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August 25, 2014

(Via U.S. Mail & Email)
Legal & Finance Committee
City of Rapid City
300 6th Street
Rapid City, SD 57701

RE: Applicant's "Letter of Response"
Building Code Violation: Notice of Appeal
Complaint of Denise Ross and David S. Larson
James S. Steele Constructions Company, Inc. v. David S. Larson, et al
Civ. No. 13-1459

Dear Legal & Finance Committee:

I represent James Steele, Jaime Steele and the James S. Steele Construction Company, Inc. The purpose of this letter is to provide the Legal & Finance Committee (the "Committee") with my clients' "Letter of Response" for their appeal of the August 12, 2014 decision by the Building Board of Appeals (the "Board"), which decision resulted in the suspension of my clients' contractor's license.

Background

What follows is a chronology of the relevant events detailed to help the Committee put into perspective how the property owners (Denise Ross and David Larson, hereafter "the property owners") are using the City's Board to gain an advantage in our pending civil litigation (or even circumvent it).

In January and February of 2013 the property owners contracted with my clients to perform construction work on their residential property located at 3210 Kirkwood Dr., Rapid City, South Dakota. Although this work was timely completed by my clients, the property owners withheld full payment for the services rendered and materials supplied. They have paid to date less than half the contracted amount. Informal efforts were made by my clients to collect the monies owed, but these efforts were unsuccessful. Consequently, my clients were forced to resort to more formal methods, which included my engagement and the filing of a mechanic's lien against the property owners. This mechanic's lien was recorded with the Register of Deeds on June 24, 2014.

In response to the mechanic's lien, the property owners submitted a complaint to the Rapid City Building Inspection Office on August 2, 2013 and asked that their roof be inspected by the City.

Legal action to foreclose on the mechanics lien was filed with the Pennington County Clerk of Court on October 15, 2013. The property owners were served with the formal pleadings

on October 18, 2013.

On behalf of the City, Brad Solon responded to the property owners' complaint by first seeking my clients' answers to certain inquires. Mr. Solon wrote to my clients on October 23, 2013 and asked these questions:

> Were the shingles/nails/felt installed per the manufacturer's instructions?
> Did the manufacturer provide written approval of the installation?
> Was the rough opening altered at the skylights?

My clients were instructed to provide a written response to each question. They answered each question in the affirmative and provided the City with documentation corroborating their responses. In these responses, the Board was informed by my clients that the new roof covering system installed on the property owners' roof had been inspected by a manufacturer's representative on May 1, 2013, and that the installation passed the manufacturer's inspection. The manufacturer provided written assurances to the property owners and my clients that the manufacturer's warranty had not been voided by an improper installation. This information was provided to the Board prior to the November 12, 2013 meeting.

The Board's authority is to review a decision of the Building Official.[1] What decision the property owners were appealing to the Board for its November 12, 2013 meeting is unknown. There is no letter from the Building Inspection Office referenced by the property owners. The property owners do reference in their complaint that it was being filed "[a]fter speaking with Brad Solon and Curt Bechtel from your office on July 26,…." It can only be assumed that the City's staff told the property owners their complaint was without merit because the City had inspected their roof on March 1, 2013, and my client's reroofing was approved by staff member Mike Pulkrabek. (*See* enclosed copy, Exh. 1). The appeal deadline for this inspection would have had to have been filed by March 23, 2013. R.C. Ord. 15.04.110. Without a timely appeal by the property owners, the Board had no jurisdiction to rule against my clients.

Furthermore, prior to the November 12, 2013 Board meeting, the City failed to give my clients any written notice of what ordinances Steele Construction Company allegedly violated while doing construction on the property owner's property. What they had was just the opposite; a City's inspection report showing them that their reroofing job had complied with the City's ordinances.

