

2005–7: Ownership Begins – No Repairs Despite City Demands

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2005–6: In the first year of Eastwood ownership, the leaks continue and the City remains inactive

August 2005–September 2006: Bob Nazarian knows the leaks are serious but does nothing to fix them

Shortly after he purchased the Mall in August 2005, Bob Nazarian knew it had a serious problem with leaks from its rooftop parking deck. He testified: “The leak was my main concern, my nightmare right from the day that we have purchased.”¹ He also testified that, in 2005, there were leaks in the Library, in Zellers, in the food court, “and maybe some other places.”² He said he knew from the beginning that the leaks were caused by cars “driving fast over the roof, creating vibration and opening crack[s] between the joints.”³

He testified that a few months after the purchase he met with Richard Kennealy, general manager of Retirement Living, and Rhona Guertin, its finance and business development manager, to complain about the leaks. He said he was “laughed at” and belittled and told that the maintenance workers who had worked for Retirement Living and continued to work for Eastwood knew how to deal with the problem.⁴ Mr. Kennealy confirmed that he had told Bob Nazarian to rely on the maintenance workers, although his evidence was that this conversation took place before Eastwood had purchased the Mall.⁵

Ray LeBlanc and Al LaBreche, two maintenance workers who had been employed at the Mall for a number of years (along with Ken Snow, the maintenance supervisor at the Mall from 1989 until 2005, shortly after the purchase by Eastwood),⁶ continued to repair the leaks as they had always done. They opened the cracks where earlier repairs were peeling, cleaned the cracks, and then sealed and caulked them. Bob Nazarian testified that he had done research to determine the best material to use and purchased a product called THC-900 Dymonic. He directed the workers to put a thin layer of polyurethane on the bottom of the joint and fill it with that material. He agreed that, other than using this new product, the workers did nothing in 2005 or 2006 that was different from what had been done in previous years.⁷

Judy McCulloch, manager of customer service at Scotiabank in the Mall, testified that, after Eastwood’s purchase of the building, the leaks increased greatly and the mould problems were worse.⁸ Barbara Fazekas, who retired as chief librarian early in June 2006, testified that things did not improve during the year before her retirement.⁹ In the spring of 2006, the leaks produced significant complaints from tenants. A meeting of tenants, attended by Dan Bouffard, the Mall manager, was held on May 17, 2006. The meeting minutes record the following comments:

All merchants who were at the meeting agreed, the mall has deteriorated since new ownership. The suggestion made by tenants was to write the landlord (Mr. Nazarian), and inform him of how unhappy they all are. All agreed to write a letter.

...

Sue Morin (library): the smell of mold in the library is so strong that her customers are leaving. They have had to cover their books with plastic to keep the leaks from damaging their books.

Dan: It was brought to Mr. Nazarian’s attention. Personally he would like to see the area isolated. He would need to resurface the whole parking lot. It is not convenient to reduce parking.

Roger (Zellers) also stated that he has to put plastic covers over the pet food isle [sic] to stop the water from damaging his stock.

He would like to know when it is getting fixed. And who is paying for replacing the [ceiling] tiles? As is Doug from Dollarama (asked to state this for him prior to meeting).

Dan explained that the roof has been neglected for over a year. It will cost big money and take a lot of time to bring it back to a state where our maintenance staff is capable of performing routine maintenance.

Both Sue Morin from the library and Brian Knight from Marvel Travel stated it would not be a problem to get out of their lease due to the poor condition of the building. All they would have to do is call the health board on the mold issue and they would close us down.¹⁰

Bob Nazarian admitted that he knew there were leaks in the Library at the time. He also admitted that he knew there was a problem with leaks in Zellers and that it was “possible” he knew plastic had to be used in both Zellers and the Library to protect stock and books. He agreed that he wanted to resurface the entire parking lot to deal with the leaks. Despite this awareness, however, he simply persisted with the procedure used in the past to maintain the roof.¹¹

On June 1, 2006, the Bank of Nova Scotia sent Bob Nazarian a letter referring to a recent meeting in which “we discussed ... how you will be making improvements to the parking garage to stop the water penetration into our Premises.” The letter proposed the following term for a new lease, which Bob Nazarian accepted:

The Landlord covenants to repair or modify at its cost and expense the parking garage’s paving and expansion joints above the Tenant’s Premises to prevent moisture from entering the Tenant’s Premises. The Landlord covenants and agrees to pay for all reasonable costs resulting from moisture penetrating into the Premises ... Should the Landlord fail to pay for an invoice supplied to them ... the Tenant can at its option deduct the invoice amount from its rent coming due under the Lease.¹²

