No. _____

In the Supreme Court of the United States

LEON V. BONNER AND MARILYN E. BONNER,
Petitioners,

v.

CITY OF BRIGHTON,
Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should *certiorari* be granted to resolve the conflicting decisions between the Michigan Supreme Court and other states' courts as to whether an ordinance violates substantive and procedural due process when it creates a presumption that an unsafe structure shall be demolished as a public nuisance if the cost to repair the structure would exceed its value and when the ordinance does not afford the owner an option to repair as a matter of right?

II. Whether the Brighton code of ordinances § 18-59 is facially unconstitutional, in violation of both substantive and 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?

PARTIES TO THE PROCEEDING

Petitioners

Leon and Marilyn Bonner are individual citizens of the United States, residing in Brighton, Michigan.

Respondents

Respondent City of Brighton is a municipal corporation located within the State of Michigan.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the Judgment of the Michigan Supreme Court in this case.

OPINIONS BELOW

The Opinion of the Michigan Supreme Court is published as *Bonner v. City of Brighton*, 495 Mich. 209 (2014) and reproduced at Pet. App. 1. The Opinion of the Michigan Court of Appeals is published as *Bonner v. City of Brighton*, 298 Mich. App. 693; 828 N.W.2d 408 (2012) and reproduced at Pet. App. 37. The Opinion of the Livingston County Circuit Court denying Respondent's motion for reconsideration is unpublished and it is reproduced at Pet. App. 93. The Opinion of the Livingston County Circuit Court is unpublished and it is reproduced at Pet. App. 95.

STATEMENT OF JURISDICTION

The Judgment of the Michigan Supreme Court was issued on April 24, 2014. Pet. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provision:

U.S. Const. amend. XIV, § 1 (Due Process Clause)

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

This case also involves the following statutory provision:

Brighton Code of Ordinances § 18-59 ("Unreasonable Repairs" Ordinance)

> "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…"

STATEMENT OF THE CASE

This case involves Petitioners' facial challenge to the constitutionality of § 18-59 of the Brighton Code of Ordinances, which creates a rebuttable presumption that an unsafe structure may be demolished as a public nuisance if it is determined that the cost to repair the structure would exceed 100 percent of the structure's true cash value as reflected in assessment tax rolls before the structure became unsafe. § 18-59 is labeled "Unreasonable Repairs" Ordinance.

Petitioners own two residential properties located in downtown Brighton. There is a house on one parcel of property and a house with a garage on the other. Respondent's building and code enforcement official informed plaintiffs in a letter that the structures on the two properties constituted unsafe structures under

§ 18-59 and public nuisances under Michigan common law. Respondent's building official determined that it was unreasonable to repair the structures as defined in § 18-59, and ordered the structures demolished without the option to repair.

Petitioners appealed the determination to the city council and applied for all permits to make the needed repairs. The permits to repair were denied pursuant to § 18-59. The building official and his experts opined that the total cost to repair the structures was $158,000. Respondent's assessed value of the structures was $85,000. Therefore, Respondent concluded that repairs would be unreasonable. Petitioners' expert opined that it would cost less than $40,000 per house to make the necessary repairs and bring the structures up to code. Respondent's city council adopted the findings of the building official and ordered Petitioners to demolish the structures within 60 days.

Litigation ensued between the parties. The trial court determined that § 18-59 violated substantive due process because it precluded property owners from having the opportunity to repair their property, which served no rational interest or purpose, was entirely arbitrary, and shocked the conscience. Pet. App. 95. The trial court agreed with Respondent that the demolition of unsafe structures promoted the legitimate interest of public health and safety; however, that interest, the trial court stated, was not advanced by denying a property owner the chance to repair an unsafe structure. The trial court observed that if the owner repaired a structure and brought it up to code, the health and safety of the public would be

advanced. Pet. App. 108. The trial court reasoned that the interest in the public's health and safety is equally advanced by repairs as it would be with demolition, as both would eliminate any danger. The trial court determined that giving a landowner an opportunity to repair his or her property would not inhibit a municipality's ability to protect the public health and safety. *Id*.

The Michigan Court of Appeals granted leave to appeal and it affirmed the decision of the trial court. Pet. App. 37. In doing so, the Court of Appeals interpreted 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. The Court of Appeals concluded that this standard is arbitrary and unreasonable. Pet. App. 38. The Court of Appeals additionally found 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 the repairs unreasonable on the basis of expenses that the owner is able and willing to incur bears no reasonable relationship to the legislative objective. This was true, according to the Court of Appeals, because demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even unreasonable ones. Pet. App. 77. The Court of Appeals held that the ordinance violates substantive due process.

Additionally, by not providing a procedure to safeguard an owner's right to retain property by performing what others might consider unreasonably expensive repairs, which would burden Respondent to a lesser extent than demolition, the Court of Appeals reasoned that Respondent's ordinance violates procedural due process. *Id*.

The Michigan Supreme Court granted leave to appeal. Pet. App. 1. The Michigan Supreme Court disagreed with the decisions of its lower two courts that § 18-59's unreasonable-to-repair presumption violates substantive and procedural due process protections by permitting demolition without affording the owner of the structure an option to repair as a matter of right. It held that "Without question, property owners have a constitutional right of property use, but this does not translate into an absolute constitutional right to repair unsafe structures." Pet. App. 24. The Court concluded that the Michigan Court of Appeals erred by "conflating" Petitioners' substantive due process and procedural due process claims by failing to analyze each claim under separate constitutional tests. Pet. App. 2.

The Michigan Supreme Court held that § 18-59 does not constitute an unconstitutional deprivation of substantive due process because the ordinance's unreasonable-to-repair presumption is reasonably related to Respondent's legitimate interest in promoting the health, safety, and welfare of its citizens. Furthermore, the Michigan Supreme Court reasoned that the ordinance is not an arbitrary and unreasonable restriction on a property owner's use of his or her property because there are circumstances

under which the presumption may be overcome and repairs permitted. Pet. App. 36.

Finally, the Michigan Supreme Court held that Respondent's demolition procedures provide property owners, including Petitioners, with procedural due process. *Id.* It found that the prescribed procedures are not faulty for failing to include an automatic repair option, which the Court stated is, in essence, Petitioners' substantive due process argument recast in procedural due process terms. The Michigan Supreme Court found that it is sufficient that aggrieved parties are provided the right to appeal an adverse decision to the city council as well as the right to subsequent judicial review. The Court held that because Petitioners have failed to show that aggrieved property owners cannot meaningfully exercise their right to review or that such review is not conducted impartially, § 18-59, on its face, does not violate procedural due process. *Id.*

REASONS FOR GRANTING THE WRIT

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 government should not infringe upon the owner's property interest by forbidding it. The Michigan Supreme Court broke with case law from a host of sister states that have found identical or substantially similar ordinances such as Respondent's § 18-59 to be arbitrary and not related to a legitimate governmental interest and, therefore, unconstitutional. This Court should grant *certiorari* to declare that 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 government's interest of protecting the health and welfare of its citizens. Indeed, the government's prevention of repairs through the enforcement of § 18-59 is what is unreasonable, not the repairs themselves.

This Honorable Court will also become witness to an egregious governmental abuse of power aimed at Petitioners' residential properties, which are considered sacred places within our country's constitution, laws and traditions.

The Court's review is warranted for these reasons.

I. The Michigan Supreme Court reversed the decisions of its lower two courts and its opinion conflicts with the decisions of a host of other states' courts that have reviewed identical or similar laws.

The Michigan Supreme Court's decision conflicts with many sister states' decisions concerning identical or similar ordinances.

In *D&M Fin. Corp. v. City of Long Beach*, 136 Cal. App. 4th 165, 174; 38 Cal. Rptr. 3d 562 (2006), the California Court of Appeal stated that "[w]hen a city threatens to demolish structures, due process requires that the city provide the property owner and other interested parties with notice, with the opportunity to be heard, and with the opportunity to correct or repair the defect before demolition." And, in *Hawthorne Savings & Loan Ass'n v. City of Signal Hill*, 19 Cal. App. 4th 148, 159; 23 Cal. Rptr. 2d 272 (1993), *quoting Miles v. District of Columbia*, 166 U.S. App. D.C. 235, 239; 510 F.2d 188 (1975), the court opined:

> "A municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health. However, that municipality must, before destroying a building, give the owner sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe or healthy; such a procedure is the essence of the governmental responsibility to accord due process of law."

In *Washington v. City of Winchester*, 861 S.W.2d 125 (Ky. App. 1993), the appellant-owner challenged a circuit court order that required her to demolish a building that had numerous building code violations. A building inspector initially ordered demolition, which decision was appealed to a city appeals board. The appeals board delayed demolition to allow a determination regarding the value of the building and the cost of repairs necessary to bring the building into compliance with the building code. Subsequently it was determined that the estimated cost to repair the building exceeded 100 percent of the building's appraised value. On the basis of this information, the appeals board affirmed the inspector's demolition order, and the circuit court then affirmed the decision by the appeals board. On appeal to the Kentucky Court of Appeals, the appellant building owner argued that she should have been given the opportunity to bring the building into compliance with the code through repairs. *Id*. at 126.

The appellate court agreed with the building owner that she should have been given the option to repair

the building within a reasonable time. *Id.* The court, citing *Johnson v. City of Paducah*, 512 S.W.2d 514 (Ky. Ct. App. 1974), held that "the exercise of the city's police power is for the protection of the public, but the means of its implementation may extend no further than public necessity requires." *Washington*, 861 S.W.2d at 126. The court noted that the failure to provide a property owner the option of repair was arbitrary, that the government did not have absolute power over private property, and that improperly requiring demolition absent compensation constituted a taking. *Id.* at 126-127. Finally, the Kentucky court observed:

> [J]ust as the cost of . . . [code] compliance is a property owner's problem, the method of compliance is also the property owner's decision. It's his/her money and far be it from the [c]ity to say how a reasonable person should spend his/her money. . . . [A]s free men and women, we can spend our own money as we see fit, that if we want to pour endless dollars, sweat, etc., into some historic building, or personally appealing project, we may—even if the ultimate cost would be ten fold over the cost of demolition and rebuilding. So, too, with the [c]ity . . . and the appellant herein, if she wants to pour huge sums of money into her unfit building[], she has that option. A reasonable person may very well choose demolition, but it's her money and her choice. [*Id*. at 127.]

In *Herrit v. Code Mgmt. Appeal Bd. of the City of Butler*, 704 A.2d 186 (Pa. Comm. 1997), the Pennsylvania Commonwealth Court addressed the

constitutionality of a code provision identical to that at issue in Washington. The appellant, whose property was found to be unsafe and a public nuisance, maintained that the code provision was unconstitutional because it did not give him the opportunity to repair his property before demolition. *Id.* at 188. The court initially pointed out that the purpose of the demolition notice was to provide a property owner a reasonable amount of time to make repairs to abate the dangerous condition. *Id.* at 189. The court, relying on *Washington*, 861 S.W.2d at 125, concluded that the code provision was unconstitutional. It reasoned that the provision was not reasonably related to the health, safety, or general welfare of the public, because there was no rational basis not to permit the appellant the option to abate the nuisance. *Id*. The Pennsylvania court concluded that if the appellant wanted "to spend unreasonable amounts of money to bring his [p]roperty into compliance, that [was] only his concern." *Id*.

In considering an ordinance that permitted the demolition of a structure when the cost to comply with code requirements exceeded 50 percent of the structure's present value, the Georgia Court of Appeals ruled in *Horne v. City of Cordele*, 140 Ga. App. 127, 130-131; 230 S.E.2d 333 (1976):

> The vice of the ordinance under consideration is that it flatly permits uncompensated destruction of the owner's property where the cost of repair would exceed 50 percent of the value of the structure unrepaired. . . .
>
> * * *

> In the present case it appears that the owner twice applied for and was refused building permits in order to repair the house under consideration here. We do not find it necessary to reach the question of whether the owner was in good or bad faith in applying, or whether the building inspector was in good or bad faith in refusing the applications, or to pass on the remaining enumerations of error. Our holding is that any ordinance which authorizes demolition of a structure within the city without compensation to the owner merely because the cost of repair exceeds the value of the structure or any percentage therefof, without first allowing opportunity to repair (and, if necessary, providing for discovery of the criteria which must be met to bring the structure up to a minimum standard) is unconstitutional and void.

In *Horton v. Gulledge*, 277 N.C. 353; 177 S.E.2d 885 (1970), overruled in part on other grounds by *State v. Jones*, 305 N.C. 520; 290 S.E.2d 675 (1982), the North Carolina Supreme Court held that under its state constitutional version of the Due Process Clause, a city could not rely on an ordinance to order the demolition of unsafe structures without opportunity of repair when the cost to do so would exceed 60 percent or more of an unrepaired structure's value. The court, in finding a constitutional violation, noted that the city did not assert that the structure could not be made code compliant if it were to be repaired or find the existence of an imminent threat to the safety of persons or property that required the immediate destruction of the structure. *Id.* at 360. The court reasoned that the

state's "'police power does not include power arbitrarily to invade property rights.'" *Id.* at 363 (citation omitted). Further, "[p]olice regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest.'" *Id.* (citation omitted). Thus, the court concluded that when a structure can be repaired, it would be arbitrary and unreasonable for the city to require its destruction without first giving the owner a reasonable opportunity to remove the threat to the public health, safety and welfare by completing the necessary repairs. *Id.*

The Michigan Supreme Court's decision attempts to distinguish the plethora of out-of-state authority cited in the Michigan Court of Appeals' decision. The Michigan Supreme Court stated that these authorities "provide[] nominal, if any, support for its holding that BCO § 18-59, on its face, violates due process." Pet. App. 24, fn. 52. For example, the Michigan Supreme Court stated, in relevant part:

> Furthermore, *Horton, Herrit,* and *Horne* all involve takings claims, and, unlike the rebuttable unreasonable-to-repair presumption in BCO § 18-59, the ordinances at issue in both *Horton* and *Johnson* were held unconstitutional on the basis that they required demolition if the cost to repair an unsafe structure exceeded a certain no-repair cost threshold. In contrast, nothing in BCO § 18-59 expressly provides that the unreasonable-to-repair presumption is irrebuttable. Indeed, had the legislative body intended to make demolition the unavoidable

> result upon incidence of the unreasonable-to-repair presumption, it certainly could have drafted BCO § 18-59 to make that result explicit. However, under the plain language of the ordinance, demolition is permissive. Consequently, to read BCO § 18-59 as creating an irrebuttable presumption would impermissibly render a portion of the ordinance surplusage in violation of the rules of statutory construction. Pet. App. 25, fn. 52.

The Michigan Supreme Court erred in breaking with its sister states' conclusions on the grounds that Respondent's ordinance is *rebuttable*. In order to overcome the presumption that allows the city to order demolition absent an option to repair, the property owner must show that making repairs is reasonable. This aspect of the ordinance is constitutionally problematic and in violation of due process because Respondent's appeal provision in § 18-61 does not provide its own or a different standard; therefore, the city council in addressing an appeal would be constrained to also apply the reasonableness standard that governs § 18-59. Such a standard prevents a property owner who has the desire and ability to make the necessary repairs in a timely fashion to render a structure safe, even when the cost of repairs exceeds the city-determined true cash value of the structure before it became unsafe, from doing so because the ordinance deems such repairs unreasonable. The fact that Respondent's ordinance gives the city manager or his designee the discretion to not order the demolition of a structure and to allow repairs even though the structure is unsafe and the repair costs exceed the structure's assessed value, does not save the ordinance

from constitutional challenge, considering that the ordinance places no constraints on the exercise of what is essentially unfettered discretion on what is considered reasonable.

The Michigan Supreme Court's decision stands alone against a host of sister-states that have determined similar ordinances to violate due process.

This Court should grant *certiorari* for the reasons set forth above.

II. The decision below rests upon a reading of the Due Process Clause that is unsustainable because the ordinance in question only allows the right of an option to repair an unsafe condition when a property owner overcomes a presumption of unreasonableness by showing that it is economical to do so, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs.

Due process is a flexible concept, but its essence is fundamental fairness. The procedures that are constitutionally required in a particular case are determined by examining (1) the private interest at stake or affected by the governmental action, (2) the risk of an erroneous deprivation of the interest under existing procedures and the value of additional safeguards, and (3) the adverse impact on the government of requiring additional safeguards, including the consideration of fiscal and administrative burdens. *Mathews v. Eldridge*, 424 U.S. 319, 335; 96 S. Ct. 893; 47 L. Ed. 2d 18 (1976).

The nature of the private interest at stake in this case is substantial — Petitioners' property interest as owners of residential structures. The Michigan Supreme Court's decision in this case now subjects thousands of Michigan property owners to wrongful, uncompensated loss of their property.

The risk of an erroneous deprivation of their property interest under § 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.

Adding the safeguard of a repair option would not adversely 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 § 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. § 18-59 does not bear a reasonable relationship to a permissible legislative objective because 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.

In the matter *sub judice*, § 18-59 has prevented repairs of alleged dangerous conditions for over 5 years, as Respondent has litigated over the reasonableness of those repairs.

§ 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. Moreover, procedural due process requires a property owner to have an option to repair a structure determined to be unsafe except in unique and emergency situations demanding immediate action.

This Court should grant *certiorari* in this matter.

CONCLUSION

The Michigan Supreme Court erred in rejecting the consistent conclusions drawn by its sister-states when similar laws were reviewed. § 18-59 only allows the exercise of an option to repair when a property owner

overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. This standard is arbitrary and unreasonable. While police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe, Respondent's ordinance's exclusion of a repair option when repairs are deemed economically unreasonable bears no reasonable relationship to this legislative objective. Demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even ones more costly than the present value of the structure and which an owner is willing and able to timely incur. Therefore, Respondent's ordinance violates substantive due process and the Michigan Supreme Court erred by concluding otherwise. In this case, it is Respondent's prevention of repairs to unsafe conditions that is unreasonable, not the cost of those repairs.

Moreover, by not providing procedural safeguards in the form of an option to repair when a property owner's desire to repair could be viewed as unreasonable and lead to the unlawful deprivation of a constitutionally protected property interest, and which safeguard would burden the city to a lesser extent than demolition, Respondent's ordinance also violates procedural due process.

For the reasons set forth above, the Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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July 17, 2014

APPENDIX

APPENDIX

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APPENDIX A

Michigan Supreme Court
Lansing, Michigan

Opinion	Chief Justice:	Justices:
	Robert P. Young, Jr.	Michael F. Cavanagh
		Stephen J. Markman
		Mary Beth Kelly
		Brian K. Zahra
		Bridget M. McCormack
		David F. Viviano

FILED APRIL 24, 2014

STATE OF MICHIGAN
SUPREME COURT

No. 146520

LEON V. BONNER and MARILYN E. BONNER,

Plaintiffs/Counter-Defendants-Appellees,

v

CITY OF BRIGHTON,

Defendant/Counter-Plaintiff-Appellant.

