

**VIA E-MAIL AND FAX**

January 7, 2022

Chair Jake Reilly  
Zoning Committee of the St. Paul Planning Commission  
City Hall Annex  
25 West Fourth Street  
Suite 1300  
St. Paul, MN 55102

**Re: Conditional Use Permit and Variances**

**Project: James Avenue Apartments**  
**Location: 470 Lexington Avenue, St. Paul, Minnesota**  
**General Contractor: Yellow Tree Construction Services, LLC**  
**Zoning Applicant: Chet Funk**

Dear Chair Reilly and St. Paul Planning Commission Zoning Committee Members:

I represent Yellow Tree Construction Services, LLC (“Yellow Tree”), the general contractor for the James Avenue Apartments project (“the Project”).

The Zoning Committee of the St. Paul Planning Commission held a December 30, 2021, meeting to consider an updated application from Chet Funk (“the Applicant”) for a Conditional Use Permit (“CUP”) and zoning variances for the Project.

On December 29, 2021, Burt Johnson, General Counsel for the North Central States Regional Council of Carpenters (“Carpenters Union” or “NCSRCC”) submitted a letter opposing the CUP and variances because of concerns about Yellow Tree, and NCSRCC alleged that the Project did not meet the City’s requirements. The Planning Commission has reset a meeting for January 13, 2022, to consider the CUP and zoning variances.

Please consider this letter as Yellow Tree’s response to NCSRCC’s recent letter, Yellow Tree’s support for the Applicant, and Yellow Tree’s request, as general contractor, for the CUP and variances to be approved so the Project can proceed.

We want to emphasize that Yellow Tree has been pleased to work with union framing subcontractors in the past, and Yellow Tree looks forward to future work opportunities with the Carpenters Union. Yellow Tree has not hired any subcontractors yet for the Project.

**1. St. Paul Planning Staff's Report Recommends the City Issuing a CUP and Granting Variances.**

On December 23, 2021, the Zoning Committee's Staff Report was issued recommending the City issue the CUP and grant zoning variances.

The reason the CUP and variances are needed is the unusual contour of the site. There is a steep slope on the Project site causing a 20' change in elevation on the Project site. Basically, the Project is built on a hill and this makes the height of the proposed building exceed normal requirements.

The maximum height for this zoned area of the City is 75' and the proposed Project height is 69' 10". Side and rear setback variances for the site are needed to accommodate the extra height of the building caused by the unusual slope of the Project's lot. No front setback variance is needed for the Project's site.

On March 19, 2021, the St. Paul Planning Commission approved an earlier version of the Project that had a 65' 8" building height. The initial CUP and zoning variances followed rezoning of the Project in June 2020.

In short, plenty of notice has been provided by the Applicant and Yellow Tree for this Project and the new CUP and new variances are minor compared to the CUP and variances already approved by the City. The City's Staff Report explains in detail why the Applicant's CUP and variance requests meet all requirements.

**2. The Project.**

The James Avenue Apartments Project is important to the City of St. Paul and its comprehensive plan. The Project is a five story, 114 unit apartment building with 82 vehicle parking stalls located on a two level parking structure with 114 bicycle stalls.

The Project includes 11 units for affordable housing. At a time when affordable housing in the City is scarce, the Applicant and Yellow Tree are serving the community, and the Applicant guarantees 11 affordable housing units.

Additionally, the Applicant and Yellow Tree are providing 114 bicycle stalls – each apartment unit has its own bicycle stall – thereby serving the City's desire to promote alternative forms of transportation other than fossil fuel powered vehicles.

In order to serve the community, provide affordable housing, promote alternative transportation, and meet the City's comprehensive plan, the CUP and zoning variances should be approved by the Planning Commission and its Zoning Committee, as explained in detail by the City's December 23, 2021, Staff Recommendation.

### **3. The Ongoing Attacks, Harassment, and Defamation by NCSRCC of Yellow Tree.**

Yellow Tree was disappointed to receive NCSRCC's December 29, 2021, letter because the Carpenter Union's letter contains unfounded accusations about Yellow Tree that have nothing to do with the CUP or variance requests for the Project.