Such a clause is very unusual in a commercial lease, as Bob Nazarian admitted. He testified that he agreed to it because he realized that the leaks were so serious that he was prepared to take this step to keep the bank in the Mall.¹³

In July 2006, Tom Turner was hired to replace Dan Bouffard as the Mall manager. He is a former member of the Royal Canadian Mounted Police and had been employed as an investigator by the Ontario Securities Commission. He has been an officer in the Royal Canadian Navy Reserve for 16 years and at present holds the commission of lieutenant-commander. He gave his evidence in a very straightforward manner.¹⁴

Mr. Turner had lived in Elliot Lake for about 10 years before he started to work at the Mall, and he was aware of its history of leaks, particularly at the Library and Zellers, having seen stained ceiling tiles and the use of buckets and tarps. He had no experience in running a mall before Bob Nazarian hired him. He had no idea of the extent of the problem at that time. When he started, the maintenance workers told him they dealt with each leak by identifying where it was coming from, removing caulking from the roof in that area, trying to dry it out, and then replacing the caulking. Mr. Turner agreed that this process was reactive; nothing pro-active was being done to address the leaks. When he started, Bob Nazarian gave him no advice about how to deal with the roof.¹⁵

Mr. Turner testified that the roof became an issue soon after he began at the Mall when heavy rains caused leaks in numerous locations. He had telephone conversations with Bob Nazarian “pretty much daily” about the leak situation. Mr. Nazarian’s advice was “just to get the guys up on the roof and plug the holes.” The workers doing this task were Mall employees. Mr. Turner understood that this process continued the practice that had been in place for years.¹⁶ On July 27, 2006, less than two weeks after he started, Mr. Turner emailed Bob Nazarian, telling him that heavy rain had caused problems “again” at the Library, but that the Eastwood crew had been able to bring it under control and repair it.¹⁷

Brian England is a certified technical representative, a designation given by Construction Specifications Canada to persons who represent construction products in the marketplace. He is not an engineer or an architect. He had experience before 2000 as a representative of Dow Corning, a large sealant manufacturer. He described his job with Corning as both making suggestions to engineers and architects on products to be used on their projects

and giving advice on joint details and the application of the product.¹⁸ Mr. Turner introduced Mr. England to Bob Nazarian in an attempt to deal with the roof problem. He had met Mr. England through friends and learned that he had a background in the construction industry. Mr. England suggested to Mr. Turner that the problems could be resolved by using a silicone product instead of the urethane used up to that time. The urethane product was failing regularly and was in all the joints. Mr. England's plan was to replace the weak areas first and, as time and money allowed, to replace the rest of the roof joints.¹⁹

On August 8, 2006, three weeks after he began to work as the Mall manager, Mr. Turner wrote to Bob Nazarian about a number of issues, including the roof. He told him:

[W]hile I love the idea of a tent over the roof, I am sure it would be incredibly expensive. Last week I had a retired executive with Dow-Corning look at the overhead parking. He told me that there is a solution and it involves using silicone instead of urethane.²⁰

Mr. Nazarian explained the reference to a "tent over the roof":

I was looking for a permanent solution. I could see that by caulking is not getting fixed up. By that time, I was looking for another channel to stop this leak, which was really getting into our life.

So I thought maybe – as you have seen this, balloons that they are making for golf players and as well as Sherway Mall has some kind of tent on top of the mall, I thought maybe we could do that.²¹

After he spoke to the managers at Sherway Mall in Toronto, however, he concluded that the tent solution would be too expensive.²²

On August 15, 2006, Mr. Turner sent a memo to Bob Nazarian, advising him that he was researching the new product and working on a budget. He told him there were factors that create a "bit of urgency here" and wrote:

- The lease for the library is coming up for renewal. The library wishes to expand its area and is interested in renting the 2,000 sq. ft. behind Miscellaneous Fashions and the empty store next to it. However, the employees there (all civil servants) filed a complaint with their Health & Safety Committee last year regarding mildew and mold they believe is caused by the leaking roof. The Committee took the complaint to their employer, the City of Elliot Lake, and demanded action to correct the situation or have the library moved. I have reason to believe that we can expect to hear from the City in the near future.
- The Bank of Nova Scotia has sent an Addendum to Lease (renewal to 2011) and I have forwarded this to you. Please note paragraphs 4 "Environmental Representations" and 7 Damage to Leased Premises. You may want your lawyers to review these paragraphs as the Bank is requiring us to "repair or modify the paving and expansion joints" on the parking deck and to pay for any damages resulting from leaks. The Branch Manager has told me that they are concerned with water damage and mildew as the Bank is planning to replace all its carpet and bring in new furniture.²³ [Emphasis in original]