BEFORE THE ENTIRE BENCH

KELLY, J.

This case involves two landowners' facial challenge to the constitutionality of § 18-59 of the Brighton Code of Ordinances (BCO), which creates a rebuttable presumption that an unsafe structure may be demolished as a public nuisance if it is determined that the cost to repair the structure would exceed 100 percent of the structure's true cash value as reflected in assessment tax rolls before the structure became unsafe. Specifically, we address whether this unreasonable-to-repair presumption violates substantive and procedural due process protections by permitting demolition without affording the owner of the structure an option to repair as a matter of right.

As a preliminary matter, we clarify that the landowners' substantive due process and procedural due process claims implicate two separate constitutional rights, and that we must analyze each claim under separate constitutional tests. The Court of Appeals therefore erred by improperly conflating these analyses and subsequently determining that BCO § 18-59 facially violates plaintiffs' general due process rights. Instead, when each due process protection is separately examined pursuant to the proper test, the ordinance does not violate either protection on its face.

We hold that BCO § 18-59 does not constitute an unconstitutional deprivation of substantive due process because the ordinance's unreasonable-to-repair presumption is reasonably related to the city of Brighton's legitimate interest in promoting the health, safety, and welfare of its citizens. Furthermore, the

ordinance is not an arbitrary and unreasonable restriction on a property owner's use of his or her property because there are circumstances under which the presumption may be overcome and repairs permitted.

We likewise hold that the city of Brighton's existing demolition procedures provide property owners, including plaintiffs, with procedural due process. Contrary to plaintiffs' argument, the prescribed procedures are not faulty for failing to include an automatic repair option, which is, in essence, plaintiffs' substantive due process argument recast in procedural due process terms. For purposes of this facial challenge, it is sufficient that aggrieved parties are provided the right to appeal an adverse decision to the city council as well as the right to subsequent judicial review. For the facial challenge to succeed, plaintiffs must show that no aggrieved property owners can meaningfully exercise their right to review or that such review is not conducted impartially. Because they have not done so, plaintiffs have failed to establish that BCO § 18-59, on its face, violates their procedural due process rights.

We therefore reverse the judgment of the Court of Appeals and remand this case to the Livingston Circuit Court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Leon and Marilyn Bonner own two residential properties, 122 E. North Street and 116 E. North Street, both located in downtown Brighton. Situated on these properties are three structures—two

former residential homes and one barn/garage—all of which have been unoccupied and generally unmaintained for over 30 years. In January 2009, defendant city of Brighton's (the City) building and code enforcement officer, James Rowell (the building official), informed plaintiffs via written notice that these three structures had been deemed "unsafe" in violation of the Brighton Code of Ordinances, and further constituted public nuisances in violation of Michigan common law.[1] Plaintiffs were also informed of the building official's additional determination that it was unreasonable to repair these structures consistent with the standard set forth in BCO § 18-59, which 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*

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[1] Specifically, the property was deemed "unsafe," as defined by BCO § 18-46, for the following defects: "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." This list only included violations observable from outside the structures.

> *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.[2]

Consequently, plaintiffs were ordered to demolish the structures within 60 days of the date of the building official's letter.

Because demolition had been ordered without an option to repair, plaintiffs appealed the building official's determination to the Brighton City Council (city council) pursuant to the appellate process set forth in BCO § 18-61, which provides in relevant part:

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[2] Emphasis added. The italicized language reflects what we refer to as the unreasonable-to-repair presumption.

> 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.

Initially, the city council stayed its review pending the building official's interior inspection of the structures. However, despite having previously agreed to allow the building official interior access, plaintiffs thereafter refused entry, causing the City to petition for and obtain administrative search warrants. On May 27, 2009, the building official and several other representatives of the City inspected the structures and found over 45 unsafe conditions therein. The hearing resumed on June 4, 2009, and June 18, 2009, during which the city council received written reports and heard oral testimony from both parties on the issues of the City's findings and conclusions pursuant to the interior and exterior inspection of the premises, as well as its cost estimates for the structures' repair versus their demolition. On July 16, 2009, the city council unanimously affirmed the building official's determination that the structures were unsafe under all ten of the standards set forth in BCO § 18-46.[3] The

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[3] BCO § 18-46 provides,

> *Unsafe structure* means a structure which has any of the following defects or is in any of the following conditions:

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

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

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

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

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

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

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

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

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

(10) A structure that has become damaged to such an extent that the cost of repair to place it in a safe, sound, and sanitary condition exceeds 50 percent of the assessed

city council likewise found that plaintiffs had been maintaining unsafe structures in violation of BCO § 18-47,[4] that the structures were unreasonable to repair under BCO § 18-59, and that demolition was required within 60 days of its decision.[5]

Rather than appeal the city council's decision to the Livingston Circuit Court as an original action per BCO § 18-63,[6] plaintiffs instead filed this independent cause of action against the City, alleging violations of due process, generally, as well as 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.[7] The City

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> valuation of the structure, at the time when repairs are to be made.

[4] BCO § 18-47 provides, "It shall be unlawful for an owner or agent to maintain or occupy an unsafe structure."

[5] Plaintiffs did not demolish the structures as required and were thus ordered to show cause as to their failure to comply with the city council's decision in accordance with BCO § 18-58. At the show cause hearing, the city council determined that cause had not been shown to prevent demolition and again ordered demolition. To date, demolition has not occurred.

[6] Specifically, this ordinance provides that "[a]n owner aggrieved by a final decision of the city council may appeal the decision to the county circuit court by filing a complaint within 20 calendar days from the date of the decision."

[7] Though plaintiffs clearly alleged a substantive due process violation under Count II of their complaint, they did not expressly state a procedural due process claim given that Count I simply

subsequently filed its own complaint against plaintiffs in a separate action, requesting injunctive relief in the form of an order enforcing BCO § 18-59 and requiring demolition of the structures.

After consolidating these cases, the circuit court denied the City's request for injunctive relief and likewise denied relief to plaintiffs on several of the theories they had advanced. However, the circuit court did address the constitutionality of the ordinance, determining that, on its face, BCO § 18-59 violates substantive due process by permitting the City to order an unsafe structure to be demolished as a public nuisance without providing the owner the option to repair it when the structure is deemed unreasonable to repair as defined under the ordinance. The circuit court thus granted plaintiffs' renewed motion for partial summary disposition under MCR 2.116(C)(10) on the substantive due process claim and thereafter denied reconsideration.[8]

After granting the City's application for leave to appeal, the Court of Appeals affirmed the circuit court in a split published opinion.[9] The majority concluded that the standard set forth under BCO § 18-59 is

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alleges a violation of "due process rights." However, because the Court of Appeals addressed the procedural due process component, and our grant order directed the parties to brief both substantive and procedural due process, we will address both claims.

[8] The circuit court did not rule on the procedural due process issue.

[9] *Bonner v City of Brighton*, 298 Mich App 693; 828 NW2d 408 (2012).

arbitrary and unreasonable, and thus violates substantive due process, because it

> only allow[s] the exercise of an option to repair when a property owner overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs.[10]

The majority also determined that BCO § 18-59 does not bear a reasonable relationship to the permissible legislative objective of protecting citizens from unsafe and dangerous structures because 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 that an owner is willing and able to timely finance. Accordingly, the majority held that BCO § 18-59 is facially unconstitutional. Finally, notwithstanding the circuit court's abstention from reaching the procedural due process issue, the majority went on to conclude that BCO § 18-59 likewise violates procedural due process because "the only way the city's ordinances could withstand a procedural due process challenge" would be if it provides a property owner with the option to repair the structure.[11]

We granted the City's application for leave to appeal, directing the parties to brief separately "whether § 18-59 is facially unconstitutional on the

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[10] *Id*. at 731.

[11] *Id*. at 717.

basis that the ordinance violates: (1) substantive due process; and/or (2) procedural due process."[12]

II. STANDARD OF REVIEW

This case implicates myriad standards of review. The circuit court granted plaintiff's motion for partial summary disposition pursuant to MCR 2.116(C)(10). We review de novo a circuit court's decision on a motion for summary disposition.[13] Summary disposition is appropriate under MCR 2.116(C)(10) if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."[14] "A genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the record which might be developed . . . would leave open an issue upon which reasonable minds might differ."[15] In deciding whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider "[t]he affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or

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[12] *Bonner v City of Brighton*, 494 Mich 873 (2013).

[13] *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

[14] MCR 2.116(C)(10).

[15] *Debano-Griffin*, 493 Mich at 175 (citation omitted).

submitted by the parties,"[16] in the light most favorable to the nonmoving party.[17]

This dispute also concerns the constitutionality of a municipal ordinance, which necessarily involves the interpretation and application of the ordinance itself. We review de novo questions of constitutional law;[18] however, this Court accords deference to a deliberate act of a legislative body, and does not inquire into the wisdom of its legislation.[19] The decision to declare a legislative act unconstitutional should be approached with extreme circumspection and trepidation, and should never result in the formulation of a rule of constitutional law "broader than that demanded by the particular facts of the case rendering such a pronouncement necessary."[20] "Every reasonable presumption or intendment must be indulged in favor of the validity of the act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the

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[16] MCR 2.116(G)(5).

[17] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996),

[18] *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).

[19] *Dearborn Twp v Dail*, 334 Mich 673, 680; 55 NW2d 201 (1952).

[20] *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997), citing *United States v Raines*, 362 US 17, 21; 80 S Ct 519; 4 L Ed 2d 524 (1960).

Constitution that a court will refuse to sustain its validity."[21]

Further, because ordinances are treated as statutes for purposes of interpretation and review, we also review de novo the interpretation and application of a municipal ordinance.[22] Since the rules governing statutory interpretation apply with equal force to a municipal ordinance,[23] the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body.[24] The most reliable evidence of that intent is the language of the ordinance itself and, therefore, the words used in an ordinance must be given their plain and ordinary meanings.[25]

III. ANALYSIS

Plaintiffs make two facial constitutional attacks upon BCO § 18-59. First, they assert that the ordinance violates substantive due process by permitting demolition of an unsafe structure without extending to its owner an option to repair, because denying a

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[21] *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).

[22] *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

[23] *Macenas v Village of Michiana*, 433 Mich 380, 396, 446 NW2d 102 (1989).

[24] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[25] *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011).

property owner the chance to repair an unsafe structure does not advance the City's otherwise legitimate interest in protecting the health, safety, and welfare of the Brighton citizenry. Second, plaintiffs argue that the ordinance violates procedural due process by failing to provide a procedure to safeguard a property owner's right to choose whether to repair a structure municipally deemed unsafe before the City orders it demolished. We will address plaintiffs' arguments in this order; before proceeding further, however, we find it necessary to make two critical observations.

First, we emphasize that this is a *facial* challenge to BCO § 18-59;[26] plaintiffs do not challenge the ordinance's application in a particular instance.[27] A party challenging the facial constitutionality of an ordinance "faces an extremely rigorous standard."[28] To prevail, plaintiffs must establish that " 'no set of circumstances exists under which the [ordinance] would be valid' " and " '[t]he fact that the . . .

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[26] A facial challenge alleges that an ordinance is unconstitutional "on its face" because "[t]o make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid." *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 303; 586 NW2d 894 (1998) (citations and quotation marks omitted).

[27] An as-applied challenge, to be distinguished from a facial challenge, alleges "a present infringement or denial of a specific right or of a particular injury in process of actual execution" of government action. *Village of Euclid, Ohio v Amber Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).

[28] *Judicial Attorneys Ass'n v Michigan*, 459 Mich at 310.

[ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient' " to render it invalid.[29] Indeed, " 'if any state of facts reasonably can be conceived that would sustain [the ordinance], the existence of the state of facts at the time the law was enacted must be assumed' " and the ordinance upheld.[30] Finally, because facial attacks, by their nature, are not dependent on the facts surrounding any particular decision, the specific facts surrounding plaintiffs' claim are inapposite.[31]

Second, and particularly noteworthy here, we emphasize that analysis of substantive and procedural due process involves two separate legal tests. While the touchstone of due process, generally, "is protection of the individual against arbitrary action of government,"[32] the substantive component protects against the arbitrary exercise of governmental power,[33] whereas the procedural component is fittingly aimed at ensuring constitutionally sufficient procedures for the

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[29] *Council of Orgs*, 455 Mich at 568, quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

[30] *Council of Orgs*, 455 Mich at 568-569, quoting 16 Am Jur 2d, Constitutional Law, § 218, p 642.

[31] *City of Lakewood v Plain Dealer Pub Co*, 486 US 750, 770 n 11; 108 S Ct 2138; 100 L Ed 2d 771 (1988).

[32] *Wolff v McDonnell*, 418 US 539, 558; 94 S Ct 2963; 41 L Ed 2d 935 (1974).

[33] *Daniels v Williams*, 474 US 327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986) (the substantive due process guarantee prevents governmental power from being oppressively exercised).

protection of life, liberty, and property interests.[34] As evidenced by the following statement, the Court of Appeals made clear its misunderstanding of these distinct constitutional claims when it concluded that BCO § 18-59 was facially unconstitutional:

> Ultimately, we conclude 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*.[35]

As a result, the Court of Appeals conflated what previous decisions have indicated should be treated as separate inquiries. Indeed, the issue whether BCO § 18-59 is facially unconstitutional for denying property owners the opportunity to repair unsafe structures in violation of substantive due process is distinct from the issue whether the ordinance is facially unconstitutional for permitting the demolition of unsafe structures without providing adequate procedural safeguards in violation of the right to procedural due process. By melding together plaintiffs' substantive and procedural due process claims, the Court of Appeals failed to

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[34] *Hannah v Larche*, 363 US 420; 80 S Ct 1502; 4 L Ed 2d 1307 (1960) (the procedural due process guarantee requires that an individual must be accorded certain procedures before a protected interest is infringed, including notice of the proceedings against him, a meaningful opportunity to be heard, as well as the assurance that the matter will be conducted in an impartial manner); *Wolff*, 418 US 539; *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976).

[35] *Bonner*, 298 Mich App at 710 (emphasis added).

observe that distinction and thus examine these claims in light of the correct legal standards. We therefore take this opportunity to clarify that alleged violations of substantive and procedural due process must be separately analyzed in order to determine whether the specific dictates of due process have been satisfied.

A. GENERAL DUE PROCESS PRINCIPLES

1. LEGAL FRAMEWORK

The federal due process provision guarantees that no person shall be deprived of "life, liberty, or property, without due process of law."[36] Prior caselaw has interpreted this language to "guarante[e] more than fair process,"[37] but to encompass a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them."[38] Determining whether the ordinance in this case violates due process requires that we engage in several inquiries, the first and most essential of which asks whether the interest allegedly infringed by the challenged government action—here, a property owner's interest in repairing an unsafe structure—comes within the definition of "life, liberty or property."[39] If it does not, the Due Process Clause

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[36] US Const, Am XIV.

[37] *Washington v Glucksberg*, 521 US 702, 719, 117 S Ct 2258; 138 L Ed 2d 772 (1997).

[38] *Daniels*, 474 US at 331.

[39] *Ingraham v Wright*, 430 US 651; 97 S Ct 1401; 51 L Ed 2d 711 (1977).

affords no protection. If, however, a life, liberty or property interest is found to exist and to be threatened by the City's conduct, the next two queries will address what process is due before the government can interfere with that interest. Because the Due Process Clause offers two separate types of protections—substantive and procedural—separate inquiries must examine whether these protections have been provided.

2. APPLICATION

Plaintiffs allege that their property rights have been violated by the City's decision to order their structures demolished without providing them with the option to repair the structures. Explicit in our state and federal caselaw is the recognition that an individual's vested interest in the use and possession of real estate is a property interest protected by due process.[40] Accordingly, plaintiffs, as owners of the three structures at issue and the land on which those structures are situated, have a significant property interest within the protection of the Due Process Clause.

B. SUBSTANTIVE DUE PROCESS

1. LEGAL FRAMEWORK

Having identified a significant property interest protected by the Due Process Clause, we continue our analysis by addressing plaintiffs' substantive due

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[40] See, e.g., *Dow v Michigan*, 396 Mich 192, 204; 240 NW2d 450 (1976); *Bd of Regents of State Colleges v Roth*, 408 US 564, 571-572; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (The "actual owner[] . . . of real estate, chattels or money" has "property interests protected by procedural due process").

process claim. " 'Substantive due process' analysis must begin with a careful description of the asserted right,"[41] for there has "always been reluctan[ce] to expand the concept of substantive due process" given that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."[42] Where the right asserted is not fundamental, the government's interference with that right need only be reasonably related to a legitimate governmental interest.[43]

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[41] *Reno v Flores*, 507 US 292, 302; 113 S Ct 1439; 123 L Ed 2d 1 (1993).

[42] *Collins v City of Harker Hts*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992). See also *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994).

[43] *TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557-558; 629 NW2d 402 (2001). Discussing the parameters of this standard, this Court in *TIG* stated:

> "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id*. at 259-260. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. *Thoman v Lansing*, 315 Mich 566, 576; 24 NW2d 213 (1946). [*TIG Ins Co*, 464 Mich at 557-558.]

A zoning ordinance must similarly stand the test of reasonableness—that it is " 'reasonably necessary for the preservation of public health, morals, or safety' "[44]—and, as we have stated, it is presumed to be so until the plaintiff demonstrates otherwise. Accordingly, a plaintiff may successfully challenge a local ordinance on substantive due process grounds, and therefore overcome the presumption of reasonableness, by proving either "that there is no reasonable governmental interest being advanced by the present zoning classification itself . . . or, secondly, that an ordinance [is] unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question."[45] The reasonableness of the ordinance thus becomes the test of its legality.[46]

2. APPLICATION

Mindful of these principles, we begin by describing the right asserted by plaintiffs. Plaintiffs are not generally arguing that they have a categorical right of property use or possession, but assert a much more limited constitutional right; namely, that encompassed within the Due Process Clause's protection of property is a property owner's right to repair a structure municipally deemed "unsafe" before that structure can be demolished. However, we are unaware of any court

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[44] *City of North Muskegon v Miller*, 249 Mich 52, 58; 227 NW 743 (1929).

[45] *Kropf v Sterling Hts*, 391 Mich 139, 158; 215 NW2d 179 (1974).

