DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO Court Address: 1777 6th Street, Boulder, CO 80302 303-441-3750 **Plaintiff(s):** **BUTTERBALL, LLC**, a North Carolina limited liability company, v. **Defendant(s):** **CITY OF LONGMONT**, a political subdivision of the State of Colorado.	DATE FILED: June 12, 2014 8:34 AM CASE NUMBER: 2013CV30314 ♦ COURT USE ONLY ♦ Case No: 2013 CV 30314

ORDER RE: CITY OF LONGMONT'S MOTION FOR SUMMARY JUDGMENT

Defendant, CITY OF LONGMONT filed its Motion for Summary Judgment against BUTTERBALL, LLC. Butterball opposes and argues there are material facts in dispute that must be resolved at trial. For the reasons set forth below, the motion is GRANTED. Taking into account all the circumstances, the undisputed material facts show the City of Longmont respected Butterball's due process rights guaranteed by the United States and Colorado Constitutions during its rezoning process of the Butterball properties located within city limits. Even if the City of Longmont had violated Butterball's due process rights, which the Court finds it did not, Butterball's case must still be dismissed because any damages Butterball suffered are a result of the rezoning itself, and not the result of any procedural defect. Because the purpose of summary judgment is to expedite litigation by avoiding needless trials, the September 22, 2014 trial is thus VACATED.

I. INTRODUCTION

This lawsuit arises out of certain actions taken by the City of Longmont in connection with the rezoning of a defined area of land within city limits, which area encompassed property owned by Butterball. Butterball alleges the City of Longmont acted in an unconstitutional manner during the rezoning process. Butterball originally filed a complaint in February 2013, which asserted three claims: (1) review of a quasi-judicial action pursuant to C.R.C.P. 106(a)(4); (2) an alleged violation of constitutional rights pursuant to federal and state constitutional provisions; and (3) a declaratory judgment under various federal and state constitutional and statutory provisions that certain zoning ordinances of the City of Longmont were unconstitutional. Subsequently, Butterball stipulated to the dismissal of the First Claim and Third Claim, leaving only the Second Claim, an alleged violation of constitutional rights pursuant to the United States and Colorado Constitutions.

The City of Longmont moved for judgment as a matter of law in its favor for two reasons: (1) pursuant to the balancing test federal law requires, the City of Longmont afforded Butterball procedural due process under the Fourteenth Amendment to the United States Constitution; and (2) the City of Longmont afforded Butterball procedural due process under Article II, Section 25 of the Colorado Constitution. The Court finds these arguments well-taken and enters an order granting summary judgment in favor of the City of Longmont. As the Constitutional violations are Butterball's sole remaining claims against the City of Longmont, the trial set for September 22, 2014 is vacated.

II. STANDARD OF REVIEW

Summary judgment in favor of the movant is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of any material fact necessary for the determination of a question of law and the moving party is entitled to summary judgment as a matter of law. C.R.C.P. 56(c). When the party moving for summary judgment does not have the burden of proof at trial, that party satisfies its C.R.C.P. 56 burden by showing there is an absence of record evidence to support the non-movant's case. *Cont'l Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Id.* at 713.

Because the purpose of summary judgment is to expedite litigation by avoiding needless trials, *see Dubois v. Myers*, 684 P.2d 940, 943 (Colo. App. 1984), any factual dispute Butterball raises in response to this Motion must be material to the claims at issue. *See Krane v. Saint Anthony Hosp. Sys.*, 738 P.2d 75, 77 (Colo. App. 1987) (a material fact is a fact, the resolution of which will affect the outcome of the case). Butterball cannot meet its burden based on argument, allegations, or denials alone. C.R.C.P. 56(e). If Butterball cannot muster sufficient evidence to make out a triable issue of fact on its claims, a trial would be useless and the City of Longmont is entitled to summary judgment. *See Cont'l Airlines*, 731 P.2d at 713. Butterball, as the party against whom summary judgment is sought, is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts. *Crawford Rehab. Servs. v. Weissman*, 938 P.2d 540, 550 (Colo. 1997).

III. RELEVANT UNDISPUTED FACTS

1. After ceasing turkey slaughter on November 4, 2008, Butterball continued using the main plant and the other properties for further processing of raw materials (turkey meat) into value added products (hot dogs, lunch meat, raw roast, ground turkey), onsite warehouse for finished product, storage of ingredients and materials, refrigerated storage, laboratory, truck shop, wastewater treatment, and truck and trailer holding and storage until December 31, 2011, when it ceased operations in Longmont, Colorado. [Affidavit of Joe Nalley, Response Exhibit A, at ¶ 3]
2. Although it ceased operations in December 2011, Butterball still employs Nathan Higgins, as caretaker, who continues to oversee maintenance and local issues in Longmont, Colorado to this day.[1] [*Id.* at ¶ 4]
3. In 2011, Butterball was invited, via email, to, and did attend a "1st and Main Station Transit and Revitalization Stakeholder Committee Visioning Meeting" on August 30, 2011. [Affidavit of Joe Nalley, Response Exhibit A at ¶ 5]
4. In early December 2011, Longmont's Director of Economic Development, Brad Power, contacted Butterball and advised Butterball that Longmont was interested in acquiring the Butterball Properties. [*Id*. at ¶ 6]
5. Between June of 2012 and January 22, 2013, Longmont undertook the process of enacting a zoning change for the area that encompassed the Butterball Properties. [Greenwald Depo., Response Exhibit F, at p. 47, l. 13 – p. 49, l. 22 (rezone

[1] At least as of the date Butterball filed its Response, January 31, 2014.

