No. 20-CV-556

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

1417 BELMONT COMMUNITY DEVELOPMENT,
APPELLANT,

v.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Other

STATEMENT OF THE ISSUES

Appellant 1417 Belmont Community Development ("Belmont") attempted to develop a large, four-story building into condominium units with an underground parking garage. From the beginning, however, the project posed a serious safety risk to the community. Belmont's dangerous construction methods undermined the structural integrity of the building by gutting it without properly bracing the exterior walls, among other failures. Over the course of two years, despite enforcement directives by the District of Columbia's Department of Consumer and Regulatory Affairs ("DCRA"), as well as the Board for the Condemnation of Insanitary Buildings ("Board"), Belmont refused to stabilize the empty shell of a building, or, in the alternative, to demolish it. After the building partially collapsed, and after two building engineers, one architect, and one contractor concluded that the building was at risk of imminent collapse, the District razed the building. Belmont brought this suit against the District, alleging that the raze had occurred without constitutionally adequate notice. The Superior Court granted summary judgment to the District. The questions presented on appeal are:

1. Whether the District is entitled to summary judgment where Belmont failed to show a municipal policy of providing constitutionally inadequate notice, and failed in particular to demonstrate that the DCRA Director (a) had final policymaking authority, (b) participated in decisions regarding notice to Belmont,

or (c) was deliberately indifferent to a serious risk of a procedural due process violation when she authorized the raze.

2. Whether the District is entitled to summary judgment because, in the alternative, it did not violate Belmont's procedural due process rights when it razed the building only after the building had been condemned and ordered repaired or demolished, Belmont ceased repair work, a second partial collapse occurred on the property, the District posted and mailed further written notice to Belmont that the building was unsafe and subject to corrective action, and a contractor determined that the building could collapse at any time.

3. Whether, assuming the Superior Court erred in granting summary judgment to the District, Belmont is not entitled to summary judgment because a jury should decide, at a minimum, any outstanding factual questions about the provision of notice to Belmont including the DCRA Director's role, if any, in providing such notice.

STATEMENT OF THE CASE

In September 2010, Belmont filed suit against the District under 42 U.S.C. § 1983, claiming deprivation of procedural due process and seeking $7,000,000 in damages. App. 34. On June 24, 2016, the Superior Court initially granted Belmont partial summary judgment on liability and reserved the issue of damages for a jury trial, App. 355-56, but then orally vacated its summary judgment ruling on May 2,

2018, App. 422. After denying several motions to reconsider by Belmont, the court granted summary judgment to the District on June 16, 2020. App. 465. On August 14, the court denied Belmont's motion for reconsideration of summary judgment. SA 111. On September 16, Belmont timely filed its notice of appeal. SA 148.

STATEMENT OF FACTS

1. Legal Framework.

A. The Construction Codes.

The District's "Construction Codes" encompass the Building Code, Electrical Code, Property Maintenance Code, and Fire Safety Code, among others. *See* D.C. Code § 6-1401(2); *Lumen Eight Media Grp. v. District of Columbia*, Nos. 20-CV-316 & 20-CV-317, 2022 WL 3270077, at *8 (D.C. Aug. 11, 2022) (quoting 12-A DCMR § 101A). At the time of the dispute (and today), the District's Building Code established minimum standards for the "safe and sanitary maintenance of all structures and premises," including the construction and rehabilitation of buildings. 12-A DCMR § 101.2.3 (2008); *see id.* § 101.2.4 (stating that the "purpose of the Building Code" is to establish "minimum standards to safeguard the public health, safety, and general welfare").

In 2009, the Director of DCRA was charged with enforcing the Building Code and authorized to delegate those powers. *See* D.C. Code § 6-1405.01 (effective Dec. 7, 2004); 12-A DCMR §§ 103.1, 103.1.1, 104.1 (2008). Her duties included issuing permits, certificates, and notices related to "the erection, razing, demolition,

alteration, and use of buildings and structures" in conformance with the Building Code. *Id.* §§ 104.2-.3, 113.2 (2008). Although the DCRA Director was previously empowered to propose amendments to the Codes, *see id.* § 122.2.1, the Mayor delegated that authority to the newly created Construction Codes Coordinating Board in February 2009. *See* Mayor's Order 2009-22, 56 D.C. Reg. 2049 (Feb. 25, 2009). The Coordinating Board has 13 members and includes building experts, private citizens, and government officials, including three members of DCRA and a Council representative. Mayor's Order 2009-22, at 2-3. Other than the Council representative, all are appointed by the Mayor. DCRA provides "administrative and staff support" to the Coordinating Board. *Id.* at 4. As before, any proposed amendment must be approved by the Council of the District of Columbia. D.C. Code §§ 6-1402, 6-1409 (continuing to provide for 45-day review period by the Council and prohibiting any proposed rules from taking effect "until approved or deemed approved by the Council").

In 2009, the Building Code provided that "abandoned, deteriorated, unsafe [and] unsanitary" buildings or structures, or those "otherwise dangerous to human life or the public welfare," or "which involve illegal or improper use occupancy or maintenance, shall be taken down and removed or made safe and secure," as the DCRA Director "may deem necessary pursuant to this section or pursuant to D.C.

Official Code § 42-3131.01, *et seq.* or D.C. Official Code § 42-3171.01 *et seq.*" 12-A DCMR § 115.1 (2008).

B. The Nuisance Abatement Act.

D.C. Code § 42-3131.01 allows for the abatement of nuisance properties by authorizing the Mayor to correct unlawful building conditions. In 2009, the statute provided that the Mayor may "[c]ause such [unlawful] condition[s] to be corrected" and assess "all expenses incident thereto . . . as a tax against the property," where the owner "fail[s] or refuse[s], after the service of reasonable notice in the manner provided in § 42-3131.03, to correct any condition" in violation of the law, "or to show cause . . . why he should not be required to correct such condition." D.C. Code § 42-3131.01(a)(1) (effective Mar. 25, 2009).

The notice provision in Section 42-3131.03 allows for service of process by numerous methods. Relevant here, in 2009, the statute "deemed [notice] to have been served":

> (1) If delivered to the person to be notified, or if left at the usual residence or place of business of the person to be notified, with a person of suitable age and discretion then resident therein;
>
> (2) If no such residence or place of business can be found in said District by reasonable search, if left with any person of suitable age and discretion employed therein at the office of any agent of the person to be notified, which agent has any authority or duty with reference to the land or tenement to which said notice relates;

> (3) If no such office can be found in the District by reasonable search, if forwarded by first-class mail to the last-known address of the person to be notified, or the person's agent, as determined by the tax records, business license records, or business entity registration records, and not returned by the post office authorities; [or]
>
> (4) If no address be known or can by reasonable diligence be ascertained, or if any notice forwarded as authorized by paragraph (3) of this section shall be returned by the post office authorities, if posted in a conspicuous place in or about the property affected by the notice.

Id. § 42-3131.03(1) to (4) (effective Mar. 21, 2009).[1]

The abatement provision further provided for "summary correction" of "violations of the construction codes where a life-or-health threatening condition exists," defined in part as any condition that "imminently endangers the health, safety, or welfare of the surrounding community." *Id.* § 42-3131.01(c)(1) (effective Mar. 25, 2009). In that case, the summary abatement procedures provided for "an opportunity for review of the summary corrective action without prejudice to the Mayor's authority to take and complete that action," and notification "by personal service or by registered mail to the last known address and by conspicuous posting on the property." *Id.* § 42-3131.01(c)(1).[2]

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[1] Belmont in its opening brief incorrectly cites to the version of Section 42-3131.03 currently in effect. Br. 14.