Bob Nazarian recalled receiving this memo. He said it gave him great concern, because the leaks were not improving despite the efforts he had made over the previous year. He testified that he knew the leaks were getting worse and, although he did not know what was causing them, he presumed the reason was that his employees were not doing a proper job. He did not, however, consider hiring a professional to give him advice about the problem. He had no explanation other than to say that he thought he could do it without an engineer and, to repeat, that he thought the problem stemmed from his employees' work performance.²⁴

Mr. Turner testified that as Mall manager he had access to the revenues and most of the expenses of the Mall. Although he acknowledged he could not provide a completely accurate figure, he estimated that Eastwood was earning approximately \$1 million a year while he was manager.²⁵ Mr. Turner also testified that he was asked to manipulate the Mall's books within the first two months of becoming manager. Eastwood was seeking refinancing, and Bob Nazarian asked him to leave on the rent roll a couple of tenants who had vacated their

premises and were no longer paying rent. The purpose, Mr. Turner understood, was to enhance the apparent income of the business. Mr. Turner spoke with Sam Hurmizi, Eastwood's accountant, and told him he would not do it – that if there was going to be any manipulating it would be Mr. Hurzimi making the adjustments, not Mr. Turner. Mr. Hurmizi said he would speak to Bob Nazarian.²⁶

Although Mr. Nazarian did not retain professional consultants to give him advice about how to fix the roof, he was interested in selling the Mall at an early stage. Less than a month after Mr. Turner sent his memo, he again wrote to Mr. Nazarian, telling him that an individual had come to the Mall saying that he understood it might be for sale:

As you had told me everything is for sale at the right price, I took him for a quick tour and told him about its great potential. After that I gave him your number and asked him to deal with you direct. My opinion is that he is legitimate and represents serious investors.²⁷

Bob Nazarian recalled speaking to this individual and acknowledged he had told Mr. Turner that everything was for sale for the right price. Indeed, as Bob Nazarian testified and as the evidence disclosed, he continued to offer the Mall for sale right up until the day of the collapse.²⁸

Mr. Turner testified that, despite asking Bob Nazarian for his long-term vision for the Mall,

I never did succeed in getting his vision of where we're going. Whether it was to pretty up the mall and sell it or to fill it and run it forever. I never did have a clear idea as to where we were going.²⁹

On September 6, 2006, Mr. Turner met with the Mall's tenants. Bob Nazarian was not present. Notes taken at the meeting show that Mr. Turner explained the repairs to the roof that were planned. The notes state:

Explanation of repairs – cement.

Silka to be fixing the old cement over Zellers, work to be continued till end of October. Projection of goal for this year: Zellers, Bank of Nova Scotia, lighthouse, Dollarama, and the food court.

...

This project will cost approximately \$50,000 plus GST plus the equipment and labour. Our estimated cost will be \$150,000. This project is headed by Brian England, who is knowledgeable in this field. Due to the guarantee for the product, we had to hire someone so the warrantee would be fulfilled.

...

Due to us doing the work (Brian England) they are guarantying the product.³⁰

Mr. Turner acknowledged making the statements attributed to him in the memo, but testified that, "as it turned out, I'm not sure about the warranty."³¹ Bob Nazarian admitted that there was no warranty on the work because Eastwood was using its own employees rather than the manufacturer's to do the work. He purported not to know that the tenants were being told there was a warranty.³² In light of my general conclusions about Mr. Nazarian's credibility, one might be justified in suspecting that he did know.

Mr. Turner testified that the new product was applied in the summer of 2006 to the areas considered most urgent, replacing the caulking with the silicone product. Casual staff was hired to assist with the work. The new product was applied so that it sat below the surface of the roof to prevent the car tires from picking it up. The planned work was not completed by the time the weather required it to be stopped in the fall. The following spring, Bob Nazarian told him that the new product was too expensive and to return to applying the product that had been used by Retirement Living. I accept this evidence.³³

September 2005–July 2006: City officials know they can require repairs to deficient properties but do not do so

In September 2005, Troy Speck, the City's chief administrative officer, recommended to council that the City begin pro-active inspections of some multi-residential and commercial properties. This suggestion was made because of a recurring problem of substandard properties seized by the City for unpaid taxes being sold without adequate repairs. On September 7, 2005, he reported to council:

The Building Code Act, the Fire Code and the Property Standards By-Law all contain provisions allowing Inspectors to enter and inspect premises, issue orders for work to be done to bring properties into compliance, and for charges to be laid where there is a failure of compliance. There are also provisions allowing the municipality to perform remedial work and charge the cost against the property, to be collected as taxes.³⁴