process started after Revitalization Plan was adopted in June of 2012)]

6. On December 4, 2012, the City introduced an application to rezone a 103-acre area in the City of Longmont situated around the intersection of 1st Avenue and Main Street, Longmont, Colorado ("Rezone Area"). [*See,* Butterball's Amended Second Amended and Supplemental Complaint ("Second Amended Complaint")]
7. On January 22, 2013, the City of Longmont passed and adopted Ordinance O-2012-94. [*See,* Second Amended Complaint]
8. The City of Longmont held a series of public meetings in connection with the Rezone Area, and leading up to the eventual passage of Ordinance O-2012-94, on the following dates: August 29, 2012, October 17, 2012, December 4, 2012, December 18, 2012, and January 22, 2013. [*See* Affidavit of Phil Greenwald, at ¶ 3, attached as Exhibit A; *see also, e.g.*, Second Amended Complaint, at ¶¶ 18-19, 23-26, 28]
9. In advance of the neighborhood meeting on August 29, 2012, the Planning and Zoning Commission meeting on October 17, 2012, and the second reading and public hearing before City Council on December 18, 2012, the City of Longmont sent, via U.S. mail, notice of each meeting to Butterball at the address Butterball listed with the Boulder County assessor. This address was Butterball, LLC, P.O. Box 589, Mt. Olive, North Carolina 28365-0589. [Exhibit A, at ¶¶ 4, 10-12]

10. In advance of the August 29, 2012 meeting, the City of Longmont sent seven notices of the meeting to Butterball, LLC, at the address Butterball listed with the Boulder County assessor. [Exhibit A**,** at ¶ 10][2]
11. None of the notices the City of Longmont mailed to Butterball, LLC, P.O. Box 589, Mt. Olive, North Carolina 28365-0589 was returned to the City as undeliverable. [Exhibit A, at ¶ 13]
12. The City later sent certified mail to Butterball, LLC, P.O. Box 589, Mt. Olive, North Carolina 28365-0589, which mail was accepted as delivered. [Exhibit A, at ¶ 16]
13. In addition to mailing the aforementioned notices, the City of Longmont also published notice of the October 17, 2012 and December 18, 2012 public meetings in the local newspaper, the *Longmont Times-Call*. [Exhibit A, at ¶ 14]
14. City of Longmont failed to post any written notice of the Neighborhood Meeting in connection with the proposed zoning change, and did not certify that it had posted the required notice in accordance with Longmont's Municipal Code, Land Development Code, Title 15 ("Code"). [Greenwald Depo., Exhibit F hereto, at p. 70, l. 17 – p. 72, l. 7]
15. City of Longmont did not post any written notice of the Planning & Zoning Commission Hearing or the City Council Hearings on the Butterball Properties or on any affected properties. [*Id*. at p. 81, ll. 3-12; p. 90, l. 22 – p. 91, l. 6]

[2] Butterball spends a significant portion of its Response explaining its mail handling processes and that its personnel did not remember actually receiving the notices, thus asserting there is a material fact in dispute. As detailed *infra*, under the United States and Colorado Constitutions, due process does not require that the interested party actually receive the notices—only that the notices be placed in the mail.

16. City of Longmont representative Phil Greenwald admits that the decision was made at the time of the Neighborhood Meeting Notice not to post notices of the rezone on any properties because it was a large rezoning. [*Id*. at p. 70, l. 21 – p. 72, l. 3]

17. Ordinance O-2012-94 changed the zoning designation of the Rezone Area from Mixed Industrial to Mixed Use, dividing the zone into four Mixed Use designated areas: (1) Transit Core; (2) Commercial Core; (3) Mixed Use Transition #1; and (4) Mixed Use Transition #2. [*See,* Second Amended Complaint, at ¶ 10]

18. Butterball owns seven properties within the Rezone Area. [*See,* Second Amended Complaint, at ¶ 14 and Exhibit A to Second Amended Complaint.]

19. Four of the Butterball properties fall within the Mixed Use Transition area of the Rezone Area, and the three remaining Butterball properties fall into the Transit Core area of the Rezone Area. [*See,* Second Amended Complaint, ¶ 14]

20. The industrial uses to which Butterball put its property prior to the passage of Ordinance O-2012-94 are unavailable in Mixed Use zones. [*See,* Second Amended Complaint, ¶ 15]

21. The City conducted a full public process to reenact Ordinance O-2012-94. [Motion Exhibit A, at ¶¶ 16-18]

22. Through counsel, Butterball participated in these meetings, testifying before the Planning and Zoning Commission and City Council, and submitting comments to those bodies. [Motion Exhibit A, at ¶ 18]

23. At the end of the process, the City Council enacted Ordinance O-2013-59, a reenactment of the original rezoning Ordinance O-2012-94. [Motion Exhibit A, at ¶ 18]

IV. ANALYSIS

A necessary condition precedent to Butterball's remaining Second Claim is that it had a protected property interest in the zoning classification of its properties in the area of 1st and Main prior to the enactment of Ordinance O-2012-94 on January 22, 2013, of which it was deprived, without due process of law.[3] Assuming that Butterball had such a property interest, and assuming further that a deprivation occurred, the City of Longmont is nevertheless entitled to judgment as a matter of law in its favor because the requirements of due process were satisfied under both the United States Constitution and the Colorado Constitution.