[2] Several additional District laws authorized the District to unilaterally correct unsafe building conditions and, if appropriate, demolish buildings posing a threat to

C. The Board for the Condemnation of Insanitary Buildings.

In addition to the above authority, the District, through its Board for the Condemnation of Insanitary Buildings ("Board"), has long been empowered to inspect and enforce the "habitable and sanitary condition" of all buildings in the District. D.C. Code §§ 6-901 (effective Apr. 27, 2001), 6-903 (effective Dec. 7, 2004). District law in 2009 provided that an uninhabitable building presents unlivable conditions due to, *inter alia*, "improper maintenance, [and] decaying structures." *Id.* § 6-901. Where the condition of the building "endanger[ed] the health or lives of the occupants thereof or persons living in the vicinity," the Board was authorized to issue an order of condemnation requiring that the unsafe building be put into habitable and sanitary conditions, or be demolished. *Id.* §§ 6-903, 6-907 (further criminalizing the violation as a misdemeanor). The current version of the Code clarifies that Board proceedings and remedies have been available concurrent with, and do "not preclude," DCRA enforcement of the Building Code. *Id.* § 6-903(a)(1). Condemnation orders are appealable to the Superior Court and this Court. *Id.* §§ 6-913, 6-914.

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public safety. *See* D.C. Code § 6-801(a) (effective Apr. 27, 2001) (authorizing the Mayor, "where the public safety requires immediate action," to "cause the said unsafe structure or excavation to be shored up, taken down, or otherwise secured without delay"); *id.* § 42-3173.02(b) (effective Apr. 19, 2002) (granting authority to demolish deteriorated structures).

2. Factual Background.

The following facts are drawn from the summary judgment record and not genuinely disputed, except as otherwise indicated. At all relevant times, Belmont was a limited liability corporation owned and operated by Khalid Eltayeb. App. 330. In August of 2006, Belmont purchased the property located at 1417 Belmont Street, NW, which included a four-story brick building. App. 166, 330. Belmont sought to develop the building into approximately 30 condominium units with a 27-car underground parking garage, all of which required extensive renovation, including demolition of the building's interior. App. 166, 186; SA 9.

Almost from the beginning, the project encountered numerous safety issues. A June 2007 inspection of the building revealed that Belmont was in violation of 14 DCMR § 900.2, requiring that "[u]noccupied buildings . . . left uncompleted" be secured in a manner "afford[ing] protection against accident to persons in or about the premises." SA 14; App. 81-82. DCRA accomplished notice of the infraction by personal service on Mr. Eltayeb's attorney, and by certified mail. App. 81-82. Belmont ignored the notice, as well as a second notice of infraction served in April 2008. SA 15. The D.C. Office of Administrative Hearings found that Belmont had "received adequate notice of the charges" and entered a default order against

it. SA 15 (imposing fine and authorizing imposition of additional sanctions upon failure to pay). [3]

In July 2007, the Board inspected and found the property "in such insanitary condition as to endanger the health or the lives of . . . persons living in the vicinity." SA 1. The Board found evidence of deteriorating interior and exterior structures, including cracked and decaying exterior walls, among other issues. SA 3. As community complaints around the same time further detailed, all construction work had stopped, and the unsecured building was frequently host "to illegal drug activity, crowds of unsavory people who use[d] th[e] vacant building to hide their drugs, loud music[,] and noise beginning in th[e] early evening until the wee hours of the night, and sexual activity." App. 155. One neighbor complained to DCRA that he had not seen any progress on construction since 2006, shortly after Mr. Eltayeb purchased the property, and that the property had posed a nuisance to the community ever since. App. 156.

The Board issued a notice to show cause why the building should not be condemned, which it served by certified mail. SA 1-2. Belmont requested a hearing,

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[3] Although the OAH order, Board notices, and related Board materials cited herein are not included in the record below, the Court may take judicial notice of them as matters of public record. *See Bostic v. District of Columbia*, 906 A.2d 327, 332 (D.C. 2006); *see also, e.g.*, 10-B DCMR § 3002 (permitting public inspection of "individual case files" of the Board).

which was held in September 2007. SA 5. As a result, the Board approved a 30-day extension to complete all necessary repairs rendering the property sanitary, or to demolish the building. SA 6. The Board granted numerous, additional extensions of time through early February 2008. SA 7. Belmont failed to remediate the violations by that deadline. In late February 2008, the Board issued an Urgent Notice demanding that Belmont provide a construction schedule. SA 8. The Notice emphasized the Board's authority to "cause the building to be made safe and sanitary or razed and removed," should the owner fail to remedy the cited conditions. SA 8. Belmont finally responded that, while "interior demolition and some foundation repair had been completed," remaining concrete and masonry work could not resume until the spring of 2008. SA 9. Belmont stated that it planned to complete the project within 8 to 12 months. SA 9. On consideration of Belmont's response during its regular meeting in March 2008, the Board approved an additional extension to complete all work to repair or demolish the building by June 2008. SA 10.

On May 22, 2008, the center portion of the building shell, from the roof down to the basement level, collapsed and seriously injured a construction worker. App. 159-60, 166, 278. DCRA retained a structural engineer to assess the structural integrity of the remaining, partially collapsed structure. App. 162. The District's engineer determined that the building was unstable and in danger of collapse. App. 163. The engineer's inspection revealed that steel column footings located in

an area being excavated for parking had been "severely undermined," and that at least two exterior walls were completely unbraced, while the underpinning of other walls exhibited "poor workmanship." App. 166. The engineer recommended in a report that "immediate actions be taken to stabilize the structure to prevent any further collapse of the walls and structure." App. 166-67. The engineer urged that, in the absence of further bracing the exterior walls, Belmont should demolish the entire structure. App. 167.

In early summer 2008, DCRA convened a meeting to discuss the District's report with its engineer; Mr. Eltayeb; and Mr. Eltayeb's own structural engineer, Suresh Baral. App. 176. Mr. Baral agreed with the report's assessment, that "[t]he interior of the structure was caving-in, [and that] the building was in an unsafe condition and was in danger of collapse." App. 176. The parties discussed the need to demolish the building unless Belmont could make it safe through further remedial action. App. 163, 176. Mr. Eltayeb stated that his engineer would devise a plan to temporarily brace and stabilize the building. App. 163, 331. Mr. Baral completed those plans in June 2008, which DCRA approved, and Belmont purportedly completed the shoring work that summer. App. 178-81, 184, 310.

In late summer 2008, Mr. Eltayeb was again warned, this time by an architect whom he had hired to design the underground parking garage, that the building was once more "unsafe and in imminent danger of collapse because it was not completely

shored up and braced." App. 238-39. In fact, "[o]n several occasions," the architect advised Mr. Eltayeb "to either brace the west wall," which was not braced or fully underpinned, "or demolish it because it was unstable and in imminent danger of collapse." App. 239.

On August 27, 2008, the Board granted yet another, 45-day extension of time, to complete all necessary repair work or demolish the building. App. 188. Still, by early fall of 2008, community leaders reported the lack of any additional progress on construction and persistent safety concerns. An email from the Chairman of the Meridian Hill Neighborhood Association noted that construction was still halted, and that the property "continue[d] to be a nuisance and a big safety concern." App. 186. And an email from Councilmember Jim Graham further stated that Mr. Eltayeb had "promised [him] aggressive progress" on the project but "[n]othing like th[at] ha[d] happened." App. 187.

The Board's October 2008 deadline to either make repairs or demolish the building passed without further action. The Board ordered the building condemned on October 22, 2008, and a Certificate of Order of Condemnation was filed with the Recorder of Deeds on November 17, 2008. SA 11. As a result, by statute, the building was subject "to be demolished and removed" absent remediation within a reasonable period of time. *See* D.C. Code § 6-903 (effective Dec. 7, 2004); *see also id.* § 6-907 (effective Apr. 27, 2001).

On November 10, 2008, DCRA was alerted to an earthen collapse of a trench at the property, leading it to conduct an emergency site inspection. App. 190. DCRA Chief Building Inspector Don Masoero examined the site with Mr. Eltayeb and Mr. Baral, and Mr. Baral informed Mr. Eltayeb that his construction methods had created a dangerous condition. App. 190. Inspector Masoero instructed Mr. Baral to prepare an emergency stabilization plan. App. 190. DCRA authorized work to stabilize the area around the collapse, contingent on observation at all times by Mr. Baral. App. 190. DCRA further informed Mr. Eltayeb that all future construction would require full-time observation by Mr. Baral, to which Mr. Eltayeb agreed. App. 190.

