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Section 1983: Demolitions and Due Process

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Constitutional Issues: Section 1983 Demolitions

This presentation focuses on emergency demolitions that municipalities deem required after an inspector deems a privately owned structure to be "imminently dangerous." Due to the nature of these emergencies, the municipal inspector must evaluate the likelihood of collapse, the presence of dangerous conditions, and the likelihood of injury to members of the public. The most common causes of action following an emergency demolition by a municipality involve suits by the property owner claiming constitutional injuries under the 4th Amendment, 5th Amendment, and 14th Amendment. Plaintiff property owners typically complain that their substantive and procedural due process rights were violated under the 4th and 14th Amendments, respectively. They may also raise claims of 5th Amendment takings, however, generally those claims are considered meritless because a demolition merely removes an unsafe structure without removing the possessory rights of the owner. *Andrus v. Allard,* 444 U.S. 51 (1979).

This presentation focuses on due process claims raised by individual property owners following an emergency demolition of their property. The claims are also frequently brought under a theory of municipal liability pursuant to 42 U.S.C. § 1983 and *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658 (1978).

Elements of a Claim under § 1983 and *Monell*

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658 (1978), the Supreme Court determined that a municipality may be sued directly under § 1983 as long as the claim involves a municipal policy or custom that is attributable to the government unit itself. The Court held, however, that a municipality may not be held vicariously liable "solely because it employs a tortfeasor—or, in other words, a municipality may cannot be held liable under § 1983 on a *respondeat superior* theory." *Id* at 691.

Generally the elements of a claim pursuant to § 1983 are 1) that the conduct complained of was committed by a person acting under the color of state law and 2) that the conduct deprived the Plaintiff of rights privileges or immunities secured by the Constitution or the laws of the United States. To survive the pleading stage in a § 1983 claim against the City, a plaintiff must allege that (1) a constitutionally-protected right has been violated and (2) the alleged violation resulted from a municipal policy or custom that exhibits deliberate indifference to rights of citizens. *Monell*, 436 U.S. at 694–95.

In the Third Circuit, the courts generally recognize a two-path track to municipal liability under § 1983, depending on whether the allegation is based on municipal policy or custom. *Mulholland v. County of Berks*, 706 F.3d 227, 237 (3d Cir. 2013). A policy occurs when a decisionmaker with final authority "issues an official proclamation, policy, or edict," while a custom occurs when practices are "so permanent and well-settled as to virtually constitute law." *Id.* And to bring a § 1983 municipal liability claim under Monell, Plaintiff must present evidence that a "policy or custom of [the City of Philadelphia] was the 'moving force' behind a violation of his [constitutional] rights." *Clark v. Regional Medical First Correctional,* 360 F. App'x 268, 269 (3d Cir. 2010).

4th Amendment Substantive Due Process Claims

The 4th Amendment guarantees the right of citizens to be free from unreasonable searches and seizures by the government. While this amendment is most frequently considered in the context of criminal law when a police officer stops, searches, or arrests an individual or their property, the 4th Amendment applies to government action in the civil context as well. In the context of emergency demolitions, the 4th Amendment is triggered because demolition of a property is considered a seizure because it results in meaningful interference with the possessory interests for a property. *See U.S. v. Jacobsen,* 466 U.S. 109 (1984). Thus, a claim brought pursuant to the 4th Amendment requires analysis into whether the decision to demolish the property was reasonable.

The reasonableness of a determination made by a municipal employee is a fact-specific inquiry. Courts often look to the testimony of the individual inspector to determine whether the motive for classification as "imminently dangerous" was based on facts about the property or other factors such as animus toward the owner or punishment for the owner's failure to comply with prior notices of violation.

Cases in the Eastern District of Pennsylvania

Bullard v. City of Philadelphia, 847 F. Supp.2d 711 (E.D. Pa. 2014),

In *Bullard* the district court considered a summary judgment motion on a § 1983 action alleging a violation of the plaintiff's 4th Amendment substantive due process rights and 14th Amendment procedural due process rights. The court denied summary judgment with respect to the 4th Amendment claim because the record demonstrated a genuine issue of material fact on the reasonableness of the state actor's decision to demolish the structure. On July 12, 2010, an inspector evaluated the property and deemed it imminently dangerous. A notice was sent to the

registered owner the same day; however, the registered owner was recently deceased. . On July 23, 2010 a second inspector visited the property, unaware it had already been found imminently dangerous by the first inspector. The second inspector deemed the property merely "unsafe" and not "imminently dangerous." The second inspector left a notice of violation with information for "unsafe" properties, which provided 30 days to repair or demolish the structure and 5 days to appeal the notice. The plaintiff, who was in the process of purchasing the property, was present for the second inspection and hired an engineer on July 24, 2010 to evaluate the property. On July 24, 2010, the city sent the "unsafe" notice of violation to the owner—the deceased individual—but the notice actually described the property as "imminently dangerous" and notified the owner that demolition would occur.