[46] *Moreland v Armstrong*, 297 Mich 32, 35; 297 NW 60 (1941).

that has ever granted a property owner the fundamental right of an absolute repair option involving property that has fallen into such disrepair as to create a risk to the health and safety of the public. Indeed, that conclusion would hardly be compatible with the line of cases in which this Court and the United States Supreme Court have held that reasonableness is essential to the validity of an exercise of police power affecting the general rights of the land owner by restricting the character of the owner's use,[47] which would include the opportunity to repair unsafe structures. The right asserted by plaintiffs, then, cannot be considered fundamental. Therefore, to demonstrate a violation on substantive due process grounds, plaintiffs have the burden of showing that the unreasonable-to-repair presumption set forth in BCO § 18-59 does not bear any reasonable relationship to a legitimate governmental interest.

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[47] See *City of North Muskegon*, 249 Mich 52; *Moreland*, 297 Mich 32; *Pere Marquette R Co v Muskegon Twp Bd*, 298 Mich 31; 298 NW 393; *Pringle v Shevnock*, 309 Mich 179; 14 NW2d 827 (1944); *Hammond v Bloomfield Hills Bldg Inspector*, 331 Mich 551; 50 NW2d 155 (1951); *Fenner v City of Muskegon*, 331 Mich 732; 50 NW2d 210 (1951); *Anchor Steel & Conveyor Co v City of Dearborn*, 342 Mich 361; 70 NW2d 753 (1955); *Detroit Edison Co v City of Wixom*, 382 Mich 673; 172 NW2d 382 (1969); *Kropf*, 391 Mich 139; *Bevan v Brandon Twp*, 438 Mich 385; 475 NW2d 37 (1991). See also *Village of Belle Terre v Boraas*, 416 US 1; 94; S Ct 1536; 39 L Ed 2d 1536 (1974); *Williamson v Lee Optical of Oklahoma*, 348 US 483; 75 S Ct 461; 99 L Ed 563 (1955); *Penn Central Transp Co v City of New York*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978); *Schad v Borough of Mount Ephraim*, 452 US 61; 101 S Ct 2176; 68 L Ed 2d 671 (1981); *Reno*, 507 US 292.

BCO § 18-59 was enacted pursuant to the City's police powers, and its purpose is to abate a public nuisance by requiring repairs or demolition of unsafe structures. It is firmly established that nuisance abatement, as a means to promoting public health, safety, and welfare, is a legitimate exercise of police power[48] and that demolition is a permissible method of achieving that end.[49] Certainly, then, there can be no dispute that the public interest that BCO § 18-59 is intended to serve—protecting the health and welfare of the citizens of Brighton by eliminating the hazards posed by dangerous and unsafe structures—is a legitimate one. What is in dispute, however, is whether the unreasonable-to-repair presumption bears a reasonable relationship to that interest.

The Court of Appeals found it did not. In the Court of Appeals' view, to refuse a willing and able property owner the option to repair property that has been deemed unsafe because of the City's view of the unreasonableness of the cost does no more to advance this permissible legislative objective than does allowing corrective repairs to be made in the first instance. In our view, however, if permitting demolition of unsafe structures (notwithstanding the willingness and financial ability of property owners to undertake corrective repairs) is not unconstitutional in itself, it does not become so simply because it is shown to be less desirable than some other action. While affording a property owner the opportunity to perform corrective

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[48] *Austin v Tennessee*, 179 US 343, 349; 21 S Ct 132; 45 L Ed 224 (1900).

[49] See MCL 125.486.

repairs is one method by which the dangers posed by an unsafe structure may be remedied, it is by no means the only method—much less the only *constitutional* method—of doing so. As long as certain minimum standards have been met, and the ordinance does not encroach upon a property owner's fundamental rights, the decision to exceed those standards by providing a property owner with an automatic right of repair, as some municipalities have chosen to do, is a policy judgment, not a constitutional mandate.[50]

Indeed, to satisfy substantive due process, the infringement of an interest that is less than fundamental, such as the right asserted here, requires no more than a reasonable relationship between the governmental purpose and the means chosen to advance that purpose. This standard allows a municipal body sufficient latitude to decide, as the City has, that certain considerations favor using one means, i.e., demolition, rather than another, i.e., repairing. Enacting an ordinance that presumes repairs will be unreasonable to undertake if the cost of those repairs exceeds 100 percent of the property's value before it became unsafe protects children and others from the risk of increased injury, reduces the opportunity for

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[50] That the City's legitimate interest in protecting its citizens from unsafe and dangerous structures might be equally advanced by demolition and by repairing the property at issue does not sever the reasonableness between BCO § 18-59 and the City's permissible legislative objective. To affirm the lower courts' conclusion to the contrary would appear to subject the City's demolition process to heightened scrutiny by requiring that BCO § 18-59 be narrowly tailored to minimize the denial of a repair option. Of course, narrow tailoring is not required here because fundamental rights are not involved.

crime, and aids in the maintenance of property values and marketability of lands. Any one of these purposes is reasonably related to the City's interest in promoting the health, safety, and welfare of its citizens and it is presumed that the City acted for such reasons, or for any other valid reason, in enacting BCO § 18-59.

Without question, property owners have a constitutional right of property use, but this does not translate into an absolute constitutional right to repair unsafe structures. Moreover, even assuming that plaintiffs had a protected interest in repairing the unsafe structures at issue here before that property could be subject to demolition,[51] BCO § 18-59 is reasonably related to several governmental interests, and thus did not facially violate substantive due process. Accordingly, plaintiffs' asserted private right of repair must yield to the City's higher governmental interest in protecting the health, safety, and welfare of its citizens, and the Court of Appeals erred in concluding otherwise.[52]

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[51] For a property interest to be protected pursuant to the Due Process Clause, a claimant must have "a legitimate claim of entitlement" to the property interest, not simply "a unilateral expectation of it." *Williams v Hofley Mfg Co*, 430 Mich 603, 610; 424 NW2d 278 (1988), quoting *Roth*, 408 US at 577.

[52] The Court of Appeals' reliance on several nonbinding decisions from other jurisdictions for their "general due process analys[e]s," *Bonner*, 298 Mich App at 727, provides nominal, if any, support for its holding that BCO § 18-59, on its face, violates due process. Indeed, both *Horton v Gulledge*, 277 NC 353, 360; 177 SE2d 885 (1970), overruled in part on other grounds by *State v Jones*, 305 NC 520; 290 SE2d 675 (1982), and *Johnson v City of Paducah*, 512 SW2d 514, 516 (Ky, 1974), involve as-applied challenges, not facial

Nor have plaintiffs shown that BCO § 18-59 violates their substantive due process rights as an arbitrary and unreasonable restriction on plaintiffs' constitutionally recognized property interests. Under this standard, a presumption still prevails in favor of the reasonableness and validity in all particulars of a municipal ordinance, unless plaintiffs can show that the unreasonable-to-repair-presumption constitutes " 'an arbitrary fiat, a whimsical ipse dixit,' " leaving

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challenges. Nor do the cases relied on by the Court of Appeals assist us in resolving the specific inquiry whether BCO § 18-59 is facially violative of substantive due process, since *Horton*, 277 NC 353, *Horne v City of Cordele*, 140 Ga App 127; 230 SE2d 333 (1976), *Herrit v Code Mgmt Appeal Bd of City of Butler*, 704 A2d 186 (1997), and *Washington v City of Winchester*, 861 SW2d 125 (Ky App, 1993), do not specifically consider a local demolition ordinance in the context of substantive due process.

Furthermore, *Horton*, *Herrit*, and *Horne* all involve takings claims, and, unlike the rebuttable unreasonable-to-repair presumption in BCO § 18-59, the ordinances at issue in both *Horton* and *Johnson* were held unconstitutional on the basis that they *required* demolition if the cost to repair an unsafe structure exceeded a certain no-repair cost threshold. In contrast, nothing in BCO § 18-59 expressly provides that the unreasonable-to-repair presumption is irrebuttable. Indeed, had the legislative body intended to make demolition the unavoidable result upon incidence of the unreasonable-to-repair presumption, it certainly could have drafted BCO § 18-59 to make that result explicit. However, under the plain language of the ordinance, demolition is permissive. Consequently, to read BCO § 18-59 as creating an irrebuttable presumption would impermissibly render a portion of the ordinance surplusage in violation of the rules of statutory construction. See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 714; 664 NW2d 193 (2003).

" 'no room for a legitimate difference of opinion concerning its reasonableness.' "[53]

Plaintiffs argue, and the Court of Appeals agreed, that the unreasonable-to-repair presumption in BCO § 18-59 can only be overcome upon a showing of economic reasonableness, i.e., that repair costs would not exceed "100 percent of the true cash value of the structure as reflected on the city assessment tax rolls prior to the building becoming an unsafe structure." There is, however, no textual support for this interpretation because BCO § 18-59 does not specify the manner in which the unreasonable-to-repair presumption may be overcome. A showing of reasonableness could therefore be established by presenting a viable repair plan; evidence from the challenger's own experts that, contrary to the City's estimates, the repair costs would not exceed 100 percent of the property value; or evidence that the structure subject to demolition has some sort of cultural, historical, familial, or artistic value. Because reasonableness can be established in economic or noneconomic terms, plaintiffs have failed to show, and the Court of Appeals erred by concluding, that BCO § 18-59 is arbitrary and unreasonable because "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."[54]

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[53] *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957).

[54] *Bonner*, 298 Mich App at 714.

Again, even assuming that there is a protected property interest in repairing an unsafe structure, plaintiffs have failed to demonstrate that BCO § 18-59 arbitrarily or unreasonably infringes that right by denying a property owner an option to repair as a matter of right. The unreasonable-to-repair presumption in BCO § 18-59 is not arbitrary because it does not represent a total prohibition on a property owner's opportunity to repair an unsafe structure, and the ordinance applies uniformly to all structures that have repair costs in excess of 100 percent of the structure's value before it became unsafe, except those structures that BCO § 18-59 expressly exempts.[55] Nor is the ordinance unreasonable merely because there exists an arguably preferred method of addressing the legislative objective sought to be attained, or because the prohibited land use is just as reasonable as the one permitted or required under the ordinance. Certainly, a variety of permissible land uses may be excluded or restricted by local ordinance provided the ordinance is reasonable, and we do not concern ourselves with the wisdom or desirability of such legislation. Furthermore, even if the relationship between BCO § 18-59 and the City's interest in promoting the public health, safety, and welfare is debatable, we need more than a mere difference of opinion to establish a substantive due process violation, and plaintiffs have failed to make such a showing. Accordingly, the presumption of constitutionality favors the ordinance's validity, and we

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[55] These include a structure that became unsafe as a result of an event beyond the owner's control, including, but not limited to, fire, windstorm, tornado, flood, or other act of God.

may not second-guess the City's policy judgment in enacting it.

We find nothing arbitrary or unreasonable about the City's interest in demolishing unsafe structures and believe the means selected—the unreasonable-to-repair presumption in BCO § 18-59—bears a reasonable relationship to the objective sought to be attained. Because plaintiffs have failed to satisfy the burden necessary to invalidate BCO § 18-59 on substantive due process grounds, it must be sustained.

C. PROCEDURAL DUE PROCESS

1. LEGAL FRAMEWORK

We turn now from the claim that the City may not, by virtue of BCO § 18-59, deprive plaintiffs of their asserted property interest without first affording them the opportunity to repair a structure deemed unsafe by the City, to plaintiffs' procedural due process claim that the City may not order demolition on the basis of the procedures BCO § 18-59 provides. Well established is the assurance that deprivation of a significant property interest cannot occur except by due process of law.[56] While the meaning of the Due Process Clause and the extent to which due process must be afforded has been the subject of many disputes, there can be no question that, at a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be

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[56] See *Cleveland Bd of Ed v Loudermill*, 470 US 532, 538; 105 S Ct 1487; 84 L Ed 2d 494 (1985).

heard.[57] To comport with these procedural safeguards, the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[58] As recognized by the U.S. Supreme Court,

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[59]

2. APPLICATION

To determine whether BCO § 18-59 provides property owners the process to which they are constitutionally entitled, we first review in some detail the procedures the City has employed through this ordinance. The City's demolition process ordinarily begins with an inspection of a particular structure followed by a determination by the city manager, or

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[57] *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950).

[58] *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965).

[59] *Mathews*, 424 US at 334-335. See also *Goldberg v Kelly*, 397 US 254, 263-271; 90 S Ct 1011; 25 L Ed 2d 287 (1970).

some other agent designated by the City, that the structure is unsafe pursuant to any one or more of the ten factors delineated in BCO § 18-46 and is, therefore, subject to demolition. This determination triggers BCO § 18-59, which requires that the city manager, or the city manager's designee, determine the cost to repair the structure and compare that cost to the structure's true cash value as reflected in assessment tax rolls before the structure became unsafe. If the cost to repair exceeds the structure's true cash value, then the structure is presumed to be a public nuisance subject to demolition. If not, the structure remains in its unsafe condition but may not, at this point, be subject to demolition. In either case, the city manager must then serve the structure's owner with written notice pursuant to BCO § 18-52.[60] If the city manager has

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[60] BCO § 18-52(c) prescribes the specific notice contents and provides in its entirety:

> The notice shall:
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> (1) Be in writing;
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> (2) Include a description of the real estate sufficient for identification;
>
> (3) Specify the repairs and improvements required to be made to render the structure safe or if the city manager, or his designee, has determined that the structure cannot be made safe, indicate that the structure is to be demolished;
>
> (4) Specify a reasonable time within which the repairs and improvements must be made or the structure must be demolished;
>
> (5) Include an explanation of the right to appeal the decision to the city council within ten calendar days of

determined that the structure at issue can be made safe, the notice must identify the required repairs and improvements with which the property owner must comply within a reasonable time or face demolition. However, if, as in this case, the city manager determines that the structure cannot be made safe, the notice must indicate that demolition will ensue. Moreover, following either determination, the notice must inform the property owner of the right to appeal the city manager's determination to the city council pursuant to BCO § 18-61. Within ten calendar days of receipt of this notice, the property owner must notify the City of his or her intent to accept or reject the terms of the notice.

If the owner rejects the terms of the notice and submits a written appeal that "state[s] the basis for the appeal," "[t]he owner or his agent shall have an opportunity to be heard by the city council at a regularly scheduled council meeting."[61] The city council then has the discretion to "affirm, modify, or reverse all or part of the determination of the city manager, or his designee."[62] If the owner receives an adverse final decision from the city council, the owner "may appeal th[at] decision to the county circuit court by filing a

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receipt of the notice in accordance with section 18-61;

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

[61] BCO § 18-61.

[62] *Id*.

complaint within 20 calendar days from the date of the decision."[63]

Because this is a facial constitutional challenge, plaintiffs do not argue that the City failed to properly execute or enforce this procedural system.[64] Instead, plaintiffs contend that the City's procedural system results in an unconstitutional deprivation of a property interest absent due process of law because it fails to give the owner of an unsafe structure the procedural protection of a repair option before that property may be demolished. Because this argument is simply the substantive due process argument recast in procedural due process terms, the argument meets with the same fate.

Nevertheless, the Court of Appeals determined that although BCO § 18-61 comports with procedural due process to the extent that it provides notice, a hearing, and a decision by an impartial decision-maker, "the [C]ity should have also provided for a reasonable opportunity to repair the unsafe structure" in order for the ordinance to pass constitutional scrutiny.[65] We disagree. At least as it pertains to this facial challenge, due process was satisfied by giving plaintiffs the right

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[63] BCO § 18-63.

[64] In any event, however, there is no question that the building official made a determination that the structures at issue were unsafe and that it was unreasonable to repair them, that he served plaintiffs with written notice of these determinations, and that the notice included the requisite contents.

[65] *Bonner*, 298 Mich App at 716.

to an appeal before the city council and the opportunity to appeal that decision to the circuit court.

The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it."[66] All that is necessary, then, is that the procedures at issue be tailored to "the capacities and circumstances of those who are to be heard"[67] to ensure that they are given a meaningful opportunity to present their case, which must generally occur before they are permanently deprived of the significant interest at stake.[68] Here, there is no dispute that if the city manager orders a structure to be demolished under BCO § 18-59, aggrieved parties, such as plaintiffs, have the right to appeal that determination to the city council under BCO § 18-61. Although BCO § 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 percent of the structure's true cash value as reflected in the assessment tax rolls before the structure became unsafe, this presumption is rebuttable. To rebut this presumption and avoid demolition, the aggrieved party need only show that the repair is reasonable, a showing that may be achieved by economic or noneconomic means. It is then within the city council's discretion to "affirm, modify, or reverse all or part of the determination of the city

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[66] *Joint Anti-Fascist Refugee Comm v McGrath*, 341 US 123, 171-172; 71 S Ct 624; 95 L Ed 817 (1951) (Frankfurter, J., concurring).

[67] *Goldberg v Kelly*, 397 US at 268-269.

[68] See *Loudermill*, 470 US at 542.

manager, or his designee."[69] When the city council decides, as it did here, to affirm the determination of the building official based on the evidence before it, that adverse ruling does not render an aggrieved party's opportunity to be heard any less meaningful. To the contrary, it shows that the procedures in place are sufficient to provide property owners with notice and a meaningful opportunity to be heard.

Furthermore, vital to the assessment of what process is due in this case is the tenet that substantial weight must be given to the procedures provided for by those individuals holding legislative office—including members of a city council with whom the electorate has entrusted the duty of protecting the health and safety of all citizens—for "[i]t is too well settled to require citation that a statute must be treated with the deference due to a deliberate action of a coordinate branch of our State government. . . ."[70] This is especially so where, as here, in addition to providing the aggrieved party with an effective process for asserting his or her claim before any demolition, the

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[69] BCO § 18-61. As previously noted, if the city manager determines that a structure is "unsafe" and that the costs to repair that structure would exceed 100 percent of the structure's pre-deteriorated true cash value, it will be presumed under BCO § 18-59 that such repairs are *unreasonable*. The appeal to the city council afforded by BCO § 18-61 is thus the property owner's opportunity to rebut the unreasonable-to-repair presumption by showing that repairs are *reasonable*. Clearly, then, the same reasonableness standard necessary to rebut the unreasonable-to-repair presumption applicable to BCO § 18-59 also applies to an appeal before the city council pursuant to BCO § 18-61.

[70] *Dearborn Twp v Dail*, 334 Mich at 680.

prescribed procedures also ensure the right to a hearing, as well as to subsequent judicial review, before the denial of the aggrieved party's claim becomes final.[71] For these reasons, we conclude that plaintiffs have failed to demonstrate a facial procedural due process violation where they received all the process to which they were constitutionally entitled. Accordingly, the Court of Appeals reversibly erred by holding to the contrary. We therefore conclude that affording a property owner an option to repair as a matter of right is not required before the demolition of an unsafe structure and, furthermore, existing procedures in BCO § 18-59 comport entirely with due process.

