SUPREME COURT, STATE OF COLORADO 2 East 14th Ave., Denver, CO 80203 Colorado Court of Appeals, Case No. 99CA2070 Opinion by Judge Plank; Ney and Sternberg, JJ., concurring Colorado Court of Appeals, Case No. 00CA570 Opinion by Judge Ney; Plank and Casebolt, JJ., concurring Appeal from Jefferson County District Court, The Honorable Kenneth E. Barnhill, Senior District Judge, District Court Case number: 98 CV 1842	▲ COURT USE ONLY ▲
Petitioners: THE CITY OF GOLDEN, and THE CITY COUNCIL OF THE CITY OF GOLDEN. **Respondents:** MARIAN L. OLSON and IDA MAE BRUESKE.	Case Numbers: 01 SC 808 and 01 SC 878
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OPENING BRIEF OF AMICI CURIAE THE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INC.

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The Colorado Municipal League ("League") and Colorado Counties, Inc.("CCI") by their respective counsel of record respectfully submit this Opening Brief.

STATEMENT OF THE ISSUES

1. Whether the failure to conduct a public hearing on a landowner's application for a special use permit pursuant to a provision of a municipal code, which grants adjacent landowners the right to notice of and an opportunity to participate in such hearing, violates the adjacent landowner's procedural due process rights, even though adjacent landowners successfully sue for mandamus to remedy the mistake.

2. Whether the Court of Appeals erred in affirming the trial court's award of attorney fees pursuant to 42 U.S.C. 1988.

STATEMENT OF THE CASE

This lawsuit relates to a dispute over the construction of an Addition to the Hillside Community Church (the "Church"), located at 103 North Ford Street in the City of Golden. In April 1998, Marion Olson, a neighbor, complained to the City about the lack of a special use permit for the Addition. The City determined that a special use permit should have been required, but the City did not revoke the building permit, or require a special use permit for the Addition, because the structure had been substantially completed. Under the provisions of the Golden Municipal Code §18.30.020 ("GMC"), a public hearing is required for all special use permits, and neighboring landowners are entitled to notice and an opportunity to be heard at those hearings.

Plaintiffs filed their Complaint in the district court, alleging, *inter alia,* that the City violated the Plaintiffs' procedural due process rights by depriving them of notice and an opportunity to participate in a hearing on the special use permit. A trial to the court was held,

and on October 6, 1999, the trial court issued a Judgment in favor of Plaintiffs finding that the City's failure to hold a hearing on the Church's special use permit violated the Plaintiffs' procedural due process rights. In the Judgment, the trial court determined that Plaintiffs would be entitled to attorney fees pursuant to 42 U.S.C. 1988. On February 18, 2000, the trial court issued an Order awarding attorney fees in the amount of $57,923.00 to Plaintiffs.

On September 13, 2001, the Court of Appeals issued its decision affirming the ruling of the trial court that the procedural requirement embodied in GMC 18.30.020(7) constitutes a protected property interest, and that the City's failure to allow the Plaintiffs to testify at a special use permit hearing constitutes a violation Plaintiffs' procedural due process rights.

Subsequently, the City filed a Petition for Writ of Certiorari in this Court seeking review of the decision of the Colorado Court of Appeals. The League contemporaneously filed its Brief of Amicus Curiae in support of the City's Petition. This Court granted the City's Petition and agreed to review the decision of the Colorado Court of Appeals with respect to issue set forth above.

SUMMARY OF THE ARGUMENT

The 14th Amendment prohibits state deprivation of property without due process of law. Due process of law requires that an individual be given notice and an opportunity to be heard prior to the deprivation of a protected property interest. However, a property interest and the procedure required for its protection are distinct. Property is not defined by the procedures provided for its deprivation.

The decision of the Court of Appeals should be reversed because the Court improperly held that the procedural requirements of the Golden Municipal Code constitute constitutionally cognizable property interests protected by the Due Process Clause. In addition, if the Plaintiffs'

had a property interest sufficient to require due process, their rights were not violated because an adequate post-deprivation remedy was available to the plaintiffs, and utilized by the Plaintiffs.

ARGUMENT

1. The decision of the Court of Appeals should be reversed because the Court improperly held that the procedural requirements of the Golden Municipal Code constitute constitutionally cognizable property interests under the Due Process Clause.

