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2011 046823

STATE OF INDIANA  
LAKE COUNTY  
FILED FOR RECORD

2011 AUG 26 AM 9:40

MICHELLE R. FAJMAN  
RECORDER

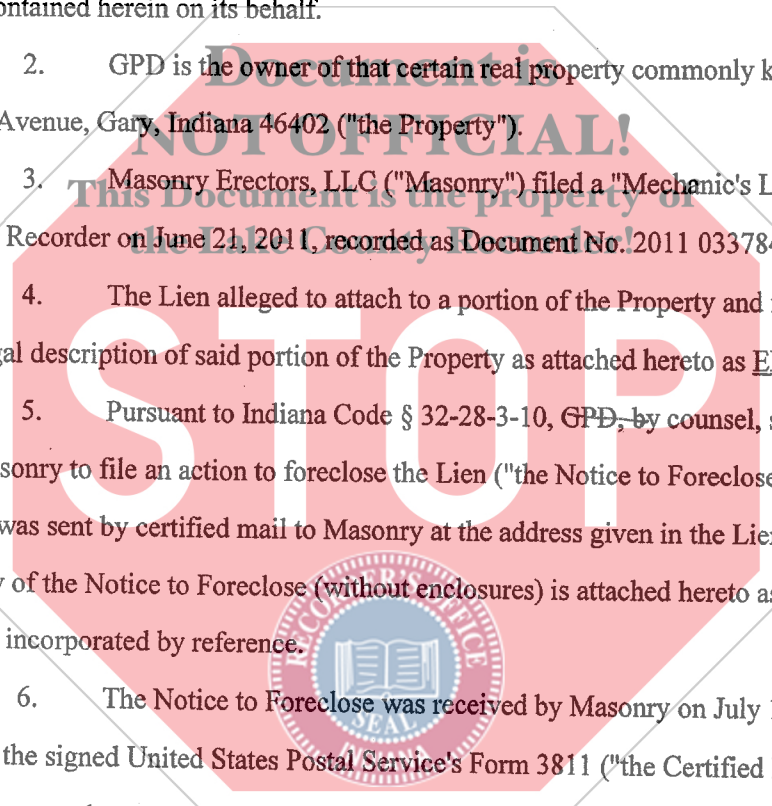
82652c inv

STATE OF INDIANA )  
 ) SS:  
COUNTY OF ST. JOSEPH )

**AFFIDAVIT OF LANCE A. SWANK**

Lance A. Swank, being over the age of eighteen and having first been duly sworn upon his oath, states as follows:

1. I am the Manager of Dalton Apartments LLC, the Managing General Partner of Gary Progress Development, L.P. ("GPD"). I am authorized by GPD to make the statements contained herein on its behalf.
2. GPD is the owner of that certain real property commonly known as 121-137 East 5<sup>th</sup> Avenue, Gary, Indiana 46402 ("the Property").
3. Masonry Erectors, LLC ("Masonry") filed a "Mechanic's Lien" with the Lake County Recorder on June 21, 2011, recorded as Document No. 2011 033784 ("the Lien").
4. The Lien alleged to attach to a portion of the Property and included a purported legal description of said portion of the Property as attached hereto as EXHIBIT A.
5. Pursuant to Indiana Code § 32-28-3-10, GPD, by counsel, served written notice on Masonry to file an action to foreclose the Lien ("the Notice to Foreclose"). The Notice to Foreclose was sent by certified mail to Masonry at the address given in the Lien. A true and accurate copy of the Notice to Foreclose (without enclosures) is attached hereto as EXHIBIT B and is hereby incorporated by reference.
6. The Notice to Foreclose was received by Masonry on July 19, 2011, as evidenced by the signed United States Postal Service's Form 3811 ("the Certified Mailing Return Receipt"). A true and accurate copy of the Certified Mailing Return Receipt is attached hereto as EXHIBIT C and is hereby incorporated by reference.