The plaintiff began repairs on July 24, 2010, even though he did not official purchase the property until July 29, 2010. Over the next two weeks, the plaintiff was in contact with the second inspector and the chief of the city department. During this two week period, the plaintiff was never notified that the property was classified as imminently dangerous. On August 4, 2010 at 8:30 pm the plaintiff received a call from the second inspector stating the property would be demolished the next day and the only way for plaintiff to stop the demolition was to apply for a temporary restraining order (TRO) against the city. Both the second inspector and the chief of the unit testified in their depositions that the decision to demolish was made because plaintiff was not conforming his repairs to what was required by the engineer's reports for structural integrity. The chief of the unit further testified that he believed the repairs were making the structure less safe. The plaintiff testified that the repairs conformed to the engineer's report and were not undermining the structure integrity of the property.

The demolition occurred on August 5, 2010. The plaintiff attempted to avoid the city demolition process by demolishing the structure himself, but he was prevented from doing so by city officials. Ultimately the district court concluded that there was a material issue of fact regarding whether the decision to demolish was reasonable because a factfinder could either determine that the decision was based on safety, per the testimony of the unit chief, or that the decision was punitive in nature for failing to adhere to the engineer's report, per the testimony of the plaintiff.

Philly Auto, Inc. v. City of Philadelphia, 362 F. Supp. 3d 272 (E.D.Pa 2019)

In *Philly Auto* the district court considered a motion for summary judgment on a § 1983 claim based on alleged 4th and 14th amendment violations following an emergency demolition. On April 28-29, 2017 a warehouse owned by the plaintiff caught fire and sustained major damage including the collapse of its roof and partial collapse of its walls. An inspector arrived at the property on April 29, 2017 and ordered emergency demolition of the rear wall of the structure because it was in immediate danger of collapse. The inspector deemed the property imminently dangerous because he believed the structure would collapse within six months. The inspector posted a notice on the front of the structure, which remained in place until May 8, 2017.

On May 1, 2017 the city generated a final notice of violation and order classifying the property as imminently dangerous. The notice instructed the owner to hire a structural engineer and make repairs or the city would demolish the structure and bill the plaintiff for costs. However, the notice was not mailed out to the plaintiff until May 4 or May 5. On May 6, 2017 the remaining portion of the structure's wall collapsed. On May 8, 2017 the city held bids for demolition. The plaintiff alleges receiving the notice of violation on May 9, 2017. On May 10,

2017 the city began demolition of the structure. The city billed plaintiff $271,559.32 for the demolition.

During depositions, the city inspector testified that the property was about to collapse and would put adjacent buildings and pedestrians in danger zone. The plaintiff challenged this as the real reason the inspector invoked the emergency demolition because the inspector also testified that if the plaintiff had appealed, the demolition would not have proceeded. The plaintiff argued that this fact undermined the public safety testimony because if the property were truly unsafe an appeal would not halt the demolition. Ultimately the court believed this issue constituted a genuine issue of material fact and denied summary judgment. The case went to trial, which resulted in a full defense verdict for the city.

14th Amendment Procedural Due Process

The 14th Amendment guarantees citizens the right to be free from deprivation of life, liberty, or property without due process of law. In the context of emergency demolitions, the 14th Amendment requires the demolition to be preceded by notice and opportunity to be heard. However, due process does not require actual notice before the structure is demolished. Instead, the notice must be "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950); *and* Jones v. Flowers, 575 U.S. 220, 226 (2006). Claims under the 4th and 14th Amendment are often tethered together, with the same factual inquiries driving the ultimate legal conclusion.

Cases in the Third Circuit and the Eastern District of Pennsylvania

Munoz v. City of Union City, 481 Fed. Appx. 754 (3d Cir. 2012).

The Third Circuit considered a § 1983 claim for violation of 14th Amendment substantive due process following an emergency demolition on an appeal from the grant of summary judgment in favor of the defendants (the municipality and its employee) by the lower court. On the morning of September 9, 2006 the plaintiff's building caught fire. The plaintiff was immediately notified of the fire, which was brought under control around 7:00 am. At 10:00 am, a city inspector assessed the building and saw the roof was collapsing and the floors were about to collapse. The plaintiff was verbally notified of the imminent collapse and that the building required demolition and a notice was affixed to the front of the property. The inspector engaged a demolition company to begin demolition at 4:00pm that day. The plaintiff claimed to have learned about the actual demolition 3-4 days after the demolition occurred. After demolition, there were four separate due process hearings in state court, which resulted in the plaintiff owing $76,000 to the city for the cost of the demolition.