Over the last eight months, NCSRCC has harassed, attacked, and defamed Yellow Tree for no reason. Forty-two (42) "anonymous" complaints have been filed with MnOSHA at seven different Yellow Tree job sites, NCSRCC bannered a Yellow Tree job site with false accusations, and now NCSRCC submits this unfounded attack on Yellow Tree from NCSRCC's General Counsel to City officials.

We will respond to Burt Johnson's December 29, 2021, letter and outline NCSRCC's reckless pattern of harassment for the last eight months so that the City's Planning Commission and its Zoning Committee can be confident that Mr. Johnson's recent letter is inaccurate and ill-advised.

#### **a. 42 "Anonymous" Complaints to MnOSHA from April 2021 through December 2021.**

In 2021, MnOSHA received 42 "anonymous" complaints since April 2021 at seven different Yellow Tree job sites. Mr. Johnson's December 29, 2021, letter proves what Yellow Tree has known all along – NCSRCC submitted the anonymous complaints to MnOSHA.

The 42 anonymous complaints have nothing to do with the Applicant or the James Avenue Apartments Project.

Mr. Johnson's December 29, 2021, letter includes photos of alleged unsafe practices. Those photos were submitted by NCSRCC to MnOSHA to initiate MnOSHA inspections and to try to shut down Yellow Tree's job sites.

MnOSHA has already concluded their investigations of 14 of the 42 "anonymous" 2021 complaints, no safety violations were found by MnOSHA in those 14 closed cases, and no Citations were issued by MnOSHA in those 14 closed cases.

We verified through Federal OSHA's website that 14 of the 42 MnOSHA "anonymous" complaint inspections from April 2021 through December 2021 are closed without any Citations being issued.

<b>Inspection No.</b>	<b>Date</b>	<b>Location</b>	<b>Status</b>
1567032.015 - 103811	12/3/2021	4601 Minnehaha Ave Minneapolis, MN 55406	<b>Case Closed 12/10/2021</b>
1563184.015 - 103711	11/4/2021	233 Humboldt Ave N Minneapolis, MN 55405	<b>Case Closed 11/22/2021</b>
1560705.015 - 103678	10/28/2021	255 Girard Ave N Minneapolis, MN 55404	<b>Case Closed 11/18/2021</b>
1560412.015 - 103665	10/26/2021	255 Girard Ave N Minneapolis, MN 55404	<b>Case Closed 11/16/2021</b>
1560138.015 - 103591	10/7/2021	2225 University Ave W Saint Paul, MN 55114	<b>Case Closed 10/29/2021</b>
1560701.015 - 103578	10/4/2021	2225 University Ave W Saint Paul, MN 55114	<b>Case Closed 11/10/2021</b>
1557187.015 - 103571	10/4/2020	233 Humboldt Ave N Minneapolis, MN 55405	<b>Case Closed 12/23/21</b>
1548935.015 - 103336	8/20/2021	1428 Marshall St N Minneapolis, MN 55413	<b>Case Closed 9/28/2021</b>
1541737.015 - 103143	7/12/2021	4230 Nicollet Avenue Minneapolis, MN 55409	<b>Case Closed 7/22/2021</b>
1539832.015 - 103116	7/1/2021	4230 Nicollet Avenue Minneapolis, MN 55409	<b>Case Closed 7/27/2021</b>
1538596.015 - 103036	6/17/2021	4230 Nicollet Avenue Minneapolis, MN 55409	<b>Case Closed 6/30/2021</b>
1531178.015 - 102889	5/14/2021	4230 Nicollet Avenue Minneapolis, MN 55409	<b>Case Closed 5/18/2021</b>
1530332.015 - 102865	5/11/2021	4230 Nicollet Avenue Minneapolis, MN 55409	<b>Case Closed 6/7/2021</b>
1528529.015 - 102814	4/28/2021	4230 Nicollet Avenue Minneapolis, MN 55409	<b>Case Closed 6/17/2021</b>

The remaining anonymous complaint inspections from 2021 are being handled and going through MnOSHA's normal process. Yellow Tree is defending the few Citations that were issued; Yellow Tree anticipates additional dismissals in the coming weeks to months.

The most important things for the Planning Commission and its Zoning Committee to note about the "safety issues" raised by NCSRCC are:

1. The Planning Commission and its Zoning Committee do not have jurisdiction about safety hazards and safety violations. MnOSHA has jurisdiction.
2. There is nothing for the Planning Commission and its Zoning Committee to do in response to NCSRCC's December 29, 2021, letter regarding alleged safety issues.