A. Butterball Was Afforded Due Process Under the United States Constitution.

1. The City of Longmont provided sufficient notice to Butterball.

Pursuant to the Fourteenth Amendment to the United States Constitution, the City of Longmont afforded Butterball procedural due process sufficient to satisfy federal law. Under the Fourteenth Amendment, a court assessing a procedural due process claim must balance three factors to determine whether the procedures employed by the government in a particular case were constitutionally adequate:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal

[3] The Court notes that Butterball has sold or will shortly sell the properties at issue. *See* Order 3/13/2014. The sale is irrelevant to this issues at bar. *See generally, Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)

> and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldredge, 424 U.S. 319, 335 (1976). Colorado law does recognize a protected property interest in a zoning classification when a use specifically permitted under the applicable zoning code becomes securely vested by a landowner's substantial actions taken in detrimental reliance on the government's representations and affirmative actions. *Eason v. Bd. of Cnty. Comm'rs*, 70 P.3d 600, 605-06 (Colo.App. 2003); *see Moreland Props., LLC v. City of Thornton*, 559 F. Supp. 2d 1133, 1161 (D. Colo. 2008). Thus, the court must consider the possible deprivation of Butterball's property interest by the alleged lack of due process the City of Longmont afforded it.

The two major requirements that a government must employ to conform with *Eldredge* and other due process requirements, are (1) notice and (2) opportunity for hearing. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). As relevant to this Motion, the "notice" must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. Importantly, whether the government strictly complied with its own notice procedures is *not* the relevant question in this inquiry:

> [T]he question raised in a procedural due process challenge is whether the level of process afforded to the [plaintiffs] passed constitutional muster, not whether [the defendant] followed statutes or regulations. "[A] failure to comply with state or local procedural requirements does not necessarily constitute a denial of due process; the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause."

Ward v. Anderson, 494 F.3d 929, 935 (10th Cir. 2007) (quoting *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1256 (10th Cir. 1998)).

When the name and address of an interested party are reasonably ascertainable, due process requires that party be given "[n]otice by mail or other means as certain to ensure actual notice." *United States v. Clark*, 84 F.3d 378, 380 (10th Cir. 1996) (quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983)). Critically, for this ruling, due process does *not* require that the interested party actually receive the notice if all the circumstances show notice was reasonable. *United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1316 (10th Cir. 1994).

51 Pieces of Real Property actually bears many similarities to the instant matter and is highly instructive. In *51 Pieces of Real Property*, "The government sent notice to Nitsua [the property owner or manager] in care of James Gasper at an address in La Jolla, California, that was reflected on the recorded deed to the subject properties, executed in February 1989, as well as in the County Treasurer's records in New Mexico. [footnote omitted] The government does not dispute Nitsua's representation that this notice was returned undelivered. Six months before it sent the notice to La Jolla, the government was aware that Gasper had ceased any activities with Nitsua in the summer of 1989." The Tenth Circuit Court of Appeals affirmed the trial court's ruling on the government's motion for summary judgment finding that the notice given to the party with a property interest prior to forfeiture (a result infinitely more economically extreme than rezoning) was sufficient under a due process analysis. *Id*.

51 Pieces of Real Property, quoting established U.S. Supreme Court doctrine, stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id., quoting, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (emphasis added). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id*. at 1316 *quoting Mullane,* 339 U.S. at 315.

Taking "all the circumstances" into account, Butterball received notice reasonably calculated to achieve vindication of its due process rights. The circumstances that are undisputed facts include:

1. After ceasing turkey slaughter on November 4, 2008, Butterball continued using the main plant and the other properties until December 31, 2011, when it ceased operations in Longmont, Colorado. *Thus Butterball had an active presence in Longmont and active personnel within the City of Longmont's jurisdiction*.
2. Although it ceased operations in December 2011, Butterball still employs Nathan Higgins, as caretaker, who continues to oversee maintenance and local issues in Longmont, Colorado to this day.[4] *Same.*
3. In 2011, Butterball was invited, via email, to, and did attend a "1st and Main Station Transit and Revitalization Stakeholder Committee Visioning Meeting" on August 30, 2011. *Thus Butterball was made aware of the City of Longmont's plans, at least in a general sense, for the properties at issue.*
4. In early December 2011, Longmont's Director of Economic Development, Brad Power, contacted Butterball and advised Butterball that Longmont was interested in acquiring the Butterball Properties. *Same*.

[4] *See* note 1.

5. On December 4, 2012, the City introduced an application to rezone a 103-acre area in the City of Longmont situated around the intersection of 1st Avenue and Main Street, Longmont, Colorado ("Rezone Area"). [*See,* Butterball's Amended Second Amended and Supplemental Complaint ("Second Amended Complaint")]. *This was a public process.*
6. On January 22, 2013, the City of Longmont passed and adopted Ordinance O-2012-94. *Same*.
7. The City of Longmont held a series of public meetings in connection with the Rezone Area, and leading up to the eventual passage of Ordinance O-2012-94, on the following dates: August 29, 2012, October 17, 2012, December 4, 2012, December 18, 2012, and January 22, 2013. *Same*.
8. In advance of the neighborhood meeting on August 29, 2012, the Planning and Zoning Commission meeting on October 17, 2012, and the second reading and public hearing before City Council on December 18, 2012, the City of Longmont sent, via U.S. mail, notice of each meeting to Butterball at the address Butterball listed with the Boulder County assessor. This address was Butterball, LLC, P.O. Box 589, Mt. Olive, North Carolina 28365-0589. *This shows City of Longmont was "one desirous of actually informing the absentee"*. *Mullane,* 339 U.S. at 315.
9. In advance of the August 29, 2012 meeting, the City of Longmont sent seven notices of the meeting to Butterball, LLC, at the address Butterball listed with the Boulder County assessor. *Same*.