Whether an adjacent landowner who is not allowed to participate in a hearing on a neighbor's land use application has suffered a deprivation of constitutional rights sufficient to give rise to a cause of action under 42 U.S.C. § 1983 is an issue of first impression in the State of Colorado. As more fully set forth below, the decision of the Court of Appeals is erroneous because adjacent landowners do not have a constitutionally cognizable private property interest in attending a land use hearing on a neighbor's land use application. The rights afforded adjacent landowners under the GMC are procedural only and do not create a property interest of constitutional dimensions. The U.S. Supreme Court has held that procedural requirements in a statute or ordinance cannot give rise to a substantive property interest for purposes of due process protection. Courts from other jurisdictions have held that adjoining landowners do not have a constitutionally recognized property interest in attending a land use hearing of another landowner. The decision of the Court of Appeals is contrary to this large body of case law, and warrants reversal by this Court.

In order to be entitled to the protections of due process, a person must establish that he has a protected liberty or property interest at stake. *Board of Regents vs. Roth*, 408 U.S. 564, 569-70 (1972). The United States Constitution does not create or define the contours of "liberty" or "property," as enshrined in the Fourteenth Amendment. *Farthing v. City of Shawnee,* 39 F.3d 1131, 1135 (10th Cir. 1994). Instead, property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *Roth*, 408 U.S. at 569-70. However, it is federal constitutional law that determines whether the interests articulated by state law rise to the level of a constitutionally protected property

interest. *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 9 (1978).

The Supreme Court has repeatedly emphasized the important distinction between property and the procedures that are constitutionally required for its protection. In *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 541 (1985), the Supreme Court clarified that "[p]roperty" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. *Loudermill,* 470 U.S. at 541. The Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived, except pursuant to constitutionally adequate procedures. *Id.* at 541. The categories of substance and procedure are distinct, and to define a substantive right by reference to a procedural requirement reduces the Due Process Clause to a mere tautology. *Id.*

The case law is clear that absent an underlying substantive property interest, the denial of a procedural right is not a denial of procedural due process. *See Loudermill, supra; Olim v. Wakinekona,* 461 U.S. 238, 250 (1983) (process is not an end in itself. Its purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement); *Clark v. Township of Falls,* 890 F.2d 611, 620, n.4 (3rd Cir. 1989) *citing Olim, supra,* (a property interest is no more created by the mere fact that a state has established a procedural structure than is a liberty interest); *Fleury v. Clayton,* 847 F.2d 1229, 1231 (7th Cir. 1988) (there is neither a liberty nor a property interest in procedures themselves); *District Council v. City of Philadelphia,* 944 F.Supp. 392, 395 (E.D. Penn. 1995) (stating that the court found no case in which a property interest has been held to exist in a procedure); and *Brandywine Affiliate, NCCEA/DSEA v. Board of Education,* 555 F.Supp. 852, 862 (D.Del. 1983), ("The claim that a state procedural statute can create a liberty or property interest cannot withstand analysis.") In *Brandywine*, the court reasoned that:

> To find that a procedure is a constitutionally protected interest would be to find that a state cannot deprive an individual of due process of law without due process of law.

Id. The weight of authority follows *Loudermill* and these holdings. *See Gagliardi v. Village of*

Pawling, 18 F.3d 188, 193 (2nd Cir. 1994) (the deprivation of a procedural right to be heard is not actionable when there is no protected property right at stake); *Double I Ltd. Partnership v. Plan and Zoning Commission of Town of Glastonbury*, 588 A.2d 624, 631 (Conn. 1991) (holding that a party whose asserted property interest is not related to the substantive criteria but rather is grounded solely in the procedures set forth in the statute does not have a constitutionally cognizable property interest); *Winslow v. Romer,* 759 F. Supp. 670, 675 (D. Colo. 1991) (holding that notice and hearing rights under a zoning ordinance are procedural only and do not give rise to an independent interest protected by the Fourteenth Amendment); *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988) (a violation of state zoning law is not a denial of due process); *Fusco v. State of Connecticut*, 815 F.2d 201, 205 (2nd Cir.1987), cert. den. 484 U.S. 849 (1987) (holding that a Connecticut statute that gave a right to abutting landowners and aggrieved persons to appeal an adverse zoning decision was purely procedural and did not give rise to an independent interest protected by the Fourteenth Amendment); *Dorr v. County of Butte,* 795 F.2d 875, 877 (9th Cir. 1986) (a substantive property right cannot exist exclusively by virtue of a procedural right). *See also Carlson vs. Industrial Claim Appeals Office*, 950 P.2d 663, 666 (Colo. App 1997) (the fact that the General Assembly has created a right to a hearing in certain circumstances does not mean that person granted that right is independently entitled to a hearing as a matter of constitutional law) .

