

ORDINANCES

Burning Down the House: Destruction or Repair Who Makes the Call?

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It is axiomatic that no American can be deprived of life, liberty or property without due process of law. A Michigan condemnation ordinance which tests the scope of that due process was recently considered for *certiorari*.

In January 2009, Leon and Marilyn Bonner were notified by James Rowell, the building and code enforcement officer for Brighton, Michigan, that three structures owned by them on the City's East North Street were "unsafe" in violation of the Brighton Code of Ordinances (BCO) and constituted public nuisances under Michigan common law. The two homes and barn had been unoccupied and generally unmaintained for more than 30 years, leading to a finding of numerous defects by the City, including "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 damaged chimney."

Based on these flaws, the building official determined that it was "unreasonable" to repair the structures under the standard set forth in a Brighton ordinance, BCO § 18-59, which provides 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. (emphasis added).

The "unreasonable-to-repair" presumption can be overcome by property owners who present a viable repair plan including evidence from experts that repair costs will not exceed 100 percent of the property's value, or other evidence that the structure possesses some sort of artistic, cultural, historical or familial attribute—but the Bonners apparently could not evince such superlatives for their decrepit buildings.

The Brighton ordinance also provides for certain extenuating circumstances beyond the control of the property owner, but these too did not mitigate the Bonners' decades of inaction:

> 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.

Based on its determination that repairs would cost more than 100 percent of the cash value of the Bonners' structures, the City ordered them to demolish the residences and barn without allowing the Bonners any option to rehabilitate the properties.

The Bonners appealed the City's demolition order before the City Council, but were unsuccessful. They then commenced an independent action in Livingston Circuit Court, launching a facial challenge to BCO § 18-59. The Circuit Court and subsequently the Court of Appeals each agreed with the Bonners that the ordinance's "unreasonable to repair" tautology was a facial violation of substantive due process. The lower courts held that requiring an owner to demonstrate that the cost of repair is less than true cash value violates substantive due process. Those judges found that the nuisance posed by the Bonners' dangerous structures could be eliminated by repairs as well as by demolition. As the Court of Appeals reasoned, a property owner might well want to repair a dwelling for sentimental, historic or family reasons and might be willing to spend more than the structure's cash value on the City's tax rolls.

Brighton appealed to the Michigan Supreme Court. In a unanimous decision, the court's seven members reversed, concluding that the Court of Appeals erred when it failed to analyze separately the Bonners' substantive and procedural due process claims. As the Michigan Supreme Court elucidated, they are distinct: the *substantive* element of due process protects against the arbitrary exercise of governmental power, whereas the *procedural* component ensures that constitutionally-adequate processes are followed to protect life, liberty, and property interests.

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their proliferation or minimize their potential negative effects. I think this could be one of those circumstances where unrestrained competition, if allowed to be the driving force, may have a negative impact on existing local businesses.

So, for us the question is: once the door to video gaming is open, how far should it get pushed? ML

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The Michigan Supreme Court acknowledged that the Bonners had "a significant property interest within the protection of the Due Process Clause." However, the court's substantive due process analysis turned on the proposition that *property owners do not have a fundamental right to repair a structure that has been declared unsafe by a municipality*. Accordingly, governmental intrusion into that (non-fundamental) right only needs to be reasonably related to a legitimate governmental interest. Under this standard, the Brighton ordinance was not facially deficient; the "unreasonable-to-repair" presumption was reasonably related to the City's legitimate governmental interest in preserving the health and welfare of Brighton residents, reducing crime and maintaining property values. Demolition of an unsafe nuisance was not an arbitrary act; it was a legitimate exercise of the City's police power.

The Michigan Supreme Court also found adequate procedural due process in the Brighton ordinance scheme. While the Bonners had argued that BCO § 18-59 failed to give property owners the procedural protection of a repair option before demolition, the court stated that due process merely requires impartial "adjudication . . . preceded by notice and an opportunity to be heard . . . granted at a meaningful time and in a meaningful manner" before the deprivation of a property interest. The court held that procedural due process "was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court."

Bonner v. City of Brighton, no. 146520 (Mich. Apr. 24, 2014). ML

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Implications-

Together, *Wainfleet Wind Energy Inc. v Wainfleet (Township)*, 2013 ONSC 2194, *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 and *East Durham Wind Inc.*, are strong judicial authority for the proposition that provincially approved renewable energy projects may be constructed despite municipal opposition.

City of Burnaby- Kinder Morgan At Odds Over Pipeline.

The Supreme Court of British Columbia has rejected the City of Burnaby's bid for a temporary injunction to stop survey work for an oil pipeline expansion project proposed by Kinder Morgan.

Kinder Morgan is proposing a $5.4 billion project to triple the capacity of its Trans Mountain pipeline, which currently carries oil products to a terminal in Burnaby from Alberta. The City of Burnaby has expressed its opposition with such expansion, and has attempted to block Kinder Morgan's survey work on Burnaby Mountain. The City of Burnaby alleges that Kinder Morgan violated municipal bylaws that protect trees and parkland, when Kinder Morgan workers toppled 13 trees, although Kinder Morgan indicated it was only seven trees. The City of Burnaby filed with the British Columbia Supreme Court to issue an injunction on the survey.

The City of Burnaby's action follows a previously upheld decision by the National Energy Board of Canada last month, allowing Kinder Morgan to access the Burnaby Mountain land under federal law. The National Energy Board Act stipulates that a company may enter into the land of any person that lies on the intended route to survey or otherwise ascertain whether the land is suitable. There is no requirement for companies to reach agreement with landowners, the Crown, or otherwise, before exercising the right to access land. Therefore, the National Energy Board held that Kinder Morgan does not need the City of Burnaby's permission to access Burnaby Mountain and can proceed with necessary studies of its preferred pipeline route through the mountain without the City's consent. In response to this holding, Kinder Morgan has filed a motion asking the National Energy Board to forbid the City of Burnaby from obstructing its crew. This decision is imminent.

On September 17, the British Columbia Supreme Court judge dismissed the application for an injunction against the Kinder Morgan survey crews on Burnaby Mountain. At the time of this publication, Judge Brenda Brown had not yet given her reasons for dismissing the injunction. ML

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employees was not required under the PDA even though it was offered to employees injured on the job.[15] The court reasoned that it was not Congress' intent to provide pregnant employees with greater rights than non-pregnant employees, which would be the result if the court adopted the employee's rationale.[16]

The employee in *Young* appealed to the Supreme Court and certiorari was granted on July 1, 2014. Oral arguments will be heard in December.

The EEOC's Guidance Conflicts with Fourth Circuit's Holding and Creates Controversy

As noted above, the timing of the Guidance is controversial given the impending Supreme Court decision on the subject, and in addition to that, some of the substance of the Guidance has garnered criticism. In fact, two EEOC Commissioners provided separate written dissents to the Guidance.[17] One point of contention is that according to the Guidance, Title VII requires that employers treat pregnant workers the same for all employment related purposes as other non-pregnant individuals who are similar in their ability or inability to work.[18] The Guidance therefore reasons that if an employer provides an accommodation to an employee with a disability, a pregnant employee who has similar limitations would be entitled to the same accommodation, regardless of whether the pregnant employee is actually disabled for ADA purposes.[19] This conclusion was one of the central points of criticism by Commissioner Victoria Lipnic in her dissent:

> The Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to "reasonable accommodation" as that term is defined by the Americans with Disabilities Act ("ADA"). No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it. Moreover, the Pregnancy Guidance