At the November 12, 2013 Board meeting, my clients and the property owners appeared in person and without legal counsel. No sworn testimony was given. Glaringly absent was an independent review of the property owners' complaints. City staff did not provide the Board with any investigative report as to the validity of the property owners' allegations. No reference was made of the City's March 1, 2013 inspection report approving the roof installation. My clients were not given the opportunity to question the property owners on any issue let alone the propriety of their appeal. The Board completely ignored City's own inspection report, which was exculpating evidence for my clients. After failing to follow or consider these basic evidentiary tenets, the Board ruled that "the flashing was incorrect, the second layer of the felt paper was

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[1] 15.04.120 Building Board of Appeals—Authority. The Building Board of Appeals shall have the authority to review and, by affirmative vote of a majority of the members present at any public hearing, sustain, reverse, change or modify any decision of the Building Official relating to questions concerning methods of building, use of processes and devices, strength and character of construction, and such other questions of like kind and character as may arise between the Building Official and the individual(s) aggrieved by the decision of the Building Official, except as otherwise provided in this section.

incorrect, and the overdriven and crooked nails were incorrect." The property owners had also asserted that a separate building permit was needed for the installation of a skylight but the Board ruled otherwise.

After its November 12, 2013 rulings, the Board gave no direction on enforcement of these unspecified Code violations for the Building Official to act upon. In addition, the Board's minutes for the November 12, 2013 meeting do not cite any specific ordinance being violated. (*See* attached Minutes. Exh. 2).

Three days later, on November 15, 2014, the property owners filed their Answer and Counterclaim in the pending foreclosure action. In their Answer and Counterclaim, the property owners made no reference to the alleged deficiencies they stated in their August 2, 2013 complaint to the Building Inspection Office. Interestingly, their responsive pleadings alleged no Code violations.

Months went by, during which time I tried to schedule the deposition of the property owners without any success. It was on April 28, 2014 when the property owners next wrote to the City and inquired about the enforcement of the November 12, 2013 Board decision. It is clear in the property owners' letter that the pending civil litigation with my clients was an ongoing concern for them and that they were seeking to circumvent what might happen there by using as evidence against my clients the Board's November 12, 2013 rulings (i.e., *res judicata* or "the matter has been decided").

In response to their April 28, 2014 letter, Brad Solon's May 30, 2014 letter informed the property owners that the City was not revoking or suspending my clients' contractor's license because the alleged Code violations that the Board found did not "rise to the level of creating a public interest concern." In other words, the alleged violations did not result in "life safety issues, or … in significant property damage." In addition, Mr. Solon informed them that the on-going civil dispute between them and my clients made it inappropriate for the City to suspend or revoke my clients' license.[2]

On June 19, 2014, the property owners were deposed in the foreclosure proceeding.

On July 2, 2014, my clients received a letter from Mr. Solon advising them that the property owners were appealing the denial of their request that their contractor's license be revoked. My clients were advised by Mr. Solon to attend the public meeting on July 8, 2014. A copy of the property owners' notice of appeal was not provided, and to this date, it is unknown as to whether this second appeal was timely filed. Instead, my clients received from the City a copy of an undated letter sent to the Board by the property owners explaining why they were appealing the Board's November 12, 2013 decision. In it, the property owners added irrelevant information for the purpose of garnering further sympathy for them and stoking the Board's emotions against my clients.

The Board met on July 8, 2014 to address the property owner's "appeal" but no finding was made as to whether the property owners' appeal was timely made. Apparently due to the Board's busy agenda, and the Board having no procedural rules in place for conducting a license revocation hearing, the appeal was continued until the August 12, 2014 Board meeting. At the August 12,

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[2] City Staff have obviously been put into the middle of other civil disputes in the past and knew all too well where this matter was headed. Mr. Solon tried to insulate the City from this litigation and any additional litigation where the City might be exposed for a wrongful enforcement action stemming from the Board's erroneous rulings on November 12, 2014.

