

February 13, 2017

Jason Lien

Direct Dial: (612) 672-8319

Direct Fax: (612) 642-8319

jason.lien@maslon.com

VIA EMAIL ONLY

St. Paul City Council
City of St. Paul
15 Kellogg Blvd. West
Saint Paul, MN 55102
Attention: Mai Vang

Marcia Moermond
Legislative Hearing Officer
310 City Hall
15 Kellogg Blvd. West
Saint Paul, MN 55102

**Re: Appeal of Talon First Trust, LLC/Jackson I LLC from Fire Inspection Correction
Notice at 180 Fifth Street East
File # RLH FCO 16-135**

Dear Council President Stark, Councilmembers, and Ms. Moermond:

I write to supplement the record in the above-referenced appeal. At the January 4, 2017 public hearing, the City Council requested additional documents and information in order to determine the party responsible for remedying the defects to the structural steel beams located within the public areaway abutting 180 East 5th Street, St. Paul (“the Areaway”). Since that time, I submitted requests under the Minnesota Data Practices Act (“MDPA”) to the Metropolitan Council (“Met Council”) and the Public Works Department, City of St. Paul (“the City”). On January 27, 2017, I received several documents from Met Council, which are enclosed for your consideration. We have not yet received documents from the City in response to our MDPA request, but we did receive a signed copy of the contract between the City and Met Council regarding the work to the Areaway from LHO Marcia Moermond. Met Council also produced this same contract in response to our MDPA request.

The additional documents we have obtained show the following facts:

- On June 16, 2009, the City and Met Council entered into an agreement to relocate and update utilities in advance of construction of the Central Corridor Light Rail Transit Project (“CCLRT”) in downtown St. Paul. *See attached* Exhibit A (Resolution and Cooperative Reconstruction and Utility Relocation Agreement between City and Met Council (“the Utility Relocation Agreement”).) As part of this work, the City granted Met Council access to public rights-of-way, including the Areaway, and required abutting property owners to remove any utilities from those rights-of-way prior to construction. *See* Exhibit A, Article II, Section 4 (Right of Entry); Item 6 in Record (February 8, 2010 Letter from Met Council (Richard Rovang) to Julie Bauch (Jackson I, LLC)).
- The City and Met Council agreed to share in the financial responsibilities of the utility relocation project. *See* Exhibit A.
- The City agreed to supervise and inspect “all Utility construction,” including a final inspection. Exhibit A, Article II, Sections 8 (Status Reports and Inspection), 9 (Other

City Responsibilities). Within ten working days of this final inspection, the City was to “notify the Met Council’s Authorized Representative, in writing of any defects.” *Id.* At Section 9. Once notified of defects, Met Council agreed to “take the necessary steps to have the Met Council’s contractor correct the defects identified by the City.” *Id.* Met Council further agreed to reimburse the City’s costs related to this inspection. *Id.*

- The utility relocation work to the Areaway was completed in 2011, but we have not located any documents or records showing that the City performed an inspection of the Areaway at that time. Likewise, there is no record of any notice of defective / incomplete construction regarding the structural steel beams in the Areaway being provided by the City to Met Council. Instead, the record shows the City Department of Safety and Inspections issued a Correction Notice to Jackson I, LLC on February 22, 2012, requesting Jackson I to fireproof the structural beams of the Areaway.
- The record shows that Jackson I, LLC objected to the correction notice and also notified Met Council of the reported defect by the City. Met Council then responded with a letter dated September 18, 2012, stating that the work performed to the Areaway did “not make the building less conforming than it was before the repair,” and that the repairs complied with building codes at the time. *See* Item 6 in Record (Letter from Met Council (Nick Landwer) to Jackson I, LLC (Gary Buckley)).
- The project’s final plans and specifications recently produced by Met Council for its utility work in the Areaway provide that the design and construction of the improvements were to be in accordance with the “Minnesota Building Code 2007 (Incorporating 2006 IBC).” *See attached* Exhibit B (Structural Areaway Modification Specifications for 180 E. 5th Street), at p. 1. Chapter 1305 of the Minnesota Building Code 2007 incorporates by reference the 2006 IBC. *See* Minnesota Rules, Chapter 1305 (2007). Section 714 of the 2006 IBC requires fire proofing of structural members, including structural steel beams like those installed in the Areaway. Other portions of the project specifications for this work directed Met Council’s contractor as follows: “where old Work is removed or altered, all Work affected shall be properly modified to match existing or new Work as the case may require.” *See attached* Exhibit C (Advanced Utility Contract Summary of Work), at Section 1.07.
- The project’s drawings showed that the Areaway’s previous structural steel beams were encased in concrete and properly fire proofed. *See* Exhibit B, at Sheets 4-6, 12, 15. It is clear that Met Council’s contractor simply failed to meet its obligation to fireproof the new replacement structural steel beams installed as required by the Minnesota Building Code (and 2006 IBC) and the project specifications so that the Areaway was returned to its preexisting, code-compliant condition.

These documents establish that the City maintained control and supervision of the Areaway throughout the utility relocation project and was fully within its rights to empower Met Council

to require Jackson I, LLC to remove its utilities in the Areaway so that the utility improvements could be performed by Met Council's contractor. The Utility Relocation Agreement between the City and Met Council also required the City to inspect and provide notice of any defects to Met Council, and Met Council would bear the cost and responsibility of addressing any defects. The record does not show that the City ever provided Met Council with notice of any defects to the construction of the structural steel beams at issue. Rather, the City's Department of Safety and Inspections incorrectly provided a Correction Notice to Jackson I, LLC. This led to Jackson I, LLC providing notice to Met Council, which responded by stating that there was no defects because Met Council's contractor had returned the Areaway's steel beams to their prior condition. The projects final plans and specifications now show that Met Council's statement was false since the prior steel beams were in fact encased in concrete and the project specifications required Met Council's contractor to fireproof the steel beams so they were returned to their prior, code-compliant condition.

The record also establishes that neither Talon First Trust, LLC nor its predecessor Jackson I, LLC had any involvement in the utility improvements, and thus cannot bear responsibility for repairing the defects caused by Met Council and its contractor. As we have previously explained, the relevant City Ordinances do not allow the City to require the property owner in this instance to correct defective work performed by the City or its agent (Met Council) to the Areaway, which is a public right-of-way. Moreover, Minnesota law has long held that maintaining public rights-of-way is the City's responsibility, and "this duty remains with the city at all times and cannot be shifted to private property owners." *Donald v. Moses*, 94 N.W.2d 255, 261 (Minn. 1959). As such, the City cannot place the responsibility of remedying these costly defects on Talon First Trust, LLC. The proper resolution of this case is to turn this matter over to the City Attorney to demand that Met Council honor its obligations under the Utility Relocation Agreement and repair the defects to the structural steel beams. This is what Utility Relocation Agreement requires.

For these reasons and all other arguments set forth in the record, Talon First Trust, LLC respectfully requests that the City Council grant the appeal and remove all deficiencies in the Correction Notice related to requiring Talon First Trust, LLC to fireproof the structural steel beams in the Areaway.

Sincerely,



Jason Lien

cc: Talon First Trust, LLC