On November 15, 2005, Syl Allard, the chief building official and property standards officer, reported to council on the same issue. He noted that, under the policy enacted in 1995, enforcement of the Property Standards By-law was "complaint-driven" and that the City had the option, if necessary repairs were not made after an order had been issued, to repair the property itself and charge the cost back to the property owner as taxes. He recommended that the enforcement policy for commercial property or residential buildings with more than three units be changed to allow an inspection of vacant properties or properties with a vacancy rate of 50 percent or more. He recommended that all such buildings be inspected for visually evident deficiencies which would "affect the structure or building integrity." In addition, he recommended that the inspections be limited to specified sections of the by-law, including section 2, entitled "Structural Capacity," and section 5.1, entitled "Roofs." Leslie Sprague, the City clerk, and Mr. Speck approved his report.³⁵ On January 19, 2006, City Council accepted the recommendation in principle and referred the matter to the budget committee and the personnel committee.³⁶

Mr. Allard's report also noted that "occupied buildings would be self-governing by tenancy complaints and therefore the current service level approach could continue."³⁷ Both Mr. Speck and George Farkouh, the mayor at the time, testified that this clause meant that council had decided to enact the proactive program only for buildings that were at least partly vacant. The councillors had concluded that the City could rely on tenants' complaints to ensure enforcement of the Property Standards By-law for occupied buildings. As Mr. Farkouh testified, if a tenant complained, the property standards officer would investigate, inspect, and bring about whatever remedy was appropriate.³⁸

On July 24, 2006, City Council formally approved the new policy in accordance with a report signed by Ms. Sprague and approved by Mr. Speck. This report reminded council again that the existing policy for enforcement of the Property Standards By-law for non-vacant buildings, which was complaint-driven, would continue in force.³⁹

According to Mr. Allard's testimony, complaint-driven enforcement meant that, before he could act, he required a communication, identified as a complaint, that conditions which were a breach of the by-law existed at a building. The complaint had to be brought to the direct attention of the Building Department, not any other department of the City, and the complainant had to explain how he or she expected the municipality to react. Mr. Allard said he would not do anything if someone came in and told him, for example, that a roof was leaking into his store. That, he testified, would not be a complaint, just a "transmission of information." He held to this view even though he knew that water infiltrating a building – especially chloride-laden water dripping from vehicles – could, over time, cause structural damage. Furthermore, he explained that he himself could not be the complainant. Unless he saw evidence of an obviously unsafe condition, he would not be able to act on his own; he needed a complaint from someone else.⁴⁰

Given the number of times this issue had been before City Council following reports by staff, it must have been, at a minimum, clear to any councillor, the mayor, the City clerk, the chief building officer, and Mr. Speck that

- the Property Standards By-law required that buildings have structural integrity;
- if a building was in breach of the by-law, repairs could be ordered by the City's property standards officer and, if not made, could be carried out by the City, with the cost being charged to the owner in the same way as taxes;
- commercial buildings such as the Mall which were more than 50 percent occupied would not be inspected by City staff unless a complaint was received; and
- the provisions of the Property Standards By-law – such as the requirement that buildings be structurally sound and watertight – were designed to ensure public safety. The City's confidence in these provisions relied on the assumptions:
 - that tenants would complain to the City about buildings which were not in compliance with the Property Standards By-law; and
 - that, if such complaints were received, the City's property standards officers would investigate and make whatever orders were required.

One might expect that this collective understanding on the part of the City's leaders would have made City officials more responsive to such complaints. The evidence shows, however, that in the first year of Eastwood's ownership, that was not so.

The City receives complaints about leaks at the Mall and does nothing

I heard from a series of witnesses who were employees or officeholders of the City of Elliot Lake during the first year that Eastwood owned the Mall. They testified they were

- unaware of leaks at the Mall;
- unaware that the City could require that leaks and any other defects be remedied;
- unable to act despite knowing that a tenant had reported persistent leaks to the City in writing; or
- had failed to consider whether any such action could be taken.

I also heard evidence that responsible City officials tried to discourage attempts to resolve the situation.

August–December 2005: Chief administrative officer ignores concerns about ongoing leaks from the Library and the Joint Health and Safety Committee

On August 11, 2005, there was a meeting of the City's Joint Health and Safety Committee, established pursuant to the *Ontario Health and Safety Act*. The committee received an update about the employer's response to its recommendations about the leaks in the Library. The committee was advised that there had been new leaks, and that buckets had been put out and ceiling tiles removed. The minutes of the meeting noted that the employer's response was "still outstanding" and that Ms. Fazekas was to meet with the new landlord in the fall.⁴¹ Mr. Speck testified that he had probably received a copy of these minutes and noted that, contrary to his earlier belief, the leaks "obviously" had not been fixed.⁴²

