April 16, 2024

Via email to rentappeals@ci.stpaul.mn.us

The Honorable Marcia Moermond
Legislative Hearing Officer
St. Paul City Hall & Court House
15 West Kellogg Blvd.
St. Paul, MN 55102

Re: Third Supplemental Appeal Submission – The Haven of Battle Creek
RLH RSA 23-13

Dear Hearing Officer Moermond:

Counsel for Appellant Sumeya Mohamed submit this letter to address recent developments that directly impact the evaluation of Ms. Mohamed's appeal of the 26.48% rent increase at her apartment complex, The Haven of Battle Creek ("Haven").

First, we have filed a motion for preliminary injunction in the concurrent class action lawsuit, *Mohamed v. Marquette Management, Inc. et al*, 23-CV-1740 (JRT/JFD).[1] The motion thoroughly details evidence that shows Marquette Management's extensive violations of both asbestos safety law and its own internal asbestos policy since it took over Haven in May 2021. Such violations are a breach of Minnesota's implied warranty of habitability and put hundreds of Haven tenants at extreme risk of exposure to dangerous asbestos fibers. Marquette's blatant disregard for tenant health and safety mandates that its request for an exception to the rent cap be denied.

Second, a recent order by a Ramsey County District Court judge found Marquette's lease language violates Minnesota's single-meter utility law, Minn. Stat. § 504B.215, which, as a result, precludes the grant of any exception to the 3% rent cap.

Finally, we want to reiterate our request for materials related to the August 10, 2023 appeal hearing and, in addition, ask for a second hearing on Ms. Mohamed's appeal to address the above developments, as well as those noted in our second supplemental appeal submission.

I. New Evidence Shows Marquette's Continued Violations of Asbestos Safety Law, Mandating the Denial of its Rent-Increase Application.

On April 8, 2024, counsel for Ms. Mohamed filed a motion for preliminary injunction in the concurrent class action lawsuit. Among other relief, the motion seeks a court order enjoining

[1] The initial class action complaint was included as Exhibit 1 in Ms. Mohamed's appeal.

Marquette from conducting renovation, repair, and maintenance work in a manner violative of state and federal asbestos safety laws. The motion is attached to this letter as Exhibit A. An expert report authored by Greg Myers and submitted in support of the motion for preliminary injunction is attached as Exhibit B.

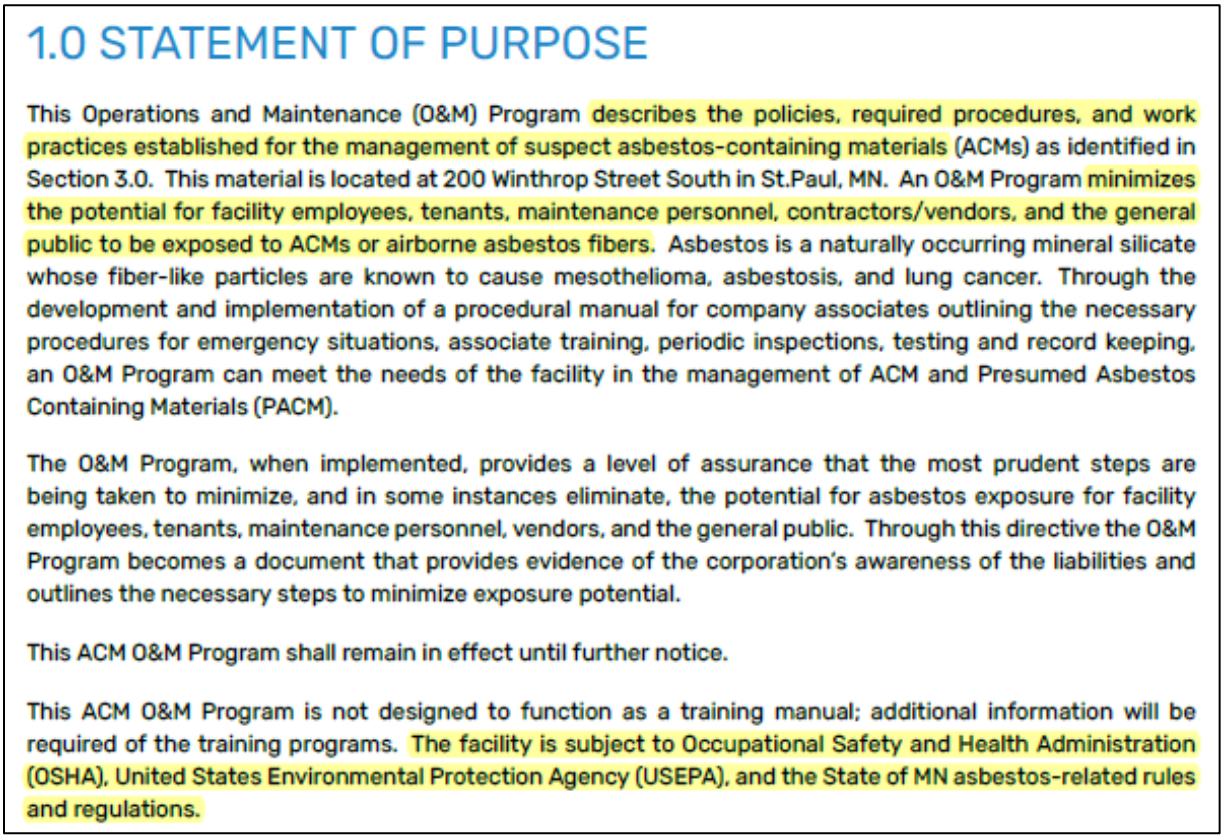
Although we recognize that this motion was filed in a different proceeding, the factual basis underlying the motion is directly relevant to Ms. Mohamed's appeal, as it shows grave violations of Minnesota's implied warranty of habitability, under which landlords must covenant to "maintain the premises in compliance with the applicable health and safety laws." Minn. Stat. § 504B161. As made clear in the motion, Marquette has, and continues to, engage in renovation, maintenance, and repair work in a manner that violates asbestos health and safety law, exposing Haven tenants to an unacceptable risk of asbestos inhalation. **These violations of asbestos safety law are clear breaches of the implied warranty of habitability, and as such, preclude any grant of an exception to the city's 3% rent cap.** *See* SPLC §193A.06(c) ("The city will not grant an exception to the limitation on rent increases for any unit where the landlord has failed to bring the rental unit into compliance with the implied warranty of habitability in accordance with Minn. Stats. § 504B.161.").