3. Yellow Tree denies that any of its employees created safety hazards, if any existed, on the seven job sites where there were 42 anonymous complaints.
4. Yellow Tree denies that any of its employees were exposed to safety hazards, if any existed, on the seven job sites where there are 42 anonymous complaints.
5. Yellow Tree denies that its employees knew of any safety hazards, if any existed, created by subcontractors.
6. All of the alleged safety violations occurred on other construction projects and have nothing to do with the Applicant or the James Avenue Apartments.

Yellow Tree has retained our Firm to handle any ongoing investigations by MnOSHA, defend any Citations issued by MnOSHA, and defend any administrative cases commenced by MnOSHA. As mentioned, 14 of 42 “anonymous” complaints have already been closed without Citations, and we know more closures by MnOSHA will occur.

The Zoning Committee and the Planning Commission should keep in mind that MnOSHA investigates safety issues, and Citations issued by MnOSHA are allegations of safety violations which an employer is then allowed to contest and resolve. No one can hold Yellow Tree liable for any alleged safety violation until after an Administrative Law Judge has determined there is a safety violation.

Most companies would be crippled and could not function if they had to endure 42 “anonymous” complaints and serial MnOSHA inspections over an eight-month period in a single calendar year. This has not occurred with Yellow Tree for the simple reason that Yellow Tree’s devotion to safety is all day, every day.

**b. Bannerings of a Yellow Tree Job Site by NCSRCC.**

Over the summer of 2021, NCSRCC bannered one of Yellow Tree’s job sites for reasons which remain unclear. Yellow Tree has done nothing wrong, and Yellow Tree did not interfere with the bannerings.



The bannering campaign proves NCSRCC’s bias against Yellow Tree, yet Yellow Tree has done nothing to provoke NCSRCC or try to silence NCSRCC.

On past projects, Yellow Tree has been pleased to hire union framing subcontractors, and Yellow Tree looks forward to future opportunities to work with union framing subcontractors even in the face of harassment and untruths by NCSRCC.

**c. Wage Theft Allegations on the University Avenue Project.**

NCSRCC’s December 29, 2021, letter alleges that past Yellow Tree projects have been riddled with wage theft and exploitation of immigrant workers. This allegation is untrue.

NCSRCC alleges that a mechanic’s lien for \$30,000 to \$40,000 was filed by 15 workers against the University Avenue project. *See* Burt Johnson’s December 29, 2021, letter, page 1, sixth paragraph.

This is untrue. One worker, Angel Polivio Merino, employed by Strong Framing, LLC, filed a \$19,824 mechanic’s lien. A copy of Mr. Merino’s September 20, 2021, mechanic’s lien is enclosed with this letter.

Please note that Mr. Merino is not a Yellow Tree employee. No one from Yellow Tree knows Mr. Merino either. Apparently, Mr. Merino worked for a second-tier subcontractor, Strong Framing, LLC.

Mr. Merino alleges that he was an employee of Strong Framing, LLC on the University Avenue Project, and his mechanic's lien says he worked from July 8, 2021 through August 19, 2021. We find it hard to believe that a single employee working six weeks would be owed \$19,824, but we are not alleging that Mr. Merino is dishonest.

Please note that Yellow Tree hired US Framing as the original first-tier framing subcontractor on the University Avenue Project, but Yellow Tree terminated US Framing several months ago. Strong Framing, LLC was a sub-subcontractor to US Framing. Strong Framing, LLC has not worked on the University Avenue project for several months.

Both US Framing and Strong Framing, LLC are no longer working on the University Avenue project. Yellow Tree has no contract with Strong Framing, LLC – Mr. Merino's former employer.

The title company for the University Avenue Project is holding 150% of the \$19,824 mechanic's lien, and Yellow Tree is holding sufficient funds from US Framing to cover the mechanic's lien. Mr. Merino has not brought forward any information to verify his mechanic's lien.

Yellow Tree does not have much information about Mr. Merino's claim. Yellow Tree does not know the days, hours, rate of pay, overtime hour status, or anything else about Mr. Merino's claim because Mr. Merino is not a Yellow Tree employee and Mr. Merino has not provided any supporting documentation to understand his claim.