The Court of Appeals decision is also inconsistent with this Court's pronouncement in *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6, 20 (Colo. 1993). In *Ficarra*, this Court rejected the notion that a procedural right is tantamount to a property interest for procedural due process purposes in assessing whether a bail bondsman has a property interest in his license renewal. In so holding this Court stated:

> In the case before us, it is undisputed that the plaintiffs were entitled to a hearing before the nonrenewal of their licenses became effective. This right to a hearing, however, is statutorily based, and the fact that the General Assembly has created a right to such a hearing does not mean that the plaintiffs are independently entitled to it as a matter of constitutional law. In order to establish that they have a

> property interest in the renewal of their licenses that is entitled to the protections of procedural due process, the plaintiffs would have to show that they had a legitimate claim of entitlement in the renewal of their licenses, based perhaps on the sort of informal rules and mutually explicit understandings alleged in Sindermann. The plaintiffs have alleged no such understandings or rules, nor have they suggested that there are any other bases in state law for concluding that they have a property interest in the renewal of their licenses.

849 P.2d at 20.

The Plaintiffs have not asserted, and the Court of Appeals has not identified, an underlying property right separate and distinct from the procedural right afforded by §18.30.020(7). A procedural right, alone, does not constitute a property interest for purposes of the Due Process Clause. The decision of the Court of Appeals impermissibly expands the category of protected property interests, confuses substance with procedure, and is contrary to well established precedent delineating the boundaries of substantive property interests. Accordingly, the decision should be reversed.

In Colorado, the courts have held that an adjacent landowner's interest in protecting his property from adverse zoning decisions does not amount to a vested right in the maintenance of a particular zoning classification, *Spiker v. Lakewood,* 198 Colo. 528, 603 P.2d 130 (1979), or a vested right in precluding the issuance a special use permit to a neighbor. *Bentley v. Valco, Inc.,* 741 P.2d 1266 (Colo. App. 1987). As this Court noted in *Spiker,* vested rights in a particular zoning ordinance do not accrue to neighboring owners. *Spiker,* 603 P.2d at 533.

Similarly, courts in other jurisdictions have held that an adjacent landowner does not have a property interest in the zoning of a neighbor's property. For instance, the court in *Telker v. Planning & Zoning Board,* 1991 WL 27808 (Conn. Super. 1991) held that there is no automatic procedural due process right to a public hearing to object to the development of someone else's property. *See also Gagliardi, supra* at 193 (if state law makes the pertinent official action discretionary, one's interest in a favorable decision does not rise to the level of a property right entitled to procedural due process protection); *Woodward & Lothrop, Inc. vs.*

Neall, 813 F.Supp. 1158, 1160 (D. Md. 1993) (the law is well established that a person does not have a constitutionally cognizable property interest in another person's land use merely because that use may adversely affect the value of his own property); *MacNamara v. County Council of Sussex County,* 738 F. Supp. 134, 143 (D. Del. 1990) (stating that the court is unaware of any cases in which persons who merely owned property in the neighborhood of a rezoned parcel have successfully claimed the deprivation of a constitutionally protected interest); *Dale v. Town of Elsmere,* 702 A.2d 1219, 1224-25 (Del. 1997) (a landowner's adjacent property interest was insufficient to establish a property interest worthy of due process protection); *Stop-State Township Open Places, Inc. v. Board of Supervisors of Montgomery Township,* 1996 WL 663875 (E.D. Pa. 1996) (where plaintiffs were deprived of an opportunity to speak at a public meeting, the court concluded that a violation by local officials of state law is not a violation of the federal constitution).