For some time thereafter, DCRA received weekly updates from Mr. Baral. App. 192. However, by late March 2009, construction had once again ceased. App. 192. On March 30, 2009, DCRA issued a notice of violation requiring that Belmont, within 15 days, "[i]mmediately render [the] structure safe by repair, demolition, or raze." App. 203. The violation notice advised of Belmont's right to request a show-cause hearing, but also warned that the District was empowered to cure the unsafe conditions and to assess the costs against Belmont, and could summarily correct the violation in the case of a life-or-health threatening condition. App. 203-05 (citing D.C. Code §§ 42-3131.01(a)(1), (c)(1)).

DCRA employee Ken Wilson, then Supervisor of Building Inspections, posted the violation notice, which was signed by Inspector Thomas J. Hayden, on

the front door of the property. App. 204, 210. He also mailed it via first-class mail to Belmont as the record owner of the property, at 1301 Pennsylvania Ave., SE, Washington, D.C. 2003, which was its address on record with DCRA and the District's Office of Tax and Revenue. App. 210-11. The mailing "was not returned by the United States Postal Service." App. 211. Belmont did not genuinely dispute that it in fact received such notice. App. 315-17, 460-62.

Inspector Masoero scheduled a meeting with Mr. Eltayeb and his engineers for March 31, 2009, to discuss the violations on the property. App. 198, 309, 312. Inspector Masoero attested that the meeting was scheduled for 10 a.m. that day, but nobody appeared, and Mr. Eltayeb refused to answer his phone. App. 198, 201. Belmont did not genuinely dispute these facts. App. 311-15.

The 15-day deadline to render the building safe or demolish it passed without Belmont requesting an extension or taking further action to abate the dangerous conditions detailed in the notice. App. 198, 211.

About a month later, on May 15, 2009, yet another collapse occurred, this time creating a fire hazard—a cave-in underneath the sidewalk next to the building, where a gas line was located. App. 108, 198, 211-12. As a result, Inspector Masoero deemed the building an unsafe structure under 12-A DCMR § 115. App. 83, 217; *see* 12-A DCMR § 115 (providing that unsafe buildings or structures "shall be taken down and removed or made safe and secure, as the code official may deem necessary

pursuant to this section or pursuant to D.C. Official Code § 42-3131.01, *et seq.*"). DCRA procured a contractor to raze the building on an emergency basis. App. 97-99. The procurement requests, signed by DCRA Director Linda Argo, justified the emergency raze due to the "imminent danger of collapse" and potential for "significant[] damage [to] the adjacent property," potentially "caus[ing] harm to life and limb." App. 97, 99.

DCRA proceeded as expeditiously as possible over the next two months to carry out the raze. Speed was of the essence since "the footings of the building [we]re . . . beginning to settle," further contributing to the "imminent threat of collapse." App. 217. Emails at the time exchanged between DCRA and ANC Commissioner Nadeau noted delays in the bidding process due to the "complicated" nature of the operation posed by the building's dangerous condition. SA 12. Belmont's engineer, Suresh Baral, was copied on the email chain. SA 12. On June 23, the contractor obtained for the emergency raze confirmed that the site was "highly unstable" and building "severely compromised," and "could collapse at any time spontaneously." App. 226. On July 2, 2009, the emergency raze permit issued, signed by Director Argo, and the raze was completed on July 10. App. 88, 91-92, 102. The District filed a Certificate of Delinquent Costs for Correction of Wrongful Housing Conditions in the assessed amount of $178,129.00, and placed a lien on the

property. App. 84. The lien was released in 2019 after finally receiving payment ten years after the emergency raze. SA 20.

3. Procedural History.

A. The 2010 complaint alleging a violation of procedural due process.

In 2010, Belmont brought suit against the District, alleging: (1) a Fifth Amendment deprivation of property rights without due process, App. 34, 51, and (2) a tort claim for unlawful destruction of property, App. 34; *see* SA 23.[4] The complaint averred that "[t]he building was in good structural condition and was properly braced," and, "being basically brace[d] showed no signs of impending collapse." App. 33. The complaint further alleged that the District "made regular inspections and . . . no concerns were raised," and that "[h]ad the plaintiff received notice, it would have taken all necessary steps to administrative [sic] appeal it." App. 33. Belmont sought $7 million in damages. App. 33.

The Superior Court dismissed Belmont's destruction-of-property tort claim. SA 24. Litigation proceeded on the due process count, and, over the next years, the Superior Court compelled discovery, granted sanctions against Belmont, dismissed the case for want of prosecution, reopened the case, and even reopened discovery at

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[4] Belmont never alleged a claim under the Takings Clause of the Fifth Amendment. *See* Br. 1, 2, 9, 11. Belmont impermissibly attempted to raise such a claim for the first time at summary judgment. *See* App. 51, 118-19. It later conceded to the Court that it was pursuing (necessarily) only its procedural due process claim on summary judgment. App. 464-65.

Belmont's request in 2015. SA 33; App. 9, 12; *see* SA 26-27 (detailing Belmont's failure to comply with at least one court order, refusal to participate in pretrial meetings, and failure to present a joint pretrial statement). Belmont never deposed any DCRA employees, and discovery closed in 2016. SA 34.

B. The June 2016 initial grant of summary judgment to Belmont.

The Superior Court initially granted summary judgment to Belmont on liability on June 24, 2016. App. 355-56. It held that the District had violated procedural due process by failing to strictly comply with statutory requirements when it sent Belmont the March 2009 violation notice by first-class mail, rather than registered or certified mail. *See* App. 341-51.[5] The court also viewed the notice as insufficiently clear that the District could immediately take summary corrective action and, moreover, concluded that it was premature because it predated DCRA's May 2009 determination that the building constituted an unsafe structure. App. 348-49.

The Superior Court initially imputed the procedural due process violation to the District. App. 351; *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

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[5] The District's March 2009 violation notice invoked its authority under D.C. Code §§ 42-3131.01(a)(1) (incorporating Section 42-3131.03), 42-3131.01(c)(1), and 12-A DCMR-A § 115.1, *see* App. 206, App. 107 (District response to interrogatory confirming emergency raze was authorized pursuant to D.C. Code § 42-3131.01 *et seq.*), although the court discussed additional statutes authorizing the District to demolish unsafe buildings, *see, e.g.*, App. 348 (citing D.C. Code §§ 6-807 and 42-3131.03).

Recognizing that "a municipal entity is not vicariously liable for the actions of its agents or employees" under Section 1983, App. 352, the court nevertheless imposed liability based on the acts of Director Argo, reasoning that she was a final policymaker who had signed various documents authorizing the raze, App. 355.[6]

C. The May 2018 reversal of summary judgment and subsequent proceedings.

Upon reviewing the parties' pretrial submissions at a May 2018 pretrial conference, the Superior Court reversed its grant of summary judgment, concluding that Belmont had not shown, as a matter of law, that notice was constitutionally inadequate. *See* SA 52-56, 106, 113. In July 2019, upon motion, the court clarified that it was vacating its grant of summary judgment as to municipal liability as well. App. 422-27. Belmont sought reconsideration, which the Superior Court denied in August 2019. App. 447.

In April 2020, the Superior Court denied Belmont's second motion for reconsideration. SA 115. Relevant here, the court cautioned that while Director Argo "may have made the final decision to raze the building," it "d[id] not follow that she also decided or ratified the content, timing, or method of notice." SA 120.

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[6] The Superior Court further reasoned that Director Argo had issued the March 2009 notice and declared the building unsafe in May 2009, App. 355, but the record indicates that she was not the one who did so, App. 79, 86-87 (March 2009 notice signed by Thomas Hayden and mailed by Ken Wilson); App. 217, 379 (building declared unsafe by Chief Building Inspector Masoero).

And the court emphasized that "municipal liability of the District is not established by the mere facts that DCRA employees decided what notice to provide and that Ms. Argo was then the head of the DCRA." SA 123.