If Mr. Merino's claim is valid, then he will be paid, and Yellow Tree will be delighted that he gets paid. But Yellow Tree did not hire Mr. Merino and Yellow Tree has no contract with him.

Please keep in mind that NSCRCC's General Counsel told the Planning Commission's Zoning Committee that the mechanic's lien was for 15 workers for \$30,000 to \$40,000 when, in fact, the mechanic's lien was for one worker for \$19,824 and Mr. Merino has never been a Yellow Tree employee and no one from Yellow Tree knows Mr. Merino.

All of these issues have nothing to do with Yellow Tree and should not impact the Planning Commission's decision about the CUP and variances.

And, most importantly, all of these issues have nothing to do with the Applicant and the James Avenue Apartments project.

**d. NCSRCC's Allegations About Black Diamond Nationwide.**

Next, NCSRCC's December 29, 2021, letter alleges that Black Diamond Nationwide worked on Yellow Tree's Nicollet II Apartments Project. *See* Burt Johnson's December 29, 2021, letter, pages 1-2, bottom paragraphs of page 1 and top paragraph of page 2.

What does NCSRCC allege that Black Diamond Nationwide did wrong?

Mr. Johnson says that Black Diamond Nationwide did not pay 14 of its workers on a construction project located in International Falls, Minnesota. NCSRCC does not identify any of the 14 workers

by name, NCSRCC does not explain the amount of money they are owed, and NCSRCC does not identify the year in which they worked either. NCSRCC just says 14 people allege that they were not paid. Who? How Much? What year?

But the most important thing that NCSRCC failed to disclose to the Planning Commission's Zoning Committee is the most important fact: Yellow Tree has no connection to the International Falls, Minnesota project.

Please re-read the last three paragraphs. NCSRCC and its General Counsel are complaining about an International Falls construction project that Yellow Tree has no connection to and does not serve as the developer or general contractor. I suppose we should all be concerned if there is injustice anywhere in the World, but NCSRCC cannot make Yellow Tree liable for those injustices.

Black Diamond Nationwide has not been hired as a subcontractor to work on the James Avenue Apartments Project either. NCSRCC has wasted everyone's time talking about 14 unnamed workers who worked on a job site hundreds of miles away from St. Paul that Yellow Tree has no connection to and never visited.

These issues have nothing to do with Yellow Tree, the Applicant, or the James Avenue Apartments project.

**e. NCSRCC's Allegations About Painting America and Absolute Drywall.**

Next, NCSRCC's defames Yellow Tree by raising issues about Painting America and Absolute Drywall, and the work those two companies performed on other construction projects having nothing to do with Yellow Tree.

NCSRCC alleges that Painting America misclassified its workers, and alleges that Painting America and the Minnesota Department of Labor and Industry entered into a Consent Order in 2019. *See* Burt Johnson's December 29, 2021, letter, page 2.

This may all be true, but this has nothing to do with Yellow Tree, the Applicant, or the James Avenue Apartments project.

Similarly, NCSRCC's December 29, 2021, letter discusses allegations about Absolute Drywall in 2017. *See* Burt Johnson's December 29, 2021, letter, page 2.

None of this information from 2017 and earlier has anything to do with Yellow Tree, the Applicant, or the James Avenue Apartments project, so the Planning Commission's Zoning Committee should not even consider the Carpenters Union's submittal.

Yellow Tree also wants to point out to the Planning Commission's Zoning Committee that Yellow Tree has not hired Painting America or Absolute Drywall to work on the James Avenue Apartments project.



**f. Photographs Submitted by NCSRCC of Alleged Safety Hazards.**

The Carpenters Union alleged, and supplied photographs, of alleged “serious safety infractions” at Yellow Tree construction sites. *See* Burt Johnson’s December 29, 2021, letter, pages 2-3 and attached photographs. NCSRCC is wrong.

We should first review the photographs submitted with Mr. Johnson’s letter so the Planning Commission can confirm that NCSRCC is incorrect.

**1. “Harrison Apartments Project Photo.”**

NCSRCC refers to a Harrison Apartment project as Photo 1 on page 4 of Burt Johnson’s December 30, 2021, letter.



*See* Burt Johnson’s December 30, 2021, letter, page 4, Photo 1, top of page.