On December 15, 2005, the leaks at the Library had become such a regular occurrence that the chief librarian issued an instruction to staff setting out a daily procedure for dealing with them. It listed 16 steps to be taken, including checking for leaks every morning using a prescribed checklist of potential locations; cordoning off areas of leaks that could involve electrical issues; covering books, tapes, or computers that might be damaged with tarps (using a supply of plastic kept on hand); arranging drip buckets “to catch as much water as possible”; shielding affected areas with tarps hanging from the ceiling; recording all damage; and mopping with a wet vacuum. The document included a note that, if Library patrons complained about the procedures, they should be given a brochure with the names of the members of the Library board, the mayor, and members of council.⁴³ Mr. Speck testified that he was aware that this procedure had been put in place in response to one of the recommendations from the Joint Health and Safety Committee.⁴⁴

When asked what steps he took, in light of this information, to see whether the leaks were being fixed, Mr. Speck stated that he left the matter in the hands of the Library and the Joint Health and Safety Committee to monitor.⁴⁵ Given that the Library had clearly been unable to have the problem resolved on its own, and the committee’s role was limited to recommendations to management, this response amounted to doing nothing.

June 2006: Councillor McTaggart warns against involving council, while mayor, councillors, and chief administrative officer ignore complaints

On June 8, 2006, after the May 17 meeting of the Mall merchants described above, Councillor Cathy McTaggart, who had been appointed to the Library board by council, sent a copy of that meeting’s minutes (which detailed tenants’ complaints about leaks and mould, the use of tarps to protect books and stock, and the Mall manager’s comment that it would cost “big bucks” to fix) to Mayor Farkouh, all members of council, Dennis Kukoraitis, the City treasurer, Ms. Sprague, and Mr. Speck. She wrote in the accompanying email:

The reason why I am passing these documents on to you is because they contain information about the obvious opinions from the various merchants in attendance at the meeting that “the mall has deteriorated since new ownership.” “The mall is now dirty compared to before”.

I am the Council representative on the Library Board and we held our Library Board meeting this evening. One of the Issues discussed was the ongoing problems that the Library and all merchants are experiencing with the Algo Centre Mall.

... Council is going to have to deal with this problem because we are going to start to get complaints.⁴⁶

The next day, Scott Reinhardt, a member of council, responded to Ms. McTaggart, writing: “I would encourage you to not embroil council in mall problems in any way. Either as an individual councillor or as a member of the library committee.”⁴⁷

Ms. McTaggart responded on June 10, copying all the recipients of her original email:

I did not intend to give the impression that I would “embroil” council in mall problems in any way. I merely tried to provide Council with a “heads up” and point out that, it is my personal impression that in the very near future, this Issue is going to be brought to the attention of the Municipal Government (Council) by either disgruntled Mall Merchants or disgruntled citizens (taxpayers), or both, and I do not believe that it is something that Council will be able to ignore, shrug off or avoid. I think that Council is going to be asked to go to bat (step up to the plate) as it were, for these people, which includes our own Library ... What do you suggest? Just tell everybody, if they do not like the way they are being treated by Eastwood Mall Inc., then move out. Pretty soon, we will see an empty Mall, which used to be a concern to City Council when Nordev owned the property. Now that Eastwood Mall Inc. owns the property, has the attitude of Council towards the condition of the Mall suddenly changed? The City does write the rent cheque every month to Eastwood Mall Inc. for \$8,054.16 for the Library (\$92,649.92/yr.) does everyone believe that the City and the Library is receiving value for the money that is being spent?

I felt that as the Council appointed representative on the Library Board, it was my duty to report to Council the latest information that I had about the Landlord of the Library ... You read the Notes that I provided all of you from the meeting. Given the current "mindset" of the new mall owner, which seems to be "the bottom line and profit at any cost" it does not look like the cleanliness or security of the Mall is a top priority.

The leaks from the ceiling tiles have been an ongoing problem for years and the new owners know very well that they have inherited this ongoing problem. Perhaps they see the Mall as a great write-off (loss) for tax purposes. I still have a beautiful CD, which happens to have been burned by Dan Gagnon, [director of project tourism and leisure], at City Hall in March 2005 because I borrowed the City Hall digital camera to take photos of the damage to the Library. (some of these photos are attachments.) Is this any way to run a Library? Now, it isn't just leaking ceiling tiles. Now it is cleanliness and security ...

I wonder how Nordev feels about this whole situation?