The weight of authority establishes that an adjacent landowner lacks a constitutionally protected property interest sufficient to give rise to constitutional notice and right to a hearing related to a land use application of a neighbor's property. The only identifiable interest in this case is the right afforded neighboring landowners to notice and an opportunity to attend a special use permit hearing. The Plaintiff's lack any underlying substantive property interest in the Church's land use. Accordingly, the Court of Appeals committed reversible error when it held that the Plaintiffs not only had an interest in enforcement of §18.30.020(7), but that their interest eclipses a vested right, and rises to the level of a constitutionally protected property interest.

2. The Plaintiffs' Due Process rights were not violated because an adequate post-deprivation remedy was available to the plaintiffs.

Adequate post-deprivation remedies were available, and were successfully utilized by the Plaintiffs. *See Parratt v. Taylor,* 451 U.S. 527 (1981). In *Parratt,* the Supreme Court stated that

due process is not violated if the deprivation is caused by an unauthorized failure to follow procedure, and the state provides an adequate post-deprivation remedy. *Parratt,* 451 U.S. at 542. Here, the decision to forego a special use permit hearing was contrary to procedure, and the Plaintiffs sought and obtained relief in the form of mandamus and an injunction under C.R.C.P. 106(a)(2), which is an adequate post-deprivation remedy. *See Regennitter v. Fowler,* 290 P.2d 223, 225 (Colo. 1955); *Norby v. City of Boulder,* 577 P.2d 277, 280 (Colo. 1978). Therefore, the Plaintiffs' rights to procedural due process were not violated by the City.

3. The Decision Of The Court of Appeals Will Adversely Affect All Municipalities and Counties Within The State of Colorado.

The expansion by the Court of Appeals of the scope of constitutionally protected property interests to encompass the procedural right of an adjacent landowner to attend a hearing on a neighbor's land use application is contrary to existing law. The Court of Appeals' decision improperly subjects municipalities and counties throughout this State to significant potential liability for procedural irregularities and inadvertent errors that may occur in the course of such a hearing.

The League is a nonprofit, nonpartisan organization that represents the collective interests of Colorado's cities and towns. Currently, 265 of Colorado's 270 communities are members of the League. One of the purposes of the League is to represent its members before the appellate courts on cases of statewide municipal concern. Similarly, CCI represents 61 out of the 64 counties in this state.

Local governments engage in a wide variety of tasks related to the regulation and administration of their communities. They are empowered by the Colorado Constitution, state statutes, county resolutions, and municipal ordinances to act in a variety of areas, including land use planning and development. Many such statutes and ordinances provide for a public hearing

in a variety of contexts prior to government action. Such a hearing serves the public interest by providing citizens an opportunity to participate in the decision-making process and affords the local decision-makers the benefits of receiving and considering varying viewpoints prior to taking action. For example, a municipal ordinance or county zoning resolution may provide for a notice of an upcoming hearing on a land use application and may invite citizens to be heard. However, until the Court of Appeals' decision, any procedural process, established by local statute, of an adjacent landowner to notice and an opportunity to be heard has not been elevated to a right protected by the United States Constitution, and municipalities and counties have not been required to adhere to constitutional safeguards. Rather, the adjacent landowner has enjoyed adequate state remedies to ensure that municipalities and counties follow their own locally-established requirements.

The ruling by the Court of Appeals improperly elevates a locally established right of an adjacent landowner to attend a public hearing to a protected property interest subject to civil rights claims. As a result, municipalities and counties will be now burdened with the threat of constitutional violations for inadvertent procedural errors any time they choose to provide for a public hearing. Inevitably, inadvertent violations will occur, subjecting municipalities and counties to damages claims under 42 U.S.C. § 1983 and attorney fee claims under § 1988. If allowed to stand, the Court of Appeals decision will result in a curtailment by municipalities and counties of the right of public comment at such hearings. Local governments are likely to reduce opportunities for public hearings and end the practice of sending notice to adjoining landowners, rather than expose themselves to the potential for civil rights damages claims, and attorney fees, due to inadvertent errors.

