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 REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This Court granted leave to consider the jurisprudentially significant issue of whether the City of Brighton's Code of Ordinance ("BCO") § 18-59 is facially constitutional under substantive and procedural due process guarantees. This issue is significant not only to this case and to the City of Brighton, but also to municipalities statewide. Yet, in Plaintiffs-Appellees' brief they essentially ignore the Court's directive to address whether this ordinance is facially constitutional and, instead, focus on facts and arguments that are inaccurate, unpersuasive, and not supported by the record. These facts asserted by Plaintiffs, even if accurate, could relate only to an "as applied" challenge, which is not before this Court, and are irrelevant to the issues which are before the Court. Plaintiffs also rely on excerpts from a substantial amount of case law from other jurisdictions without substantive discussion or a showing of how *any* of those cases support a finding that BCO § 18-59 is not facially constitutional under federal due process guarantees.

Ultimately, Plaintiffs' brief missed the real issue in this case and failed in its attempt to avoid reversal, as Plaintiffs skirted around the main issue and instead focused on facts, case law and code provisions that are not relevant or beneficial to the determinative issues in this case. When the ordinance is analyzed on its face the only conclusion that can be reached, under the controlling standard for both substantive and procedural due process, is that BCO § 18-59 is facially constitutional. This reply brief will address the shortcomings of Plaintiffs' response.

1. Plaintiffs failed to show that BCO § 18-59 violates substantive due process rights on its face.

Plaintiffs spend the majority of their brief focusing on unnecessary facts, most of which are not part of the record, as well as on inapplicable case law and code provisions, but without addressing how this ordinance violates substantive due process rights on its face. Plaintiffs' arguments fall short. Plaintiffs cannot escape the fact that 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, and it is not arbitrary and unreasonable where the property owner has the opportunity to overcome the rebuttable presumption of demolition. A court must uphold a law under a facial challenge if there are any circumstances under which it could be valid, and this ordinance must be upheld. *Keenan v Dawson,* 275 Mich App 671; 739 NW2d 681 (2007). While Plaintiffs boldly assert that the City "has never provided one example of how 18-59 could be applied constitutionally" under substantive due process grounds, the City's brief on appeal sets forth a myriad of examples of how the rebuttable presumption of demolition could be overcome. (See Appellant's brief, pp 22-24). Plaintiffs have the burden to establish that no circumstances exist under which it would be valid, and they have failed to do so. Thereby, it is mandated that the ordinance be upheld as facially constitutional.

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 ordinance, however, allows a property owner to appeal this determination and present evidence to the City Council to overcome the rebuttable presumption of demolition. The core of the dispute in this case centers around how the presumption of demolition can be overcome. Plaintiffs, as well as the Court of Appeals, argue the ordinance is unconstitutional because it only allows a showing of *economical* reasonableness to overcome the presumption.[1] The City opposes this conclusion because nowhere within the plain language of the ordinance does it impose a showing of economical reasonableness

[1] By imposing an economical reasonableness standard into the ordinance, the Court of Appeals has invaded the legislative, policy-making power of the Brighton City Council. The City's choice of enacting this ordinance was well within the City's legislative authority where the ordinance is not arbitrary and, thus the Court of Appeals has stepped beyond its appropriate role by invading the City's legislative authority.

to overcome the rebuttable presumption; rather it requires only a showing of "reasonableness", which can be demonstrated by an means whether economic or non-economic. Plaintiffs cannot escape the reality that the language of the ordinance does not restrict the manner of overcoming this presumption. As set forth in the City's principal brief, there is a universe of possibilities that could exist to overcome this presumption, so long as the property owner affirmatively comes forward with the evidence to meet his burden. Plaintiffs have offered no basis to conclude otherwise.

Accordingly, 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 owner's 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. The ordinance cannot be held facially unconstitutional under substantive due process grounds.

2. *Plaintiffs failed to show that BCO § 18-59 is facially unconstitutional under procedural due process grounds.*

Plaintiffs rely almost entirely on the Court of Appeals majority opinion to support the position that BCO §18-59 violates their procedural due process rights. That opinion, however, 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. In fact, 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).

As set forth in the City's brief, the ordinance does not violate Plaintiffs' right to procedural due process and meets all the necessary requisites of procedural due process because persons are

provided with notice, an opportunity to be heard, and a decision from an impartial decision maker. (Appellant's brief, pp 31-33). Plaintiffs now make a bald assertion that the City Council is not an "impartial decision maker". The few allegations made by Plaintiffs with respect to the impartiality of the City Council, however, would not support a finding of bias even if they were true. This Court has identified four situations that present a high 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). Plaintiffs' vague, unsubstantiated allegations of bias do not fall within any of these categories and do not support a finding that the City Council is not an impartial decision maker.[2]

In short, the ordinance provided all the process that was constitutionally due. Plaintiffs have failed to show otherwise.