Plaintiff initially brought an action in state court, which was removed to federal court by the defendants because of the constitutional claims. The Third Circuit ultimately affirmed the lower court's decision. In doing so, the Third Circuit affirmed that a pre-deprivation hearing was not required before demolition. The Court stated that ordinarily a due process hearing *should* occur before deprivation but, "in special circumstances, a state may satisfy the requirements of procedural due process merely by making available 'some meaningful means by which to assess the propriety of the state's action at some time after initial taking." The Court specifically looked to the expertise of the decisionmaker, inspector, and determined that the demolition was a necessarily quick action by the sate due to the existence of exigent circumstances.

Bullard v. City of Philadelphia, 847 F. Supp.2d 711 (E.D. Pa. 2014),

In *Bullard*, the district court granted summary judgment in favor of the plaintiff on his § 1983 14th Amendment due process claim because the notice provided to him was insufficient under the totality of the circumstances. The facts, which are detailed more fully above, indicated that plaintiff only received notice of an "unsafe" determination, which provided 30 days for him to make repairs to bring the property in compliance with the code. Despite the fact that another inspector had previously deemed the property "imminently dangerous" and mailed notice to the then owner that demolition would occur, the plaintiff did not receive such notice and therefore had neither an opportunity to object nor an opportunity to abate the issues. The Court found that even if the plaintiff had been notified of the "imminently dangerous" designation that the facts in this case would not have allowed a reasonable timeframe for plaintiff to abate the issue.

Philly Auto, Inc. v. City of Philadelphia, 362 F. Supp. 3d 272 (E.D.Pa 2019)

The district court in *Philly Auto* tied its determination that summary judgment was not appropriate for plaintiff's 14th Amendment claim to its conclusion of the same with regard to the 4th Amendment claim. The court looked to the facts, as outlined in more detail above, that the inspector testified the property was about to collapse and would put adjacent buildings and pedestrians in danger zone but that there was also testimony that if the plaintiff had appealed the demolition would not have proceeded. The court considered the testimony that the halt in demolition triggered by an appeal could undermine the testimony that the decision to demolish was based in public safety. As a result, the motion was denied and the case proceeded to trial where the jury found in favor of the defendants.

The Demolition Process in Philadelphia

The City of Philadelphia, through the Department of Licenses and Inspection, demolishes approximately 500 properties a year. Many of these demolitions occur without court involvement through the Department's police powers.

There are two categories of structures the Department seeks to demolish: unsafe structures and properties with imminently dangerous conditions. The Property Maintenance Code of the Philadelphia Building Construction and Occupancy Code, Title 4 of the Philadelphia Code defines what unsafe and imminently dangerous structures are. An unsafe structure is one that is found to be dangerous to the life, health, property or safety of the public or the occupants of the structure by not providing minimum safeguards to protect or warn occupants in the event of fire, or because such structure contains unsafe equipment or is so damaged, decayed, dilapidated, structurally unsafe or of such faulty construction or unstable foundation, that partial or complete collapse is possible. Philadelphia Code PM-108.1.1. An Imminently Dangerous Structure is imminent danger of failure or collapse which endangers life, or when any structure or part of a structure has fallen and life is endangered by the occupation of the structure. Philadelphia Code PM-110.1.

When the Department seeks to demolish an Imminently Dangerous structure, the Philadelphia Code authorizes the Department to demolish the structure once notice of violation and imminently dangerous condition and an opportunity to correct are provided to the owner. Under the Philadelphia Code, notice must be written and include: the address of the premises in violation, a description of the violations, a correction order to eliminate the violations, and a time limitation for correction of the violations. Philadelphia Code A-502.2. This notice can be served personally or by first class or registered mail. Philadelphia Code A-502.4. For Imminently

Dangerous Cases, in addition to the methods mentioned above, notice must be posted to the subject property as well, and this posting shall be deemed the equivalent of personal notice. The role of the City attorney in these cases is to review the notice of violation to ensure that it has been sent to the correct owner and to the correct last known address, and to ensure that the Department does not demolish a structure until the compliance period has past.

There are situations where court action is required before a demolition can occur. Some Imminently Dangerous structures are inhabited. In these cases, the City attorney files a complaint and preliminary injunction seeking an order to vacate and demolish from the court. Some property owners will file a preliminary injunction seeking to stay demolition where the Department has started a demolition through their police powers. In these circumstances, the City attorney will represent the Department, at the Preliminary Injunction hearing to defend the Department's decision to move forward with demolition. For Unsafe Structures, the City attorney will typically file a complaint in court, seeking equitable relief in the form of a court order directing the owner to make the required repairs by a certain date.