IV. CONCLUSION

The Court of Appeals erroneously determined that BCO § 18-59 is facially violative of due process. BCO § 18-59 does not, on its face, deprive plaintiffs of substantive due process when the ordinance's unreasonable-to-repair presumption is reasonably related to the City's interest in protecting the health, safety, and general welfare of its citizens from unsafe

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[71] To this end, plaintiffs further contend that the appellate process was constitutionally deficient because plaintiffs did not receive a decision from an impartial decision-maker given that, according to plaintiffs, the city council is part of the same group that enacted the ordinance in the first place. We reject this argument for the simple reason that it overlooks the fact that a city council is authorized to exercise legislative and administrative functions and that the administrative function may include quasi-judicial powers. See, e.g., *Babcock v Grand Rapids*, 308 Mich 412, 413; 14 NW2d 48 (1944); *Prawdzik v Grand Rapids*, 313 Mich 376, 390-391; 21 NW2d 168 (1946); and *In re Payne*, 444 Mich 679, 708, 720; 514 NW2d 121 (1994). Plaintiffs' bare assertion that the city council is somehow not impartial is therefore untenable.

or dangerous structures. Furthermore, the presumption set forth in BCO § 18-59 is neither arbitrary nor unreasonable because there are circumstances under which the presumption could be overcome and repairs permitted.

Nor does § 18-59, on its face, deprive plaintiffs of procedural due process. BCO § 18-61 affords an aggrieved party notice and a meaningful opportunity to present evidence to rebut the unreasonable-to-repair presumption in BCO § 18-59 before an impartial decision-maker, and plaintiffs have not satisfied their burden of showing that they are constitutionally entitled to further processes in order to satisfy due process requirements. We therefore reverse the decision of the Court of Appeals and remand this case to the Livingston Circuit Court for further proceedings consistent with this opinion.

Mary Beth Kelly
Robert P. Young, Jr.
Michael F. Cavanagh
Stephen J. Markman
Brian K. Zahra
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David F. Viviano

APPENDIX B

FOR PUBLICATION

STATE OF MICHIGAN
COURT OF APPEALS

No. 302677
Livingston Circuit Court
LC No. 09-024680-CZ

[Filed December 4, 2012, 9:10 a.m.]

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

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

MARKEY, P.J.

Defendant-counterplaintiff, city of Brighton (the city), appeals by leave granted the trial court's order granting partial summary disposition in favor of plaintiffs. The trial court determined that § 18-59 of

the Brighton Code of Ordinances (BCO) violates substantive due process when it permits the city to have an unsafe structure demolished as a public nuisance, without providing the owner the option to repair it, if the structure is deemed unreasonable to repair, which is presumed when repair costs would exceed 100 percent of the structure's true cash value as reflected in the assessment tax rolls before the structure became unsafe. 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 the repairs unreasonable on the basis of expenses that 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 would burden the city to a lesser extent than demolition, the city's ordinance violates procedural due process. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs own two residential properties located in downtown Brighton. There is a house on one parcel of property and a house with a garage or barn on the other. According to the city, the three structures have been unoccupied and largely ignored and unmaintained for over 30 years, representing the most egregious instances of residential blight in Brighton. The city's building and code enforcement official (hereafter "building official") informed plaintiffs in a letter that the structures on the two properties constituted unsafe structures under the BCO[1] and public nuisances under Michigan common law. The building official cited a litany of alleged defects and code violations in regard to the condition of the structures. Plaintiffs were further informed that it had been determined that it was unreasonable to repair the structures as defined in BCO § 18-59, which 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

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[1] BCO § 18-46 defines an "unsafe structure," setting forth a number of qualifying criteria. BCO § 18-47 makes it "unlawful for an owner or agent to maintain or occupy an unsafe structure." BCO § 18-48 requires those responsible for a structure to "take all necessary precautions to prevent any nuisance or other condition detrimental to public health, safety, or general welfare from arising thereon."

> 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.

Plaintiffs were ordered to demolish the structures with no option to repair within 60 days.

Plaintiffs appealed the determination to the city council pursuant to 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.

In preparation for the appeal, plaintiffs retained a structural engineer and various contractors to determine the repairs necessary to bring each structure into compliance with the applicable building codes. Plaintiffs subsequently filed affidavits signed by their retained engineer and contractors that addressed the condition of the structures relative to their professional field and provided cost estimates with respect to the proposed repairs. These individuals prepared drawings and repair plans and asserted that the structures were safe, structurally sound, and readily repairable. At a hearing before the city council, plaintiffs agreed to

provide the building official with an expert's report and to allow city personnel access to the structures for purposes of exterior and interior inspections. The city council tabled the appeal pending the inspections. Subsequently, plaintiffs authorized their contractors to commence some repairs, and applications for building permits were submitted to the city. In a letter to plaintiffs, the building official denied the building-permit applications and accused plaintiffs of refusing to allow inspections of the structures and of failing to provide their expert's report, contrary to plaintiffs' agreement at the city council hearing. The building official also noted that the city had the right to inspect property before granting permits. Because they were denied building permits, plaintiffs did not complete any repairs.[2] Plaintiffs' alleged lack of cooperation and failure to abide by their agreements resulted in the building official obtaining administrative search warrants for the properties. The search warrants authorized a search, inspection, and examination of the interior and exterior of each structure to determine whether they were in compliance with applicable laws, codes, and ordinances. After inspecting the structures pursuant to the administrative search warrants, the city's inspectors and experts identified extensive defects and code violations, requiring numerous repairs and the replacement of certain structural features. When litigation commenced, the city filed affidavits by these individuals. In communications to plaintiffs and the city council, the building official reiterated his position that the structures were unsafe, BCO § 18-46,

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[2] A stop-work order was posted as to any repairs that may have been contemplated or initiated.

that it would be unreasonable to repair them, BCO § 18-59, and that therefore, demolition was required.

The pending appeal to the city council was resumed, and hearings were conducted in which the council received the reports of inspectors, contractors, engineers, and other experts, along with written repair estimates, PowerPoint presentations, testimony, and oral arguments. The building official and his experts opined that the total cost to bring the structures up to code was approximately $158,000. The city determined the cash value of the structures at approximately $85,000. One of plaintiffs' experts opined that it would cost less than $40,000 per house to make the necessary repairs and bring the structures up to code.

In Resolution 09-16, Decision on Appeal, the city council adopted the findings set forth in the building official's inspection reports, accepted his repair estimates and agreed with the oral testimony and PowerPoint presentations the building official introduced. The city council determined that plaintiffs' reports and cost estimates lacked credibility and that the structures had lost their status as nonconforming, single-family residential uses. The council concluded that the structures constituted "unsafe structures" under BCO § 18-46, that plaintiffs were in violation of BCO § 18-47 by owning and maintaining unsafe structures, and that the structures were unreasonable to repair and must be demolished under BCO § 18-59. The city council ordered plaintiffs to demolish the structures within 60 days.

Plaintiffs did not take any steps toward demolishing the structures within the 60-day period. Shortly before the 60-day period was set to expire, plaintiffs filed the

instant action against the city, alleging, in a first amended complaint, 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.[3] Plaintiffs' constitutional challenges were predicated on the United States Constitution, 42 USC 1983, and the Michigan Constitution. After the complaint was filed, the city's building official, under the authority of BCO § 18-58, issued plaintiffs an order to show cause to appear before the city council where they would have the opportunity to present testimony and evidence as to why the structures should not be demolished. The order to show cause set forth an exhaustive list of defects and problems associated with the structures that rendered them "unsafe." The city council conducted a show-cause hearing in which plaintiffs participated. The council rejected plaintiffs' position against demolition.[4] Again, the show-cause

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[3] Before the complaint in the case at bar was filed, plaintiffs had commenced a mandamus action against the city, which the trial court dismissed.

[4] In Resolution 09-26, the city council found that "the testimony and evidence presented [was] insufficient to show cause why the structure[s] should not be demolished for the reasons that that testimony and evidence was irrelevant and/or not credible, and that [plaintiffs] have, accordingly, not fulfilled their burden of proof." Resolution 09-26, in its written form, further indicated that plaintiffs were to be given approximately six months to "take any and all actions necessary to bring the [s]tructures into compliance with the 2006 Michigan Building Code." We note, however, that a transcript of the hearing in which the resolution was announced, recited, voted upon, and approved fails to include this provision.

proceedings occurred after the lawsuit was commenced.

The city subsequently filed its own complaint in a separate action, requesting injunctive relief in the form of an order enforcing BCO § 18-59 and requiring demolition of the structures. The trial court consolidated the cases. Plaintiffs filed a motion for partial summary disposition with respect to their complaint, arguing that BCO § 18-59 was unconstitutional. The trial court denied the motion on procedural grounds, concluding that plaintiffs were required, but failed to submit, documentary evidence.[5] The trial court also denied the city's request for a preliminary injunction to demolish the structures, which the court found to be an improper request given the entirety of the proceedings pending before the

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Resolution 09-26, in its written form, additionally authorized the city attorney to institute appropriate legal proceedings to seek demolition of the structures if the work was not completed in timely fashion. The transcript of the hearing, however, reflects that the council authorized the city attorney to immediately pursue legal proceedings seeking demolition. The transcript also indicates that two resolutions were prepared before the hearing: one that authorized litigation and one that authorized an "extension for repair." Given the surrounding circumstances and the events that transpired, it is clear that the city council did not allow plaintiffs an opportunity to make repairs. Evidently, after the hearing, the council mistakenly executed the wrong resolution.

[5] We note that the trial court granted partial summary disposition to the city on its motion relative to plaintiffs' claims for money damages based on a violation of the Michigan Constitution and in regard to the contempt of court and slander of title. Additionally, plaintiffs agreed to the dismissal of their claim under MCL 125.540 (enforcement agency's notice requirements for dangerous conditions).

court. Throughout the litigation, plaintiffs filed numerous motions seeking court authorization to make various repairs and to abate the alleged public nuisances. The motions were denied, although the court did permit plaintiffs to place a tarp on a roof and to close open and obvious access points. Eventually, plaintiffs renewed their motion for partial summary disposition, again arguing that BCO § 18-59 was unconstitutional on a variety of grounds, including a claim that the ordinance violated substantive due process. The trial court rejected plaintiffs' argument that BCO § 18-59 was unconstitutional because it constituted an improper delegation of legislative authority, and the court found that issues of fact existed on the constitutional argument that application of BCO § 18-59 resulted in a taking without just compensation. The trial court also ruled, however, that BCO § 18-59, on its face, violated substantive due process.[6]

The trial court determined that BCO § 18-59 violated substantive due process because it precluded property owners from having the opportunity to repair their property, which served no rational interest or purpose, was entirely arbitrary, and shocked the conscience. The trial court agreed with the city that the demolition of unsafe structures promoted the legitimate interest of public health and safety; however, that interest, the court stated, was not advanced by denying a property owner the chance to

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[6] Plaintiffs presented, and the trial court ruled upon, myriad arguments on several subjects in the motion for partial summary disposition; however, we shall not address them as only the constitutionality of BCO § 18-59 is at issue on appeal.

repair an unsafe structure. The court observed that if the owner repaired a structure and brought it up to code, the health and safety of the public would be advanced. The trial court reasoned that the interest in the public's health and safety is equally advanced by demolition and by owner repairs that satisfy city standards. The court determined that giving a landowner an opportunity to repair his or her property would not inhibit a municipality's ability to protect the public health and safety. The trial court also indicated that Michigan law required giving a property owner a chance to repair prior to a demolition conducted for safety reasons. The court noted that there was an abundance of persuasive authority from other jurisdictions that found similar ordinances withholding the option to repair advanced no rational purpose and were arbitrary. The trial court concluded that the city "must cure this defect in the ordinance and must reissue a new demolition order under the revised ordinance before proceeding with any demolition of the properties." The court denied the city's motion for reconsideration. This Court granted the city's application for leave to appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

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

When reviewing an ordinance, we apply the same rules applicable to the construction of statutes. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396, 407; 761 NW2d 371 (2008). "The goal of statutory construction, and thus of construction and interpretation of an ordinance, is to discern and give effect to the intent of the legislative body." *Id*. at 407-408. The words used by the legislative body provide the most reliable evidence of its intent. *Shinholster v Annapolis Hosp*, 471 Mich 540, 549; 685 NW2d 275 (2004). Unless otherwise defined, we assign the words in a municipal ordinance their plain and ordinary meanings, *Great Lakes Society*, 281 Mich App at 408, avoiding an interpretation that would render any part of an ordinance surplusage or nugatory, *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009). Also, unless a different intent is manifest, the language used by the legislative body must be understood and read in its grammatical context. *Shinholster*, 471 Mich at 549. The legislative body is deemed to have intended the meaning clearly expressed in an ordinance's unambiguous language, which must be enforced as written. *Id*. "'A necessary corollary of these principles is that a court may read nothing into an unambiguous [ordinance] that is not within the manifest intent of the [legislative body] as derived from the words of the [ordinance] itself.'" *Zwiers*, 286 Mich App at 44 (citation omitted).

B. CONSTITUTIONAL DUE PROCESS PRINCIPLES

The state and federal 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; *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Id*. And, although the text of the Due Process Clauses provides only procedural protections, due process also has a substantive component that protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 370; 803 NW2d 698 (2010); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public.[7] *Lingle v Chevron USA, Inc*, 544 US 528, 541; 125 S Ct 2074; 161 L Ed 2d 876 (2005). 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; see also *In re Beck*, 287 Mich App 400, 402; 788 NW2d 697 (2010), aff'd 488 Mich 6 (2010).

In *Kropf v Sterling Hts*, 391 Mich 139, 157; 215 NW2d 179 (1974), our Supreme Court discussed a

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[7] We note that this case presents a facial challenge to the ordinance. See *Hendee v Putnam Twp*, 486 Mich 556, 568 n 17; 786 NW2d 521 (2010) (distinguishing between facial and as-applied challenges and noting that a facial challenge attacks the very existence of an ordinance as infringing upon property rights).

substantive due process claim in the context of a zoning ordinance, stating:

> A plaintiff-citizen may be denied substantive due process by the city or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence. The power of the city to enact ordinances is not absolute. It has been given power by the State of Michigan to zone and regulate land use within its boundaries so that the inherent police powers of the state may be more effectively implemented on the local level. But the state cannot confer upon the local unit of government that which it does not have. For the state itself to legislate in a manner that affects the individual right of its citizens, the state must show that it has a sufficient interest in protecting or implementing the common good, via its police powers, that such private interests must give way to this higher interest.

A citizen is entitled to due process of law when a municipality, exercising its police power, enacts an ordinance that affects the citizen's constitutional rights. *Kyser*, 486 Mich at 521. In determining whether an ordinance enacted by a municipality comports with due process, the test employed is whether the ordinance bears a reasonable relationship to a permissible legislative objective. *Id*. When a municipal ordinance restricts the use of property, the issue is whether the exercise of authority entails an undue invasion of private constitutional rights without a reasonable justification in connection with the public

welfare. *Id*. We begin with the presumption that an ordinance is reasonable and thus constitutionally compliant. *Id*. "[T]he burden is upon the person challenging . . . an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance." *Id*. The property owner must demonstrate that the challenged ordinance arbitrarily and unreasonably affects the owner's use of his or her property. *Id*. An ordinance does not offend the Due Process Clause when it satisfies the reasonableness test; the ordinance must be reasonable or reasonably necessary for purposes of preserving the public health, morals, or safety.[8] *Id*. at 523, 529. An ordinance will be declared unconstitutional only if it constitutes an arbitrary fiat or a whimsical ipse dixit, leaving no legitimate dispute regarding its unreasonableness. *Id*. at 521-522.

Although the trial court's ruling and the arguments of the parties are framed in the context of substantive due process, we find that the nature of the issues presented in this case also implicate procedural due process. The principle espoused by plaintiffs is that a property owner has the right, or must have the option or opportunity, to make repairs to a structure deemed unsafe by a municipality before the structure can be demolished or razed. Plaintiffs do not contend that the

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[8] The *Kyser* Court explained that while the standard of review for zoning regulations is characterized as a "reasonableness" test, it is analogous to the "rational basis" test for testing the constitutionality of legislation not involving suspect classifications or fundamental rights to which courts apply heightened or strict scrutiny. *Kyser*, 486 Mich at 522 n 2.

city lacks the general authority to demolish unsafe or dangerous structures; they instead argue that a property owner must be afforded the opportunity to repair an unsafe structure before the city orders it demolished. Plaintiffs' argument contains elements of procedural due process requiring notice, hearing, and a ruling by an impartial decision-maker, before the government infringes constitutionally protected property interests.

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v Burch*, 494 US 113, 125; 110 S Ct 975; 108 L Ed 2d 100 (1990). "'Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.'" *Id*. at 125-126 (citation omitted). Procedural due process differs from substantive due process in that "procedural due process principles protect persons from deficient procedures that lead to the deprivation of cognizable [property] interests." *Bartell v Lohiser*, 215 F3d 550, 557 (CA 6, 2000). A procedural due process violation occurs when the government unlawfully interferes with a protected property or liberty interest without providing adequate procedural safeguards. *Schiller v Strangis*, 540 F Supp 605, 613 (D Mass, 1982). To establish a violation of procedural due process, one must show that the action concerned a recognizable property or liberty interest, that there was a deprivation of that interest absent due process of law, and that the deprivation took place under the color of state law. *Id*. "A 'substantive due

process' claim is, fundamentally, not a claim of procedural deficiency, but, rather, a claim that the state's conduct is inherently impermissible." *Id*. at 614.[9]

In *D&M Fin Corp v City of Long Beach*, 136 Cal App 4th 165, 174; 38 Cal Rptr 3d 562 (2006), the California Court of Appeal stated that "[w]hen a city threatens to demolish structures, due process requires that the city provide the property owner and other interested parties with notice, with the opportunity to be heard, and with the opportunity to correct or repair the defect before demolition." And, in *Hawthorne S & L Ass'n v City of Signal Hill*, 19 Cal App 4th 148, 159; 23 Cal Rptr 2d 272 (1993), quoting *Miles v Dist of Columbia*, 166 US App DC 235, 239; 510 F2d 188, 192 (1975), the court opined:

> "A municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health. However, that municipality must, before destroying a building, give the owner sufficient notice, a hearing and ample opportunity to demolish the building himself or to do what suffices to make it safe or healthy; such a procedure is the essence of the governmental responsibility to accord due process of law."

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[9] In contrast to procedural due process, substantive due process protects individual liberty and property interests from arbitrary government actions regardless how fairly implemented. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998); *Mettler Walloon*, 281 Mich App at 197.

