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## *Bonner v Brighton:* Demolition of Unoccupied Structures Under City Ordinance

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### Background

On April 24, 2014, the Michigan Supreme Court issued an opinion upholding a Brighton city ordinance that permitted demolition of three unoccupied residential structures without providing the owners the option to repair the structures. The owners of the structures, Leon and Marilyn Bonner, sued the city claiming that their substantive and procedural due process rights had been violated since they had not been given the opportunity to repair the structures.

The trial court agreed with the Bonners that the ordinance violated property owners' substantive due process rights by not giving them the opportunity to make repairs. The Court of Appeals affirmed the decision of the trial court and further held that the ordinance violated property owners' procedural due process rights. The Michigan Supreme Court, however, reversed the judgment of the Court of Appeals and found that the ordinance, on its face, did not violate either substantive or procedural due process rights of those subject to the ordinance. The case was remanded to the trial court for further proceedings.

The case provides a thorough analysis and resulting "green light" for one of the more severe tools available to municipalities dealing with dangerous and unsafe buildings—an ordinance permitting demolition of an unsafe structure. A comprehensive discussion and listing of the tools available to municipalities are set out in *Restoring Michigan Communities: Building by Building*, a reference publication of the Michigan Municipal League. The publication provides a practical guide outlining the methods by which communities can address issues of blight, abandoned properties, dangerous buildings, litter, and other conditions of privately-owned property that affect the development of attractive and safe downtowns and neighborhoods. The publication specifically lists enforcement tools and procedures—including state statutes and municipal

ordinances—available to Michigan municipalities as they confront these issues.

One of the types of ordinances listed in the League publication is the Dangerous Building ordinance—the type of ordinance at issue in the Bonner case. The Brighton Dangerous Building ordinance is included in its Code of Ordinances under Unsafe Structures (Article III) of Buildings and Building Regulations (Chapter 18). There are six articles included in Chapter 18; Article III contains 19 sections relating to definitions and procedures for addressing an "unsafe structure." [See listings of the articles in Chapter 18 and of the sections in Article III below.]

Before beginning a discussion of the ordinance itself, it is important, first, to recognize the authority upon which the city relied in the adoption of the ordinance.

### Under what authority did the city adopt the ordinance?

The ordinance was enacted pursuant to the city's police powers and its purpose was to abate a public nuisance by requiring repair or demolition of unsafe structures. Cities in Michigan have a legitimate interest in promoting the health, safety, and the welfare of its citizens—the so-called *police powers*. Certain other types of local units of government have been granted police powers as well. There is no question that nuisance abatement is a legitimate exercise of a municipality's police power and that demolition is a permissible method of achieving that end.

A declaration or finding that a building is a public nuisance carries with it certain inherent—and beneficial—procedural options. In Michigan, claims based on abating a nuisance may be brought in the circuit court. MCL 600.2940 recognizes the traditional

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power and jurisdiction of circuit courts to grant injunctions to stay and prevent nuisances. In addition, Michigan court rules specifically address a court's power with respect to injunctions and public nuisances. [See *Restoring Michigan Communities: Building by Building* for further discussion.]

### What does the ordinance provide?

The ordinance, in general, defines what an unsafe structure is (BCO §18-46) and outlines the steps the city can take to remedy the problem (BCO §18-47 through 18-64).

### When is a structure unsafe?

BCO §18-46 sets out 10 defects or conditions that determine when a structure may be deemed to be unsafe. [See BCO §18-46 in its entirety below.] Included among the 10 factors are (1) "a structure, because of dilapidation, decay, damage, faulty construction, or otherwise which is unsanitary or unfit for human use," and (5) "a structure that is in such a condition so as to constitute a nuisance, as defined by this Code."

*Note: The inclusion of a condition constituting a public nuisance as one of the 10 factors provides "extra teeth" for enforcement options by the municipality.*

Section 18-47 makes it unlawful for an owner to maintain or occupy an unsafe structure.