Yellow Tree immediately noticed that NCSRCC was incorrect when suggesting that there was a safety violation at the Harrison Apartments project because Mr. Johnson’s letter does not provide a photo of the Harrison Apartments Project. Set forth below are photos of the actual Harrison Apartments project taken by Yellow Tree on December 22, 2021, so the Planning Commission and its Zoning Committee can confirm that NCSRCC has submitted a photo of a different project and then alleged a safety violation.

Yellow Tree Photo 1: This photo is a true and accurate depiction of Yellow Tree’s Harrison Street Apartments project, taken on December 22, 2021.



Yellow Tree Photo 2: This photo is a true and accurate depiction of Yellow Tree’s Harrison Street Apartments project taken on December 22, 2021.



Yellow Tree Photo 3: This photo is a true and accurate depiction of Yellow Tree’s Harrison Street Apartments project taken on December 22, 2021.



**2. Burt Johnson’s December 30, 2021, letter, page 4, Photo 2.**

In NCSRCC’s December 30, 2021, letter, page 4, Photo 2, NCSRCC allege a safety violation from the following photo.



But the photo does not show a safety violation. NCSRCC’s photo shows that three workers are working behind a warning line. Warning lines are an acceptable form of fall protection on low sloped or flat roofs. The photo submitted by NCSRCC does not show that the warning line was misplaced either.

The real issue with NCSRCC's photographs is that the Carpenters Union has now revealed itself as the party that submits serial "anonymous complaints" to try to make life miserable for Yellow Tree. The real purpose of the anonymous complaints by NCSRCC has been to disrupt Yellow Tree's job sites and job flow while jobs have been inspected and temporarily shut down 42 times in the last eight months.

### **3. Burt Johnson's December 30, 2021, letter, page 4, Photo 3.**

The third photograph from NCSRCC's letter does not depict a Yellow Tree employee and it is not clear that the photo is taken of a Yellow Tree job site. Further, the third photograph from NCSRCC's letter is taken from a perspective where it is difficult to determine how far away the two workers are standing from the roof's leading edge and whether they are performing a construction task. If the two workers are conducting an inspection without performing work, then no fall protection is required.

MnOSHA is in a better position than the Planning Commission or its Zoning Committee to investigate these issues. The Planning Commission and its Zoning Committee has no jurisdiction either to consider alleged safety violations. So far, MnOSHA has been wading through the 42 "anonymous" complaints, and MnOSHA has already closed its investigation of 14 of the 42 or 33% of the "anonymous" complaints.

Yellow Tree will defend any Citation issued by MnOSHA, and Yellow Tree is confident that it will prevail. Yellow Tree did not create any safety hazards. Yellow Tree's employees were not exposed to any safety hazards. And Yellow Tree's employees were not aware of any safety hazard created by any subcontractors.

No Yellow Tree employee created a safety hazard, no Yellow Tree employee was exposed to a safety hazard, and no Yellow Tree employee knew or should have known of any existing safety hazard. Because Yellow Tree was not the creating employer or exposing employer, Yellow Tree does not have OSHA liability in this situation.

Yellow Tree is not the guarantor of activity by subcontractors. If a subcontractor committed a safety violation, then Yellow Tree is not strictly liable for the actions or omissions of subcontractors.

NCSRCC says that its Photo 3 is a photo of the University Avenue project owned by Paster Apartments. No one can verify that information from the photo submitted by NCSRCC.

However, Yellow Tree provides the photo below of the actual University Avenue project owned by Paster Apartments taken on December 3, 2021, to show davits installed on the roof top.



This December 3, 2021, photograph shows a flat roof with installed davits and an erected warning line system. If the warning lines could not be used as a form of fall protection, then workers could tie off to the davits. If a subcontractor employee failed to use either the warning line or the davits, then this is not Yellow Tree’s fault.

All of this analysis confirms what the Planning Commission and its Zoning Committee already knows: the Planning Commission does not have jurisdiction to consider NCSRCC’s allegations regarding safety violations, MnOSHA is the government entity that has jurisdiction, and MnOSHA has already closed 14 of 42, or 33% of the anonymous complaints.

Again, the University Avenue project owned by Paster Apartments has nothing to do with the Applicant and the James Avenue Apartments project.

**Conclusion**

The Carpenters Union’s final argument is that the James Avenue Apartments project does not comply with LU-6 of the Saint Paul Comprehensive Plan. *See* Burt Johnson’s December 30, 2021, letter, page 2-3. NCSRCC’s letter contains no analysis – just a bald conclusion.