Plaintiffs' position in this case that the ordinance denies them the right or an opportunity to repair prior to demolition can be equated to an argument that the ordinance lacks a necessary procedural safeguard or that it is procedurally deficient or inadequate. Plaintiffs do not contend that demolition of an unsafe structure is unlawful even when an option to repair is extended to the property owner by the municipality. Rather, plaintiffs' position is that a deprivation of a property interest by way of demolition is unjustified *if* an opportunity to correct any structural defects is not made available. Plaintiffs do not take the stance that demolition of unsafe structures is inherently impermissible. To some extent, the mere manner in which the issue is framed bears on whether plaintiffs' claim is one of substantive or procedural due process. Plaintiffs certainly contend that the demolition of unsafe structures "without a sound repair option" is inherently impermissible. As the court in *Schiller*, 540 F Supp at 614, noted, "[T]he line dividing 'procedural due process' from 'substantive due process' is not always bright, [and] it may be difficult in some cases to determine which is the proper characterization of the plaintiff's claim." Ultimately, we conclude 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.

C. DISCUSSION

We first carefully examine the language of BCO § 18-59 to determine and define its scope, its requirements, and its proper implementation. Again,

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

> Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair.[10]

Accordingly, there must be an initial determination that a structure is indeed unsafe, and the definition of an "unsafe structure" is found in BCO § 18-46. The city's building official determined that the structures were unsafe under BCO § 18-46, and plaintiffs do not debate that conclusion for purposes of this appeal. Next, there must be a determination, which the

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[10] Under BCO § 18-52(a) and (b), the city must issue and serve a notice on an owner of a structure, or the owner's agent, that reflects a determination that the owner's structure is unsafe. BCO § 18-52(c)(3) provides that the notice must "[s]pecify the repairs and improvements required to be made to render the structure safe *or if the city manager, or his designee, has determined the structure cannot be made safe, indicate that the structure is to be demolished*[.]" (Emphasis added.) In situations in which the city allows an opportunity to repair an unsafe structure, the notice must "[s]pecify a reasonable time within which the repairs and improvements must be made or the structure must be demolished." BCO § 18-52(c)(4).

building official in this case made as to all buildings, that the repair costs would exceed the true cash value of a structure as reflected in past assessment tax rolls when the structure was not characterized as unsafe. 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. Therefore, the ordinance does not definitively establish the unreasonableness of repairs, the existence of a public nuisance, and the authority to order demolition without option to abate the nuisance and repair the structure. Rather, the ordinance merely gives rise to these presumptions.[11]

"Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. 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). For purposes of our analysis, we shall assume that the "presumed" language in BCO § 18-59 does not create a conclusive, mandatory, absolute, or irrebuttable presumption, which would only strengthen our conclusion that the ordinance violates due process. Under BCO § 18-59, a property owner may, regardless of the fact that repair costs would exceed a structure's true cash value, avail

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[11] Considering that the issue on appeal concerns repair rights, our focus is more on the presumption that repairs are unreasonable, and therefore not permitted, than on the presumption that the unrepaired structure is a public nuisance.

himself or herself of an opportunity to overcome or rebut the presumption by showing that making repairs would nonetheless be reasonable under the circumstances. In turn, accomplishing the repairs would abate any unsafe conditions negating the presumption of public nuisance, thereby precluding a demolition order. Conceivably, a property owner could attempt to rebut the presumptions of BCO § 18-59 by pleading the owner's case directly to the city manager or his designee, here the building official, but an attempt to show the reasonableness of repairs could presumably also be pursued in an appeal to the city council under BCO § 18-61. The city council contemplated, but ultimately rejected, a resolution which would have allowed plaintiffs six months to make the repairs necessary to avoid a demolition order.

Even though BCO § 18-59 can be interpreted to allow a property owner the opportunity to overcome or rebut the presumptions of that section, creating the possibility that an owner of a structure determined to be unsafe will be accorded an option to repair, such a construction of BCO § 18-59 still requires an owner to establish the reasonableness of making repairs. Stated otherwise, in order to overcome the presumption that allows the city to order demolition absent an option to repair, the property owner must show that making repairs is reasonable. We find this aspect of the ordinance to be constitutionally problematic and in violation of due process. The appeal section, BCO § 18-61, does not provide its own or a different standard; therefore, the city council in addressing an appeal would be constrained to also apply the reasonableness standard that governs BCO § 18-59. Such a standard prevents a property owner who has the desire and

ability to make the necessary repairs in a timely fashion to render a structure safe, even when the cost of repairs exceeds the city-determined true cash value of the structure before it became unsafe, from doing so because the ordinance deems such repairs unreasonable.

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.

We note that BCO § 18-59, by using the language "*may* be ordered" (emphasis added), gives the city manager or his designee the discretion to not order the demolition of a structure and to allow repairs even though the structure is unsafe and the repair costs exceed the structure's pertinent value. In other words, demolition is not mandated when it is unreasonable to make repairs. We find, however, that this discretionary language does not save the ordinance from constitutional challenge, considering that the ordinance places no constraints on the exercise of what is essentially unfettered decretion.

We hold that BCO § 18-59 violates substantive due process because it is arbitrary and unreasonable, constituting a whimsical ipse dixit; it denies a property owner the option to repair an unsafe structure simply on the basis that the city deems repair efforts to be economically unreasonable. When a property owner is willing and able to timely repair a structure to make it safe, preventing that action on the basis of the ordinance's standard of reasonableness does not advance the city's interest of protecting the health and welfare of its citizens. We do not dispute that a permissible legislative objective of the city under its police powers is to protect citizens from unsafe and dangerous structures and that one mechanism for advancing that objective can entail demolishing or razing unsafe structures.[12] But BCO § 18-59 does not bear a reasonable relationship to this permissible legislative objective.[13] *Kyser*, 486 Mich at 521. There

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[12] Municipalities may exercise their legitimate police powers to abate a public nuisance. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 272; 761 NW2d 761 (2008). There is a well-established exception to the constitutional prohibition against takings without just compensation, which provides that because no person has the right to utilize property in a manner that creates a nuisance, the state, when asserting power to stop a nuisance, has not taken anything. *Id.* Consequently, governmental entities are not required to provide just compensation when they diminish or destroy a property's value to abate a public nuisance. *Id.*

[13] We note that BCO § 18-59 provides an exception 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

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.[14] If a property owner fails to make the necessary repairs within a reasonable timeframe, demolition can then be ordered. The city's restriction on plaintiffs' opportunity to repair the structures and right to protect their constitutionally recognized property interests from invasion has no reasonable relation to the public welfare. *Kyser*, 486 Mich at 521. The public welfare is safeguarded by the construction

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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.

[14] We recognize 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. There may also be emergency situations, see BCO § 18-56, where immediate destruction is necessary to avoid an imminent danger and repairs are not feasible. The instant action does not present a unique or an emergency situation. Moreover, and importantly, the reasonableness standard employed in BCO § 18-59 focuses on economic and financial reasonableness because the ordinance is predicated on the examination of repair costs and property valuations.

repairs, and the ordinance does not afford the public greater protection or safeguards by calling for demolition over repairs when making repairs is characterized as being unreasonable. Of course, the municipality has the authority to define the repairs necessary and to set a reasonable time limit for their completion. For the reasons set forth above, we conclude that BCO § 18-59 violates substantive due process.

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.[15] 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

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[15] See n 14 *supra*.

ordinances could withstand a procedural due process challenge.

Due process is a flexible concept, but its essence is fundamental fairness. *Reed*, 265 Mich App at 159. The procedures that are constitutionally required in a particular case are determined by examining (1) the private interest at stake or affected by the governmental action, (2) the risk of an erroneous deprivation of the interest under existing procedures and the value of additional safeguards, and (3) the adverse impact on the government of requiring additional safeguards, including the consideration of fiscal and administrative burdens. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), citing *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976). The nature of the private interest at stake in this case is substantial—plaintiffs' property interest as owners of three structures. 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. In sum, on review of the pertinent factors in the present case, we find that procedural due process requires a property owner to have an option to repair a structure determined to be unsafe except in unique and emergency situations demanding immediate action.

Court decisions in other jurisdictions, while not binding precedent, provide persuasive support for our holding. See *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007). In *Washington v City of Winchester*, 861 SW2d 125 (Ky App, 1993), the appellant-owner challenged a circuit court order that required her to demolish a building that had numerous building code violations. A building inspector initially ordered demolition, which decision was appealed to a city appeals board. The appeals board delayed demolition to allow a determination regarding the value of the building and the cost of repairs necessary to bring the building into compliance with the building code. Subsequently it was determined that the estimated cost to repair the building exceeded 100 percent of the building's appraised value. On the basis of this information, the appeals board affirmed the inspector's demolition order, and the circuit court then affirmed the decision by the appeals board. On appeal to the Kentucky Court of Appeals, the appellant building owner argued that she should have been given the opportunity to bring the building into compliance

with the code through repairs. *Id*. at 126. Two separate code provisions were relevant, and they provided:

> PM-111.1: The code official shall order the owner of any premises upon which is located any structure or part thereof, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation, occupancy or use, and so that such structure would be unreasonable to repair the same, to raze and remove such structure or part thereof; or if such structure can be made safe by repairs, to repair and make safe and sanitary or to raze and remove at the owner's option[.]
>
> PM-111.2: Whenever the code official determines that the cost of such repairs would exceed 100% of the current value of such structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this section that such structure is a public nuisance which shall be ordered razed without option on the part of the owner to repair. [*Id*.]

The appellate court agreed with the building owner that she should have been given the option to repair the building within a reasonable time. *Id*. The court, citing *Johnson v City of Paducah*, 512 SW2d 514, 516 (Ky, 1974), held that "the exercise of the city's police power is for the protection of the public, but the means of its implementation may extend no further than public necessity requires." *Washington*, 861 SW2d at 126. The court noted that the failure to provide a property owner the option of repair was arbitrary, that

the government did not have absolute power over private property, and that improperly requiring demolition absent compensation constituted a taking. *Id*. at 126-127.[16] Finally, the Kentucky court observed:

> [J]ust as the cost of . . . [code] compliance is a property owner's problem, the method of compliance is also the property owner's decision. It's his/her money and far be it from the [c]ity to say how a reasonable person should spend his/her money. . . . [A]s free men and women, we can spend our own money as we see fit, that if we want to pour endless dollars, sweat, etc., into some historic building, or personally appealing project, we may—even if the ultimate cost would be ten fold over the cost of demolition and rebuilding. So, too, with the [c]ity . . . and the appellant herein, if she wants to pour huge sums of money into her unfit building[], she has that option. A reasonable person may very well choose demolition, but it's her money and her choice. [*Id*. at 127.]

We agree with these sentiments and observations. While BCO § 18-59 varies slightly from the code provision at issue in *Washington*, we adopt the

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[16] The court ultimately determined that the code provision regarding repair costs and property values was unconstitutional under § 2 of the Kentucky Constitution. *Washington*, 861 SW2d at 126. Section 2 of the Kentucky Constitution provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." This principle is essentially embodied in Const 1963, art 1, § 17, which provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law."

principles espoused in *Washington* for purposes of our analysis of BCO § 18-59.

In *Herrit v City of Butler Code Mgt Appeal Bd,* 704 A2d 186 (Pa Commw, 1997), the Pennsylvania Commonwealth Court addressed the constitutionality of a code provision identical to that at issue in *Washington.* The appellant, whose property was found to be unsafe and a public nuisance, maintained that the code provision was unconstitutional because it did not give him the opportunity to repair his property before demolition. *Id*. at 188. The court initially pointed out that the purpose of the demolition notice was to provide a property owner a reasonable amount of time to make repairs to abate the dangerous condition. *Id*. at 189. The court, relying on *Washington*, 861 SW2d at 125, concluded that the code provision was unconstitutional. It reasoned that the provision was not reasonably related to the health, safety, or general welfare of the public, because there was no rational basis not to permit the appellant the option to abate the nuisance. *Id*. The Pennsylvania court concluded that if the appellant wanted "to spend unreasonable amounts of money to bring his [p]roperty into compliance, that [was] only his concern." *Id*.

As in *Herrit* and *Washington*, we conclude that whether it is economically reasonable for a property owner to repair an unsafe or dangerous structure is irrelevant and cannot serve as the basis to deny a property owner an opportunity to repair a structure in order to comply with applicable code provisions.[17]

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[17] We acknowledge a contrary result in *City of Appleton v Brunschweiler*, 52 Wis 2d 303; 190 NW2d 545 (1971), but find that

In considering an ordinance that permitted the demolition of a structure when the cost to comply with code requirements exceeded 50 percent of the structure's present value, the Georgia Court of Appeals ruled in *Horne v City of Cordele*, 140 Ga App 127, 130-131; 230 SE2d 333, 335-336 (1976):

> The vice of the ordinance under consideration is that it flatly permits uncompensated destruction of the owner's property where the cost of repair would exceed 50 percent of the value of the structure unrepaired. . . .
>
> * * *
>
> In the present case it appears that the owner twice applied for and was refused building permits in order to repair the house under consideration here. We do not find it necessary to reach the question of whether the owner was in good or bad faith in applying, or whether the building inspector was in good or bad faith in refusing the applications, or to pass on the remaining enumerations of error. Our holding is that any ordinance which authorizes demolition of a structure within the city without compensation to the owner merely because the cost of repair exceeds the value of the structure or any percentage therefof, without first allowing opportunity to repair (and, if necessary, providing for discovery of the criteria which

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case unpersuasive because the court addressed the issue as one of statutory interpretation and only superficially mentioned possible constitutional problems.

> must be met to bring the structure up to a minimum standard) is unconstitutional and void.

In *Horton v Gulledge*, 277 NC 353; 177 SE2d 885 (1970), overruled in part on other grounds by *State v Jones*, 305 NC 520; 290 SE2d 675 (1982), the North Carolina Supreme Court held that under its state constitutional version of the Due Process Clause, a city could not rely on an ordinance to order the demolition of unsafe structures without opportunity of repair when the cost to do so would exceed 60 percent or more of an unrepaired structure's value. The court, in finding a constitutional violation, noted that the city did not assert that the structure could not be made code compliant if it were to be repaired or find the existence of an imminent threat to the safety of persons or property that required the immediate destruction of the structure. *Id*. at 360. The court reasoned that the state's "'police power does not include power arbitrarily to invade property rights.'" *Id*. at 363 (citation omitted). Further, "[p]olice regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest.'" *Id*. (citation omitted). Thus, the court concluded that when a structure can be repaired, it would be arbitrary and unreasonable for the city to require its destruction without first giving the owner a reasonable opportunity to remove the threat to the public health, safety and welfare by completing the necessary repairs. *Id*.

The case of *Village of Lake Villa v Stokovich*, 211 Ill 2d 106; 810 NE2d 13 (2004), in which the court found

constitutional a statute permitting a municipality to file a complaint in court to seek the demolition of a dangerous and unsafe building after giving notice of the need to put the building in a safe condition, is a bit more difficult to assess. The property owners in that case agreed that the provision was intended to serve a legitimate governmental interest, but they argued that the cost limitation on the right to repair in the statute was arbitrary, unreasonable, and not rationally related to the governmental interest, citing many of the cases we have noted. The Illinois Supreme Court concluded that the cases cited by the property owners were inconsequential "because, in each case, the state statute or local ordinance found unconstitutional allowed an officer of the municipality to issue an order of demolition." *Id*. at 126. The statute at issue did not permit a municipal officer to order demolition; rather, it required the municipality to "give at least 15 days notice to the property owner of the need to 'put the building in a safe condition or to demolish it,'" affording some time for repairs. *Id*. at 127 (citation omitted). Only after the notice was issued could the municipality seek a demolition order in circuit court, where it had the burden of proving that the building was "dangerous and unsafe" or "uncompleted and abandoned." *Id*. The court could order demolition if substantial reconstruction was necessary to correct defects or if a structure was beyond reasonable repair, taking into consideration repair costs. *Id*. at 128. The Illinois court then concluded that the statute passed constitutional muster because

> [it] is entirely reasonable and protects the rights of the property owner while permitting the municipality to deal expeditiously with threats

> to the public health and safety. [The statute] makes a reasonable distinction between properties that are readily repairable and those that are not. The statute guarantees a property owner the opportunity to make repairs, either before or after an adjudication of "dangerous and unsafe," if the property is readily repairable. If, however, the property is in need of substantial reconstruction to render it safe, a property owner who is willing to undertake such a project must obtain the necessary permits and undertake repairs promptly upon receiving notice. The owner of such a property who does not promptly undertake repairs, but instead chooses to contest whether the building is dangerous and unsafe and to litigate the question of whether the building is readily repairable, runs the risk that he will lose on the merits and an order of demolition will issue. [*Id*. at 130.]

We read *Stokovich* as upholding the constitutionality of the statute because it affords property owners the opportunity to commence the process of necessary repairs during the 15-day notice period. In the instant action, BCO § 18-59 gives a municipal officer the authority to order demolition, and BCO § 18-52(c)(3) allows the notice to contain a statement that the structure is to be demolished without the option to make repairs. Indeed, the building official, in notifying plaintiffs, stated that he had determined that the structures were unsafe and not reasonable to repair, and he ordered demolition within 60 days. Accordingly, the ordinance at issue in this case is distinguished from the statute in *Stokovich*.

Finally, we note that our own Supreme Court, cautioning that a remedy should not be greater than necessary to achieve a desired result, has stated that "something less than destruction of the entire building should be ordered where such will eliminate the danger or hazard." *State Police Comm'r v Anderson*, 344 Mich 90, 96; 73 NW2d 280 (1955).

D. RESPONSE TO THE DISSENT

We find it necessary to address some of the arguments posed by our dissenting colleague. With respect to the criticism that procedural due process did not serve as a basis for the trial court's ruling and that it is not argued on appeal, we conclude that for the reasons stated earlier, procedural due process principles are implicated and need to be examined and applied in order to properly resolve this appeal. The failure to offer correct solutions to a controlling legal issue does not limit the ability of this Court "to probe for and provide the correct solution." *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002). "[A]ddressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle." *Id.*

In regard to procedural due process, the dissent criticizes our ruling on the grounds that requiring a reasonable opportunity to repair is not a matter of process or procedure and that the procedural due process rights to notice, a hearing, and an impartial decisionmaker are satisfied under the BCO, with nothing more being required. As indicated previously in this opinion, an option-to-repair requirement, incorporated as part of a razing or demolition ordinance relative to nuisances and unsafe structures,

can logically be viewed as a *procedural* mechanism or safeguard comparable to notice, hearing, and impartiality mandates. See *D&M Fin Corp*, 136 Cal App 4th at 174; *Hawthorne S & L*, 19 Cal App 4th at 159; *Miles*, 166 US App DC at 239. At the same time, the matter concerning an option to repair also has significant substantive attributes in relationship to due process protections, and the cases that we discussed earlier dealt with the issue of a repair option within the analytical framework of either procedural or substantive due process; there were varied approaches as to which due process principle was applicable. Because of this overlap, and for purposes of providing a thorough and complete analysis, it is incumbent upon us to discuss procedural and substantive due process principles.

