (1999). On this point alone, the Court of Appeals erred in considering this issue.

Notwithstanding the fact that the issue of procedural due process was not properly before the Court of Appeals and had never been briefed by the parties until now, the ordinances do not violate plaintiffs' rights to procedural due process because the ordinances provide persons with notice, an opportunity to be heard at a hearing before City Council, and a decision from an impartial decision maker. Thus, it is facially constitutional under a procedural due process analysis.

The two ordinances at issue are BCO §§ 18-59 and 18-61. If the City orders a structure to be demolished under BCO § 18-59, a party can appeal that determination to the City Council under BCO § 18-61, which provides in pertinent part:

> An owner of a structure determined to be unsafe may appeal the decision to the city council. The appeal shall be in writing and shall state the basis for the appeal . . . . The owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting. The city council may affirm, modify, or reverse all or part of the determination of the city manager, or his designee.

(BCO § 18-61, Apx 233a).

Regardless of whether an appeal is taken under BCO § 18-61, the City must still provide notice of its decision ordering demolition pursuant to BCO § 18-52. If the property owner fails to comply with the demolition order, then the City must issue a Notice and order to show cause under BCO § 18-58. (Apx 230a). The show cause hearing shall be conducted by the City Council and shall be at a regularly scheduled meeting of the council. (Apx 230a).

Finally, BCO § 18-63 provides an appeal of right to circuit court to an owner aggrieved by any final decision of the City Council.[4] (Apx 235a).

Procedural due process differs from substantive due process in that "procedural due process principles protect persons from deficient procedures that lead to the deprivation of cognizable [property] interest." *Bartell v Lohiser*, 215 F3d 550, 557 (6th Cir 2000). "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v Burch*, 494 US 113, 125 (1990). Notice and an opportunity to be heard have traditionally and consistently been held to be the essential requisites of procedural due process. *See Goldberg v Kelly*, 397 US 254, 267-68 (1970). It has been stated that "[n]otice and an opportunity to be heard are fundamental to due process of law." *Joint Anti-Fascist Refugee Comm v McGrath*, 341 US 123, 178 (1951).

Procedural due process requires that a party receive a hearing before an "unbiased and impartial decision-maker." This Court has identified four situations that present a high

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[4] The Plaintiffs in this case were provided notice under § 18-52 that the property had been deemed unsafe and ordered demolished. Plaintiffs' appealed that decision under BCO § 18-61 to the City Council. Plaintiffs had an opportunity to be heard by the City Council on their appeal and the City Council ultimately affirmed the decision that the property should be demolished where the property owners failed to overcome the presumption of demolition. When Plaintiffs did not comply with the order to demolish the property, the City issued a notice and order to show cause as to why the property had not been demolished. A show cause hearing was held before the City Council wherein it was again determined that the property should be demolished. Plaintiffs never availed themselves to the right to appeal the City Council's decision under BCO § 18-63. Instead, Plaintiffs filed their complaint alleging violations under constitutional substantive due process. (Apx 5a-32a).

probability of bias where the decision maker : (1) has a pecuniary interest in the outcome; (2) has been the target of personal abuse or criticism from the party before him; (3) is enmeshed in [other] matters involving petitioner; or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision-maker. *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975) (internal quotation marks and citations omitted); *See also Kloian v Schwartz*, 272 Mich App 232, 244-45; 725 NW2d 671 (2006). There is no dispute that the City Council is an unbiased and impartial decision maker and no allegations or evidence to show any bias on the part of the City Council, which is comprised of seven individuals.

The ordinances, therefore, provide notice that demolition has been ordered, an opportunity to be heard at a hearing before City Council before demolition occurs, and a decision from an impartial decision maker. This is sufficient to preclude any facial challenge to the ordinances based on procedural due process. The opinion of the Court of Appeals, however, may be the first case in the State of Michigan to hold that procedural due process requires something more than notice, an opportunity to be heard, and an impartial decision maker. The majority below held that not only are Plaintiffs owed notice, an opportunity to be heard, and a decision by an impartial decision maker, the "city should have also provided for a reasonable opportunity to repair an unsafe structure. . . ." (12/04/12 Opinion, p 12, Apx 200a). Judge Murray recognized that this position is not sustainable: "For one, the majority's focus is on the standards to be applied by the council (whether the council *must* allow a homeowner the option to repair when the cost exceeds 100 percent of the structure's value), as opposed to the *process* provided by the ordinance to persons who are contesting an inspector's decision. And, as set forth above, procedural due process is concerned only with the procedures employed by the government to allow the citizen to be heard before being deprived of his property." (12/04/12 Opinion, dissent, p 4, Apx 212a).

Indeed, ordinances must be upheld as long as there is any set of circumstances that would make the ordinances constitutional. *Keenan*, 275 Mich App at 680. BCO § 18-61, provides an opportunity for an appeal and a hearing before city council where a property owner can overcome the presumption of demolition under BCO § 18-59 and show that repairs are warranted. Accordingly, since the ordinances provide notice, an opportunity to be heard, and a decision from an impartial decision maker, they do not violate procedural due process rights. Plaintiffs received all the process that they were constitutionally due and the Court of Appeals erred in holding otherwise.

RELIEF REQUESTED

Defendant-Appellant City of Brighton respectfully requests this Court to reverse the decisions of the Court of Appeals and the trial court and determine that BCO § 18-59 is facially constitutional under substantive and procedural due process grounds.

Respectfully submitted,

Caryn A. Gordon

ROSALIND ROCHKIND (P23504)
CARYN A. GORDON (P68590)
GARAN LUCOW MILLER, P.C.
Attorneys for Appellant City of Brighton
1000 Woodbridge Street
Detroit, MI 48207-3108
Telephone: 313.446.1530
Email: rrochkind@garanlucow.com
Email: cgordon@garanlucow.com

MICHAEL M. WACHSBERG (P28646)
PEDERSEN, KEENAN, KING,
WACHSBERG & ANDRZEJAK. P.C.
Co-Counsel for Appellant City of Brighton

PAUL E. BURNS (P31596)
BRADFORD L. MAYNES (P68319)
LAW OFFICES OF PAUL E. BURNS
Co-Counsel for Appellant City of Brighton

Dated: September 19, 2013
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