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May 25, 2016

VIA EMAIL

Kristin Schledorn  
City Attorney  
City of Littleton  
2255 West Berry Avenue  
Littleton, CO 80120

**Re: Potential Vote by Littleton City Council Regarding Building Permit # B15-0899 Issued to Zocalo Construction**

Dear Ms. Schledorn:

This firm represents Zocalo Community Development Corporation ("Zocalo"), the holder of the above referenced building permit ("Building Permit"). The purpose of this letter is to express our grave concerns surrounding a proposed motion to rescind the Building Permit offered by Councilman Clark and seconded by Councilman Valdes at a public meeting of the Littleton City Council (collectively "Council" or individually as "Council Members") on May 17, 2016. At your urging, the vote was tabled; however, it is our understanding that the issue will be revisited at the public hearing on June 7, 2016.

As you will undoubtedly recall, the Building Permit was issued on April 27, 2016, after a careful, thorough, and protracted review by the Community Development Department staff. Our client reasonably relied on the Building Permit, and assumed substantial financial liabilities by closing on a loan, ordering the generation of additional construction and engineering plans, and commencing construction.

Let me be clear. A direct Council vote or order by the Council to any other party to rescind, revoke, or otherwise impair the full force and effect of the Building Permit in any way is blatantly *ultra vires*, devoid of any legal authority, and will be viewed as a willful and wanton act against my client.<sup>1</sup> Moreover, and perhaps of particular interest to your client, a vote to rescind the Building Permit will expose not only the City, but Council members individually and personally to financial liability for damages, attorney's fees, and other legal remedies which my client intends to pursue to the fullest extent allowable by law should the Council proceed down this illegal path. Given the scope of the approved project, the damages could well exceed \$30,000,000.

These damages are not speculative. They are based on a proven track record on the part of our client for delivery of financial returns with the same equity partner. Our client has multiple, realized

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<sup>1</sup> See e.g., *Perlmutter Assocs., Inc. v. Northglenn*, 35 Colo. App. 355, 356 (1975); *Berman v. Denver*, 120 Colo. 218, 220 (1949).



examples that will justify the amount of this loss. Moreover, in addition to money damages, our client will also be entitled to attorney's fees, which continue to mount, and significant non-monetary damages.

Neither the City, nor members of Council are protected by governmental immunity in this case. While the Colorado Governmental Immunity Act protects municipalities and its elected officials under certain circumstances,<sup>2</sup> it provides no protection for *ultra vires* acts beyond the course, scope, or authority of the City or its Council Members. Nor does it apply to claims based on federal civil rights violations which are clearly implicated in this matter.<sup>3</sup>

The City's powers are limited by federal and state constitutions, state statutes, its charter ("Charter"), and other adopted codes. The charter or law by which the municipal body is created is to be strictly construed, and any doubt concerning the City's power must be resolved against it.<sup>4</sup> The Colorado Constitution vests the people of a home rule city with the power to make, amend, add to or replace its charter, which shall be its organic law and extend to all its local and municipal matters.<sup>5</sup> The Littleton Charter specifically provides under the heading "Council not to interfere with Administrative Service" that:

Except for purposes of inquiry, the Council and its members shall deal with the administrative service of the City solely through the City Manager, and neither the Council nor any member shall give orders to any subordinates of the City Manager either publicly or privately.<sup>6</sup>

The issuance of a building permit is an administrative service of the City.<sup>7</sup> Thus, any dealings related to the building permit are reserved by law for the City Manager or his duly appointed representative.<sup>8</sup> Because the Council is specifically mandated by Charter not to interfere with building permits, not only is there no grant of authority (under the Charter or the Littleton Municipal Code ("Code")) for Council to revoke a building permit, there is an express prohibition against Council doing so.