10. None of the notices the City of Longmont mailed to Butterball, LLC, P.O. Box 589, Mt. Olive, North Carolina 28365-0589 was returned to the City as undeliverable. *Mailing of notice is a necessary and sufficient Constitutional precondition of government action affecting real property. Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 800 (1983) *("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the ... property interests of any party ... if its name and address are reasonably ascertainable.")*

11. The City later sent certified mail to Butterball, LLC, P.O. Box 589, Mt. Olive, North Carolina 28365-0589, which mail was accepted as delivered. *Same as above and shows Butterball actually received the notice.*

12. The City of Longmont also published notice of the October 17, 2012 and December 18, 2012 public meetings in the local newspaper, the *Longmont Times-Call*. *This provided additional notice to Butterball.*

* * *

21. & 22. The City later conducted a full public process to *reenact* Ordinance O-2012-94. Through counsel, Butterball participated in these meetings, testifying before the Planning and Zoning Commission and City Council, and submitting comments to those bodies. *This shows active participation by Butterball in the rezoning process.*

23. At the end of the process, the City Council enacted Ordinance O-2013-59, a reenactment of the original rezoning Ordinance O-2012-94. *Thus, the current*

rezoning was enacted after Butterball was put on notice and actually participated in the process.

So long as the government "acted reasonably in selecting means likely to inform [the] persons affected, . . . then it has discharged its burden." *Weigner v. City of N.Y.*, 852 F.2d 646, 649 (2d Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989); *see Weigner*, 852 F.2d at 650 ("In the context of a wide variety of proceedings that threaten to deprive individuals of their property interests, the Supreme Court has consistently held that mailed notice satisfies the requirements of due process."); *see also Moreland Props.*, 559 F. Supp. at 1161 (where defendant municipality's city code required "proper notice" of public hearing on request for zoning change, due process not satisfied where defendant municipality did not mail personal notice to plaintiff investment firm and similarly situated landowners).

The U.S. Supreme Court has held that ordinary mail "provide[s] an 'efficient and inexpensive means of communication' upon which prudent men will ordinarily rely in the conduct of important affairs." *Greene v. Lindsey*, 456 U.S. 444, 455 (1982) (citation omitted) (quoting *Mullane*, 339 U.S. at 319).

Notice is constitutionally sufficient "if it was reasonably calculated to reach the intended recipient when sent." *Jones v. Flowers*, 547 U.S. 220, 226 (2006); *see id.* (citing cases) ("In each of these cases, the government attempted to provide notice and heard nothing back indicating that anything had gone awry, and we stated that '[t]he reasonableness and hence the constitutional validity of [the] chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.'").

In accordance with this principle, the City of Longmont's use of the postal service to send the recipient letters notifying it of an impending forfeiture or deprivation of property is a method the Supreme Court has "recognized as adequate for known addressees when [it has] found notice by publication insufficient [footnote omitted]." *Dusenbery v. United States*, 534 U.S. 161, 170 (2002). Further, the Court "ha[s] repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988).

The City of Longmont's multiple mailed notices to Butterball of impending forfeiture of property that were not returned unclaimed, coupled with notice by publication, when taken together, satisfy the City of Longmont's duty to take steps reasonably calculated to notify Butterball of an impending forfeiture or deprivation of property even if the City of Longmont mailed the notices to an out of date address for Butterball. *See Thorp v. United States*, 2012 LEXIS 5831184 (No. 11-cv-00206-PAB-KLM, 2012 U.S. Dist. LEXIS 164827, *9-14 (D. Colo. Nov. 16, 2012); *see id.* at *13-14 (civil forfeiture of property case recognizing that the intended recipient's failure to update the relevant contact information, "as a practical matter, ... posed an impediment to locating him, diminishing the range of practicable options available to the [government]"); *see also Mullane*, 339 U.S. at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency," and notice by publication in and of itself is insufficient).

As mentioned *supra*, with respect to the private interest at stake, Butterball would enjoy a property interest in the zoning classification existing prior to the passage of Ordinance O-2012-

94. *See Eason*, 70 P.3d at 605-06; *see also Moreland Props.*, 559 F. Supp. 2d at 1161. However, with respect to "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards", *Mathews v. Eldredge*, 424 U.S. at 335, the risk of an erroneous deprivation was not significant given (1) that the City of Longmont was careful to mail personal notice of the relevant opportunities for hearing directly to the address that Butterball itself provided, as well as notice by publication, and (2) the probable value of additional or substitute procedural safeguards would have been negligible given the personalized nature of the notices.

The City of Longmont sent via U.S. mail, to the address that Butterball provided, the following notices in connection with the City's application to rezone the Rezone Area:

(1) notice of the August 29, 2012 neighborhood meeting;

(2) notice of the October 17, 2012 Planning and Zoning Commission meeting; and

(3) notice of the December 18, 2012 Longmont City Council meeting.

Motion Exhibit A, at ¶¶ 4-12.

None of the notices the City of Longmont sent to Butterball's listed address were returned as undeliverable. Motion Exhibit A, at ¶ 13.