As a result, the Superior Court expressed its "inclin[ation] to conclude that Belmont [] failed to establish a triable issue of fact with respect to municipal liability." SA 133; *see* SA 125 (providing the parties "notice of issues that [the court] is tentatively prepared to resolve as a matter of law"). With respect to final policymaker liability in particular, the court stated that it "was not aware of any evidence" that Director Argo "herself decided when or how DCRA should provide notice or what the notice to Belmont should say," or that "she was deliberately indifferent to the risk that Belmont had not received adequate notice when she authorized the raze." SA 133. The court instructed Belmont to proffer all supporting evidence in favor of municipal liability in a supplemental joint pretrial statement. SA 134.

The court also notified the parties that it was "inclined to conclude that facts about which there is no genuine dispute establish that the District mailed and posted the [March 2009 notice]." SA 131. Explaining that "[c]onclusory assertions that Belmont did not receive the mailing or see the posting do not create a genuine dispute," the court directed the parties to "address the applicable legal principles and the factual record in the supplemental joint pretrial statement." SA 131, 133.

Belmont once more sought reconsideration, which the Superior Court denied. App. 453.

D. The June 2020 grant of summary judgment to the District on municipal liability and denial of reconsideration.

In June 2020, on reviewing the parties' pretrial submissions on the legal issues, the Superior Court granted summary judgment to the District. App. 465. On the predicate constitutional violation, the court found as a matter of law that the first-class mailing and posting of the March 2009 notice was reasonably calculated to reach Belmont, even if it did not strictly comply with D.C. Code §§ 42-3131.01(a)(1) and 42-3131.03. App. 458-59, 463. The court found no genuine dispute that DCRA had in fact mailed and posted the March 30, 2009 notice. App. 460-61. Nevertheless, the court determined that there was a procedural due process violation, on the basis that the March 2009 notice was ambiguous about whether the District would provide additional notice before razing the property, and that the March 2009 notice issued too far in advance of the July 2009 raze. App. 462-64.

Still, the District prevailed on municipal liability. App. 454. The Superior Court explained that Belmont offered absolutely no "evidence that the District ha[d] a policy or custom to provide constitutionally insufficient notice of intent to demolish unsafe structures." App. 456; *see* App. 455 (noting Belmont's concession of constitutional sufficiency of the abatement provision and notice statute). The

court noted that it had previously "explicitly raised" the lack of evidence in the record as to whether Director Argo played any role—directly or indirectly—in "when or how DCRA should provide notice," precisely "in order to give Belmont an opportunity to respond." App. 456. Even assuming that Director Argo was a final policymaker, App. 457; SA 121, Belmont did "not provide any evidence that [Director] Argo or anyone with policy-making authority decided or ratified the content, timing, or method of notice," or that Director Argo was deliberately indifferent to the risk of violating Belmont's due process rights in authorizing the raze. App. 456-57. The Superior Court additionally ruled that Section 42-3131.01(a) represented the District's notice policy, meaning the departure here from the notice statute by an unidentified DCRA employee was not an act of the District. App. 456 (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality op.)).

The Superior Court denied Belmont's subsequent motion, which sought reconsideration of the grant of summary judgment but presented no new evidence. In particular, the court noted that Belmont, "in its reconsideration motion . . . d[id] not dispute that it produced no" evidence regarding whether Director Argo was involved in the decision to provide notice. SA 140.

STANDARD OF REVIEW

The Court reviews the grant of a motion for summary judgment de novo. *Kotsch v. District of Columbia*, 924 A.2d 1040, 1044 (D.C. 2007).

SUMMARY OF ARGUMENT

1. The Superior Court correctly granted summary judgment to the District on municipal liability. After nearly a decade of litigation, including the reopening of discovery, Belmont was unable to adduce any evidence of a custom or policy by the District of providing insufficient notice of intent to demolish unsafe buildings in a state of imminent collapse. In particular, Belmont failed to demonstrate that liability for any alleged due process violation should be imputed to the District based on the acts of DCRA Director Argo, who authorized the building's raze. The summary judgment record was completely devoid of any evidence that Director Argo actually enjoyed authority to establish final municipal policy, as required by the Supreme Court's final policymaker cases. Nor was there any evidence to establish that Director Argo participated in decisions regarding whether or how to provide notice to Belmont, or that she was deliberately indifferent to a serious risk of a procedural due process violation when she authorized the raze.

Belmont, for good reason, does not contend that Director Argo was directly involved in any decision with respect to notice and has therefore forfeited the argument. Belmont likewise does not argue that Director Argo consciously disregarded any risk that the agency would issue constitutionally inadequate notice, and has forfeited that argument as well. Belmont's discontent with the Superior Court's decision boils down to a misreading of Supreme Court precedent, which in

fact requires a showing of deliberate indifference where it is claimed that an official's lawful action indirectly caused a constitutional deprivation. Final policymaker liability does not automatically follow, as Belmont contends, from identifying a decision undertaken by the head of an agency.

2. In the alternative, the District is entitled to summary judgment because no predicate constitutional violation occurred. Although Belmont claims not to have received sufficient notice of the building's raze, in fact a notice posted on the property in March 2009 and mailed to Belmont's address of record (and not returned), satisfied due process. There is no serious dispute that notice by combined mailing and posting was reasonably calculated to reach Belmont. While Belmont attacks the District's method of notice as contrary to District law, that contention runs headlong into the well-established principle that the fact of a state law violation does not, in and of itself, establish a constitutional violation.

The March 2009 notice on its face reasonably conveyed the possibility of demolition and afforded Belmont sufficient time to respond. To the extent there were any doubt, Belmont can hardly claim ignorance as to the consequences of its continued defiance of District law under the circumstances here: two years of repeated interactions with the District requiring Belmont either to render its building safe or demolish it. Due process, after all, requires only that notice be reasonable under all the circumstances. Especially in light of the danger posed to the public by

the building's imminent collapse, the March 2009 notice met minimum constitutional standards. And even were a second notice somehow constitutionally required, the District notified Belmont's structural engineer by email of the raze mere weeks before it occurred.

3. If this Court were to determine that the District is not entitled to summary judgment, the case should proceed to a jury trial. Assuming that Belmont presented sufficient evidence of a municipal policy of deficient notice, or evidence that it did not actually receive the March 2009 notice, a jury would need to resolve those material disputes. Belmont is not entitled to summary judgment as a matter of law.

ARGUMENT

I. The Superior Court Correctly Granted Summary Judgment To The District On Municipal Liability.

A. Section 1983 liability extends only to constitutional deprivations caused by a municipality's unlawful policy or custom.

Under *Monell* and its progeny, "municipal liability under § 1983 can only be imposed for injuries inflicted pursuant to Government 'policy or custom.'" *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 809 (1985); *see Monell*, 436 U.S. at 690. *Monell*'s 'custom' or 'policy' requirement provides the requisite "direct causal link between the municipal action and the deprivation of federal rights" in what the Court has described as a "fault-based analysis for imposing municipal liability." *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997); *Tuttle*, 471 U.S. at 818; *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 478 (1986) ("*Monell* is a

case about responsibility."). Even as "[m]unicipalities, of course, conduct much of the business of governing through human agents," *Praprotnik*, 485 U.S. at 138 (Brennan, J., concurring), liability under Section 1983 follows only from those "acts that are, properly speaking, acts 'of the municipality.'" *Pembaur*, 475 U.S. at 479. "A municipality may not be held liable under § 1983 solely because it employs a tortfeasor," or, in other words, under a theory of respondeat superior. *Bryan Cnty.*, 520 U.S. at 403.

Applying the above principles, courts have recognized several ways in which a municipality might establish a municipal policy or custom, through:

> (1) the explicit setting of a policy by the government that violates the Constitution, (2) the action of a policy maker within the government, (3) the adoption through a knowing failure to act by a policy maker of actions by his subordinates that are so consistent that they have become 'custom,' or (4) the failure of the government to respond to a need (for example, training of employees) in such a manner as to show 'deliberate indifference' to the risk that not addressing the need will result in constitutional violations.