*Note: Although not applicable to the analysis of the case, all 10 factors were found by the city to have existed in the Bonner structures.*

### Why was this ordinance challenged?

After determining that the structures in question were unsafe, the city applied Section 18-59 of the Unsafe Structures ordinance. Section 18-59 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. The standard created by the ordinance is referred to as the *unreasonable-to-repair* presumption. Under the ordinance, the unreasonable-to-repair presumption can be overcome by presenting a viable repair plan that 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. The Bonners argued that the ordinance violated their constitutional rights of substantive and procedural due process since it did not provide them the opportunity to first repair the structures before demolition.

*Note: BCO § 18-59 specifically provides a different procedure for 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.*

### Did the Bonners challenge the ordinance on its face or as applied to them?

The assertions by the Bonners were "facial" attacks, requiring the Bonners to establish that no set of circumstances existed under which the ordinance would be valid.

### Who makes the unreasonable-to-repair determination?

The determination of the unreasonable-to-repair presumption is made, under the terms of the ordinance, by the city manager or his or her designee who may then order demolition without giving the owner the option to repair. BCO §18-61 provides for the procedure to be followed by an owner after a determination has been made by the city manager or designee that a structure is unsafe.

### Breaking down Section 59, clause by clause

A visual representation of the ordinance, clause by clause, helps in understanding its components and requirements.

#### If structure is unsafe

**AND**

**If the cost of repairs exceeds 100 percent true cash value of structure before deemed unsafe**

**THEN**

- 1. the repairs are presumed unreasonable**  
*and*
- 2. the structure is presumed to be a public nuisance that may be ordered demolished without providing the owner an option to repair it.**

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The remainder of the Unsafe Structures ordinance sets out the procedures to be followed by the city upon a determination that a structure is unsafe and by the owner if appealing that determination.

### **Why did the Michigan Supreme Court hold that the ordinance does not violate a property owner's substantive due process rights?**

The Bonners asserted 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 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. The Court, however, recognized that the public purpose that BCO §18-59 was intended to serve, i.e., to protect the health and welfare of its citizens by eliminating the hazards posed by dangerous structures, is a legitimate purpose.

Federal due process provisions in the U.S. Constitution guarantee that no person shall be deprived of "life, liberty, or property, without due process of law." (U.S. Const, Am XIV) The Court acknowledged that the Bonners, as owners of the three structures at issue and the land on which those structures were situated, had a significant property interest within the protection of the Due Process Clause.

The Court noted that the touchstone of due process is to protect individuals against arbitrary action of government. In particular, the substantive component of due process protects against the arbitrary exercise of governmental powers.

Having found that property owners have a significant property interest, the Court turned its inquiry into whether that property interest was fundamental. If the right asserted is not fundamental, then the government's interference (Section 18-59) with that right need only be reasonably related to a legitimate governmental interest. The Court recognized the line of cases in which it 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 landowner by restricting the character of the owner's use, including the opportunity to repair unsafe structures.

As such, the Court found that the right asserted could not be considered fundamental and that the Bonners had the burden of showing that the unreasonable-to-repair presumption did not bear any reasonable relationship to a legitimate governmental

interest. The Court stated, in part, "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." The Court further stated, "property owners have a constitutional right of property use, but this does not translate into an absolute constitutional right to repair unsafe structures." Further, the Court did not find that BCO § 18-59 violated their substantive due process rights as an arbitrary and unreasonable restriction on their constitutionally recognized property interests.

### **Why did the Michigan Supreme Court hold that the ordinance does not violate a property owner's procedural due process rights?**

The Bonners argued 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.

As noted above, the touchstone of due process is to protect individuals against arbitrary action of government. As it relates to the procedural component, the aim is to safeguard at ensuring constitutionally sufficient procedures for the protection of life, liberty, and property interests. Since aggrieved parties are provided the right to appeal an adverse decision to the city council as well as the right to subsequent judicial review under the ordinance, the Court found no violation of the Bonners' claim of a procedural due process violation.

### **Is there any relationship between the city's Unsafe Structures ordinance and its adoption of the International Property Maintenance Code?**

Yes. The city adopted the International Property Maintenance Code as prepared by the International Code Council in Section 18-76 with certain additions and revisions. In particular, the following revision to the Property Maintenance Code is included within the city's code:

*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**

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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. [Emphasis provided.]