The violations of asbestos law detailed in the motion include Marquette's failure to (1) comprehensively identify or test for asbestos hazards prior to disturbing or destroying suspect asbestos-containing material ("ACM"); (2) inform tenants or contractors about the asbestos risk; (3) hire contractors who know how to safely handle suspect materials; (4) display required warning signs; (5) isolate areas under renovation; (6) wet or otherwise encapsulate suspect materials prior to destruction; and (7) contain debris from suspect ACM before moving it through Haven's hallways, elevators, and garages. Although these are violations that we have previously summarized in both Ms. Mohamed's rent-increase complaint and appeal, the seriousness, scope, and continuous nature of the violations is thoroughly detailed in the attached motion and in Mr. Myers' accompanying expert report.

We also want to call specific attention to a highly significant Marquette internal document that dates back to May 2021 but was only produced to us a few months ago on January 12, 2024—and has **never** been produced to the City during the rent increase application process or this appeal process. The document is the **Asbestos Containing Materials Operations and Maintenance Program** ("Haven O&M Program"), which we have attached to this letter as Exhibit C. The Haven O&M Program not only confirms the presence of presumed and suspect ACM at Haven, but also details required protocols that must be taken by Haven management to minimize the risk of asbestos exposure for those living at the property. The bottom line is that this document essentially confirms every aspect of expert Greg Myers' prior and current analysis of the rampant asbestos-law violations by Marquette at Haven.

The Haven O&M Program was prepared by a national environmental consulting firm in May 2021 and was provided to DRA Advisors, Marquette's equity partner in the purchase of Haven, shortly before Marquette took control of the property. Despite the Program being in effect

since May 2021, counsel for Marquette only disclosed the existence of the Haven O&M Program in January 2024. The Program "describes the policies, required procedures, and work practices established for the management of suspect asbestos-containing materials" located at Haven and explicitly recognizes that the state and federal asbestos safety laws—for which Ms. Mohamed has provided ample evidence of violation—apply to the property.



1.0 STATEMENT OF PURPOSE

This Operations and Maintenance (O&M) Program describes the policies, required procedures, and work practices established for the management of suspect asbestos-containing materials (ACMs) as identified in Section 3.0. This material is located at 200 Winthrop Street South in St.Paul, MN. An O&M Program minimizes the potential for facility employees, tenants, maintenance personnel, contractors/vendors, and the general public to be exposed to ACMs or airborne asbestos fibers. Asbestos is a naturally occurring mineral silicate whose fiber-like particles are known to cause mesothelioma, asbestosis, and lung cancer. Through the development and implementation of a procedural manual for company associates outlining the necessary procedures for emergency situations, associate training, periodic inspections, testing and record keeping, an O&M Program can meet the needs of the facility in the management of ACM and Presumed Asbestos Containing Materials (PACM).

The O&M Program, when implemented, provides a level of assurance that the most prudent steps are being taken to minimize, and in some instances eliminate, the potential for asbestos exposure for facility employees, tenants, maintenance personnel, vendors, and the general public. Through this directive the O&M Program becomes a document that provides evidence of the corporation's awareness of the liabilities and outlines the necessary steps to minimize exposure potential.