Blue v. District of Columbia, 811 F.3d 14, 19 (D.C. Cir. 2015) (quotation marks omitted); *see Praprotnik*, 485 U.S. at 130 (plurality op.); *City of Canton v. Harris*, 489 U.S. 378, 389 (1989); *Pembaur*, 475 U.S. at 480 (quoting *Monell*, 436 U.S. at 694). It is a plaintiff's burden under Section 1983 to plead and prove the specific theory of municipal liability on which he relies. *Blue*, 811 F.3d at 20 (explaining that plaintiff must "identify the type of municipal policy at issue").

With respect to the actions of policymakers, "municipal liability may be imposed for a single decision by municipal policymakers" only under limited, "appropriate circumstances." *Pembaur*, 475 U.S. at 480. The official must "possess[] final authority to establish municipal policy with respect to the action ordered," *id.* at 481 (plurality op.), which is a question of state law. *Praprotnik*, 485 U.S. at 123 (plurality op.). Having identified a final policymaker, a plaintiff may prove that the official directly caused a deprivation, through a policy choice "in *that area* of the city's business" where the official enjoys final policymaking authority. *Id.* Such direct acts include, for example, "direct[ing] or authoriz[ing] the deprivation of federal rights." *Bryan Cnty.*, 520 U.S. at 406. Alternatively, a plaintiff can establish that, although the final policymaker did not "directly inflict[] [the] injury," the official indirectly did so through a facially lawful municipal action "taken with 'deliberate indifference' as to its known or obvious consequence[]" of violating the plaintiff's rights. *Id.* at 407.

B. The Superior Court correctly rejected municipal liability under the final policymaker doctrine.

The Superior Court here properly granted summary judgment to the District on municipal liability. In particular, the Superior Court correctly rejected Belmont's attempt to establish municipal liability by relying on the single act by a final policymaker. As the court properly concluded, Belmont cannot prevail under the

final policymaker doctrine, either on the theory that Director Argo directly or indirectly caused the due process violation claimed here, for three reasons.

1. Director Argo did not have final policymaking authority.

At the outset, Director Argo was not a final policymaker in the relevant area, contrary to the Superior Court's assumption. App. 457; SA 121.[7] The authority to make final municipal policy "may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority." *Pembaur*, 475 U.S. at 483 (plurality op.). Critically, "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Praprotnik*, 485 U.S. at 127 (plurality op.).

Director Argo was constrained by District law and did not enjoy final policymaking authority. To be sure, Director Argo implemented the Nuisance Abatement Act, *see* D.C. Code § 42-3131.01, and administered the Construction Codes, *see* D.C. Code § 6-1405.01—for example, by DCRA issuing "the necessary notices to cause the removal of illegal or unsafe conditions," 12-A DCMR § 104.1 (2008), and approving permits "for the erection, razing, demolition . . . of buildings and structures," *id.* § 104.2. However, Belmont never identified any relevant

[7] Contrary to Belmont's urging (Br. 1 n.1), the Superior Court did not "h[o]ld," that "Ms. Argo was acting as a final policymaker when she issued the orders in this case."

rulemaking authority that she held. The authority to propose amendments to the Codes rested instead with the independent Construction Codes Coordinating Board, *see* Mayor's Order 2009-22, and ultimate policymaking authority resided with the Council, which had to approve any amendments before they could take effect. D.C. Code § 6-1409 (effective Apr. 5, 2005). In other words, Director Argo was constrained by statutes and rules "not of . . . [her] making," *Praprotnik*, 485 U.S. at 127 (plurality op.), and her "discretion in the exercise of [those] particular functions does not, without more, give rise to municipal liability." *Pembaur*, 475 U.S. at 482 (plurality op.).

The D.C. Circuit's decision in *Singletary v. District of Columbia*, 766 F.3d 66 (D.C. Cir. 2014), confirms that any alleged decision by Director Argo to depart from District law is not an act of the municipality. There, the court reached the same conclusion about the Board of Parole and declined to attribute to the District the Board's revocation of parole that relied on hearsay evidence, in violation of due process. *Id.* at 68. The court reasoned that, even as the Board made "final . . . decisions in individual cases," the Board did not enjoy delegated rulemaking authority, and the Council retained authority to approve rules governing the Board's exercise of powers. *Id.* at 74. The court concluded that "the Board thus was 'constrained by policies not of [its] making,' and its decision 'to depart[]' from

those policies . . . [wa]s not an act of the municipality for purposes of § 1983." *Id.* at 359 (quoting *Praprotnik*, 485 U.S. at 127) (plurality op.)).

Thus, Director Argo was not, as Belmont argues (Br. 20) "a final policymaker as to raze decisions." Belmont exclusively—and mistakenly—focuses on the decision to raze, as opposed to any decision regarding notice, which is the municipal action directly implicated by its procedural due process claim. *See infra* pp. 32-33; *Pembaur*, 475 U.S. at 481 (plurality op.) ("Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy *with respect to the action ordered*." (emphasis added)). Regardless, the reasons why Director Argo did not enjoy final policymaking authority apply equally to both the raze decision and the notice given.

Belmont seeks to rely (Br. 21) on *Thompson v. District of Columbia*, 832 F.3d 339 (D.C. Cir. 2016), but Director Argo would not be considered a final policymaker under the logic of that case. In *Thompson*, the D.C. Circuit inquired whether the alleged final policymaker's actions were subject to oversight, both under District law and in practice. *See id.* at 349. Because "the record [wa]s replete with evidence that" the official "exercised his authority . . . without any control by other District officials," the D.C. Circuit held that the official could fairly be considered a final policymaker, despite certain provisions of District law providing for further review of the official's actions. *Id.*; *see id.* at 350 (noting further the official's rulemaking

authority). Here, by contrast, the record contains no evidence that Director Argo exercised her enforcement powers contrary to the authority delegated to her. *Thompson* is therefore beside the point. Indeed, the case stands for nothing more than the unremarkable proposition that a policy official's exercise of authority in practice might evidence that a municipality's formal policy is one in name only, which is not the case here. *See Monell*, 436 U.S. at 691 (acknowledging that an official's actions, "[a]lthough not authorized by written law," could amount to "'custom or usage' with the force of law" (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-168 (1970))).

Given that Director Argo lacked relevant final policymaking authority, the Superior Court properly recognized that the notice provision in Section 42-3131.03 constrained District officials, including Director Argo. App. 456. Thus, any departure from District law did not represent an official, municipal act. App. 456.[8]

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[8] Contrary to Belmont's suggestion (Br. 31), reversal of summary judgment is unwarranted based on the Superior Court's statement that "the decision of a DCRA employee to violate a binding statutory policy . . . cannot, as a matter of law, be the basis of municipal liability under *Monell*." App. 454. The Superior Court's decision is best read to refer to "the decision of a DCRA employee" *who does not enjoy final policymaking authority*. *See* App. 455 (citing *Praprotnik*, 485 U.S. at 127 (plurality op.) (referring to "subordinate's departure" from municipal policy)). Of course a so-called "'paper' policy cannot insulate a municipality from liability" if it is routinely and blatantly ignored, *Daskalea v. District of Columbia*, 227 F.3d 433, 442 (D.C. Cir. 2000), and the Superior Court's decision should not be construed to state otherwise. At any rate, this Court reviews the municipal liability question de novo,

2. Alternatively, Director Argo took no action regarding notice that caused any deprivation of Belmont's due process rights.

Even assuming Director Argo had final policymaking authority, Belmont must establish either that she "directed or authorized the deprivation of federal rights" (i.e., direct involvement in the provision of notice), or that she did not "directly inflict[] [the] injury" but indirectly did so through a "facially lawful municipal action" taken with deliberate indifference (i.e., the raze authorization). *Bryan Cnty.*, 520 U.S. at 405-06. Belmont did neither.