**CTIC** Has made an accomodation  
recording of the instrument.  
Chicago Title Insurance Company

AMOUNT \$ 31.00  
CASH \_\_\_\_\_ CHARGE CT  
CHECK # \_\_\_\_\_  
OVERAGE \_\_\_\_\_  
COPY \_\_\_\_\_  
NON-COM \_\_\_\_\_  
CLERK UR

7. More than thirty (30) days have passed since the Notice to Foreclose was received by Masonry, the holder of the Lien.


8. No action to foreclose the Lien is pending.

9. There is no unsatisfied judgment that has been rendered on the Lien.

10. Pursuant to Indiana Code § 32-8-3-10(c), the Property is hereby fully released from the Lien by operation of law.

*Further affiant sayeth not.*

I affirm under the penalties for perjury that the foregoing representations are true.

  
Lance A. Swank

STATE OF INDIANA )  
                                  )SS:  
COUNTY OF ST. JOSEPH )

Before me, a Notary Public in and for said State and County, personally appeared Lance A. Swank, Manager of Dalton Apartments LLC, the Managing General Partner of Gary Progress Development, L.P., who subscribed and swore before me the foregoing Affidavit.

Witness my hand and Notarial Seal this 24<sup>th</sup> day of August, 2011.

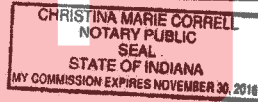
  
Notary Public

My Commission Expires: 11/30/16

Printed Name: Christina Marie Correll


My County of Residence: St. Joseph

Seal:



THIS INSTRUMENT PREPARED AND WHEN RECORDED SHOULD BE RETURNED TO:  
Brian P. Clifford, Attorney at Law — BAKER & DANIELS LLP  
111 East Wayne Street, Suite 800, Fort Wayne, Indiana 46802

*I affirm, under the penalties for perjury, that I have taken reasonable care to redact each Social Security number in this document, unless required by law.*

  
Brian P. Clifford, Attorney at Law

# EXHIBIT A

Document is  
**NOT OFFICIAL!**

This Document is the property of  
the Lake County Recorder!

# STOP



# EXHIBIT A

Property Description:

[ PROPERTY LEGAL DESCRIPTION ]

ATTACHED

45-08-03-302-007.000-004

GARY PROGRESS DEVELOPMENT L P

121 - 31 E 5TH AVE



45-08-03-302-007.000-004

GARY PROGRESS DEVELOPMENT LP

121 - 31 E 5TH AVE

411

ADMINISTRATIVE INFORMATION

PARCEL NUMBER  
45-04-03-302-007.000-004  
Parent Parcel Number

Property Address  
121 - 31 E 5TH AVE

Neighborhood  
25916 Neighborhood- 25916  
Property Class  
411 Commercial Hotels

TAXING DISTRICT INFORMATION

Jurisdiction 45 Lake County  
Area 001 Calumet Township  
District 004  
Routing Number 344-085 20

OWNERSHIP

GARY PROGRESS DEVELOPMENT L P  
C/O SHAWN LOYDEN  
1149 36TH AVE NE  
SAINT PETERSBURG, FL 33704

GARY LAND CO'S 1ST SUBDIVISION ALL L & BL 45 ALL L & 7  
BL 85 AND L & BL 85 & E 1/2 OF VACATED ALLEY ADJ.

TRANSFER OF OWNERSHIP

Date  
11/04/2005 WASHINGTON PROP INC \$0  
11/04/2005 GARY PROGRESS DEVELOPMENT, LLC \$95000  
GARY PROGRESS DEVELOPMENT L P \$0  
C/O SHAWN LOYDEN

Printed 06/03/2011 Card No. 1 of 2

COMMERCIAL

Assessment Year	03/01/2007	03/01/2008	03/01/2009	03/01/2010	Worksheet
Reason for Change					