*Note: The League's Municipal Litigation Center's publication Local Property Maintenance Codes addresses the relationship between the Single State Construction Act, the International Property Maintenance Code, and local building maintenance codes. The city of Grand Rapids prevailed in a case in which it was found that Grand Rapids' local maintenance code was not preempted by the state act. Brighton, in contrast to Grand Rapids, did not create its own maintenance code, but rather, adopted the International Property Maintenance Code with revisions, including the important provision, of referencing Section 18-59.*

### **Why is the Bonner case important for municipalities?**

The case provides a basis upon which municipalities and their attorneys can review their Dangerous Building ordinances in terms of scope and needs of the community. It also is a good starting point for reviewing all municipal ordinances that pertain to buildings and the enforcement procedures adopted by the community. The League's guide—*Restoring Michigan Communities: Building by Building*—is an excellent resource for making an analysis of community's ordinances and use of enforcement procedures.

### **APPENDIX**

[The following are relevant code provisions found in Chapter 18 of Brighton's Code of Ordinances.]

### **Chapter 18 BUILDINGS AND BUILDING REGULATIONS**

#### **Note**

#### **ARTICLE I. IN GENERAL**

#### **ARTICLE II. STATE CONSTRUCTION CODE**

#### **ARTICLE III. UNSAFE STRUCTURES**

#### **ARTICLE IV. PROPERTY MAINTENANCE CODE**

### **ARTICLE V. FLOODPLAIN MANAGEMENT PROVISIONS**

### **ARTICLE VI. MANDATORY REGISTRATION AND INSPECTION OF RESIDENTIAL RENTAL PROPERTIES**

### **ARTICLE III. UNSAFE STRUCTURES**

#### **Sec. 18-46. Definitions**

#### **Sec. 18-47. Unlawful to occupy or maintain**

#### **Sec. 18-48. Owner and occupants responsible for structure**

#### **Sec. 18-49. Enforcing officers**

#### **Sec. 18-50. Rules and regulations**

#### **Sec. 18-51. Right of entry**

#### **Sec. 18-52. Notice**

#### **Sec. 18-53. Placarding of structure**

#### **Sec. 18-54. Removal of placard**

#### **Sec. 18-55. Prohibited use**

#### **Sec. 18-56. Emergency measures**

#### **Sec. 18-57. Temporary safeguards**

#### **Sec. 18-58. Notice and order to show cause**

#### **Sec. 18-59. Unreasonable repairs**

#### **Sec. 18-60. Restoration**

#### **Sec. 18-61. Appeal to city council**

#### **Sec. 18-62. Commencement of legal proceedings**

#### **Sec. 18-63. Appeal to circuit court**

#### **Sec. 18-64. Penalties and remedies**

#### **Secs. 18-65 - 18-75. Reserved**

### **BCO § 18-46**

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

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abandonment;

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

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

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

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

#### **BCO § 18-47**

It shall be unlawful for an owner or agent to maintain or occupy an unsafe structure.

#### **BCO § 18-59**

Whenever the city manager, or his designee, has determined that a structure is unsafe and has determined that the cost of the repairs would exceed 100 percent of the true cash value of the structure as reflected on the city assessment tax rolls in effect prior to the building becoming an unsafe structure, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this article that such structure is a public nuisance which may be ordered demolished without option on the part of the owner to repair. This section is not meant to apply to those situations where a structure is unsafe as a result of an event beyond the control of the owner, such as fire, windstorm, tornado, flood, or other Act of God. If a structure has become unsafe because of an event beyond the control of the owner, the owner shall be given by the city manager, or his designee, reasonable time within which to make repairs and the structure shall not be ordered demolished without option on the part of the owner to repair. If the owner does not make the repairs within the designated time period, then the structure may be ordered demolished without option on the part of the owner to repair. The cost of demolishing the structure shall be a lien against the real property and shall be reported to the city assessor, who shall assess the cost against the property on which the structure is located.

#### **BCO § 18-61**

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

#### **BCO § 18-77 Additions, insertions and changes** [found in Article IV of Chapter 18]

The following sections of the adopted International Property Maintenance Code, current edition, are hereby revised 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.