This ACM O&M Program shall remain in effect until further notice.

This ACM O&M Program is not designed to function as a training manual; additional information will be required of the training programs. The facility is subject to Occupational Safety and Health Administration (OSHA), United States Environmental Protection Agency (USEPA), and the State of MN asbestos-related rules and regulations.

When implemented, the Haven O&M Program "**minimizes the potential for facility employees, tenants, maintenance personnel, contractors/vendors, and the general public to be exposed to ACMs or airborne asbestos fibers**." And the potential for asbestos exposure at Haven is real. Similar to the 2017 Nova Report—which we addressed in our second supplemental appeal submission—the Haven O&M Program identifies an array of suspect and presumed ACM that permeate virtually every building surface at Haven, including "textured ceiling tile," "drywall," "plaster," "vinyl floor tile and associated mastics," and "carpet mastic." And, similar to the 2017 Nova Report, the Haven O&M Program directs that "**No known or suspect ACM or PACM [presumed asbestos containing material] shall be disturbed or involved in any work, in any way, prior to laboratory analysis for asbestos content**."

3.0 MATERIALS MAINTAINED IN THIS PROGRAM

No inspection or sampling was performed during the preparation of this ACM O&M Program. However, suspect materials previously identified include the following: textured ceiling material; ceiling tile; wall system components; drywall and joint compound; plaster; vinyl floor tile and associated mastics; linoleum and associated mastics; carpet mastic; window/door caulk; window glazing; spray on fireproofing; thermal system insulation; and roof materials. Materials were reported to be in generally good condition throughout the Property. Based on the reported condition of the ACM and PACM, it can effectively be managed in place under the provisions of an O&M Program.

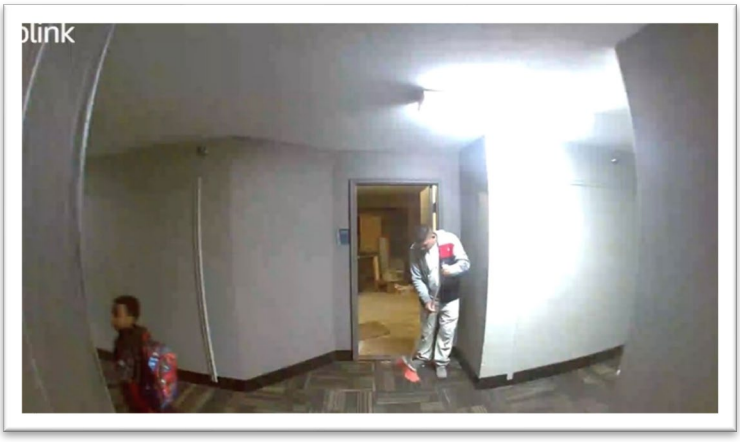
The OSHA regulation 29 CFR 1926.1101, requires certain construction materials to be presumed to contain asbestos, for purposes of this regulation. All TSI, surfacing material, and asphalt/vinyl flooring that are present in a building constructed no later than 1980 and have not been appropriately tested are PACM.

Note: There may be supplemental information (reports, addendum, etc.) that may alter the listed materials above. If so, these supplemental documents must be maintained with this O&M Program.

No known or suspect ACM or PACM shall be disturbed or involved in any work, in any way, prior to laboratory analysis for asbestos content.

Despite this directive, it is clear that Marquette has extensively disturbed numerous suspect and presumed ACM at Haven prior to testing for asbestos content. As detailed in the many communications and documents Marquette provided to DSI staff in support of its rent-increase application, Marquette is in the middle of a multimillion-dollar renovation project that has included, among other things, the demolition and full interior renovations of dozens of units and common areas. Yet, even after repeated requests, Marquette has failed to provide documentation showing that it identified and tested for asbestos prior to this work, as required by its own Haven O&M Program and state and federal asbestos safety law.

But beyond failing to identify or test for asbestos hazards, Marquette and its contractors have disastrously failed to comply with the work practices prescribed by either asbestos safety law or its own Haven Asbestos O&M Program. These violations are extensively documented in the attached motion and expert report, but the gravity of Marquette's violations is best symbolized by the following image of a young Haven tenant walking in front a worker dry-sweeping potentially asbestos-containing dust knocked loose as a result of Marquette's illegal renovations.



Marquette's disregard for asbestos safety laws has created a hazardous living environment for Haven tenants that constitutes serious violations of Minnesota's implied warranty of habitability. And, as previously argued in Ms. Mohamed's appeal, **violations of section 504B.161 mandate denial of Marquette's application for an exception to the 3% rent increase limitation**. *See* SPLC §193A.06(c).