The Court of Appeals ruling also creates the anomalous result of putting adjoining

property owners in a better position that the applicants themselves in terms of their ability to assert procedural due process challenges to land use decisions. It is well established that an applicant to a zoning decision will not be deemed to have a property interest in an approval where the zoning body has wide discretion to grant or deny an application. See *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991). Most land use decisions for Colorado municipalities and counties involve purely discretionary criteria and thus, would not afford an applicant a property interest in an approval. Yet, if the Court of Appeals decision stands, a neighboring property owner could challenge a land use decision under a procedural due process theory, but an applicant who arguably has more at stake in the decision, could not. Accordingly, the Court of Appeals decision would lead to an absurd result.

The implications of the Court of Appeals' decision are significant for local government. For instance, in the context of land use applications, the provisions of the GMC are not unique. Municipal and county laws and regulations frequently provide for notice to be given to adjacent landowners of a hearing on a neighbor's land use application. *See, e.g.,* Westminster Municipal Code §11-5-13(a); Lakewood Ordinance §17-17-4(1); Boulder Revised Code §9-2-3(c); Louisville Municipal Code §17.40.070. Further, notice is routinely provided by first class mailings to the last known address of adjacent landowners and other interested parties. In some municipalities, the burden of notifying adjacent landowners is placed upon the applicant. *See e.g.,* Lakewood Ordinance §17-17-4(1)(b). The names and addresses of these adjacent landowners are typically derived by reference to the records of the county assessor. As a result of the decision of the Court of Appeals, any irregularities in following these routine procedures create the threat of civil rights damages claims and awards of attorney fees.

For a myriad of reasons, an adjacent landowner, or other interested party, may not receive

notice as provided by ordinance. For instance, the county assessor's records may not yet reflect new ownership of a home; an error could occur in the transmittal of information from the assessor to the planning department; the applicant might fail in his duty to notify adjoining landowners; the planning officials might err in mailing the proper notice and the Postal Service might err in delivery of the mail; or, as here, a planning official might make a mistake in interpreting a local ordinance. In each of these instances, the adjacent landowner who, by local ordinance, should receive notice in order to decide whether to attend a hearing can now maintain an actionable civil rights claim against the municipality for a deprivation of procedural due process.

The above examples serve to highlight the practical implications of the decision of the Court of Appeals. It is undisputed in this case that the City of Golden did not conduct a hearing on a special use permit. However, the decision of the Court of Appeals, conferring constitutional due process protection to an adjacent landowner based solely upon procedural requirements in municipal ordinances, is legally improper and contrary to the vast weight of authority on this issue. Municipalities and counties will be subject to civil rights liability for inadvertent errors of public officials (or third parties over whom they have no control) in failing to properly notice and hold a hearing in a wide range of quasi-judicial contexts. Because of concern for their exposure to such liability, municipalities and counties may very well end the practice of sending notice of hearings to neighboring landowners and will simply call for published or posted notice of pending land use matters, and as a practical effect neighbors are less likely to become aware of the hearing. Moreover, local governments may eliminate or reduce the scope of public hearings in land use matters. As a result, local community participation in land use decisions will be diminished. For these reasons, the decision of the Court of Appeals must be reversed.

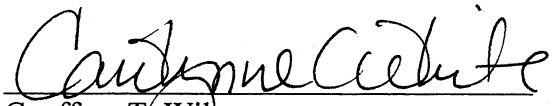
CONCLUSION

The decision of the Court of Appeals improperly expands the reach of the Due Process Clause by holding that a procedural right that a municipality chooses to confer by ordinance is sufficient to create a protected property interest. The holding is contrary to *Loudermill* and the weight of authority in several lower courts finding that the procedural right of an adjoining landowner to attend a hearing on a neighbor's application for a special use permit is not a constitutionally protected property interest.

Based upon the foregoing, the League and Colorado Counties, Inc. respectfully request this Court reverse the decision of the Court of Appeals in this case.

Respectfully submitted,

COLORADO MUNICIPAL LEAGUE



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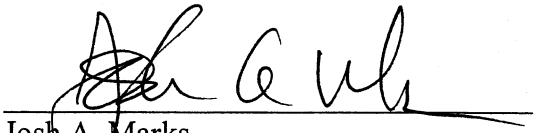

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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 22nd day of April 2002 a true and complete copy of the foregoing **OPENING BRIEF OF AMICI CURIAE COLORADO MUNICIPAL LEAGUE AND COLORADO COUNTIES, INCORPORATED** was placed in the U.S. mail, first-class postage prepaid, addressed as follows:

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