VALUATION	Mac	22400	22400	22400	22400
Appraised Value	1259700	1259700	133000	135700	134500
VALUATION	1280500	1346700	155400	158500	156900
True Tax Value	20800	20800	22400	22800	22400
	1259700	1324300	133000	135700	134500
	1280500	1346700	155400	158500	156900

Site Description	Rating	Measured	Table	Soil ID	Acresage	Depth Factor	Effective	Area	Rate	Adjusted	Extended	Inclusion	Value
Topography:													
Public Utilities:													
All													
Street of Road:													
Paved, Sidewalk, Alley													
Neighborhood:													
Declining													
Zoning:													
Legal Acres:													
R.0000													

LAND DATA AND CALCULATIONS

Base	Rate	Adjusted	Extended	Inclusion	Value
1.00	45000.00	51800.00	22400		22400

OLD

121-37 E 5TH



COMB: Combined Parcels  
ADDED E 1/2 OF VACATED ALLEY ADJ. 12/30/98 DC  
HEAD: VACANT HOTEL  
FEN: 4211- 7/7/03  
VIC: FOLDER 114 1UR TO YEARS OF VANCANCY 25A OBS.  
ASSESSED ON HOTEL HOTEL UNITS, PER FIELD  
INSPECTION. ENTERED BY M. CARR 8/25/98.  
REMOVED M/C PLUMBING, ELECTRICAL, INTERIOR  
FINISH. 1/5/99 REMOVED OSR B SEASE 8/31/06

FARMLAND COMPUTATIONS  
Parcel Acres  
81 Legal Drain NW [ ]  
82 Public Roads NW [ ]  
83 UT Towers NW [ ]  
9 Homesite(s) [ ]  
91/92 Excess Acreage [ ]  
TOTAL ACRES FARMLAND  
TRUE TAX VALUE

Supplemental Cards  
TRUE TAX VALUE  
Measured Acreage  
Average True Tax Value/Acre  
TRUE TAX VALUE FARMLAND  
Classified Land Total (\*)  
HomeSite(s) Value (\*)  
Excess Acreage Value (\*)  
Supplemental Cards  
TOTAL LAND VALUE  
22400  
0.2439  
22400

# EXHIBIT B

Document is  
NOT OFFICIAL

This Document is the property of  
the Lake County Recorder!

# STOP



# BAKER DANIELS

EST. 1863

BRIAN P. CLIFFORD  
Direct 260.460.1687  
Fax 260.460.1700  
brian.clifford@bakerd.com

BAKER & DANIELS LLP  
111 East Wayne Street, Suite 800  
Fort Wayne, Indiana 46802  
Tel 260.424.8000 Fax 260.460.1700  
www.bakerdaniels.com

July 15, 2011

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

Masonry Erectors, LLC  
ATTN: Mr. Edgar M. Turner, Jr.  
708 West 66<sup>th</sup> Place  
Merrillville, Indiana 46410

Masonry Erectors Construction Co.  
ATTN: Mr. Edgar M. Turner, Jr.  
475 Broadway, Suite 203  
Gary, Indiana 46402

Re: **Release of Mechanic's Lien — Dalton Apartments Renovation Project**

Mr. Turner:

We are the attorneys for Gary Progress Development, L.P. ("Owner"), and I am writing you regarding a certain "Mechanic's Lien" filed on or about June 21, 2011 ("Lien") by your company, Masonry Erectors, LLC ("Masonry"), against certain property commonly known as 121-31 East 5<sup>th</sup> Avenue, Gary, Indiana 46402 ("Property"). A copy of the Lien is attached for your reference as EXHIBIT A.

I understand that you allege that the Lien arose in connection with work and materials Masonry allegedly performed or provided under a certain construction agreement, dated September 13, 2010 ("Contract"), as amended by Change Order #1 (10/27/10), Change Order #2 (2/17/11), and Change Order #3 (2/28/11), related to the Dalton Apartments Project ("Project"), for which Sterling Construction Corporation ("Sterling") served as the construction manager.