II. A Ramsey County District Court Judge has Ruled that Marquette's Lease Violates Minnesota Single-Meter Utility Law.

Additionally, we would like to call attention to a recent Ramsey County District Court decision, in which a judge ruled that Marquette's lease violates Minnesota's single-meter utility law by failing to contain "an equitable method of [utility] apportionment" as required by Minn. Stat. § 504B.215, subd. 2a(a)(2). The judge's order is attached to this letter as Exhibit D.

As previously noted in both Ms. Mohamed's appeal and her second supplemental appeal submission, landlord compliance with section 504B.215 must be considered when evaluating whether to grant an exception to the 3% rent cap. *See* SPLC § 193A.06(a)(2)(a), (c). Under section 504B.215, landlords of single-metered buildings who bill for utilities separately from rent must include an equitable method of utility apportionment in tenant leases. Minn. Stat. § 504B.215, subd. 2a(a)(2). The order attached to this letter found that the required "equitable method" was missing from Marquette's lease.

In the case underlying the order, a tenant of Haven had brought a rent-escrow action to address, among other habitability violations, the imposition of illegal utility fees by Marquette. In her order, the judge evaluated the formula ("Formula 8") that is used by Marquette in its standard lease to allocate the costs of water, sewer, and gas utilities to tenants. The judge determined that:

> [N]othing in Formula 8 identifies how the "method" is fair or equitable. Formula 8 only provides for an "[a]llocation based on a combination of square footage of [Plaintiff's] apartment and the number of persons residing in your apartment." (Am. Pet., p. 14.) Defendant argues this is clearly intended to be a "fair" apportionment, where "tenants with larger apartments and a larger number of tenants living in them will be apportioned a larger amount of the monthly utilities," but nothing in Formula 8 indicates as much. (Def. Br., p. 8; Am. Pet., p. 14.) Notably, Formula 8's plain language could just as easily be fulfilled by an inversion of Defendant's "fair" assumption, or any similarly arbitrary "combination of square footage . . . and the number of persons residing" in a given unit. (Am. Pet., p. 14.)
>
> This language is not ambiguous, and the Court does not need to look beyond the ordinary meaning of the words used by the legislature here. Accordingly, the Court . . . finds that the language of the lease at issue in this case does not contain "an equitable method of apportionment."

Critically, formula 8, which fails to meet the "equitable method" standard found in Minn. Stat. § 504B.215, subd. 2a(a)(2), is the **exact same** apportionment formula that is found in Ms.

Mohamed's lease,[2] as well as, we believe, the leases of all Haven tenants who have lease agreements with Marquette. As a result, **all Marquette leases containing this allocation formula violate Minnesota's single-meter utility law**. And the failure by Marquette to comply with Minnesota's single-meter utility law is itself a violation of Minn. Stat. § 504B.161. *See* Minn. Stat. § 504B.215, subd. 2a(c) ("A failure by the landlord to comply with this subdivision is a violation of sections 504B.161, subdivision 1, clause (1) . . .."). Consequently, Marquette has failed to bring Ms. Mohamed's unit, as well as all units in which it requires tenant payment of common-meter utilities, into compliance with the implied warranty of habitability and, as a result, Marquette is not eligible for an exception to the 3% rent cap. SPLC § 193A.06(c).

III. Reasserted Request for August 2023 Hearing Materials.

We would also like to make Your Honor aware that we have not yet received a copy of the August 10, 2023 hearing transcript, nor have we received the hearing minutes or audio recording. We had initially requested a copy of the hearing transcript on October 20, 2023, after learning that DSI staff had used a hearing transcript to draft its Supplemental Appeal Memoranda. On November 1, 2023, we requested a copy of the hearing minutes, as well as an audio recording of the hearing. To date, we have not received either the hearing transcript, minutes, or an audio recording. Accordingly, we again respectfully request copies of these materials.

Finally, unless Your Honor is close to a decision in the present appeal, we request a second hearing to address the significant evidence of continuing habitability and utility violations that has come to light since August 2023, as well an opportunity to address the additional issues noted in Ms. Mohamed's second supplemental appeal submission.

Best regards,

s/James Poradek

James Poradek
Tenant Rights Attorney, Housing Justice Center

Encl:

- Memorandum in Support of Motion for Preliminary Injunction, filed in Mohamed v. Marquette Management, Inc. et al, Court File No. 23-CV-1740 (JRT/JFD)
- Declaration of Greg Myers, filed in Mohamed v. Marquette Management, Inc. et al, Court File No. 23-CV-1740 (JRT/JFD)
- The Haven of Battle Creek's 2021 Asbestos Containing Materials Operations And Maintenance Program
- Order on Motion for Summary Judgment, filed in Osberg v. Marquette Management, Inc., Court File No. 62-HG-CV-23-3931

[2] The lease for Ms. Mohamed's household can be found in Exhibit 2 to her appeal submission. The utility apportionment formula appears on pages 49-50.