

community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

12.12.12

No Option To Abate By Repair - Held Unconstitutional

By Nancy Cooper Green

Protection of the public health, safety, and welfare is a fundamental responsibility of municipalities. One area where municipalities protect the public is nuisance abatement. In a recent *published opinion*, the Michigan Court of Appeals, in a 2 to 1 decision, held a nuisance abatement ordinance that authorized an order of demolition *without the option to abate by repair* was facially unconstitutional, citing both substantive and procedural due process violations.

In *Leon V. Bonner and Marilyn E. Bonner v City of Brighton*, Docket No. 302677, decided December 4, 2012, suit was brought challenging a nuisance abatement ordinance for being unconstitutional on its face. The ordinance provided:

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 the option on the part of the owner to repair. (Emphasis added)

The Court acknowledged that it is a permissible legislative objective to protect citizens from unsafe and dangerous structures, and that one mechanism to do so is demolition. However, the Court ruled that the ordinance did not bear a reasonable relationship to this permissible legislative objective. The Court concluded 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 repair, similar to demolition, will equally result in achieving the

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Review your nuisance abatement ordinance to ensure it will withstand both a substantive and a procedural due process challenge. An abatement ordinance should provide: 1) proper notice to the owner of the initial decision that a property is unsafe and dangerous; 2) an opportunity to appeal that decision; 3) an impartial decision maker; 4) a full hearing on the appeal; 5) notice of the appeal decision; and 6) that orders of abatement are by demolition *or repair*.

Pursuant to MCL 125.542, an owner aggrieved by a final decision or order may appeal to the circuit court by filing a petition for an order of superintending control within 20 days from the decision date.

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objective of protecting citizens from unsafe structures. The Court affirmed the lower court, and held the ordinance, on its face, violates both substantive and procedural due process.

Dissent

Justice Murray wrote a strong dissent stating that the majority's decision to affirm the lower court is in error. He stated that 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 and noted there are such circumstances.

Additionally, he stated 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. Further, even if properly before the Court, the ordinance does not violate Plaintiffs' rights to procedural due process under the United States Constitution. There is no dispute that Plaintiffs received proper notice of the inspector's decision, had the opportunity to appeal that decision to city council where a full hearing was held, and receive a decision from what the majority concedes was an impartial decision maker. Therefore, the City's ordinance satisfied the requirements of due process.

Appeal of this decision to the Michigan Supreme Court is by leave to appeal. Look to future editions of *Community Watch* for new developments.

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We welcome your questions and comments.

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