Next, as to the dissent's claim that plaintiffs were accorded procedural due process by way of notice, a hearing, and an impartial decisionmaker, it must be emphasized that procedural due process is not always satisfied in full simply because notice, a hearing, and an impartial decisionmaker were provided. In *Greenholtz v Inmates of the Nebraska Penal & Correctional Complex*, 442 US 1, 12-13; 99 S Ct 2100; 60 L Ed 2d 668 (1979), the United States Supreme Court explained:

> It is axiomatic that due process "is flexible and calls for such procedural protections as the particular situation demands." The function of legal process, as that concept is embodied in the Constitution, . . . is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must

> apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error. [Citations omitted.]

Notice and an opportunity to be heard are "the most *basic* requirements of procedural due process." *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009) (emphasis added). "The *fundamental* requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 US at 333 (emphasis added; citation omitted). The *Mathews* Court observed that, "unlike some legal rules," due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id*. at 334 (quotation marks and citation omitted). "[T]he requirements for minimum due process may vary depending on the context." *Commonwealth v Brown*, 426 Mass 475, 482; 688 NE2d 1356 (1998). The "essential" elements of due process, i.e., "rudimentary" due process, require notice and a hearing. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 271; 566 NW2d 514 (1997). Accordingly, there can be instances and situations in which procedural due process requires more than the minimum procedures noted by the dissent. And under the particular circumstances of this case and the *Mathews* factors, which we thoroughly analyzed earlier, we conclude that to satisfy procedural due process rights, an ordinance pertaining to the demolition of unsafe structures must include a provision that allows a property owner to exercise an option to repair, subject, of course, to reasonable limitations.

The dissent criticizes our reliance on *Washington*, 861 SW2d 125, *Johnson*, 512 SW2d 514, *Herrit*, 704 A2d 186, and *Horne*, 140 Ga App 127, arguing that they do not support our procedural due process ruling. We did not cite these cases with procedural due process specifically in mind; they were cited for their general due process analysis, and they tend to rely on substantive due process principles. These cases strongly support our finding of a substantive due process violation. The cases that we did expressly cite on the issue of procedural due process, *D&M Fin Corp*, 136 Cal App 4th 165, *Hawthorne S & L*, 19 Cal App 4th 148, and *Miles*, 166 US App DC 235, are not mentioned by the dissent.

The dissent concludes that one of the reasons that there is no constitutional violation is that a set of factual circumstances exist under which the ordinance is constitutional, i.e., when a structure is rendered unsafe due to events beyond the owner's control, such as weather-related events, in which case an option to repair is expressly provided. See BCO § 18-59. We acknowledged in footnote 13 of this opinion that there is a provision in BCO § 18-59 that allows repairs for structures damaged by events beyond an owner's control, and we recognize that the fact that an ordinance might operate in an unconstitutional manner under some conceivable circumstances is insufficient to find it unconstitutional. See *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568-569; 566 NW2d 208 (1997) (noting that if any factual situation can be conceived of that would sustain an act in the face of a constitutional challenge, the existence of that situation at the time of enactment must be assumed). The problem with the dissent's

argument is that we are *not* addressing the constitutionality of the ordinance language in BCO § 18-59 concerning weather-damaged, unsafe structures; we are *not* finding that provision unconstitutional. Instead, we are solely finding unconstitutional the language or provision in BCO § 18-59 that deals with all other unsafe structures. An analogy is the best way to point out the flaws in the dissent's position. Under the dissent's reasoning, a statute that, for example, precludes application of the Fourth Amendment when brick houses are to be searched would be rendered constitutional, which conclusion is obviously legally unsound, if a different or additional section in the same statute required, consistent with constitutional principles, contemplation of the Fourth Amendment when all other types of houses are to be searched. This is nonsensical. The principles alluded to in *Council of Orgs*, 455 Mich at 568-569, simply mean, as applied here, that if there is a set of circumstances under which the language actually being addressed, i.e., the language regarding unsafe structures as caused or created by events within the control of an owner, can be found constitutional, that language will survive a facial constitutional challenge.

The preceding argument naturally leads to the dissent's primary argument, made in the context of both procedural and substantive due process, that BCO § 18-59 is constitutional because an option to repair remains a possibility, even in regard to blameworthy owners, where BCO § 18-61 allows an appeal to the city council wherein the presumption created by BCO § 18-59 can be overcome and the council can allow the owner an opportunity to make repairs. We earlier

acknowledged that an owner can appeal to the city council and, although the dissent does not mention it, we even noted that a property owner could attempt to overcome the presumption by pleading his or her case directly to the city manager or the manager's designee under BCO § 18-59. However, and this point is *not* addressed by the dissent despite its being the linchpin of our holding, in order to overcome the presumption – a presumption that repairs are *unreasonable* – when appealing to the city council or pleading to the city manager, the property owner would necessarily have to establish that the act of making repairs is *reasonable* before being granted an opportunity to make repairs. The constitutional defect is the reasonableness requirement associated with repairs; a property owner should be entitled to make repairs even if others would find it economically unreasonable to do so. The city council rejected plaintiffs' request to make repairs, finding, in part, that it was unreasonable to repair the structures.

BCO § 18-59 is implicated when a determination has been made that a structure is unsafe and that repair costs would exceed 100 percent of the structure's earlier true cash value. These determinations implicate the presumption that engaging in repairs is unreasonable, which presumption is necessarily tied to and impacts the following presumption that the structure is a public nuisance, subjecting the property to an order of demolition. The presumptions are intertwined and the public-nuisance presumption is dependent on the unreasonable-to-repair presumption because if repairs are not permitted due to a failure to overcome the unreasonable-to-repair presumption by a showing that repairs are indeed reasonable, a structure

would remain in a state of disrepair and would thus presumably be a public nuisance.[18] But if the unreasonable-to-repair presumption were overcome and repairs were permitted, the public-nuisance presumption would evaporate and become irrelevant, as the repairs would make the structure safe and obviate any nuisance. Accordingly, the reasonableness requirement as to repairs, which we find unconstitutional, actually permeates the entire process under BCO § 18-59 and then carries over to an appeal under BCO § 18-61.[19]

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[18] Conceivably, a property owner could attempt to overcome the public-nuisance presumption by showing that although the structure is unsafe and no repairs are to be made, the structure is nevertheless not a public nuisance. Showing a desire or wish to repair would have no bearing on or relationship to overcoming the public-nuisance presumption.

[19] We note that it is even arguable that BCO § 18-61 only allows an appeal of an unsafe-structure determination where it provides, "An owner of a structure determined to be unsafe may appeal the decision to the city council." Again, the presumptions in BCO § 18-59 only arise after it is determined that a structure is unsafe *and* the cost of repairs exceeds value. Therefore, if an owner simply wants an opportunity to repair and accepts that his or her structure is unsafe and that repair costs exceed value, or the owner cannot prove otherwise, one could reasonably construe BCO § 18-61 as not even permitting the owner to challenge the presumptions created by BCO § 18-59 in an appeal to the city council, as the council could only entertain a determination that a structure was unsafe. The language in BCO § 18-61 does not address appealing a demolition determination in general. If a property owner could show that a structure is safe, the whole issue of repairs and an option to repair becomes moot given that demolition could not be ordered under BCO § 18-59 absent a finding that a structure is unsafe. The fact that the city council heard plaintiffs' appeal and considered a repair option in this case does not mean that the

In sum, we respectfully disagree with the dissenting opinion.

III. CONCLUSION

We interpret BCO § 18-59 as only allowing the exercise of an option to repair when a property owner overcomes or rebuts the presumption of economic unreasonableness, regardless of whether the property owner is otherwise willing and able to timely make the necessary repairs. We conclude that this standard is arbitrary and unreasonable. While police powers generally allow the demolition of unsafe structures to achieve the legitimate legislative objective of keeping citizens safe, the ordinance's exclusion of a repair option when repairs are deemed economically unreasonable bears no reasonable relationship to this legislative objective. Demolition does not advance the objective of abating nuisances and protecting citizens to a greater degree than repairs, even ones more costly than the present value of the structure and which an owner is willing and able to timely incur. Therefore, we hold that the ordinance violates substantive due process. Moreover, by not providing procedural safeguards in the form of an option to repair when a property owner's desire to repair could be viewed as unreasonable and lead to the unlawful deprivation of a constitutionally protected property interest, and which safeguard would burden the city to a lesser extent than demolition, the city's ordinance also violates procedural due process.

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council actually had the jurisdiction or the authority to do so, and the council could theoretically decline to hear future cases of a similar nature based on the language in BCO § 18-61.

We affirm. As the prevailing parties, plaintiffs may tax costs pursuant to MCR 7.219(A).

/s/ Jane E. Markey
/s/ Douglas B. Shapiro

MURRAY, J. (*dissenting*).

The trial court held that Brighton City Ordinance § 18-59 was facially unconstitutional on the basis that the ordinance's presumption, that an unsafe structure with an estimated repair cost of 100 percent of the structure's predeteriorated condition value should be demolished, violated plaintiffs' right to substantive due process. The majority's decision to affirm that decision 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 were an issue properly before us, the ordinance does not violate plaintiffs' rights to procedural due process under the United States Constitution. I therefore lodge this dissent.

I. PROCEDURAL DUE PROCESS

As the majority notes, the trial court held BCO § 18-59 unconstitutional as a violation of plaintiffs' rights to substantive due process under the Fourteenth Amendment to the United States Constitution. That was the precise and only constitutional basis for the trial court's ruling that set aside the ordinance, and that is the only ruling challenged by defendant on appeal. We should limit our review to the decision rendered below and challenged on appeal, and proceed

no further. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).[1] The majority correctly cites to *Mack v Detroit*, 467 Mich 186, 207-208; 649 NW2d 47 (2002), for the proposition that a court may raise and decide an issue not raised by any party but that otherwise falls within a broader issue raised by a party. My concern, however, is utilizing our discretion to do so, for "[a]s any casual reader of the Michigan Appeals Reports will recognize, we quite frequently inform parties that we will not address an issue not raised or decided by the trial court, on the basis that it is not properly preserved." *People v Michielutti*, 266 Mich App 223, 230; 700 NW2d 418 (2005) (MURRAY, J., *concurring in part and dissenting in part*), rev'd in part on other grounds 474 Mich 889 (2005), citing *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992), and *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992). See, also, *People v Byrne*, 199 Mich App 674, 677; 502 NW2d 386 (1993) ("We generally do not address the merits of unbriefed issues."). But, because the majority has spent a good deal of time addressing this issue, my analysis and conclusion—that the ordinance in every way survives this facial procedural due process clause challenge—follows.

Before getting to the merits, it is vital to keep in mind several important principles of judicial review. First, all courts must exercise great caution before

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[1] The trial court did address plaintiffs' argument that defendant's decision that plaintiffs lost their *nonconforming use* status violated procedural due process. However, the court ruled that a genuine issue of material fact existed, and defendant did not appeal that ruling.

utilizing the judicial power to declare a law unconstitutional. *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997). Indeed, we presume that an ordinance is constitutional, *In re Harrand*, 254 Mich 584, 589; 236 NW 869 (1931),[2] and therefore the party challenging the constitutional validity of the law bears a heavy burden. *Houdek v Centerville Twp*, 276 Mich App 568, 573; 741 NW2d 587 (2007).

Second, as the majority notes, this is a facial challenge to the constitutionality of the ordinance. We have repeatedly made clear that the party bringing a facial challenge must satisfy an "'extremely rigorous standard.'" *Keenan v Dawson*, 275 Mich App 671, 680; 739 NW2d 681 (2007), quoting *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 161; 658 NW2d 804 (2002). A facial challenge attacks the very existence of the ordinance, requiring plaintiffs to establish that "the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market." *Hendee v Putnam Twp*, 486 Mich 556, 589; 786 NW2d 521 (2010) (CORRIGAN, J., *concurring*) (quotation marks and citation omitted). Because a facial challenge attacks the ordinance itself, as opposed to how it is applied, a court must uphold the law if there are *any* circumstances under which it could

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[2] We make this presumption because of "our recognition that elected officials generally act in a constitutional manner when regulating within their particular sphere of government," *Truckor v Erie Twp*, 283 Mich App 154, 162; 771 NW2d 1 (2009), which clearly the Brighton City Council was doing when enacting the ordinances at issue.

be valid. *Keenan*, 275 Mich App at 680. In other words, even if facts can be conjured up that would make the law arguably unconstitutional, "if any state of facts reasonably can be conceived that would sustain [an ordinance]," those facts must be assumed and the ordinance upheld. *Council of Orgs*, 455 Mich at 568 (quotation marks and citation omitted). And, because this is a facial challenge, the actual facts surrounding plaintiffs' case are irrelevant. *Yates v Norwood*, 841 F Supp 2d 934, 938 n 8 (ED Va, 2012), citing *Forsyth Co, Ga v Nationalist Movement*, 505 US 123, 133 n 10; 112 S Ct 2395; 120 L Ed 2d 101 (1992).

With these important principles guiding the decision, the next question is whether ordinances BCO §§ 18-59 and 18-61 are facially unconstitutional under the Due Process Clauses of the United States Constitution.[3] With respect to the procedural component of these clauses, the focus is on—not surprisingly—ensuring that persons receive adequate *procedural protection* from government decisions that could deprive them of their property. See, generally, *Gorman v Univ of Rhode Island*, 837 F2d 7, 12 (CA 1,

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[3] The federal due process clause that applies to the States is contained in the Fourteenth Amendment to the United States Constitution, and provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV, § 1. Although the constitutional language only references process, *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998), the United States Supreme Court has held that there is both a procedural and substantive part to the Fourteenth Amendment, *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). As noted, the trial court's ruling was based exclusively on the substantive requirements of the federal due process clause.

1988). Specifically, the federal courts have held that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976), quoting *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965). See also *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213-214; 761 NW2d 293 (2008) (procedural due process requires notice, an opportunity to be heard before an impartial decision-maker, at a meaningful time and in a meaningful manner).

To be meaningful, the opportunity to be heard must occur before the person is permanently deprived of any significant property interest. *Cleveland Bd of Ed v Loudermill*, 470 US 532, 542; 105 S Ct 1487; 84 L Ed 2d 494 (1985); *Mathews*, 424 US at 333. The extent of the hearing constitutionally required varies, and depends on an evaluation of the following:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

The two ordinances at issue are BCO §§ 18-59 and 18-61. BCO § 18-59 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.

If, as in this case, the city manager orders a building demolished, a party can—as plaintiffs did here—appeal that determination to the city council pursuant to 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.

The majority acknowledges that these ordinances provide persons with notice,[4] an opportunity to be heard at a hearing before city council, and a decision from an impartial decision-maker. Recognizing that the ordinances provide notice and an opportunity to be heard before an impartial decision-maker should preclude any facial challenge to the ordinances based on procedural due process, especially when the *procedures* themselves are not alleged to be deficient. See, e.g., *English v Dist of Colombia*, 815 F Supp 2d 254, 266 (D DC, 2011) (dismissing procedural due process claim when the plaintiff was afforded predeprivation notice of the nature of the dispute, and an opportunity to be heard); *American Towers, Inc v Williams*, 146 F Supp 2d 27, 33 (D DC, 2001) (holding the same).

However, according to the majority, providing persons with notice, a full hearing before city council, and an impartial decision-maker is not enough to satisfy procedural due process. Instead, the majority holds that "the city should have also provided for a reasonable opportunity to repair an unsafe structure . . . ." 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

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[4] Another section of the ordinance spells out the detailed contents for the notice and how and when it is to be served upon the property owner. BCO § 18-52.

the procedures employed by the government to allow the citizen to be heard before being deprived of his property. *Gorman*, 837 F2d at 12.

Additionally, the majority's analysis does not adhere to the standards governing facial challenges. Specifically, we must uphold the ordinances as long as there is any set of circumstances that would make the ordinances constitutional, *Keenan*, 275 Mich App at 680, and the majority recognizes that under the ordinances as written city council could allow an owner to make repairs that exceed 100 percent of the structures value. Indeed, BCO § 18-59 contains only a *presumption* that a structure that needs repairs costing in excess of 100 percent of the structure's true cash value prior to becoming unsafe should be demolished. But, under BCO § 18-61, a person can make their case to city council and overcome the presumption, allowing for repairs rather than demolition. The ordinance itself also allows repairs without regard to cost when the structure is unsafe because of weather-related causes, i.e., not through owner neglect or negligence. Because the ordinances provide a meaningful hearing at a meaningful time, and because even when using the majority's added "safeguard" of an automatic repair option there are circumstances under which repairs can be made, we must uphold the validity of the ordinances against this facial challenge.

Finally, the decisional law from our sister states used by the majority to buttress its position on this issue is either inapplicable or unpersuasive. For instance, the Kentucky Court of Appeals' decision in *Washington v City of Winchester*, 861 SW2d 125 (Ky App, 1993), that the ordinance was arbitrary, was

based on § 2 of the Kentucky Constitution that specifically prohibits absolute and arbitrary power. See *id*. at 126. Nor is there any discussion in *Washington* of the *Mathews* factors or other case law articulating the procedural due process standards that govern this issue. And, the only case *Washington* relies upon, *Johnson v City of Paducah*, 512 SW2d 514 (Ky, 1974), was also specifically based on § 2 of the Kentucky Constitution and likewise contains no discussion about what is required under the federal due process clause.

Similarly, in *Herrit v City of Butler Code Mgt Appeal Bd*, 704 A2d 186 (Pa Commw, 1997), the court did not analyze the case with procedural due process caselaw (though it does make mention of the plaintiffs asserting a Takings Clause claim), and appears to have instead utilized a standard to determine whether the ordinance was "arbitrary, unreasonable and ha[d] no substantial relation to the promotion of the public health, safety, morals or general welfare of" the city. *Id*. at 189. Again, the test used in *Herrit* is not one used to determine whether an ordinance violates the right to procedural due process, so it has no application to this issue. This is also the deficiency in *Horne v City of Cordele*, 140 Ga App 127, 130-131; 230 SE2d 333 (1976), in which the court relied on general notions of arbitrariness and public necessity to strike down the ordinance. That case *may* be helpful in considering plaintiffs' *substantive* due process claim (though in the end it really is not), but it offers no persuasive value with respect to the *procedural* due process issue.[5]

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[5] "Analyzing violations of substantive and procedural due process involves separate legal tests." *Garza-Garcia v Moore*, 539 F Supp 2d 899, 907-908 n 11 (SD Tex, 2007). See, also, *Cobb v Aytch*, 472

In sum, there is no dispute that plaintiffs received proper notice of the city inspector's decision, had the opportunity to appeal that decision to city council where a full hearing was held, and received a decision from what the majority concedes was an impartial decision-maker. Considering the *Mathews* factors, the city's ordinance satisfied the requirements of due process.[6] Plaintiffs received all the process that they were constitutionally due, and this Court should not rule to the contrary.