I would really appreciate hearing comments from other members of Council.⁴⁸

The day before Ms. McTaggart's response was sent, there had been more significant water damage at the Library. Suzanne Morin, who replaced Ms. Fazekas as chief librarian in June 2006, sent Ms. McTaggart an email on June 12 which stated:

[J]ust wanted to keep you posted on the roof situation at the library. You mentioned at the board meeting that you would be talking to the Mayor and Council regarding the Merchants and Tenants meeting minutes and my letter to them as well. I thought you can add the following:

Wanted to let you know that we had quite a mess here on Friday, June 9th morning with the rain on Thursday evening. I arrived at work to find collapsed wet tiles, water dripping from the new light ballast which I had just had replaced the day before by a paid electrician, and water dripping from most of the prominent leaky areas. I immediately picked up the phone to call the Mall office. I asked Corrine the exec. assistant to send the mall mgr. to have a look at this situation before the maintenance crew cleans it up. Dan Bouffard (mall mgr.) along with Al from mtce. arrived at approx. 9:25 am and inspected the situation. Mr. Bouffard agreed with me that this situation has to be addressed immediately. He did say that they had a company lined up to fix the problem but the day before the work was to start the contractor backed out saying it was out of their expertise. Anyhow, he did say he would address the problem right away and find someone to temporarily fix the problem this weekend or early this morning. Again, this will only be a temp. fix until they find a contractor who is willing to take this job on.⁴⁹

Ms. McTaggart forwarded this email to Mr. Reinhardt, copying it and her response to Mayor Farkouh, all members of council, and Mr. Speck. She wrote:

In response to your e-mail reply of this morning, Sue Morin sent the e-mail below to me this morning before you sent yours and I am passing it on to Council, as requested by Sue.

Your question was "are you sure that the merchants association minutes should have been circulated?" My response is that at the meeting of the Library Board between 5:00 p.m. and 6:15 p.m. June 8th, the whole Library Board was in agreement with me passing on the "Notes" that were taken at the Mall Merchants Meeting. It is their feeling that Council should know about this situation, and that perhaps this will help get something done about it.

If you recall, last Thursday evening, June 8th, we had quite a storm and here is the resulting e-mail regarding the damage to the Library. Scot, I guess all you have to do is walk across the hall and take a look at the damage. Perhaps you have already done this today.

I am curious to know if there was damage to other Tenants ceilings, such as Zellers, and I will find this out from Sue.

With regard to the cleanliness, I have been told personally by a maintenance staff worker that the mall maintenance staff was cut back soon after Eastwood Mall Inc. bought the mall, and that the maintenance staff remaining had their hourly wage reduced, while at the same time they are working longer hours. They are not happy campers. This happened around the same time that Marcel Leblanc was relieved of his duties.

I will not be writing any more emails to you about this situation unless there is something that you should be notified about because it could become a full time job.⁵⁰

No City official took any action after this series of emails alerted the mayor, council, and senior staff of the continuing problems with leaks at the Mall, contrary to the Property Standards By-law. Mr. Farkouh initially denied having seen the emails at all. He testified that he was on vacation from early June to early July 2006 and did not get these emails while he was out of the country. His authority as mayor passed, in his absence, to the deputy mayor, Councillor Richard Hamilton (subsequently the mayor). Mr. Farkouh at first testified that he was not advised of the emails or their issues when he returned,⁵¹ but subsequently he said he would have reviewed the emails and would have asked the chief administrative officer to let him know what this correspondence was all about. He could not, however, recall the outcome of that discussion.⁵²

No City official took any action after this series of emails alerted the mayor, council, and senior staff of the continuing problems with leaks at the Mall, contrary to the Property Standards By-law.

Mr. Hamilton remembered reading the emails at the time. He disagreed with Councillor Reinhardt's views that Councillor McTaggart ought not to "embroil" council in Mall issues in any way and said it was a good idea for her to tell council about these matters. He testified that the emails were complaints that the Mall was not watertight within the meaning of the Property Standards By-law and the City's complaint-driven enforcement policy. His evidence, however, was that, despite Councillor McTaggart's concerns, the issues were not discussed at council either formally or informally. He noted that senior staff had been copied on the emails and said he expected Mr. Speck to refer them to Mr. Allard. Although he agreed it was council's role to ensure that City staff were adequately performing their responsibilities, he testified that council did nothing to see that staff did deal with this issue, just as council had done nothing since Councillor McTaggart raised the issue of leaks with Councillor Don Denley in April 2004.⁵³

Mr. Speck testified that he did nothing to deal with the problems outlined in the emails. He did not consider whether an order could be issued under the Property Standards By-law, even though he, together with Mr. Allard and Ms. Sprague, were in the midst of having council revise the policy for enforcing the by-law.⁵⁴ Mr. Speck admitted he could think of only three things the City could do to deal with the leaks at the Library – find alternative space for it, exert pressure on the landlord to fix the leaks, or have the chief building official inspect the Library and decide whether to issue an order under the Property Standards By-law. The first two options had not succeeded during his term at the City. He admitted that, if he had sent these emails on to Mr. Allard, they would have given him the basis to begin an investigation under the Property Standards By-law. But he did not do so.⁵⁵