2014 meeting, the Board's procedural rules for its license revocation hearing consisted of the Board's chairman orally instructing the parties that they were being allowed only five (5) minutes to present their case. Having only a few minutes to present their defense, my clients were unable to give full testimony; they were also unable to cross examine the property owners on their complaint; and, they were prevented from calling the Staff to testify on their behalf. The time allotted also made it impossible for the Board to fully review the 71 pages of materials that the Staff had supplied it with prior to the hearing. The Board in haste, and without questioning the propriety of the property owners' appeal, suspended my clients' contractor's license.

Discussion—Basis for Appeal

The first written notice of my clients' violation of any City ordinance was provided in Carla Cushman's August 21, 2014 letter, which was in response to my request for such written notice.

Flashing was Replaced

In Ms. Cushman's August 21, 2014 letter, she states that the Board found that my clients had violated the Code because the flashing *was not replaced* at the time of installation. She then cites R.C.M.C. Chapter 15.13. Sections R907.3 and R907.5. The latter section, titled "Reinstallation of materials", permits the reinstallation of flashing unless it is "rusted, damaged or deteriorated." Consequently, to suspend my clients' license for violating this Code section, the City would have to show that the old flashing was "rusted, damaged or deteriorated" and that it was not "replaced." During the three Board meetings on this property owners' complaint, the Board did not inquire as to whether the existing flashing was damaged, rusted or deteriorated. There were no findings on this necessary element. The property owners did not even make such a claim in their written complaint or during their oral presentation. Even if the facts were that my clients only reinstalled the old flashing, the City cannot prove that this was a violation of the Code without also being able to prove that the old flashing was rusted, damaged or deteriorated.

But my client did not reinstall the old flashing—they did in fact "replace" it with new flashing. The Board claims that my clients have violated the Code for failing to "replace" the flashing, assuming that "replacing" means "removing". Merriam-Webster's dictionary defines "replace" as "to take the place of especially as a substitute or successor" or "to put something new in the place of." Putting new flashing over existing flashing is not prohibited by Section R907.5 or any other part of the Code. Section R907.5 does not require the removal of old flashing. Again, it would only need to be replaced if it is rusted, damaged or deteriorated. Whether or not the property owners' old flashing was rusted, damaged or deteriorated is a moot point because it is undisputed that the flashing was substituted with new flashing. [And therefore, it was "replaced."] The Board confused the "removing all existing layers of roof coverings" found in Section R907.3 as including flashing and felt paper. "[R]oof coverings" do not include either. To hold otherwise would prevent the double layer of protection that such practice affords property owners. It was clear error for the Board to rule that my client had violated the Code because it replaced old flashing by installing new flashing over old flashing.

Felt Is "Underlayment"—Not Roof Covering

Ms. Cushman cites again Section R907.3 as being the Code section the Board found my clients to have violated when they did not remove the existing water barrier (i.e., felt paper). In reviewing this Section, the Board without legal advice or staff input interpreted "all layers of roof coverings" as including "underlayment" or felt paper. However, "roof coverings" are the old

layers of shingles. The Code does not define "roof coverings" as including the underlayment or felt paper. "[R]oof coverings" can only be the outer layer of the roof (i.e., metal, wood, asbestos, tile, cement, or some other material). If the IRC intended Section R907.3 to include the removal of felt paper (i.e., underlayment and ice/water barrier) and flashing, it would have stated it explicitly. The Board erroneously interpreted the Code when it held the felt paper also had to be removed. In fact, the City's bulletin, "Residential Re-Roof Building Permit Information for 1 & 2-Family Dwellings", instructs contractors to install at least two layers of underlayment for an ice/water barrier. (*See* enclosed copy of City's bulletin, Exh. 3). No rationale can be given that would make sense for the Board's interpretation that the existing felt paper had to be removed, which would reduce the ice/water barrier the IRC requires. The Board's ruling on this issue was clearly erroneous. Because it creates an unnecessary expense for contractors and homeowners and eliminates a needed layer of protection for roofs, the Board's decision establishes a horrible precedent for future reroofing projects within the city.