**Please be advised that the Lien is a wrongful encumbrance on the Owner's title to the Property, and the Owner intends to assert a civil cause of action against Masonry for its slander of the Owner's title to the Property.** Such action will seek to recover from Masonry all costs the Owner incurs in such litigation, including without limitation attorneys' fees, as well as actual damages, statutory damages, and punitive damages, all as permitted by Indiana law. See, e.g., *Harper v. Goodin*, 409 N.E.2d 1129, 1134-35 (Ind. Ct. App. 1980) (invalid mechanic's lien supported judgment of slander of title, entitling property owner to compensatory and punitive damages against the lien claimant), *reh'g denied*. See also, e.g., *Wilcox Lumber Co., Inc. v. The Andersons, Inc.*, 848 N.E.2d 1169, 1171 (Ind. Ct. App. 2006) (refusal to release wrongful mechanic's lien is a slander on property owner's title, entitling owner to recover attorneys' fees it incurred from the lien claimant).

Furthermore, please be advised that the Owner may seek to hold you, Mr. Turner, **personally liable** for any judgment entered against Masonry due, *inter alia*, to your use of Masonry to perform unjust activities (including slandering the Owner's title to the Property) and your control and manipulation of Masonry. Additionally, we are informed and believe that Masonry is

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undercapitalized and, to the extent that its wrongful acts were committed in that condition, such condition may serve as additional grounds to hold you personally responsible for the liabilities of Masonry arising from its tortious acts.

While we strongly urge you, Mr. Turner, and Masonry to seek competent legal counsel to advise you as to your and Masonry's respective liabilities created by your wrongful acts, we would specifically note that on May 24, 2011, Masonry executed a "Waiver of Lien to Date" ("5/24/11 Waiver") in exchange for good and valuable consideration received from the Owner. A copy of the 5/24/11 Waiver is attached for your reference as EXHIBIT B. The 5/24/11 Waiver explicitly states that Masonry "waive[d] and release[d] any and all lien or claim or right of lien...on the above described premises [the Property] and improvements thereon...on account of labor or services, material, fixtures or apparatus heretofore furnished to this date by the undersigned [Masonry] for the above described premises [Property]."

Moreover, on May 27, 2011, Masonry executed a "Final Unconditional Waiver of Lien" ("5/27/11 Waiver") in exchange for good and valuable consideration received from the Owner. A copy of the 5/24/11 Waiver is attached for your reference as EXHIBIT C. The 5/27/11 Waiver unambiguously states that Masonry has waived "any and all rights which it otherwise may have against Sterling Construction Corp....[and the] owner of said Project [Dalton Apartments] and the real estate upon which said improvements...[have been] constructed," confirming that the 5/27/11 Waiver, "together with any and all previous Waivers, if any, covers all amounts due the undersigned on account of labor and/or materials furnished to said Project by the undersigned [Masonry]."

the Lake County Recorder!

As you know, Masonry has not performed any work or supplied any materials to the Owner or for the Project since May 24, 2011. It is clear, therefore, that the Lien is invalid and its recording constitutes a slander of the Owner's title to the Property due to Masonry's waiver of all lien rights related to the Project.

Additionally, the Contract, as amended by the three above-referenced Change Orders, states that the total contract sum due to Masonry was \$63,344.21.<sup>1</sup> Masonry has received, prior to the recording of the Lien, good and valuable consideration equal to this amount from the Owner in accordance with the terms of the Contract.

<sup>1</sup> As you know, Masonry's former construction agreement with Stenz Construction Corporation ("Stenz") related to the Project, dated March 7, 2008, which was later assigned to the Owner, was superseded by the Contract. See Section I.A. on Page 20 of the Contract, explicitly stating that "[u]pon execution of this contract ALL previous contract and agreements will be considered null and void. This contract will be considered a full and final agreement between Gary Progress Development, LP, Sterling [Construction Corp.] and all affiliated partners to the Dalton Apartments."