3. Plaintiffs' rendition of the facts are wrong, inaccurate, and inapplicable to this facial challenge.

Throughout Plaintiffs' brief, they make references to particular facts and circumstances of this case that are simply wrong. For instance, Plaintiffs begin their statement of facts by stating that this case concerns "five historical centennial homes" that are over "150 years old". This case, however, only involves two of those five properties, 116 and 122 E. North Street. There has been no legal action by the City with respect to the other three properties listed and there is nothing in the

[2] Plaintiffs ignore the fact that multiple hearings took place before City Council in this matter. At these hearings, Plaintiffs were represented by their attorneys and were allowed to present evidence in an attempt to overcome the presumption of demolition before the decision to order the properties demolished was affirmed by the City Council.

record pertaining to those properties. Moreover there is nothing in the record to validate Plaintiffs' contention that these are "historical centennial homes" over "150 years old.".

Plaintiffs also focus a great deal on facts that are irrelevant or not part of the appeal record, such as the fact that the water was apparently turned off on the property over thirty years ago, that the decision to order demolition of the structures was based on an outside inspection of the home, and that the property lost its non-conforming use status while the constitutional issue was up on appeal. None of these facts are relevant to the issue on this appeal[3] – whether BCO § 18-59 is facially constitutional – and instead might relate to an as-applied standard which is not before the Court. 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*, 726 F3d 867, 872 (6th Cir 2013). Accordingly, the references to particular facts and circumstances of this case is inapposite to the only issue before this Court – whether BCO § 18-59 is facially constitutional.

4. The case law relied on by Plaintiffs is inapplicable and unpersuasive.

Plaintiffs cite a plethora of case law, the majority from other jurisdictions, in an attempt to support their position that the ordinance is unconstitutional; yet, none of these cases determine the constitutionality of a similar ordinance under federal due process standards. The City has already distinguished a majority of these cases in its brief on appeal, see Appellant's brief, pp 25-28. The remaining cases cited by Plaintiffs are taken out of context, where Plaintiffs focus on a single excerpt of a case without analyzing the issues presented before the court and without applying the holding

[3] While large portions of the Appellee Brief could give rise to a Motion to Strike, as it contains irrelevant facts and argument which are outside the record of this case, their inclusion in Plaintiffs' brief is a strong indication of the weakness of Plaintiffs' position on the issues which are before the Court and which are not dependent on the actual facts of this case.

in those cases to the issue before this Court. Moreover, they do not even address facial due constitutional issues.

For instance, contrary to Plaintiffs' contention, *Childs v Anderson*, 344 Mich 90; 73 NW2d 280 (1955) does not support a finding that BCO § 18-59 is unconstitutional. 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. On appeal, the Supreme Court reversed and held that the property owner should first be given the opportunity to repair, which was also an option under the statute. In reaching this decision, the Court noted that although the cost of repairs was not shown, it must be less than the value of the buildings properly repaired.

Childs is materially distinguishable. It did not involve a constitutional challenge to the statute at issue. The *Childs* court did not provide any federal due process analysis in determining that the plaintiff should be allowed to repair the property. It did not involve a statute that provided a rebuttable presumption of demolition when the cost to repair the property exceeded 100% of the pre-unsafe value of the structure. *Childs* is simply inapplicable to the issue before this Court.

Likewise, Plaintiffs' reliance on *Orion Charter Tp v Burnac Corp*, 171 Mich App 450, 461; 431 NW2d 225, 230 (1988), and *Echave v City of Grand Junction*, 118 Colo 165; 193 P2d 277 (1948) to support their position that they should be given an opportunity to repair the buildings is unpersuasive.[4] Neither *Burnac Corp* nor *Echave* were based upon any ordinance or statute; rather,

[4] Throughout Plaintiffs' brief they continue to argue that they should be given an opportunity to repair the properties before the City can order the properties to be demolished under BCO § 18-59. Plaintiffs, however, were given the opportunity to repair by the trial court after this litigation was commenced and failed to do so. When the City filed its application for leave to appeal from the trial court's order finding BCO § 18-59 facially unconstitutional, the trial court proceedings were not

they were based upon the general power of courts of equity to abate a public nuisance. Neither court engaged in any federal due process analysis and neither determined whether an ordinance similar to BCO § 18-59 was facially constitutional. Both are inapplicable and unpersuasive.