Both the Code and the Littleton Building Code ("Building Code") confirm the Charter's mandate. Only a building official, and not the Council, may suspend or revoke a permit under very particular circumstances.<sup>9</sup> The Building Code provides that the building official, and not the Council, may revoke a building permit "whenever the permit is issued in error or on the basis of incorrect, inaccurate, or incomplete information supplied by the applicant."<sup>10</sup> The City has made no such

<sup>2</sup> C.R.S. §§ 24-10-101 *et seq.*

<sup>3</sup> *Martinez v. El Paso County*, 673 F. Supp. 1030 (D. Colo. 1987 (holding that the Colorado Governmental Immunity Act does not apply to claims based on federal civil rights violations); *Mucci v. Falcon Sch. Dist. No. 49*, 655 P.2d 422 (Colo. App. 1982) (holding conduct wrongful under § 1983 cannot be immunized, and conduct by persons acting under color of state law that is wrongful under 42 U.S.C. § 1983 cannot be immunized by state law).

<sup>4</sup> *Central City Opera House Assoc. v. Central City*, 650 P.2d 1349, 1349 (Colo. App. 1982).

<sup>5</sup> Colo. Const. art. XX, § 6; *Denver v. Blue*, 179 Colo. 351, 352 (1972).

<sup>6</sup> Littleton Municipal Charter § 32, July 28, 1959; Amended, Election of 11-3-2015

<sup>7</sup> *City of Colo. Springs v. Bull*, 143 P.3d 1127, 1130 (Colo. App. 2006) (actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not, and acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative).

<sup>8</sup> LMC § 4-1-2 (A),(B) (2015).

<sup>9</sup> Littleton Building Code ("LBC") § 11-5-14(e).

<sup>10</sup> *Id.*



allegation. In fact, under pending litigation<sup>11</sup> in which the City and our client are co-defendants, the City has confirmed the validity of the Building Permit's underlying site development plan, both in its Answer to the Complaint and in its Reply to Motion for Summary Judgment. Moreover, our client has substantially and reasonably relied upon the City's representations made under oath in the pending litigation as it moved forward with construction.

Not only does governmental immunity not apply to the City under these circumstances, it will not protect Council members from personal liability. The Colorado Governmental Immunity Act applies only to those City officials (elected or appointed) who are acting within their official capacity.<sup>12</sup> It is undeniable that officials who knowingly act in the face of an express prohibition are no longer serving a governmental function and have entered the dangerous purview of conduct that is *ultra vires* and the personal liability that attaches to it.<sup>13</sup> The irony is that these same Council members who are sworn to protect and enforce the Charter and the Code now appear to be refusing to follow it when it does not serve their personal agendas to do so.

While we acknowledge that our client's development has a relatively small number of detractors, the City has acted in conformance with the Code requirements and our client has relied on those actions to its detriment. For City Council members to act in clear violation of its powers to pander to the interests of the detractors is appalling and in so doing will subject the City and its Council members to financial liability that would undermine the effectiveness of the City and its Council leadership in the eyes of its community and fundamentally place the City's ability to conduct its financial affairs in peril.

For the foregoing reasons, it is indisputable that Council is without authority to revoke or order the revocation of the Building Permit. I urge you to provide the strongest advice possible that adopting the ill-conceived motion would subject the City and Council members to litigation that will be vigorously advanced by my client. Of course, we remain hopeful that the Council will reject the pending motion thereby allowing my client to proceed with its development activities without unlawful interference.

Sincerely,

A handwritten signature in blue ink, appearing to read 'M Rork', is written over a horizontal line.

Matthew Rork

Fairfield and Woods, P.C.

cc:	David Zucker	Phil Cernanek	Debbie Brinkman
	Bruce Beckman	Doug Clark	Bill Hopping
	Peggy Cole	Jerry Valdes	Michael Penny

<sup>11</sup> District Court, Arapahoe County, Colorado, Case Number 2015CV32363.

<sup>12</sup> C.R.S. 24-12-105 (2015).

<sup>13</sup> See e.g., *Tidwell v. City & County of Denver*, 62 P.3d 1020 (Colo. App. 2002), rev'd on other grounds, 83 P.3d 75 (Colo. 2003); *King v. U.S.*, 53 F. Supp. 2d (D. Colo. 1999).