To establish final policymaker liability under the theory that Director Argo directly committed a due process violation, she must have made a *deliberate* policy decision with respect to notice. "A 'policy' . . . involves a "'deliberate' or 'conscious' choice by a municipality." *Harris*, 489 U.S. at 389; *see Tuttle*, 471 U.S. at 823 n.6 (relying on dictionary definition of "policy" as "'a definite course or method of action selected from among alternatives'" (quoting Webster's Ninth New Collegiate Dictionary 910 (1983))). The case law confirms as much. Each case involves some discrete, deliberate action on the part of an official alleged to have final policymaking authority. *See Pembaur*, 475 U.S. at 473 (decision to force entry without warrant); *Praprotnik*, 485 U.S. at 123 (plurality op.) (decision to transfer and lay off employee); *Bryan Cnty.*, 520 U.S. at 397 (decision to hire employee

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and affirmance here is independently proper because Director Argo was not a final policymaker in the area at issue.

alleged to have used excessive force); *Kidwell v. District of Columbia*, 670 A.2d 349, 350-51 (D.C. 1996) (decision not to promote employee); *Blue*, 811 F.3d at 19 (decision to hire, and subsequent decision not to terminate, employee).

The deliberate policy choice, moreover, must be specific to the allegedly unconstitutional action. *See Pembaur*, 475 U.S. at 483 (plurality op.). In *Pembaur*, for example, the plaintiff alleged a Fourth Amendment violation when police officers forcibly entered his property without a search warrant. *Id.* at 474. Thus, the Court focused on the decision to authorize entry onto the property. *Id.* at 484. Likewise, in *Bryan County*, the plaintiff claimed that the county was liable for a police officer's alleged use of excessive force based on a final policymaker's decision to hire the officer notwithstanding his criminal record. 520 U.S. at 401, 408. As a result, the Court examined the hiring decision. *Id.* at 411-15.

Here, Belmont has alleged a violation of procedural due process, making the decision to provide (or forgo) notice the correct focus of the final policymaking inquiry. Where a violation of due process is claimed, "the deprivation by state action of a constitutionally protected interest . . . is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." SA 120 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). Indeed, it is axiomatic that "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or

property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *see Ford v. Turner*, 531 A.2d 233, 240 (D.C. 1987) (repeating that denial of process "does not depend upon the merits of a claimant's substantive assertions" (quoting *Carey*, 435 U.S. at 266)). Thus, the relevant policy choice here would have to concern notice, not the deprivation itself (i.e., the raze).

The Superior Court correctly concluded that Director Argo was simply not involved in any decisions about notice. Belmont did not "provide *any* evidence that [Director] Argo" decided "the content, timing or method of notice." App. 457 (emphasis added). Nor was there any evidence that Director Argo directly authorized the issuance of insufficient notice, either by affirmatively instructing a subordinate to disregard the notice requirement, or approving the subordinate's decision to do so. App. 456. Belmont at most "assert[ed]" that Director Argo "personally decided not to notify Belmont," but there was no evidentiary support for that "conclusory assertion." App. 456-57. In the absence of "fault on the part of the city based on a course" that Director Argo "consciously chose to pursue," there is no basis for municipal liability. *Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. Cir. 1997) (quoting *Carter v. District of Columbia*, 795 F.2d 116, 122 (D.C. Cir. 1986)); *cf. Tuttle*, 471 U.S. at 821 (rejecting jury instruction permitting

"plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker").[9]

For good reason then, Belmont's opening brief on appeal does not contend that Director Argo was directly involved in any decision with respect to notice. As a result, the argument is forfeited. *See Aeon Fin., LLC v. District of Columbia*, 84 A.3d 522, 530 (D.C. 2014) (describing "the longstanding policy" of this Court to decline to consider arguments not raised in the opening brief). Belmont instead emphasizes that "the raze decisions were all made by Linda Argo." Br. 23. But as discussed, given that Belmont's sole claim is that the District violated procedural due process by failing to provide constitutionally adequate notice, it is not enough for Belmont to show that Director Argo authorized the raze. It would have to show that she specifically authorized the alleged lack of adequate notice.

The raze permit does not evince a policy choice with respect to notice. It does not by itself "support a reasonable inference that [Director Argo] was involved in

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[9] Belmont failed to identify any other DCRA employee who was a final policymaker and "made any decision about the delivery, content, and timing of the notice." App. 457. As the Superior Court noted, the March 2009 notice was "personally mailed and posted" by Mr. Wilson. However, the record did not establish that Mr. Wilson "had final authority to make" decisions on "what the notice should say or when it should be delivered." SA 122 n.3. Despite the court's invitation to further address the issue of whether "Mr. Wilson made a policymaking decision with respect to notice," Belmont at summary judgment pointed to no such evidence. SA 122 n.3.

any decision about notice to Belmont." SA 139. And Belmont has made no effort to explain any connection between the permit and Director Argo's personal participation in any decisions about whether or how to provide notice. In fact, the March 2009 notice—the one about which Belmont complains—was signed by DCRA Inspector Thomas Hayden and mailed by Supervisor of Building Inspections Ken Wilson. App. 207, 210-11. There was simply no evidence that Director Argo herself was involved in giving that notice.

3. Belmont has not claimed or shown that, in approving the raze, Director Argo acted with deliberate indifference to a serious risk that a procedural due process violation would likely occur.

The Superior Court also correctly determined that Director Argo was not "deliberately indifferent to the risk that Belmont had not received adequate notice when she authorized the raze." App. 456. "[A] facially lawful municipal action" by a policymaker that "has led an employee to violate a plaintiff's rights" requires an additional showing that "the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Bryan Cnty.*, 520 U.S. at 407. The deliberate indifference requirement is an objective, "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* at 410; *see Farmer v. Brennan*, 511 U.S. 825, 841 (1994).

The summary judgment record here was completely devoid of any evidence that Director Argo undertook any action with any particular state of mind, and Belmont does not contend otherwise. The raze permit itself represented nothing beyond the fact of Director Argo's authorization of the instant raze. Belmont simply adduced no evidence that Director Argo knew or had any reason to believe that the agency's notice procedures would not be followed, or that she disregarded that risk. *Cf. Gross v. District of Colombia*, 734 A.2d 1077, 1085 (D.C. 1999) (explaining that, in the failure to train context, "policymakers of the city can reasonably be said to have been deliberately indifferent to the need for more or different training" where the need is "so obvious"). Indeed, DCRA in this case routinely provided Belmont with notice of its previous infractions. *See supra* p. 8-10. There is no suggestion that such prior notices had been inadequate. And Belmont was on ample notice that its already condemned building was structurally unsafe and urgently needed to be repaired or demolished. *See supra* p. 8-16. Thus the court correctly declined to impute liability to the District on the alleged basis that Director Argo, by her own deliberately indifferent action, indirectly caused any due process violation.

To overcome its lack of evidence of Director Argo's deliberate indifference, Belmont maintains that "because [she] was a final policymaker, the municipality is liable; no further proof is required." Br. 29. This is incorrect. As discussed, the Supreme Court in *Bryan County* recognized two distinct ways of establishing

municipal liability based on the acts of a final policymaker. 520 U.S. at 397, 405. Where it is claimed that the final policymaker "has not directly inflicted an injury, but nonetheless has caused an employee to do so," a plaintiff must additionally prove the official's "deliberate indifference to the consequences of her actions"—the constitutional deprivation. *Bryan Cnty.*, 520 U.S. at 397, 408, 410. The deliberate indifference requirement ensures that the constitutional violation "reflects a 'deliberate' or 'conscious' choice by [the] municipality"—i.e., "a 'policy.'" *Harris*, 489 U.S. at 389. In this way, policymaker liability remains consistent with the principle that a municipality must, through its "deliberate conduct," be "the 'moving force' behind the injury alleged." *Bryan Cnty.*, 520 U.S. at 404; *see Pembaur*, 475 U.S. at 483 (plurality op.) (concluding that "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made" by the final policymaker).

In its opening brief, Belmont contends only that it is not required to demonstrate Director Argo's state of mind. Br. 24. Belmont advances no argument that Director Argo's authorization of the raze exhibited deliberate indifference. As a result, the argument is forfeited. *See Aeon Fin., LLC*, 84 A.3d at 530.