II. SUBSTANTIVE DUE PROCESS

Turning now to the ruling actually made by the trial court, it is clear that the answer to plaintiffs' substantive due process claim[7] is not as simple. In the end, however, it meets with the same fate. Unlike procedural due process, substantive due process bars "'certain government actions regardless of the fairness of the procedures used to implement them.'" *Mettler*

F Supp 908, 925-926 (ED Pa, 1979) aff'd in part, vacated in part, and rev'd in part on other grds 643 F2d 946 (CA 3, 1981). Thus, the majority should not conflate caselaw and its reasoning between the two different constitutional concepts. And, the fact that analyzing procedural due process claims requires a "flexible approach" does not mean that the different standards for analyzing these separate claims should be melded together.

[6] Though the actual facts of what transpired during plaintiffs appeal are not relevant to this facial challenge, *Forsyth Co*, 505 US at 133 n 10, during the appeal and hearing before city council the parties submitted expert reports, affidavits, PowerPoint Presentations, live testimony, and oral arguments. The city council also provided a written decision.

[7] This is also a facial challenge to the city ordinances.

Walloon, 281 Mich App at 197, quoting *Co of Sacremento v Lewis*, 523 US 833, 840; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). The established test that a plaintiff must prove is "'(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance 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 Twp*, 269 Mich App 638, 650-651; 714 NW2d 350 (2006), quoting *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). Here, no one questions that the ordinances advance a legitimate governmental interest. Thus, the sole issue on the substantive due process claim is whether the ordinances are an unreasonable means of advancing the undisputed governmental interest.

In conducting this analysis, the standard we must employ is again vitally important. Judicial review of a challenge to an ordinance on substantive due process grounds 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. [*Yankee Springs Twp v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004), quoting *A & B Enterprises v Madison*

Twp, 197 Mich App 160, 162; 494 NW2d 761 (1992).]

Applying this difficult and deferential standard, and recognizing that we conduct a de novo review of the trial court's decision, I would hold that BCO § 18-59 survives plaintiffs' facial challenge. There are at least two reasons supporting this conclusion. First, city council's decision to implement a presumption of demolition if the repair costs exceed 100 percent of the value of the structure before it because unsafe is neither unreasonable nor arbitrary. For one, the ordinance is not a flat prohibition precluding all property owners within the Brighton city limits an opportunity to repair an unsafe structure, as BCO § 18-59 exempts certain unsafe structures from the presumption, in particular structures that came to be in that condition through no fault of the structure's owner, and structures that become unsafe from weather-related events or fire damage from sources other than the owner.

Additionally, for structures that are not exempt from the presumption, the ordinance grants city council the discretion to approve repairs instead of ordering demolition. For example, city council could—as plaintiffs admit—simply decide after a hearing that the property owner should have an opportunity to repair before demolition occurs, or that repairs are only necessary. Thus, if there is a substantive due process right to repair one's property before demolition, then under this hypothetical that right is not violated. Because there are factual circumstances under which this ordinance is constitutional, under the governing standards plaintiffs cannot prevail on their facial

challenge to the ordinance. *Keenan*, 275 Mich App at 680.

Second, it is difficult to conclude that the presumption is so arbitrary that it shocks the conscience. Although the position taken by the trial court and the majority is understandable, i.e., it might be good policy for the city to allow an owner to expend whatever resources they deem appropriate to repair their own premises, accepting that principle does not result in a conclusion that a presumption to the contrary for *some* unsafe structures is unconstitutional. In other words, that there may have been other reasonable means to accomplish the city's objective of removing unsafe structures from the city does not mean that the city's choice of employing these terms was arbitrary or the result of some "whimsical ipse dixit." *Yankee Springs Twp*, 264 Mich App at 609.[8] See, also, *Bolden v City of Topeka*, 546 F Supp 2d 1210, 1218-1219 (D Kan, 2008) (rejecting a substantive due process challenge to an ordinance that had a no-repair cost threshold of 15 percent, and stating that just because the city could have utilized a higher threshold does not mean that a lower one is unconstitutional.). City council is, of course, the policy-making body for the city, and we must be extraordinarily careful not to utilize somewhat vague constitutional standards to override policy decisions that are outside our authority to make. *Warda v Flushing City Council*, 472 Mich 326, 334; 696 NW2d 671 (2005). And, given the exceptions

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[8] "Ipse dixit" is defined as "[s]omething asserted but not proved," Black's Law Dictionary (8th ed), so an ordinance resulting from a "whimsical ipse dixit" must result from an impulsive decision that has no proven basis to support it.

within the ordinance and the undisputed authority of the city to regulate unsafe structures, it is a reasonable position for Brighton's leaders to enact an ordinance containing a presumption that *certain* dwellings that need *substantial* repairs (and usually because of owner neglect) should be demolished, but leaving that ultimate decision to be made by city council after a hearing.

Finally, the trial court ruled that "withholding from the owner the option to repair does not advance the [city's] proferred interest any more than permitting the owner to repair it themselves," and because of that there lacked a real and substantial relation to the object sought to be obtained by the ordinance. This rationale elevates the standard of review beyond what is required by this facial challenge. As set out above, there are many factual circumstances under which this ordinance can be constitutional, and that alone is enough to allow the ordinance to survive this facial challenge. And, even setting aside the exceptions within the ordinance and the fact that city council can order repairs instead of demolition, it is not unreasonable for the city to have implemented a rebuttable presumption for a certain class of unsafe properties.[9]

I would reverse the trial court's order and remand for entry of an order granting defendant's motion for

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[9] Structure owners whose property the presumption applies to always have the option to repair before the city gets involved or a finding that the structure is unsafe is made. If repairs are made on a regular or as-needed basis the structure should never become unsafe.

summary disposition on the substantive due process claim and for further proceedings on any remaining claims.

/s/ Christopher M. Murray

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF LIVINGSTON

Case No. 09-24680-CZ
Consolidated with: Case No. 09-24900-CZ
Hon. Michael P. Hatty

[Filed February 1, 2011]

LEON V. BONNER and MARILYN E. BONNER, Plaintiffs/Counter-Defendants, v. CITY OF BRIGHTON, Defendants/Counter-Plaintiffs.	)))))))))

OPINION AND ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 1 day of February, 2011.

THIS MATTER having come before the Court on the defendant, City of Brighton's, motion for reconsideration under MCR 2.119(F), the Court having reviewed the motion and applicable law and otherwise being fully advised on this matter, the defendant's

motion for reconsideration is DENIED for failure to demonstrate palpable error.

The City argues that this Court committed palpable error by employing a balancing test concerning the appropriate method to deal with unsafe structures. This Court disagrees. The City mischaracterizes this Court's ruling by citing a single statement concerning the public safety not being "advanced any more" with the provision of the ordinance that deprives property owners of a right to repair. The Court did not balance the relative value of differing options that the City could take in addressing the issue of unsafe structures but instead made this statement in support of its reasoning that the provision barring repair simply does not advance the public safety at all, which is its purported objective and the only objective that this Court can surmise. Therefore, the Court is not persuaded that reconsideration is appropriate, and the City's motion is denied.

IT IS SO ORDERED.

/s/Michael P. Hatty
Hon. Michael P. Hatty
Circuit Court Judge

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

Case No. 09-24680-CZ
Consolidated with: Case No. 09-24900-CZ
Hon. Michael P. Hatty

[Filed November 23, 2010]

LEON V. BONNER and MARILYN E. BONNER, Plaintiffs/Counter-Defendants.	)))
v.	)
CITY OF BRIGHTON, Defendants/Counter-Plaintiffs,	))

OPINION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY DISPOSITION

At a session of the 44th Circuit Court,
held in the City of Howell, Livingston County,
on the 23 day of November, 2010.

The parties appeared before this Court on October 28, 2010 on the plaintiffs', Leon and Marilyn Bonners', motion for summary disposition. The Court indicated that due to the complexity of the issues presented and the likelihood of appeal of this Court's decision, the

Court would take the matter under advisement and issue a written opinion. Consequently, the Court offers the following opinion as its decision on the Bonners' motion and determines that the Bonners' motion is GRANTED IN PART and DENIED IN PART as follows.

I. Statement of Facts

This action involves residential structures located at 116 East North Street and 122 East North Street in Brighton owned by the plaintiffs, Leon and Marilyn Bonner. On January 29, 2009, defendant City of Brighton's Building Official James Rowell sent the Bonners letters that the residential structures were to be demolished due to the structures having been deemed unsafe under Brighton Ordinances and since it had been determined that the cost of repairs exceeded the true cash value of the properties. The Bonners appealed this determination. At an appeal hearing on April 2, 2009, the Bonners agreed to allow the City access to the structures for an inspection. The Bonners hereafter refused access prompting City to obtain an administrative search warrant on April 29, 2009. The City of Brighton ("the City") executed the search on May 27, 2009 with the City's representatives as well as several tradesmen. Reports and affidavits were prepared along with repair estimates and were presented to the Brighton City Council on June 4, 2009 and June 18, 2009. The Bonners also presented evidence at those hearings. The Council passed a resolution on July 16, 2009 affirming the Building Official's determination and ordered demolition within 60 days—i.e. by September 14, 2009.

During the initial appeal process of the demolition letter, the Bonners began roof repairs until a stop work order was issued. The Bonners applied for and were denied a permit for these repairs. The Bonners appealed that denial to the Board of Appeals and filed a Writ of Mandamus action in this Court under file number 09-24629-CZ, which was dismissed on August 20, 2009 for failure to exhaust administrative remedies since the Board of Appeals decision from July 16, 2009 had not been finalized. The Board of Appeals issued a resolution affirming the denial on August 27, 2009, and the Board finalized its decision at a November 16, 2009 meeting. The Bonners filed this complaint in this case, case number 09-24680-CZ, alleging four federal constitutional claims under 42 U.S.C. 1983 for Violation of Procedural Due Process, Violation of Substantive Due Process, Violation of Equal Protection, and Inverse Condemnation/Regulatory Takings, and three state law claims for Contempt of Court, Slander of Title, and Violation of MCL 125.540.

On March 12, 2010, the Court first heard arguments on the City's motion for partial summary disposition under MCR 2.116(C)(8), and the Bonners also filed a motion for partial summary disposition and request for declaratory relief under MCR 2.116(C)(10). The Court entered an Order on March 12, 2010 granting the City's motion for summary disposition and dismissing the Bonners' contempt of court and slander of title claims and restricting their state constitutional court claims. The Bonners also agreed that their claim under MCL 125.540 was withdrawn because the act was inapplicable to the City due to the size of the City's population. The Court took the Bonners' motion under advisement. Further, the Court heard testimony on the

City's request for a preliminary injunction over the course of four days, beginning on March 12, 2010 and continuing on April 7, June 18, and June 23. The Court then requested written closing arguments from the parties together with findings of fact and conclusions of law. The Court received these from the parties in early August. On September 13, 2010, the Court issued two separate opinions, one denying the City's request for a preliminary injunction as essentially asking for relief that was improper on a request for a preliminary injunction and another denying the Bonners' motion for summary disposition on procedural grounds. Following that ruling, the Bonners again moved for summary disposition under MCR 2.116(C)(10), which is the present motion before the Court.

II. Standard of Review

Under MCR 2.116(C)(10), summary disposition is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Lugo v Ameritech Corp,* 464 Mich 512, 520; 629 NW2d 384 (2001). In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals,* 205 Mich App 418, 420; 522 NW2d 335 (1994). If the moving party's initial burden is met, then "[t]he opposing party must set forth specific facts, by affidavit or documentary evidence, showing that there are genuine issues for trial, and may not rest upon mere allegations or denials in the pleading." *Johnson v Wayne Co,* 213 Mich App 143, 139; 540 NW2d 66

(1983). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich. 177, 183; 665 NW2d 468 (2003). Additionally, "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(1)(2).

III. Analysis

The Bonners' motion for summary disposition presents several constitutional questions for the Court's review as well as a single non-constitutional question concerning whether the City's ordinances themselves require providing property owners an opportunity to repair their property prior to demolition. The Court will address each of the arguments in turn.

a. Bonners' Claims of Ordinance Violations

The Bonners have alleged that the City has failed to follow its own ordinances by ordering demolition without the option to repair under Section 18-59. "Because it is always prudent to avoid passing unnecessarily on an undecided constitutional question, *see Ashwander v TVA*, 297 US 288, 345-348 (1936) (Brandeis, J., concurring), the Court should answer the [ordinance] questions first." *Steel Co v Citizens for a Better Environment*, 523 US 83, 112 (1998) (Stevens, J. Concurring). The Bonners argue that Section 18-52 requires a determination to be made by the building official that the building cannot be repaired which they claim did not occur in this case. The Bonners additionally argue that Section 18-60 of the City code

of ordinances and Section 110.1 of the International Property Maintenance Code, which is adopted into the City's ordinance under Section 18-76 and modified under 18-77, permit unsafe structures to be repaired but the City has failed to allow such repairs.

i. Standards for Construction of Ordinances

The Bonners' arguments present questions about the construction of the City's ordinances. The rules applicable to the construction of statutes apply equally to ordinances. *Tower Realty, Inc v City of East Detroit*, 196 F2d 710 (6th Cir 1952). Words and phrases in a statute are read in the context of the act as a whole to harmonize their meanings and give effect to the entire act. *Cairns v City of East Lansing*, 275 Mich App 102; 738 NW2d 246 (2007). The construction of statutes sharing a common purpose or relating to the same subject should effectuate each statute without repugnancy, absurdity, or unreasonableness. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305; 596 NW2d 591 (1999).

ii. Determination of Buildings as Unsafe Structure

The Bonners first argue that the City failed to comply with Section 18-52(c)(3) concerning the notice given for buildings that are deemed to be unsafe structures. Section 18-52(c)(3) states that the notice deeming the buildings unsafe structures shall: "Specify the repairs and improvements required to be made to render the structure safe or if the city manager, or his designee, has determined the structure cannot be made safe, indicate that the structure is to be demolished." In

other words, Section 18-52 acknowledges that the city manager may order the home to be demolished if he or "his designee" determines that the structure cannot be made safe. The Bonners, however, take issue with the requirement that the city manager or his designee must determine that the structure cannot be made safe. The Bonners state that the building official "simply decided that in his opinion (without ever having been in the homes) that it would cost too much to make them safe."

This provision of the ordinance does not provide a specific standard for making the determination that the building cannot be made safe and does not provide substantive standards for judging the official's determination. Section 18-52(c) is nothing more than a list of what contents must be in a notice; it is not a substantive regulation but a procedural rule by which the sufficiency of the notice of an unsafe structure given by the City may be judged. Section 18-52(c)(3) merely requires that when the manager has determined that the building cannot be made safe, the notice shall notify the owner that the building is to be demolished. There is no doubt from the evidence available to the Court on this motion that this requirement was complied with. Therefore, the Bonners argument as to this alleged deficiency is without merit.

iii. Opportunity to Repair Under Sections 18-60, 18-76, and 18-77

The Bonners further claim that two ordinances allow for the repair of unsafe structures and that by ordering the homes demolished, the City has failed to comply with its own ordinances which requires them to

give the Bonners an opportunity to repair. Section 18-60 states, "[a] structure deemed to be unsafe may be restored to a safe condition provided a change of use or occupancy is not contemplated or compelled by reason of such reconstruction or restoration." Further, Section 18-76 adopts the International Property Maintenance Code ("IPMC"), and in Section 18-77 of the City's Ordinances, the code amends a provision of the IPMC and provides as follows:

> "*Section 110.1 General.* The code official shall order the owner of any premises upon which is located any structure, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation or occupancy, and such that it is unreasonable to repair the structure, as defined in Section 18-59 of the Brighton City Ordinances, to demolish and remove such structure; or if such structure is capable of being made safe by repairs, to repair and make safe and sanitary or to demolish and remove at the owner's option; or where there has been a cessation of normal construction of any structure for a period of more than two years, to demolish and remove such structure."

The Bonners claim that under either of these ordinances, the City must provide the property owner the opportunity to repair without regards to the cost of repairs.

The sections referenced both provide for the repair of unsafe ordinances, but neither unequivocally contradicts Section 18-59's provision that if the costs of repair exceed 100 percent of the assessed value of the

home then the City may order the buildings demolished without an option to repair. In fact, Section 110.1 of the IPMC under Section 18-77 of the City Code of Ordinances references the City's right to demolish where "it is unreasonable to repair the structure, as defined in Section 18-59 . . . " just prior to the clause providing for repairs when "such structure is capable of being made safe by repairs . . ." Section 18-77 was adopted by the City in November 2006, and the City's insertion of the language concerning demolition under Section 18-59 modifies the standard IPMC provision. *See* 2006 International Property Maintenance Code, §110.1. Because it is obvious that the City amended Section 110.1 mindful of Section 18-59, Section 18-77 may not be read so as to contradict the demolition standard of Section 18-59. *Cairns,* 275 Mich App at 107 (noting "words and phrases in a statute are read in the context of the act as a whole to harmonize their meanings and give effect to the entire act."). Similarly, Section 18-60, which immediately follows Section 18-59 in the Code and was adopted by the City at the same time as Section 18-59 cannot be read to render the cost provision of Section 18-59 nugatory. *Id.*; *Omne Financial, Inc.*, 460 Mich at 312. Accordingly, the Bonners' claims that the City has violated its own ordinances are unmeritorious.

b. Bonners' Challenge to Section 18-59 Under Due Process Clause

The Bonners have also challenged a Section of the City's Code of Ordinances, arguing that Section 18-59 violates the Due Process clause of the 14th Amendment to the Federal Constitution. "The essence of a claim of violation of substantive due process is that the

government may not deprive a person of liberty or property by an arbitrary exercise of power." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). A party who challenges the legitimacy of an ordinance on the basis of due process "carr[ies] the burden of overcoming the presumption of constitutionality and must prove either that no public purpose is served by the act or that no reasonable relationship exists between the remedy adopted and the public purpose sought to be achieved." *VanSlooten v Larsen*, 410 Mich 21, 43; 299 NW2d 704 (1980); *Moore v City of Detroit*, 159 Mich App 199, 206; 406 NW2d 388 (1987). Further, "[t]he presumption of constitutionality favors validity and if the relationship between the statute and public welfare is debatable, the legislative judgment must be accepted." *Van Slooten*, 410 Mich at 43. "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice. *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose." *Conlin v Scio Tp*, 262 Mich App 379, 389; 686 NW2d 16, 23 (2004).