Additionally, all mechanic lien rights of Masonry related to the Project arising from the work and materials allegedly performed or provided by Masonry under the former agreement with Stenz were waived and released pursuant to that certain "Subcontractor/Supplier Affidavit, Waiver and Release of Lien", executed by Masonry on June 10, 2010 ("6/10/10 Waiver"). A copy of the 6/10/10 Waiver is attached for your reference as EXHIBIT D.



July 15, 2011

Section 1.14 of the Contract states that Masonry "acknowledges that no work shall be performed in the absence of a written change order, fully executed, and further acknowledges that in the absence of such approved written change order that he shall not be paid for any work or 'extra' not part of the original Contract, and expressly waives his right to collect or lien the Project for such unauthorized work" (emphasis deleted). Several other provisions of the Contract also require a written change order, executed by the Owner, before any increase to the indicated contract sum will be deemed effective. See, e.g. Contract Sections 4.1, 6.4, 6.5, and 6.8 and Section I.B.6 on Page 20 of the Contract.

However, the Lien claims that Masonry is entitled to an amount that is nearly 700% of the contract sum set forth in the Contract, as amended. Even if Masonry had not waived all rights it may have had to assert a lien against the Project (which it has), in no event could the Owner be liable for such an exaggerated amount. See, e.g., *Walker v. Statzer*, 284 N.E.2d 127, 132 (Ind. Ct. App. 1972) ("[W]here the...contractor has furnished labor and materials for a price agreed upon by him and the owner of the property, the amount of the lien is measured and limited by the agreed price."), *reh'g denied*.

In light of the obvious invalidity of the vastly-overstated Lien, the Owner demands that Masonry immediately release the Lien it recorded against the Property. For your convenience, a form to comply with this demand is attached as EXHIBIT E; please return a fully-executed, notarized and recorded copy of the *Release of Mechanic's Lien* to my attention before July 22, 2011. The prompt recording of such a release by Masonry may limit the amount of damages that the Owner will seek to recover from Masonry and you, Mr. Turner, as detailed above.

Furthermore, pursuant to Indiana Code § 32-28-3-10, please consider this letter notice from Gary Progress Development, L.P., by its attorneys, Baker & Daniels LLP, to Masonry Erectors, LLC to file an action to foreclose upon the Lien. However, the Owner cautions you that any foreclosure action filed by Masonry on its plainly invalid and inflated Lien would be frivolous, unreasonable, and groundless, providing the Owner with an additional right to recover its attorneys' fees from Masonry: Indiana Code § 34-52-1-1(b).

Thank you for your immediate attention to this matter.

With Regards,



Brian P. Clifford  
Enclosures (Exhibits A - E)



c: Gary Progress Development, L.P.  
Sterling Construction Corporation

**EXHIBIT C**

**This Document is the property of  
the Lake County Recorder!**

**STOP**



**UNITED STATES POSTAL SERVICE**

PRINT YOUR NAME, ADDRESS AND ZIP CODE BELOW

First Class Mail  
US Postage Paid  
Permit No. G - 10

Brian Clifford  
Baker & Daniels LLP  
111 East Wayne St., Suite 800  
Fort Wayne, IN 46802  
US



2. Article Number



7160 3901 9848 8068 4936

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly)	B. Date of Delivery
C. Signature	<input type="checkbox"/> Agent <input type="checkbox"/> Addressee
Is delivery address different from item 1? If YES, enter delivery address below	
<input type="checkbox"/> Yes <input type="checkbox"/> No	

3. Service Type **CERTIFIED MAIL**

4. Restricted Delivery? (Extra Fee)  Yes

1. Article Addressed to:

Edgar M. Turner, Jr.  
Masonry Erectors, LLC  
708 West 66th Place  
Merrillville, IN 46410  
US

0095648.0000334-16012 Clifford,  
Brian - Sterling/Dalton Apartments



CERT00033697