Belmont's remaining contention, that Director Argo "ordered that Belmont's building be razed . . . without requiring that Belmont be afforded the process to which it was due," is unavailing. Br. 29. To the extent Belmont means that mere

negligence is enough to establish municipal liability, that contention is misplaced for the above reasons. *See, e.g.*, *Pembaur*, 475 U.S. at 483 (plurality op.); *cf. Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."). Belmont's reliance on Director Argo's alleged negligence is not only without any evidentiary support, but should also be rejected as an improper "attempt[] to elevate [a] tort-law right to constitutional stature." *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986). "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *see Washington*, 802 F.2d at 1480 (Section 1983 simply "does not provide a remedy for any and all injuries inflicted by persons acting under color of state law").

II. The District is alternatively entitled to summary judgment because Belmont failed to show a predicate constitutional violation.

Although there is no basis for municipal liability, were this Court to disagree, summary judgment was proper in the alternative because no predicate constitutional violation occurred.

A. The March 2009 notice satisfied the constitutional minimum of due process with respect to method of delivery.

"It is by now well established that 'due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, "[d]ue process is a flexible concept." *United States v. Edwards*, 430 A.2d 1321, 1334 (D.C. 1981). "[N]ot all situations calling for procedural safeguards call for the same kind of procedure." *Id.* (quoting *Morrisey v. Brewer*, 408 U.S. 471, 480-82 (1972)). Generally speaking, due process requires only notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [government] action and afford them an opportunity to present their objections." *Schroeder v. City of New York*, 371 U.S. 208, 211-12 (1962) (quoting *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 314 (1950)).

As a method of service, "service by [regular] mail" is considered "reasonably calculated to give notice." *Coleman v. Scheve*, 367 A.2d 135, 137 (D.C. 1976); *see Boddie v. Robinson*, 430 A.2d 519, 521 n.4 (D.C. 1981) ("Notice by mail generally satisfies due process demands."). Indeed, "the Supreme Court has repeatedly upheld the use of first class mail" alone "as a method of notice 'reasonably calculated . . . to apprise interested parties' of proceedings affecting their rights in a variety of contexts." *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir.

1992). In *Schroeder v. City of New York*, 371 U.S. 208 (1962), the Court explained that "the mailing of a single letter would have discharged" the city's "constitutional[] oblig[ation]" to provide notice of condemnation proceedings. *Id.* at 214. And in *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956), the Court indicated that "[e]ven a letter" would have been constitutionally sufficient to apprise the property owner of administrative proceedings to fix compensation for his condemned property. *Id.* at 116.

The method by which DCRA sent the March 2009 notice satisfied the requirements of procedural due process. The notice was sent by first-class mail to Belmont's business address on record, and it was not returned. App. 211. More than that, the notice was posted on the property, and posting is a well-accepted supplement to mailing. *See Mullane*, 339 U.S. at 316 ("[P]osting affords an additional measure of notification" where "reinforced by steps likely to attract the parties' attention to the proceeding."); *Greene v. Lindsey*, 456 U.S. 444, 456 n.9 (1982) (describing "posted service *accompanied* by mail service" as a "constitutionally preferable" method of service). Indeed, there is no genuine dispute that Belmont in fact received the March 2009 notice. App. 460. The mailing and posting of the March 2009 notice was therefore reasonably calculated to reach Belmont.

Belmont attacks the March 2009 notice as constitutionally deficient (Br. 15-17) on the basis that the mailing of the March 2009 notice by first-class mail violated Section 42-3131.03. At the time of the dispute, the notice provision provided for service of notice by first-class mail only after exhausting several other methods of service. *See* D.C. Code § 42-3131.03(1)-(3) (effective March 21, 2009).

Belmont's constitutional challenge predicated on violations of District law must fail. Belmont is simply incorrect that the requirements of due process are synonymous with the statutory notice provision. "[T]he fact of a state law violation does not resolve whether a plaintiff has been deprived of due process," *Barwood, Inc. v. District of Columbia*, 202 F.3d 290, 294 (D.C. Cir. 2000), for the "[m]ere violation of a state statute does not infringe the federal Constitution," *Snowden v. Hughes*, 321 U.S. 1, 11 (1944); *see Tate v. District of Columbia*, 627 F.3d 904, 908 (D.C. Cir. 2010) ("That the District may have . . . violated its own statutory notice requirement does not mean that it deprived [plaintiff] of the process due under the Fifth Amendment."). Moreover, the Due Process Clause does not demand any particular notice procedure, "only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action." *Dusenbery v. United States*, 534 U.S. 161, 170-71 (2002); *see Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1086 (D.C. 2007). Thus, to the extent the notice did not comply with

Section 42-3131.03, the mailing and posting of the notice was a reasonable means of notifying Belmont and still constitutionally sufficient.

Belmont's reliance on *Associated Estates LLC v. Caldwell*, 779 A.2d 939 (D.C. 2001), is misplaced. That case does not stand for the proposition that "strict compliance with notice service requirements" is always required by the Constitution. Br. 16. Instead, *Associated Estates* applied the "firmly established" rule particular to certain tax cases that the District "may effect a valid conveyance of property for nonpayment of real estate taxes only by 'strict compliance' with the tax sale statute and regulations." *Id.* (quoting *Boddie v. Robinson,* 430 A.2d 519, 522 (D.C. 1981)). That tax case has no application here to the demolition of an unsafe structure. To hold otherwise would reject the well-established principle that the "notice required" by due process in any particular instance "will vary with circumstances and conditions." *Walker*, 352 U.S. at 115. And, as this Court has observed, "service by mail is reasonably calculated to give notice in most circumstances." *Doe v. D.C. Metro. Police Dep't*, 948 A.2d 1210, 1219 n.2 (D.C. 2008).

The district court's decision in *Miles v. District of Columbia*, 354 F. Supp. 577 (D.D.C. 1973) ("*Miles I*"), is not to the contrary. *See* Br. 17. *Miles* is the rare case where notice by regular mail was deemed insufficient, but under wholly different circumstances. Under "the peculiar facts of th[at] case," the Board issued a condemnation order in 1963, spurring plaintiff to expend over $25,000 in repairs

over the next six years. *Id.* at 579, 586. Then, in 1969, the Board made an *ex parte* decision to demolish plaintiff's building and sent notice by regular mail—not registered mail, as required by statute—and plaintiff's non-receipt of the notice was never disputed. *Id.* at 580; *Miles v. District of Columbia*, 510 F.2d 188, 193-94 (D.C. Cir. 1975) ("*Miles II*"). The district court concluded, that, "[u]nder th[o]se circumstances," only registered or certified mail could be considered "the type of feasible notice reasonably designed to inform the plaintiff of the Board's final decision to demolish." *Miles I*, 354 F. Supp. 577 at 585. The D.C. Circuit affirmed, emphasizing both that an "emergency clearly did not exist" to justify Board's action, and that, by statute, "regular mail notice [wa]s explicitly recognized as not satisfying the statutory requirement." *Miles II*, 510 F.2d at 192, 194.

The non-binding *Miles* case does not control here. First, the D.C. Circuit's reliance in part on District law, without any further explication, *see Miles II*, 510 F.2d at 194, runs contrary to the well-established principle, discussed *supra*, that the requirements of District law are not synonymous with that of the Constitution. *See Tate*, 627 F.3d at 908. Second, the facts presented in *Miles* are quite distinguishable. Whereas the plaintiff in *Miles* "attempted to restore the buildings" at issue over a six-year period and received "assurances that the building would not be torn down," *Miles II*, 510 F.2d at 191-92, Belmont had repeated interactions with DCRA over the course of the two years preceding the raze, putting Belmont on continual notice

that its repair efforts were deficient and that demolition was the only other option. *See supra* pp. 8-16. The totality of the circumstances therefore does not in any way compare. *See Edwards*, 430 A.2d at 1334 ("[N]ot all situations calling for procedural safeguards call for the same kind of procedure." (quoting *Morrisey v. Brewer*, 408 U.S. 471, 480-82 (1972))). Even were this Court to read *Miles* as support for requiring a second notice prior to demolition in this case, the March 2009 notice in fact served that role, following the Board's order of condemnation in 2008.