The challenged ordinance provides that the City may demolish a building without providing the owner the option to repair the property in order to remedy the hazard and avoid demolition where it is determined that the costs of repairs exceed the value of the property on the City's tax rolls. Specifically, §18-59 states:

> "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.*" (emphasis supplied).

The Bonners argue that the ordinance is unconstitutional because it withholds from the property owners the opportunity to repair the property, which does not advance any rational interest and therefore violates due process. The Court agrees and finds that the provision withholding the opportunity to repair serves no rational purpose and shocks the conscience.

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 Bonners' 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.

The Court's conclusion that the ordinances' withholding from a property owner an opportunity to repair is arbitrary and violates due process is also supported by public policy embodied in case law of this state that has held that a reasonable opportunity to repair does not inhibit a municipality's ability to protect public health and safety. For instance, although it has been determined that the housing laws of MCL 125.401, *et seq.*, do not apply because the City of Brighton did not as of the last census have a population greater than 10,000, the Michigan Court of Appeals has held that the Michigan housing laws require giving

property owners an opportunity to repair their property prior to demolitions conducted for safety reasons. *Florio v Chernick*, 45 Mich App 237, 240; 206 NW2d 538 (1973) (holding that "[u]nder the act, the determination to repair the buildings to comply with the Code or remove them is for" the property owner and not for the city's director for the enforcement of the housing code or the Court); 4 Mich Civ Jur Buildings § 18 (2010) ("When demolition is threatened, property owners must be given an opportunity to obtain building permits and a reasonable time for the completion of repairs and inspection"). Similarly, the Michigan Supreme Court in the context of a statute dealing with fire hazards admonished that demolitions "must be administered with caution" and, noting that "[t]he remedy prescribed should be no greater than is necessary to achieve the desired result," held that the trial courts must provide a property owner a reasonable opportunity to repair the property prior to demolition. *Childs v Anderson*, 344 Mich 90, 95-96; 73 NW2d 280 (1955). Thus, there is clearly support in Michigan law for the proposition that an opportunity to repair a building prior to demolition does not inhibit a municipality's interest in public health and safety.

Moreover, as the Bonners point out, an abundance of persuasive authority has held that identical ordinances that similarly withheld an option to repair advanced no rational purpose or were otherwise arbitrary. *See*, *e.g.*, *Herrit v Code Mgmt Appeal Bd of the City of Butler*, 704 A2d 186 (Penn Commonwealth Ct 1997) (holding that an ordinance requiring demolition without providing the property owner the opportunity to repair was "not rationally related to the public health, safety or general welfare because there

is no rational reason for the City . . . not to allow a property owner the ability to abate a nuisance on his/her property"); *Washington v City of Winchester*, 861 SW2d 125 (Ky Ct App 1993) (stating in the context of an ordinance with operative language that is very similar to the City's in this case that "just as the cost of such compliance is a property owner's problem, the method of compliance is also the property owner's decision. It's his/her money and far be it from the City to say how a reasonable person should spend his/her money."); *Horton v Gulledge*, 277 NC 353; 177 SE2d 885 (1970) (holding that "[t]o require [a building's] destruction, without giving the owner a reasonable opportunity thus to remove the existing threat to the public health, safety and welfare, is arbitrary and unreasonable."); *Hawthorne Savings & Loan Ass'n v City of Signal Hill*, 19 Cal App 4th 148; 23 Cal Rptr 2d 272 (1993) (noting that codified California law requires the opportunity to repair as an option to avoid demolition); *Shaffer v City of Atlanta*, 223 Ga 249; 154 SE 241 (1967) (finding that an ordinance withholding the option to repair "by thus placing [the owner] in a position of demolishing the property as his only means of abating the alleged nuisance is unconstitutional, null and void."); *Johnson v City of Paducah*, 512 SW2d 514 (Ky 1974) (holding under similar facts that "the owner should be afforded a reasonable time to repair his property so as to comply with the building code requirements if he so desires, unless there is present an imminent and immediate threat to the safety of persons or other property," and refusing to afford such opportunity is unconstitutional under state constitution provision akin to the Due Process clause). There is thus substantial persuasive and confirmatory legal authority for this Court's reasoning.

In contrast, the only case law that has been cited by the City is not on point. The case of *Bolden v City of Topeka,* 546 F Supp 2d 1210 (D Kan 2008) did not involve a due process challenge on the basis of an opportunity to repair a property but a challenge to the basis for selecting the formula used for determining that a property was eligible for demolition. The case thus does not address the issue at hand, namely whether an ordinance violates due process it fails to provide any option to the property owner to repair the building in lieu of demolition. Although the plaintiff in that case attempted to raise the pertinent issue on appeal, the U.S. Court of Appeals for the Tenth Circuit found that the issue was not properly before the Court of Appeals, stating that it had not been preserved in the trial court—i.e. it was not addressed in the District Court opinion that is now cited and relied on by the City. *See Bolden v City of Topeka*, 327 Fed Appx 58, 59 (10th Cir 2009). Therefore, the *Bolden* case does not alter this Court's conclusion that the deprivation of a home-owner's interest in his property without the option to repair lacks any rational basis. Consequently, for the reasons already given, the Bonners are entitled to summary disposition on this claim, and the Court declares that Section 18-59 is unconstitutional because it withholds from the property owners the opportunity to repair. Because Section 18-59 is unconstitutional, the demolition order that was issued on January 29, 2009 is also invalid, and the Court enjoins the scheduled demolition. Further, the City must cure this defect in the ordinance and must reissue a new demolition order under the revised ordinance before proceeding with any demolition of the properties.

c. Bonners' Challenge to Section 18-59 as Improper Delegation of Legislative Authority

The Bonners also argue that Section 18-59 is unconstitutional by providing an improper delegation of legislative authority, relying on *City of Saginaw v Budd*, 381 Mich 173; 160 NW2d 906 (1968). The Court disagrees. Under *Budd* the question for the Michigan Supreme Court was whether the City of Saginaw's ordinance was constitutional, which permitted the demolition of

> "[a]ll 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 . . ." *Id.* at 176-177.

The City committed to a building inspector the enforcement of the ordinance. The defendants, Harry and Blanche Budd, challenged the statute as an improper use of the police powers and an unconstitutional delegation of legislative authority to an administrative official without definable standards. *Id.* at 177. The Michigan Supreme Court held that "[t]he ordinance discloses that there was an improper delegation of authority without definable standards—a greater delegation of authority without definable standards than delegations we have passed judgment upon and have declared unconstitutional in previous

opinions," and the Court therefore declared the ordinance unconstitutional. *Id.* at 178.

The *Budd* decision is inapposite to the case at hand. The question in *Budd* concerning the improper delegation of legislative authority without definable standards is grounded in concerns for separation of powers and due process. *See Westervelt v Natural Resources Comm'n*, 402 Mich 412, 437-437; 263 NW2d 564 (1978). The key requirement for a statute or ordinance that will be executed by an administrative official is that "the standards prescribed for guidance are as reasonably precise as the subject-matter requires or permits." *Osius v City of St Clair Shores*, 344 Mich 693, 698; 75 NW2d 25 (1956).

Section 18-59 does not improperly delegate legislative authority to an administrative official without definable standards. In stark contrast to the facts of *Budd*, the City of Brighton's unsafe building ordinance in Section 18-59 provides a clear question for the determination of what constitutes an unsafe structure, requiring the building officials to determine "the costs 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 . . . " Unlike the ordinance in *Budd* which left unbridled discretion to the building official to make the call on what was "structurally unsafe" or "dilapidated," this standard permits a determination to be made within prescribed boundaries and with reasonable certainty. The standard in Section 18-59 is as "reasonably precise as the subject matter requires or permits." *Osius*, 344 Mich at 698. Further, the Bonners appear to argue that

the ordinance improperly delegates authority because Jim Rowell, the building inspector, did not properly inspect the buildings before making his decision that the standard in Section 18-59 was satisfied. This argument is without merit, since however Jim Rowell made the determination in the present case has no bearing on whether the ordinance is facially constitutional. There is no defect with this portion of the ordinance. Therefore, the Bonners challenge to the ordinance in this respect lacks merit.

d. Bonners' Challenge to Section 18-59 Under Takings Clauses

The Bonners also allege violation of the Takings Clause of the U.S. Constitution and the Michigan Constitution Article 10, § 2,[1] and assert a facial challenge to the ordinance, Plaintiff's First Amended Verified Complaint, ¶155, as well as a claim that the demolition order at issue constitutes a taking. *Id.* at ¶ 164. 166. The Bonners summarily allege that Section 18-59 is unconstitutional as it violates the state and federal constitutional provisions prohibiting the taking of private property without just compensation. The City in response argues that demolishing these homes would be abating a nuisance, and the abatement of a nuisance is not a taking. The Bonners cite a plethora of case summaries in support of their takings argument, only one of which, *Johnson v City of Paducah*, 512 SW2d 514 (Ky 1974), appears to tangentially address

[1] Article 10, § 2 of the Michigan Constitution has generally been interpreted to be coextensive with the Takings Clause of the 5th Amendment to the U.S. Constitution. *Peterman v State Dep't of Natural Resources*, 446 Mich 177, 184 n 10; 521 NW2d 499 (1994).

takings. However, even *Johnson* does not involve either the Michigan or Federal constitutional standards regarding takings as the case concerned whether an ordinance violated Section 2 of the Kentucky Constitution, which is more closely akin to the due process question addressed above. In other words, the Bonners have failed to cite any applicable law for this proposition.

Looking to the applicable law, the City is correct in its argument that abating a nuisance does not constitute a taking within the meaning of either constitutional provision. The U.S. Supreme Court admits a "nuisance" exception to the Takings Clause and has found that no compensation is required when the government abates a nuisance because "the State has not 'taken' anything when it asserts its power to enjoin nuisance-like activity." *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 491 n 20 (1987). Thus, under both the Michigan and Federal constitutional provisions proscribing takings without compensation, Michigan law holds that if a City "was exercising its legitimate police power to abate the public nuisance on defendant's property, no unconstitutional taking occurred." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 272; 761 NW2d 761 (2008). Accordingly, the City is entitled to abate nuisances, including by demolishing unsafe structures, and doing so does not constitute an unconstitutional taking. *See also, Stewart v City of Lansing*, No 1:08-cv-778, 2009 WL 910810, at *4-5 (WD Mich Apr 2, 2009). Therefore, since success on a facial challenge to an ordinance requires the party challenging the ordinance to demonstrate that there is no set of circumstances in which the ordinance would be valid, *Hendee v Putnam*

Tp, 486 Mich 556, 568 n 17; 786 NW2d 521 (2010), and Section 18-59 could be validly applied in a variety of circumstances where there exists a nuisance on the property involved, the Bonners' facial challenge to the ordinance lacks merit.

As applied to the facts of this case, whether the demolition order is an unconstitutional taking is unclear. The City may not lawfully demolish the Bonners' homes unless it is determined that the homes constitute nuisances. The City contends that because the buildings violate the unsafe structures ordinance, they fit within this nuisance exception, but "the mere fact that a condition constitutes a violation of a local ordinance does not make that condition a public nuisance, and the circuit court has no jurisdiction to abate or enjoin such a condition unless it is independently established that the condition constitutes a nuisance." *Kircher*, 281 Mich App at 277-278. It is true that the violation of a zoning ordinance constitutes a nuisance per se. *Independence Twp v Skibowski*, 136 Mich App 178; 355 NW2d 903 (1984). Nonetheless, the ordinance at issue is not a "zoning" ordinance, as it was not enacted under the Michigan Zoning Enabling Act.[2] *Kircher*, 281 Mich App at 278, n 8. Therefore, whether there is a nuisance that may be abated without unconstitutionally taking property depends on whether the homes present a condition "the condition is harmful to the public health, safety, morals, or welfare," *Id.* at 278, which is a factual

[2] The unsafe structures ordinance, which is part of the section of the City code encompassing "Buildings and Building Regulations," under Chapter 18 references the state construction code act as the basis for the ordinances in that chapter.

determination. *Id.* at 270. Neither party can plausibly argue that this question as applied to the two buildings does not involve genuine issues of material fact, since this Court has heard widely varying testimony from the two sides during the show cause hearings addressing the condition of the homes, the costs of repairs to the homes and the necessity of those repairs. Therefore, summary disposition would not be appropriate in favor of either party on this claim if this claim still presented a live controversy. Nonetheless, because the Bonners' takings claim is premised on the January 29, 2009 demolition order that was issued under Section 18-59, and this Court has already ruled that Section 18-59 is constitutionally deficient, this issue is at present moot because the demolition may not proceed absent the issuance of a new demolition order. *General Motors Corp v Dep't of Treasury,* __ NW2d __ (Michigan Court of Appeals, issued October 28, 2010) (noting that an issue is moot "when a judgment, if entered, cannot have, for any reason, any practical legal effect on the existing controversy.").

e. Bonners' Procedural Due Process Claim Concerning Non-Conforming Use

The Bonners also raise a procedural due process claim, alleging that they did not receive due process of law prior to the deprivation of their non-conforming use of the homes. The Bonners state that the deprivation of the non-conforming use was "simply inserted" into a resolution by the City on July 16, 2009. The City responds that the Bonners were made aware of the City Council's intent to remove the non-conforming use status at a hearing on June 4, 2009 and were provided an opportunity to contest this issue at a June 18, 2009

hearing but did not raise the issues at the hearing nor did they timely appeal the Resolution.

Deciding whether a person has been deprived of procedural due process is a two-step analysis. "First, a court determines whether the plaintiff has a property interest entitled to due process protection; second, if the plaintiff has such a protected property interest, the court determines what process is due." *Sinclair v City of Ecorse*, 561 F Supp 2d 804, 808 (ED Mich 2008) (citing *Mitchell v Fankhauser*, 375 F3d 477, 480 (6th Cir 2004)). The property interest that is alleged to have been unlawfully deprived in this case is the Bonners' nonconforming use of the homes as residential properties in an area that is now zoned commercial. Under *Heath v Sall*, 442 Mich 434 (1993), "[a] prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." Therefore, the plaintiff has a protected property interest. The only question remaining is what process is due, or phrased differently, whether the procedures attendant upon the deprivation of that property interest were constitutionally sufficient. *Dubuc v Green Oak Twp*, 642 F Supp 2d 694, 700, 703 (ED Mich, 2009).

The basic requirements of due process are well-established. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Armstrong*

v Manzo, 380 US 545, 550 (1965). The City claims that these requirements were met when Jim Rowell informed the Bonners on June 4, 2009 that the City intended to deprive the Bonners of the non-conforming use status, and the Bonners had the remaining hearing on June 18, 2009 to contest this decision prior to the deprivation. However, the Bonners deny this claim and state in an affidavit that they never received notice of this loss of non-conforming use until it was adopted by the council in the July 16, 2009 resolution. Affidavit of Leon Bonner, ¶ 13. Further, the facts as to the nature of these hearings, when such notice was given, and what occurred before the City's determination that the non-conforming use was extinguished are unclear from the documents that have been provided by both parties in support of this motion.[3] Therefore, there are material factual issues that must be resolved by a trial as to this claim.

f. Bonners' Procedural Due Process Claim Concerning Water

Finally, the Bonners raise an issue concerning the City's refusal to turn the water to the property back on after an order from the Court of Appeals to do so on August 6, 1979. The Bonners allege that the City's

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[3] The City does reference in the Findings of Fact document attached to their response brief, which was submitted to the Court following the evidentiary hearings conducted on the City's request for a preliminary examination, testimony from building official Jim Rowell in Volume II, Pages 276-277 of the transcripts that explains how the City arrived at the conclusion that the non-conforming use had been lost. This testimony, however, does not bear on when and in what manner the City gave notice to the Bonners and an opportunity to contest this determination.

failure to turn the water back on has unconstitutionally deprived them of a protected property interest and is a violation of due process. The Bonners offer no argument concerning this alleged deprivation and cite no law in support of their claim.

The Bonners' federal claim concerning the City's alleged violation of due process by failing to turn the water back on after the Court of Appeal's 1979 order to do so is barred by the statute of limitations, as this Court has already determined in reference to their state law claim for contempt of court. Specifically, the Court held in the March 12, 2010 order that the claims for contempt of court and slander of title were time barred. The same operative facts exist for this federal constitutional claim. Therefore, under MCL 600.5805(10), an action for injury to property has a limitations period of 3 years. That limitations period ran on August 6, 1982. This action was not commenced until 27 years later. Accordingly, this claim is similarly time-barred.

IV. Conclusion

For the reasons cited above, the Court GRANTS IN PART and DENIES IN PART the Bonners' motion for summary disposition. The Court ORDERS as follows:

I. The Court finds that the City complied with the notice provisions of Section 18-52(c)(3) of the City Code. Further, the Court finds that neither the language in Section 18-60 nor Section 18-77, subsection 110.1 supersede the cost balancing analysis of Section 18-59 or permits an option to repair without reference to costs.

II. The Court determines that Section 18-59 violates the Due Process Clause of the 14th Amendment to the U.S. Constitution by depriving property owners of their interest in property without the option to repair and is therefore invalid. Consequently, the Court hereby enjoins any demolition of the homes at issue from proceeding under the current order for demolition.

III. The Court finds that Section 18-59 does not improperly delegate legislative authority and provides sufficiently definite standard for review. Therefore, it is not unconstitutional in this respect, and the Bonners' claim concerning unconstitutional vagueness is dismissed.

IV. The Court finds that Section 18-59 is not facially unconstitutional under either the Takings Clause of the U.S. Constitution or Article 10, § 2 of the Michigan Constitution, and the Bonners' facial challenge to the ordinance is dismissed. Further, the Court finds that the City is immune from a claim that property has been improperly taken without just compensation if it is proven that the property is a nuisance. However, this issue is moot due to the Court's invalidation of the ordinance and the existing demolition order.

V. The Court finds that the deprivation of the Bonners' non-conforming use status is a protected property interest for which the Bonners must receive notice and an

opportunity to be heard prior to such deprivation. However, there are genuine material factual disputes concerning this claim.

VI. Finally, the Bonners' claim for a violation of Due Process based on the City's refusal to turn the water back on is time-barred under MCL 600.5805(10).

IT IS SO ORDERED.

/s/Michael P. Hatty
Hon. Michael P. Hatty
Circuit Court Judge