Likewise, Plaintiff's application of *Monroe v City of New Bern*, 158 NC App 275; 580 SE2d 372 (2003), is misplaced. In *Monroe,* the city relied on a statute that provided the city "authority to summarily remove, abate, or remedy everything in the city limits, or within one mile thereof, that is dangerous or prejudicial to the public health or public safety" when it demolished the plaintiff's property without notice. The court held that pursuant to this statute, "a city may only demolish a building without providing notice or a hearing to the owner if the building constitutes an imminent danger to the public health or safety necessitating its immediate demolition." The *Monroe* court did not decide whether an ordinance that provides a rebuttable presumption of demolition is facially constitutional. Accordingly, *Monroe* does not render any meaningful support to the issue in this appeal – whether BCO § 18-59 is facially constitutional under federal principles.

The holding in *Abraham v City of Warren*, 67 Ohio App 492; 37 NE2d 390 (1940) also lends no support to Plaintiffs' position. Without engaging in any analysis of the constitutionality of the statute at issue, the *Abraham* court determined that an owner of a building should be given an option to repair before demolition and based its decision on the fact that the property had not decayed to an extent of more than fifty percent of its value. *Abraham* did not address the situation where the

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stayed and this case continued to proceed. The trial court acknowledged Plaintiffs' admission that the properties were a nuisance and eventually provided Plaintiffs the opportunity to repair the exhaustive list of unsafe concerns from the City. Plaintiffs, however, failed to comply with the opportunity to repair when they failed to properly apply for the necessary permits. Plaintiffs' permit applications were, once again, incomplete and the repairs advanced by Plaintiffs did not address all the unsafe concerns on the part of the City. As a result, the trial court ordered the properties to be demolished. Plaintiffs have appealed this decision and the Court of Appeals has held the appeal in abeyance pending the outcome of this appeal. *See* Mich Court of Appeals Docket Numbers 314597 and 314854.

property decayed to more than one hundred percent of its value before it was deemed unsafe and it did not engage in any analysis of whether the statute at issue was facially constitutional.

In a nutshell, Plaintiffs have offered this Court excerpts from several cases but, when these cases are examined it is apparent that they lend no credence to Plaintiffs' position since they do not deal with similar ordinances. Instead these cases either involve flat prohibitions against repair, do not even address an ordinance or statutory law, or do not engage in any federal due process analysis. They provide no guidance to this Court in resolving the issues before it.

5. *The Michigan Building Code and International Property Maintenance Code do not support a finding that BCO § 18-59 is arbitrary or unreasonable.*

In the City's principal brief it referenced the Michigan Building Code Section 115.1 as a matter of comparison to show that BCO § 18-59 is not arbitrary or unreasonable and that there are other codes that allow for demolition outright without imposing first a requirement that demolition may only be ordered when the cost to repair exceeds 100 percent of the pre-unsafe value of the structure and that it creates only a rebuttable presumption of demolition which can be overcome by a showing that repair is reasonable. Plaintiffs contend that the City attempts to mislead this Court by citing Section 115.1 of the Michigan Building Code and not other provisions of the Code. This is not true. The City attached the entire Section 115 to its Appendix, see Apx 237a-238a and, in any event, the additional section cited by Plaintiffs does not alter the validity of the City's argument.

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). Plaintiffs reference Section 115.5 for the proposition that the owner of an unsafe structure must first be allowed to repair it before it can be demolished. Section 115.5 provides that "the structure or equipment determined to be unsafe by the building official is permitted to be restored to a safe condition." This, however, only applies

when the building official orders the property to be made safe and not demolished. This is evident in the fact that Section 115.3 provides that "if an unsafe condition is found, the building official shall serve on the owner, agent or person in control of the structure, a written notice that describes the condition deemed unsafe and specifies the required repairs or improvements to be made to abate the unsafe condition, or that requires the unsafe structure to be demolished within a stipulated time." When reading Section 115 as a whole it is apparent that the building official may either order an unsafe property demolished, without first determining that the cost to repair exceeds 100 percent of the pre-unsafe value of the property, or may order the property to be repaired.

Plaintiffs also rely on provisions of the International Property Maintenance Code ("IPMC") in an attempt to support their position that BCO § 18-59 is arbitrary and unreasonable. The IPMC, however, is the same as the Michigan Building Code and does not set the same parameter as BCO § 18-59 for when a property can be deemed demolished (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). It simply states that when a building is deemed unsafe such that it is unreasonable to repair the structure, the code official can order the property owner to "demolish and remove such structure" or, if it is capable of being made safe by repair, to order it repaired. (Appellee Appendix, 181B-182B). The fact that the provision allows an alternative option for repair does not avoid the fact that the IMPC also allows for an outright demolition without determining the costs for repairs and without creating a presumption that can be overcome by showing that demolition is unreasonable.

CONCLUSION

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,

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