The Planning Commission Zoning Committee's Staff Report states that the James Avenue Apartment Project satisfies the St. Paul Comprehensive Plan, LU-6.

The issues raised by NCSRCC do not fall within the Planning Commission's jurisdiction or the Zoning Committee's jurisdiction. Other government entities can investigate any issues on other projects.

The real issue for the Planning Commission to keep in mind is that the issues raised by NCSRCC in Burt Johnson's December 30, 2021, letter have nothing to do with the Applicant or the James Avenue Apartments Project.

Sincerely,

/s/ Aaron Dean

Aaron A. Dean

cc: Yellow Tree Construction Services, LLC  
Applicant Chet Funk



Doc No **A04911675**

Certified, filed and/or recorded on  
Oct 6, 2021 2:24 PM

Office of the County Recorder  
Ramsey County, Minnesota  
Todd J. Uecker, County Recorder  
Heather L. Bestler, County Auditor and Treasurer

Deputy 703

Pkg ID 1481382C

Document Recording Fee Abstract	\$46.00
<b><i>Document Total</i></b>	<b>\$46.00</b>

(Top 3 inches reserved for recording data)

**MECHANIC'S LIEN STATEMENT**  
by Individual(s)  
Minn. Stat. 514.08, subd. 2

Minnesota Uniform Conveyancing Blanks  
Form 40.1.1 (2011)

State of Minnesota, County of Ramsey

DATE: 09/20/2021  
(month/day/year)

The undersigned hereby gives notice to the public and states as follows:

1. I am the  Claimant  person acting at the instance of the Claimant and have knowledge of the facts stated herein.  
(check appropriate box)

2. The Claimant hereby gives notice of intention to claim and hold a lien upon the real property in \_\_\_\_\_  
County, Minnesota, legally described as follows (the "Property"):  
Lot sixty-one and one-half (61-1/2), Hewitts Out Lots, First Division, according to the recorded plat thereof on file and of record in the office of the Ramsey County Recorder.

Check here if all or part of the described real property is Registered (Torrens)

3. The name and mailing address (and license number, if applicable) of the Claimant are as follows:  
Angel Polivio Merino  
3715 Chicago Ave S  
Minneapolis, MN 55407

nineteen thousand eight hundred twenty four

4. The amount of the lien claimed is ~~Ninety thousand and eight hundred twenty four~~ <sup>EO</sup> 00/100  
Dollars (\$ 19824.00 ) and is due and owing to the Claimant for labor performed or skill, material, or machinery furnished to the Property (the "Work").

5. The Claimant performed or furnished the following: (insert description of Work)  
Wood framing and lines snapping.

6. The Work was performed or furnished from July/08/2021 to August/19/2021  
(insert first date of Work) (insert last date of Work)


for or to the following person(s): (insert name of person authorizing Work)  
Jaime Rocha (Strong Framing LLC)



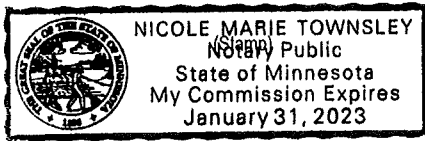
7. The name of the present owner of the Property (the "Owner"), according to the best information Claimant now has, is:  
2227 University QOZB LLC  
Attn: Robb Lubenow

8. The Claimant acknowledges that a copy of this statement must be served personally or by certified mail on the Owner, the authorized agent of the Owner, or the person who authorized the Work within one hundred twenty (120) days of doing the last Work.

9. Notice as required by Minn. Stat. 514.011, subd. 2, if any, was given.

  
\_\_\_\_\_  
(signature)

Signed and sworn to before me on September 20, 2021, by \_\_\_\_\_  
(month/day/year)  
Angel Polivio Merino Abad  
(insert name of person making statement)



Nicole Townsley  
(signature of notarial officer)  
Title (and Rank): Notary Public  
My commission expires: Jan 31, 2023  
(month/day/year)

THIS INSTRUMENT WAS DRAFTED BY: ✓  
(insert name and address)  
Eustaquio Orozco  
CtUl Construction Organizer  
09/20/2021  
3715 Chicago Ave  
Minneapolis, MN 55408