The City's reliance on the Boulder County Assessor's files was a reasonable attempt to ascertain the addresses of the affected landowners, including Butterball. When a party giving notice conducts "a basic search of the tax rolls," which "provide[] the names and addresses of every landowner," and mails notice to these addresses, the party has "properly compl[ied] with the notice required by due process." *Lobato v. Taylor*, 70 P.3d 1152, 1164-65 (Colo. 2003); *see accord, e.g., Bender v. City of Rochester, N.Y.*, 765 F.2d 7, 8 (2d Cir. 1985) (reliance on records

of property ownership maintained by the local assessor is a method reasonably calculated to provide notice, even when the assessor's records are flawed or outdated); *In re Beckham*, 447 B.R. 603, 607 (Bankr. E.D. Mo. 2011) (mailing to assessor's listed address rather than property address satisfies notice requirement of procedural due process); *Passalino v. City of Zion*, 237 Ill. 2d 118, 128, 928 N.E.2d 814, 820 (2010) (mere publication of notice was not sufficient to notify landowners of a rezoning, but it would have been enough "to review the records of the Lake County collector and then mail notice to the taxpayers of record of the 85 properties affected by the zoning map amendment").

The City of Longmont had no reason to believe that the Boulder County Assessor's records are flawed with regard to Butterball's address. In fact, the City of Longmont later sent certified mail to Butterball at that address, and the mail was accepted as delivered. Motion Exhibit A, at ¶ 16.

The notices the City of Longmont sent adequately apprised Butterball of the subject matter of the hearings and the nature of the changes proposed to the Rezone Area. Motion Exhibit A, at ¶¶ 10-12 and Exhibits (A)(6) – (A)(9) attached thereto. S*ee, also Moreland Props.*, 559 F.Supp.2d at 1161. Butterball's contention that the notices should have been physically posted on the buildings located on Butterball's property[5] is a red herring irrelevant to whether

[5] Butterball makes much of the fact that under city code, City of Longmont was required to undertake specific steps to effect a lawful zoning change. Code, Section 15.02.050 (Review procedures for major development applications); *See also* Code, Section 15.02.040(H)(3)(f) requiring that "[a]ll posted notice shall be posted no later than 14 days before hearing." Section 15.02.040(H)(3)(f) of the Code further provides, "the applicant shall certify in writing that required notice was posted according to the requirements of this section."

The Code provides that "minor defects in notice shall not impair the notice or invalidate the proceedings under the notice if a bona fide attempt has been made to comply with applicable notice requirements. Where written notice was properly mailed, failure of a party to receive written notice shall not invalidate any subsequent proceeding. In all cases, however, the requirements for timing of the notice and for specifying the time, date and place of hearing and the location of the subject property shall be strictly construed." Code, Section 15.02.040(H)(6).

procedures were constitutionally adequate. *See Ward*, 494 F.3d at 935. In fact, the mailing itself, without more, satisfied constitutional requirements, as the City of Longmont acted reasonably in selecting a means of notice for which Butterball itself provided the relevant contact information, *see Clark*, 84 F.3d at 380; *51 Pieces of Real Property*, 17 F.3d at 1316; *Weigner*, 852 F.2d at 650.

The cases are legion that recognize a government entity's mailing of notice of an impending forfeiture or deprivation of property, when addressed to the recipient's address on file with the government entity, is reasonably calculated to give notice of an impending forfeiture or deprivation of property and, thus, constitutionally sufficient. *See, e.g.*, *Jones*, 547 U.S. at 226; *Dusenbery*, 534 U.S. at 170; *Pope*, 485 U.S. at 490; *Thorp*, 2012 U.S. Dist. LEXIS 164827 at *9-14. The City of Longmont therefore satisfied its burden.

With regard to the third and final factor in the *Matthews* test, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

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Longmont admits it made an intentional decision not to post notices of any of the public meetings regarding the initial rezoning. Greenwald Depo., Exhibit F hereto, p. 70, l. 21 – p. 72, l. 3. Butterball acknowledges that whether or not a municipality followed its own Code procedures is *not* dispositive of a federal due process claim. *See Moreland Properties*, 559 F. Supp. 2d at 1158. [Response at p. 20]

Butterball argues that under Colorado law, "[s]trict compliance with provisions for notice of a public hearing in connection with a zoning ordinance amendment is required. If there are ambiguities in the notice of such a proposed change, these ambiguities should be resolved against the sufficiency of the notice." *Hallmark Builders & Realty v. City of Gunnison*, 650 P.2d 556, 559 (Colo. 1982) (internal citations omitted) (affirmed trial court's declaration that municipal zoning ordinance was invalid because the notice of public hearing published in connection with the adoption of that ordinance was inadequate).

Even if posting on the property was technically required, given the multitudinous notices the City of Longmont provided Butterball and its actual participation, there is no violation of its due process rights under *Mathews v. Eldredge* and its progeny. The result is the same under the Colorado Constitution. *See Feldewerth v. Joint Sch. Dist.*, 3 P.3d 467, 471-72 (Colo. App. 1999). That the City of Longmont allegedly *could* have provided additional notice to Butterball via posting on the property does not undermine the validity of the notice the government actually sent. See *United States v. 51 Pieces of Real Property*, 17 F.3d at 1318. ("The government is not required to send notice to every source reasonably calculated to provide actual notice, absent extraordinary circumstances that do not exist here.")

substitute procedural requirement would entail," in this circumstance the City of Longmont would have assumed administrative and fiscal burdens that would not have been insignificant if it would have had to post notices physically in various places on the buildings located on Butterball's property. Motion Exhibit A, at ¶ 17. In comparison, sending the notices by ordinary mail cost the City about $283. Motion Exhibit A, at ¶ 15. For these reasons, Butterball was not deprived of procedural due process under the Fourteenth Amendment, and the City of Longmont is entitled to judgment as a matter of law on the 42 U.S.C. § 1983 component of Butterball's Second Claim.

