STATE OF MICHIGAN

COURT OF APPEALS

LEON V. BONNER and MARILYN E. BONNER, Plaintiffs/Counter-Defendants-Appellees,	FOR PUBLICATION December 4, 2012
v	No. 302677 Livingston Circuit Court
CITY OF BRIGHTON, Defendant/Counter-Plaintiff-Appellant.	LC No. 09-024680-CZ

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

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 pre-deteriorated 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 was 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 grds 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 utilizing the judicial power to declare a law unconstitutional. *Council of Organizations & 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 references, 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 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

[1] The trial court did address plaintiffs' argument that defendant's decision that plaintiffs lost their *non-conforming 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.

[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.

assumed and the ordinance upheld. *Council of Organizations*, 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 upon – 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, 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, and 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:

> [F]irst, 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

[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, see *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.

> 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 plaintiff was afforded pre-deprivation 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 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

[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.

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 structures 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 upon § 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 upon § 2 of the Kentucky Constitution and likewise contains no discussion about what is required under the federal due process clause.

Similarly, in *Herrit v Code Mgt Appeal Bd of the City of Butler*, 704 A2d 186 (Pa Comm, 1997), the court did not analyze the case with procedural due process case law (though it does make mention of plaintiffs asserting a takings claim), and appears to have instead utilized a standard that determines whether the ordinance was "arbitrary, unreasonable and has 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 within *Horne v City of Cordele*, 140 Ga App 127, 130-131; 230 SE2d 333 (1976), where the court relied upon general notions of arbitrariness and public necessity in striking 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 respecting the *procedural* due process issue.[5]

[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 F Supp 908, 925-926 (ED Pa, 1979) aff'd in part, rev'd in part on other grds 643 F2d 946 (CA 3, 1981). Thus, the majority should not conflate case law 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 the different standards for analyzing these separate claims should be melted together.

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 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, as the trial court held. 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).]

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[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, presented power points, live testimony, and oral arguments. The city council also provided a written decision.

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

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 pre-unsafe value of the structure is neither unreasonable nor arbitrary. For one, the ordinance is not a flat prohibition precluding all property owners within 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 structures owner, and structures that become unsafe from weather related events or fire damage from sources other than the owner are not subject to the presumption.

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 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 a lower one is unconstitutional.). City council is, of course, the policy making body for the city, and we must be extraordinarily careful in not utilizing somewhat vague constitutional standards to override policy decisions that are outside our authority to make. *Warda v City Council of the City of Flushing*, 472 Mich 326, 334; 696 NW2d 671 (2005). And, given the exceptions 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.

[8] "Ipse dixit" is defined as "[s]omething asserted but not proved," Black's Law Dictionary (7th ed), so an ordinance resulting from a "whimsical ipse dixit" must result from an impulsive decision that has no proven basis to support it.

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

/s/ Christopher M. Murray

[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.