Shingle Mfg's Warranty Honored

Ms. Cushman states in her August 21, 2014 letter that the Board found that "due to the extent of the overdriven nails, the shingles were not installed according to City code." She does not cite where such findings were made in the minutes. She expands the Board's justification for its ruling by stating that the shingles had to be installed per the manufacturer's instructions. Yet, she does not cite how my clients failed to comply with such instructions in light of the fact that the manufacturer's representative, Randy Schmidt, inspected the property owners' roof on May 1, 2013 and reassured them in writing that the manufacturer's warranty was still in effect. He even went out of his way to note that my clients "6 nailed" the shingles "which surpasses GAF's 4 nail pattern minimum." (*See* enclosed copy, Exh. 4). This documentation was provided to the Board by the City's staff but obviously went either unnoticed or was intentionally ignored without just cause. Neither the property owners nor the City cited any Code section that my clients violated. The claim that there were overdriven nails voiding the manufacturer's warranty on the shingles has been refuted. The claim that overdriven nails in any way compromised the integrity of the new roof is also unfounded, especially in light of the manufacturer's observations that my clients surpassed by 50% the minimum fastening requirements. The concern about overdriven nails is that the shingles will not stay on the roof because the nails have gone through the asphalt. The manufacturer's instruction sheet for installation and improperly driven nails makes this point. The property owners in this matter have not alleged that they have lost shingles due to overdriven nails. Nor have they alleged that their roof is compromised in any manner due to overdriven nails. Their claim that their roof is no longer covered by the manufacturer's warranty has been completely rebutted. Consequently, the Board's finding that my clients violated the Code by failing to install the manufacturer's shingles per its instructions is clearly erroneous.

City's Taking-- Violation of Constitutional Rights

Because the Board has suspended my clients' Contractor's license, their livelihoods have been taken away from them. The City through the Board has adopted a very broad interpretation of the IRC's Section R907.3, which will require all roofing companies to ***remove*** the ice/water barrier and all flashing when reroofing houses with wooden shakes, slate, clay, cement or asbestos-cement tile. My clients are unaware of any precedent for this enforcement action or of any similar enforcement action on other contractors with reroofing projects in need of a final inspection. Other roofing contractors, and to my clients' knowledge the City's own Building Inspector's staff, have been interpreting the IRC's Section R907.3 in the same manner as my clients. For the Board to interpret it differently to solely aid the property owners in a civil lawsuit creates chaos. Based upon the undisputed material facts in this matter, the Board's decision to interject the City into a pending civil matter between my clients and the property owners is

extraordinary, illegal, and a clear abuse of its authority.[3] Although there are a litany of reasons why my clients have been denied due process by the Board's action, they can be summed up by stating: 1) the Board failed to give my clients proper notice for a hearing at which their contractor's license could be revoked or suspended; 2) the hearing was based upon an illegal appeal by the property owners; and 3), the hearing itself was unlawfully conducted. Needless to say, this is a case of selective enforcement by the Board that violates my clients' civil rights. The Board's rulings and the suspension of my clients' contractor's license should be reversed or stayed pending a final review by the Council. The Committee's refusal to reverse the Board's rulings and stay the enforcement action will only result in greater damages to my clients.

Respectfully submitted on behalf of Jim Steele, Jaime Steele and Steel Construction Company, Inc.

George Nelson

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[3] No life-safety issues or significant property damages have been asserted by City staff or the property owners. In general, when a license is being suspended or revoked by the City, there typically is a concern for the public's interest if the licensee is allowed to continue to do business (e.g., an alcohol establishment with numerous citations for serving alcohol to minors). Here, the public has no interest in a contractual dispute between my clients and the property owners. No citations were ever issued to my clients by the City's staff for Code violations. Instead, the Board made such rulings without any input by City staff or via an independent inspection.