2. Due process does not require that interested party actually receive notices.

Butterball dedicates pages of its Response with supporting affidavits alleging that its personnel do not remember receiving the City of Longmont's notice and the volume of mail it receives. Even if true, this is irrelevant. Under the United States Constitution, due process does not require that the interested party actually receive the notices—only that the notices be placed in the mail. *United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1316 (10th Cir. 1994); *see Weigner v. City of N.Y.*, 852 F.2d 646, 650 (2d Cir. 1988), cert. denied, 488 U.S. 1005 (1989) ("In the context of a wide variety of proceedings that threaten to deprive individuals of their property interests, the Supreme Court has consistently held that mailed notice satisfies the requirements of due process.").

Notice is constitutionally sufficient "if it was reasonably calculated to reach the intended recipient when sent." *Jones v. Flowers*, 547 U.S. 220, 226 (2006); *see id.* (citing cases) ("In each of these cases, the government attempted to provide notice and heard nothing back indicating that anything had gone awry, and we stated that '[t]he reasonableness and hence the

constitutional validity of [the] chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.'").

3. <u>Butterball is not entitled to compensatory damages in this matter</u>.

Even if Butterball had been deprived of procedural due process under the *Mathews* test, it still would not be entitled to compensatory damages under Section 1983 and the summary judgment is appropriate. This is because, to the extent that Butterball suffered a deprivation of a property interest, defective notice was not the *cause* of the deprivation. Rezoning was the cause.

The U.S. Supreme Court has rejected the "contention that damages should be presumed to flow from every deprivation of procedural due process." *Carey v. Piphus*, 435 U.S. 247, 263 (1978). Compensatory damages are only available for a procedural due process violation if the violation *caused* the deprivation. *Id.* at 260. Thus, if the government would have "made the same decision" absent the procedural violation, compensation is not available under section 1983. *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999).

In other words, "when a procedural due process violation occurs and adverse action results, damages for injuries caused by the adverse action may not be recovered if the defendant can prove the action would have been taken even absent the violation." *McClure v. Indep. Sch. Dist. No. 16*, 228 F.3d 1205, 1213 (10th Cir. 2000). For example, when the government fails to satisfy procedural due process before terminating an employee, but can show that it would have terminated the employee regardless, the government is not liable for compensatory damages flowing from the procedural due process violation. *Id.* at 1213-14.

In its Second Claim, Butterball seeks compensatory damages. Second Amended Complaint, ¶ 74. However, it is undisputed that the City of Longmont made the same rezoning

decision even *after* Butterball had fully participated in the public process. Response at 2-3. The City of Longmont conducted a *full repeat of the rezoning process*, in which Butterball received notice, participated and aired its concerns. Motion Exhibit A, at ¶ 18. At the end of the process, the City of Longmont reenacted the rezoning ordinance. Motion Exhibit A, at ¶ 18. Accordingly, any damages Butterball suffered are a result of the rezoning itself, and not the result of any procedural defect. *See Eason*, 70 P.3d at 605-06 (recognizing a property interest in a zoning classification). These damages are thus not compensable and, as a matter of law, Butterball cannot receive relief under its Second Claim.

Butterball claims that since reenactment was a foregone conclusion, Longmont's uncontroverted due process compliance in the second rezoning cannot cure the original Constitutional breach. Response 30-34. The Court does not accept with Butterball's tautology. The absurd logical conclusion of Butterball's argument is that if there *ever* was a due process violation the government could *never* cure the shortfall with subsequent compliance due to the original violation (or the government would have to prove a negative, namely, that the subsequent action was *not* a due process violation, a burden consistently frowned upon by the courts. *See Elkins v. United States*, 364 U.S. 206, 218 (1960) ("[A]s a practical matter it is never easy to prove a negative ....")). The gears of government cannot be frozen in an infinite loop as Butterball suggests.

Butterball's own brief on this score reveals its argument is bereft of any public policy consideration:

> In any event, in reenacting the rezoning, Longmont had the advantage of knowing precisely what it had done wrong the first time in terms of providing notice. It was embroiled in this litigation. Butterball had detailed the deficiencies of Longmont's procedural process in its Rule 106(a)(4) Opening Brief, providing a "roadmap" of how

> Longmont might lawfully enact the rezoning. But from the beginning, the outcome was predetermined – Longmont was going to pass the zoning change the second time, no matter what anyone said at the public meetings and hearings.

Response at 32. According to Butterball, the City of Longmont learned from its alleged due process violation and lawfully enacted rezoning the second time around. It cannot be public policy that a government should be punished for doing the right thing (assuming there was an error in the first rezoning proceeding).[6] Public policy and the separation of powers doctrine demand that governments be given the opportunity to cure allegedly unconstitutional action. *See e.g., Davidson v. Committee for Gail Schoettler, Inc*., 24 P.3d 621, 623 (Colo. 2001) (unconstitutionality claim mooted by General Assembly's amendment of statute); *Board of County Com'rs of La Plata County v. Moga*, 947 P.2d 1385, 1391 (Colo. 1997); *citing Brooke v. Restaurant Serv., Inc*., 906 P.2d 66, 71 (Colo. 1995) ("by affording administrative agencies an opportunity to correct their errors, the risk of unnecessary judicial intervention in the administrative process is minimized."); C.R.S.A. Const. Art. 3

Finally, with respect to the City's contention that Butterball is not entitled to compensatory damages, the City observes the United States Supreme Court has stated unequivocally that if the government would have "made the same decision" absent the procedural violation, compensation is not available under section 1983. *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999). In other words, "when a procedural due process violation occurs and