B. The March 2009 notice was constitutionally sufficient regarding its the contents and timing.

Although the Superior Court thought that the point in time at which the March 2009 notice was sent, and its contents, rendered the notice constitutionally inadequate, this was incorrect. The Court should decide as a matter of law that the notice was constitutional in these respects. *See Jennings v. Stephens*, 574 U.S. 271, 276 (2015) ("An appellee who does not take a cross-appeal may 'urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court.'" (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924))).

The contents and timing of the March 2009 notice were constitutionally sufficient. The notice "afford[ed] a reasonable time for [Belmont] to make [its] appearance," *Mullane*, 339 U.S. at 314, by giving Bemont 15 days to present its objection before the District took corrective action. App. 203. Moreover, the notice

was "of such nature as reasonably to convey the required information." *Mullane*, 339 U.S. at 314. The notice of violation identified the property at "1417 Belmont St NW" as the specific structure in violation of the Building Code. App. 203. It also described the unsafe condition as the "deteriorat[ing]" and "[unsafe]" building structure, and directed Belmont to commence construction or apply for a raze permit within 15 days. App. 203. Additionally, the notice expressly advised that failure to correct the violation would result in the District exercising its authority to unilaterally undertake corrective action itself, and to assess the costs against Belmont. App. 205 (citing D.C. Code § 42-3131.01(a)(1)).

The Superior Court wrongly considered the notice "ambiguous" about whether the District would directly proceed to raze the building absent repair or demolition by Belmont. App. 463. But the contents of the violation notice were more than constitutionally adequate given the District's repeated instructions to Belmont over the years that the building was unsafe and needed to be repaired or demolished. In 2007, the Board ordered Belmont to repair or demolish the building and granted repeated extensions to do so. *See* SA 6-10. When Belmont still did not comply, the Board ordered the building condemned in 2008, which required it to complete all necessary repair work or demolish the building. *See* D.C. Code § 6-907(a); SA 11. And contemporaneous with the notice was the scheduled onsite meeting with Belmont, at which Belmont would have had an opportunity to further

inquire about the consequences of its continued failure to render the building safe, but it did not appear or answer phone calls. App. 198. "Under all the circumstances, therefore, [it] cannot [be] sa[id] that [Belmont's] due process rights were violated." *In re N.N.N.*, 985 A.2d 1113, 1120 (D.C. 2009).

The contents of the notice also met minimum constitutional standards given the danger posed to the public by the building. When "faced with conditions extremely dangerous to health or safety, the government may act summarily without notice." *Miles*, 510 F.2d at 192 n.3. In fact, "deprivation of property to protect the public health and safety is '[o]ne of the oldest examples' of permissible summary action." *Hodel v. Va. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 300 (1981); *see generally* 7A McQuillin Mun. Corp. § 24:562 (3d ed. 2022) ("An emergency may justify dispensing with legal notice as prerequisite to removal or destruction of a building."). When the building was deemed an unsafe structure in May 2009, the building had partially collapsed, and yet another collapse at the property near a gas line had created a fire hazard. App. 108. And by the time of the emergency raze in July 2009, two building engineers, one architect, and one contractor had concluded that the building was in a state of imminent collapse. *See supra* pp. 10-15. Indeed, the building today could be razed under D.C. Code § 6-801(b), which authorizes the District to undertake emergency measures without notice where it "determines that the condition of the structure or excavation creates an imminent threat to public

safety," thus codifying the well-accepted principle that "summary administrative action may be justified in emergency situations," *Hodel*, 452 U.S. at 300; *see Walker*, 352 U.S. at 115 (instructing that the "notice required will vary with circumstances and conditions").

The Superior Court was wrong, moreover, to oddly fault the District for sending formal notice too far in advance of the raze. *See* App. 463 (criticizing District for sending notice in March 2009, prior to the collapse of an earthen trench in May 2009). Although the March notice was constitutionally sufficient for all the reasons discussed, the District further notified Belmont's engineer, Mr. Baral, in mid-June 2009 of its intent to raze the property, and of the District's progress in soliciting bids from contractors. *See* SA 12 (6/16/09 emails discussing the raze and copying Mr. Baral). Mr. Baral had served as the designated point of contact for Belmont and was responsible for onsite monitoring of all construction. App. 190, 192. Such "notice to [a] person[] who reasonably can be relied upon to inform the interested parties" itself satisfies due process, if any further notice were needed. *Quincy Park Condo. Unit Owners' Ass'n v. D.C. Bd. of Zoning Adjustment*, 4 A.3d 1283, 1289-90 (D.C. 2010) (holding "[n]otice to the condominium association serves as the practical equivalent of notice to the individual owners, and it therefore comports with due process"). The Superior Court erred in overlooking the emails, sent less than a month prior to the raze.

This Court's decision in *Miller v. District of Columbia*, 587 A.2d 213 (D.C. 1991), does not call into question the timing of the District's notice. *See* App. 463 n.1. In *Miller*, the Court suggested that due process might require additional notice closer in time to the demolition, where the condemnation order issued before 18 months of negotiations between appellant and the Board regarding the rehabilitation of her buildings, and where the Board's final correspondence four months before the demolition advised her to "keep [it] abreast" of developments. *Id.* at 214 & n.4, 222.

Miller is very different from the present case, where three months passed between formal notice and demolition. Moreover, the minimal delay here was caused by the dangerous condition of the building itself, and the difficulty in procuring a contractor willing to undertake the risky demolition project. *See* App. 136 (citing SA 13) (May 29, 2009 email reporting that "contractor declined project—too risky"). Unlike in *Miller*, the Superior Court had no basis to speculate that "a second notice may [have] cause[d] [Belmont] itself to fix the structural problem or raze the building." *See* App. 464. Indeed, the statement is directly contrary to Belmont's years of intransigence in fixing the well-known structural problems, making the probable value, if any, of additional safeguards minimal, as compared to the government's paramount interest in protecting the public from the

imminent danger posed by Belmont's property. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

III. Even If The District Were Not Entitled To Summary Judgment, Neither Is Belmont.

Belmont is not "entitled to a grant of summary judgment," either on municipal liability or its underlying procedural due process claim. Br. 32; *see* Br. 33 (asking this Court to vacate the grant of summary judgment and "remand with instructions . . . to enter judgment in Belmont's favor and to conduct a hearing on damages").[10] Were this Court to disagree with all of the District's arguments, Belmont is not entitled to judgment as a matter of law. Even assuming Belmont presented sufficient evidence of a municipal policy, a reasonable jury could find that Belmont had not met its burden of proof after weighing all the evidence about whether and the extent to which Director Argo was involved in the provision of notice to Belmont. *See, e.g.*, App. 457 (noting that Belmont did not "identify any evidence . . . identifying the DCRA employee who made any decision about the delivery, content, and timing of the notice"). Likewise, even assuming that the

[10] Even if Belmont prevailed on liability, it would be entitled to nothing more than nominal damages because the emergency raze was substantively justified. *See Carey*, 435 U.S. at 266-67 (explaining that denial of procedural due process claim is actionable only for nominal damages without proof of actual injury); *Thompson*, 832 F.3d at 346 ("The District is correct that [plaintiff] cannot recover compensatory damages arising from a termination that would have occurred even had he been given due process." (citing *Carey*, 435 U.S. at 263)).

District was incorrect that no genuine dispute exists as to all of the notice that Belmont received over the years, a jury would have to resolve those material disputes—including whether Belmont actually received the March 2009 notice and simply failed to appear at the contemporaneously scheduled onsite meeting with DCRA.

CONCLUSION

The Superior Court's grant of summary judgment should be affirmed.

Respectfully submitted,

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September 2022

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the

purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Thais-Lyn Trayer
Signature

20-CV-556
Case Number

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CERTIFICATE OF SERVICE

I certify that on September 14, 2022, this brief was served through this Court's electronic filing system to:

S. Micah Salb

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THAIS-LYN TRAYER