[6] Tellingly, Butterball also ignores the fact that it actually attempted to amend its complaint to request an injunction against the City of Longmont's reenactment of the rezoning ordinance that the Court denied on September 18, 2013 based on the doctrine of exhaustion of administrative remedies. "Plaintiffs must exhaust available and applicable administrative remedies in order to prevent piecemeal application for judicial relief, to avoid unwarranted interference by the judiciary in the administrative process, and to conserve judicial resources." *Board of County Com'rs of La Plata County v. Moga*, 947 P.2d 1385, 1391 (Colo. 1997); *citing Brooke v. Restaurant Serv., Inc*., 906 P.2d 66, 71 (Colo. 1995); *Horrell v. Department of Amin*., 861 P.2d 1194, 1197 (Colo. 1993). If the Court had not denied Butterball's request to halt the reenactment, the City of Longmont would have been unable to undo the alleged due process violation in the first rezoning.

adverse action results, damages for injuries caused by the adverse action may not be recovered if the defendant can prove the action would have been taken even absent the violation." *McClure v. Indep. Sch. Dist. No. 16*, 228 F.3d 1205, 1213 (10th Cir. 2000). That is the case here.

B. Butterball Was Afforded Due Process Under the Colorado Constitution.

In addition, pursuant to Article II, Section 25 of the Colorado Constitution, the City of Longmont afforded Butterball procedural due process sufficient to satisfy Colorado law. Hence, this Court should grant judgment as a matter of law for the City. First, Butterball's reliance on *Moreland Properties*, where the notice insufficiently described the rezoning action at issue as adding a *new section* to the municipal code to create an unspecified "overlay zone" over the plaintiff's property, is misplaced. *Moreland Props., LLC v. City of Thornton*, 559 F. Supp. 2d 1133, 1159 (D. Colo. 2008). Here, in contrast, the notice was clear that the rezoning would be to a mixed use district; regulations governing mixed use districts were already established in the Longmont Municipal Code. [*See* Motion Exhibit A at ¶¶ 10-12.]

In general, under Article II, Section 25 of the Colorado Constitution, notice is constitutionally adequate if it is "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them opportunity to present their objections." *Klingbeil v. State Dep't of Revenue*, 668 P.2d 930, 932 (Colo. 1983) *citing Mullane*. 339 U.S. at 314. Due process, however, does not require that the adopted method of service be absolutely certain to provide notice in every instance. *Patterson v. Cronin*, 650 P.2d 531, 535 (Colo. 1982) (parking summons affixed to illegally parked vehicle *left unattended* was reasonably certain to provide notice); *Kuhndog, Inc. v. Indus. Claim Appeals Office*, 207 P.3d 949, 950 (Colo. App. 2009); *see Schmidt v. Langel*, 874 P.2d 447, 451-52 (Colo. 1993) (in quiet

title action in which real property was bought at tax sale, where notice by mail was sent but returned as undeliverable, if diligent search of county records would uncover no alternative address, neither due process concerns under Colorado Constitution nor statute compelled county treasurer to follow up on information that there is no reason to believe would uncover correct address). In addition, "in the absence of explicit statutory language requiring it, a statute requiring the providing of notice by a specified means need not be strictly applied." *See Feldewerth v. Joint Sch. Dist.*, 3 P.3d 467, 471-72 (Colo. App. 1999).

Notice by certified mail has been held to satisfy the requirements of due process. *Ault v. Dep't of Revenue*, 697 P.2d 24, 28 (Colo. 1985) (where nondelivery of the mail containing notice is due to a plaintiff's neglect of his duty to pick up official certified mail relevant to his circumstances, due process does not require the government to prove more than the mailing of notice). And in another instance, the fact that notices were delivered to the plaintiff's residence via certified mail "militate[d] in favor of a finding of constitutionality" of the notices. *Long v. Pippin*, 914 P.2d 529, 531 (Colo. App. 1996).

Further, with respect to zoning ordinance amendments, generally the notice of public hearings respecting the proposed amendment should set forth information reasonably necessary to provide adequate warning to all persons whose rights may be affected by the proposed action. *Hallmark Builders & Realty v. City of Gunnison*, 650 P.2d 556, 559 (Colo. 1982). Specifically, the notice must at a minimum give the date, time, and place of the hearing, and it must apprise the public of the subject matter of the hearing and the nature of the proposed zoning change. *Id.*

Moreover, City of Longmont asserts there is no apparent controlling authority standing for the proposition that a municipality is not entitled to rely on a particular address to send notice

to an affected person or entity regarding proposed zoning changes when the very person or entity to which the notice is sent must provide the address to the government.[7] Rather, where the person or entity has the burden to provide a current mailing address, Colorado courts have held due process is satisfied where notice is delivered to the address most recently provided by the person or entity. *See, e.g.*, *Klingbeil*, 668 P.2d at 932 (out-of-state driver could not complain of insufficient notice where he did not provide the government with his most current address); *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838, 843 (Colo. App. 2005) (no due process concerns where parties agreed on procedure for notifying each other of their mailing addresses, but party alleging harm did not comply with said procedure); *Ward v. Bd. of Comm'rs*, 886 P.2d 310, 312 (Colo. App. 1994) (no due process concerns where nondelivery of mailed notice denying taxpayer's request for property tax abatement was "attributable to taxpayer's own failure to give the [government] an address where a mailed notice would reach him or to leave a forwarding address with the postal service").

As required by the *Hallmark Builders* case, the notices mailed by the City of Longmont to the address Butterball provided listed the date, time, and place of the hearing and apprised Butterball of the subject matter of the hearing and the nature of the proposed zoning change. *See*, motion Exhibit A, at ¶¶ 10-12. In addition, in advance of each meeting, the City of Longmont mailed the notices apprising Butterball of each meeting to the address Butterball itself

[7] While the City of Longmont may not have found cases to support of this exact proposition, there is a legion of laws (and regulations) that require parties who change their addresses to notify relevant governmental agencies. *See, e.g.* C.R.S. 12-33-114.5 ("Each person licensed under this article [chiropractors], upon changing his or her address, shall inform the board of their new address within thirty days after such change."); C.R.S. 14-14-111.5 (child support registry); C.R.S. 35-26-106 ("All registrants [Colorado nursery fund] shall inform the commissioner in writing of any change of address prior to any such change of address."); C.R.S. 42-2-119 (any person who changes their residence address must notify the Department of Motor Vehicles within 30 days of such change of address. Failure to do so is a class B traffic infraction); C.R.C.P. 227 (update of current address for attorneys required); 1 C.C.R. 104-13:6 (workers compensation hearings); 3 C.C.R. 716-1:5-4 (nurses); 3 C.C.R. 719-1:4.00.00 (pharmacists); 4 C.C.R. 736, 737, 744, 745, 903 (various regulated occupations); 8 C.C.R. 1203-1:3 (pesticides).

listed with the Boulder County assessor. Motion Exhibit A, at ¶ 4. Because Butterball had the burden to provide the mailing address for purposes of mailing such notices, the City of Longmont acted properly in relying on the address Butterball gave the Boulder County assessor. *See Klingbeil*, 668 P.2d at 932; *Estates in Eagle Ridge*, 141 P.3d at 843; *Ward*, 886 P.2d at 312. The City of Longmont had no duty to conduct additional research on Butterball's address. *See White Cap Min. Co. v. Resurrection Min. Co.*, 174 P.2d 727, 733 (Colo. 1946) (County treasurer was not obliged to review Secretary of State's records to ascertain address of corporate landowner or its officers so as to permit notice of tax sale to be served upon owner, but could serve notice by publication when landowner's address appeared unobtainable from any other source.)

Hence, the notices the City of Longmont mailed to Butterball's address on file were reasonably calculated under all the circumstances to apprise Butterball of the pendency of the zoning ordinance amendment proceedings and to afford it opportunity to present its objections, *see Klingbeil*, 668 P.2d at 932, even though this method of service may not have been absolutely certain to provide notice in every instance, *see Patterson*, 650 P.2d at 535; *Kuhndog*, 207 P.3d at 950; *Schmidt*, 874 P.2d at 451-52.

And under the Colorado Constitution, when a party giving notice conducts "a basic search of the tax rolls," which "provide[] the names and addresses of every landowner," and mails notice to these addresses, the party has "properly compl[ied] with the notice required by due process." *Lobato v. Taylor*, 70 P.3d 1152, 1164-65 (Colo. 2003). In addition, the party giving notice acts properly in relying on the address provided by the party to be notified where the party to be notified has the burden to provide its current mailing address. *See, e.g., Klingbeil*

v. State Dep't of Revenue, 668 P.2d 930, 932 (Colo. 1983); *Estates in Eagle Ridge, LLLP v. Valley Bank & Trust*, 141 P.3d 838, 843 (Colo. App. 2005); *Ward v. Bd. of Comm'rs*, 886 P.2d 310, 312 (Colo. App. 1994).

City of Longmont's representative Phillip Greenwald testified at his deposition that he superintended the City's process of mailing the original notices to the affected property owners, including Butterball. *See* Transcript of Deposition of Phillip Greenwald, attached as Motion Exhibit A, at 58:7-68:24 (Aug. 29, 2012 meeting); 73:10-78:21 (Oct. 17, 2012 hearing); 82:14-89:12 (Dec. 18, 2012 hearing).] Greenwald also testified that the notices went out in the mail on specific days approximately two weeks before each meeting. *See id.*, 60:18-64:6 (Aug. 29, 2012 meeting); 74:19-76:1 (Oct. 17, 2012 hearing); 83:8-84:11 (Dec. 18, 2012 hearing)], and that after the envelopes were stuffed and labeled but before they were mailed, he personally verified that the envelopes addressed to Butterball were in the group of envelopes that were mailed. *See id.*, 67:24-68:5, 12-15 (Aug. 29, 2012 meeting); 76:25-77:8 (Oct. 17, 2012 hearing); 87:11-23 (generally); 88:21-89:12 (Dec. 18, 2012 hearing). In addition, Greenwald testified via affidavit that the City mailed each notice to the address Butterball listed with the Boulder County assessor, which Butterball had the burden to provide. Motion Exhibit A at ¶ 4. Hence, by using means reasonably calculated under all the circumstances to provide notice, under either the United States Constitution or the Colorado Constitution, the City satisfied the minimum requirements of due process.

To the extent Butterball argues the City was required to supplement its mailings of the original notices with posted notice on the Butterball Properties according to the technical terms in the City's code, strict compliance was unnecessary. Under the United States Constitution, "[a]

failure to comply with state or local procedural requirements does not necessarily constitute a denial of due process; the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause." *Moreland Props., LLC v. City of Thornton*, 559 F. Supp. 2d 1133, 1158 (D. Colo. 2008). And under the Colorado Constitution, there need not necessarily be strict compliance with a provision of law that otherwise sets forth specific procedures for providing notice. *See Feldewerth v. Joint Sch. Dist.*, 3 P.3d 467, 471-72 (Colo. App. 1999).

V. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of the City of Longmont and the September 22, 2014 trial is vacated.

SO ORDERED this 12th day of June, 2014.

BY THE COURT:

Andrew Hartman
District Court Judge