Ms. Sprague was also asked about these emails. She testified that it was common knowledge that there were leaks at the Mall and particularly at the Library; as she put it, "everyone would have been generally aware of the leaks."⁵⁶ She took no action when she was copied on the emails to and from Councillor McTaggart; she noted that they were also copied to members of council, so that it was a "political discussion" and not one in which the clerk's office would have been involved.⁵⁷ She did not view the emails as complaints within the meaning of the Property Standards By-law; she said, "it wouldn't have occurred to anyone that this is a complaint. It is a discussion about the issues at the Mall and the Library."⁵⁸

The evidence makes it clear that there was little supervision of the chief building official, who was also the property standards officer for the City. Mr. Speck testified that in 2003 he had recommended, and council had approved, a change in the reporting relationship so that the chief building official, who had reported to him as the chief administrative officer, would report to the City clerk. Before that change, Mr. Speck said that he would not tell the chief building official what he could or could not do, but that he would be

sitting with him on a regular basis, understanding what challenges that he might be facing, whether they be in terms of particular issues or finances or personnel. So that we could work together towards solutions to any issues like that and that I would be able to advocate on his behalf with Council ...⁵⁹

Mr. Allard testified that Ms. Sprague, the City clerk, was his immediate supervisor in 2006 as chief building official.⁶⁰ Ms. Sprague, however, testified that the chief building official does not report directly to her; she does not meet with him regularly, and he does not keep her apprised of what is going on in the Building Department. Although she has conducted performance appraisals for the chief building official, including Mr. Allard, it appeared from her evidence that she was not able to deal with the substantive aspects of his performance.⁶¹ It may be that this lack of structure contributed to Mr. Allard's failure to properly deal with the issues at the Mall, as described here and below.

Mr. Allard testified that, between 2002 and the summer of 2006, he had been in the Mall at least once a week, visiting a number of stores and, on one occasion, the Library. He testified that the only evidence he saw of leaks during that period was one garbage pail placed to collect drips close to the food court area. This evidence did not make him curious about the condition of the Mall and, he testified, even if it had, he would not have been able to investigate without a complaint.⁶²

Nor, according to his evidence, did Mr. Allard receive copies of the email of June 12, 2006 from Councillor McTaggart to the mayor, all members of council, and Mr. Speck describing the serious water damage to the Library which had occurred the previous weekend. Although his office was on the second floor of city hall – directly across the hall from Mr. Speck's office, down the hall from the councillors' offices, and one floor above Ms. Sprague's office – he never had a conversation before June 2006 about leaks from the Mall roof.⁶³

Chris Clouthier echoed Mr. Allard's evidence. He began to work as a building inspector for the City on September 7, 2004. He testified that, before October 2006, he was unaware that there were any leaks in the Mall; he was not sent any correspondence, emails, or letters regarding any such leaks. Nor was he aware that the Library had suffered very bad leaks in April and May 2005.⁶⁴

August 2006: Council and the property standards officer are advised that the leaks are ongoing, but they do nothing

On August 25, 2006, Suzanne Morin, by then the chief librarian, emailed the members of the Library board, including Councillor McTaggart. She wrote:

I wanted to keep you all posted on the discussions I have had with the new Mall Manager, Tom Turner. Tom has been in to see me several times in the last few weeks to let me know that they will be testing a new sealant product from Dell Corning ... Tom anticipates the work to be completed by the beginning of October. I'm very hopeful that this will be the solution we've been looking for.⁶⁵

Ms. McTaggart forwarded this email the same day to Mayor Farkouh, all members of council, Mr. Kukoraitis (the acting chief administrative officer after Mr. Speck left the City's employ), Ms. Sprague, Mr. Allard, and other City staff. She wrote: "I am forwarding this e-mail from Sue Morin, Chief Librarian, for your information. I like to keep everyone posted on the situation with the ongoing 'Leaky roof' at the Algo Mall."⁶⁶

Mr. Farkouh recalled receiving that email. He acknowledged that, by that date, he was aware that serious leaks at the Library had been a problem for the entire time it had occupied that space; that they had resulted in complaints to the Joint Health and Safety Committee, which had recommended that the leaks be stopped; that there had been testing and that mould had been found; and that the leaks continued – and that council was aware of them. His evidence was that, despite this knowledge, no one in authority did anything about the problem. In a rambling and confusing set of answers to Commission counsel, he seemed to say that, although he knew that the Property Standards By-law allowed the City to issue an order to have the property fixed, and he knew that, if such an order were disregarded, the City could fix the problem itself and recover the costs from the owner, he had not directed his mind to the issue.⁶⁷

Mr. Allard also recalled receiving this email. His evidence was that this message constituted the first time he had heard of leaks in the Library:

I reviewed the communications as information, and didn't discuss it. I didn't investigate it further. I received it, essentially, is the approach I took.⁶⁸

He testified that he never spoke to anyone about it. He specifically denied being told by anyone not to get involved. He said that, if he had investigated and found that the roof was very leaky and that there was structural deterioration in the building, he would have taken some action. The only reason he could give for not investigating is that he did not treat this information as a complaint.⁶⁹

Mr. Clouthier did not see this email. He testified that a building permit may or may not have been required to start the repairs, depending on their exact nature. It was his evidence that, if the workers were just sealing surface cracks with silicone or caulking, it was questionable whether a permit was necessary. If, however, they were trying to seal a lot of leaks over a large roof area, it would have to be done in a different way, would need engineers and architects, and would require a permit. It was his evidence that, had he seen the email, he would have wanted to know exactly what the Mall owners were doing up on the roof.⁷⁰

October 2006 Notice of Violation: The first official City action

On October 10, 2006, Tom Derreck began his duties as the City's chief administrative officer, replacing Mr. Kukoraitis, who had been acting chief administrative officer since Mr. Speck's departure on July 26. Mr. Derreck has diplomas in public and municipal administration from, among other institutions, Queen's University, the University of Western Ontario, and Fanshawe College. He had previously worked as a town clerk, city clerk, and chief administrative officer for a number of municipalities, including the Town of Fort Erie and the City of St. Catharines. He had also worked for six years as a local government adviser in the Ontario Ministry of Municipal Affairs and Housing, providing advice to both municipalities and individuals within the ministry about the application of provincial legislation and regulations in municipalities.⁷¹

Mr. Derreck explained that it was normal for the chief administrative officer to work closely with the mayor and to meet more frequently with the mayor than with other members of council.⁷² When he started his employment, Mr. Derreck noticed that the chief building official reported to the City clerk. He had not seen that relationship in other municipalities: he testified that, normally, the building services were attached to and reported to the city engineer or, if there was no engineer, to the chief administrative officer.⁷³

The situation facing Mr. Derreck: More leaks at the Library

Leaks at the Library had come to a head again two weeks before Mr. Derreck took up his position. On September 25, 2006, Ms. Morin emailed all members of the Library board (including Councillor McTaggart) and Daniel Gagnon, who, as director of project tourism and leisure, acted as the liaison between City staff and the Library. She wrote:

Because of the wet weekend we have a wet Library. We had covered the books in the “drip zone” area but unfortunately the books on shelves 2, 3, 4 & 5 have gotten wet (below the top shelf). We have 35 books drying out this morning.

I called on the Mall maintenance to dry vac the wet carpet and asked where they are on the roof with the new product. They are currently working on one seem [sic] . . . above the Library. So hopefully, if all goes well, they will have the new product installed above the Library before the weather gets too cold to work with the product.⁷⁴

Mr. Derreck started work on Monday, October 10, 2006. That day, he visited the Mall to acquaint himself with the City, not having lived in Elliot Lake before. He noticed signs of water damage, such as buckets set out to catch leaks, ceiling tiles missing in various areas, stained ceiling tiles, and yellow caution tape cordoning off sections where maintenance work was ongoing. He spoke to merchants and others in the Mall. He quickly learned that the leaks were a long-standing and consistent problem.⁷⁵

A few days later, he met Ms. Morin. She told him the history of the Library’s leaking problem and showed him the shelves covered with tarps, buckets on the floor, missing ceiling tiles, and dehumidifiers. He saw a hose coming from the area above the suspended ceiling and draining water into a bucket. He climbed a ladder into the area directly under the roof and saw water puddled on top of the light fixtures. Some of the light fixtures were not working. She told him that the situation had been like this virtually since the first day the Library moved into the Mall in 1989.⁷⁶

Mr. Derreck was shown photographs of the condition of the Library (see, for example, fig. 1.8.1). He testified that they depicted the Library in a better condition than on the day he saw it with Ms. Morin. On that occasion, it had been raining, and the water was dripping from the ceiling.⁷⁷ Mr. Derreck’s immediate reaction was that he did not understand why a library would be in the worst possible environment for books. He was surprised to learn from Ms. Morin that the Library was occupying the premises under a 20-year lease.⁷⁸



Figure 1.8.1 Conditions in the Library, fall 2006

Source Exhibits 11-64, 11-72

On October 11, 2006, Ms. Morin sent an email to Andrea Leddy, the City's personnel director and co-chair of the Joint Health and Safety Committee, and Tanya-Lee Williams, the City staff member responsible for workplace health and safety, with copies to Councillor McTaggart and Katherine Croxson, the chair of the Library board. She wrote:

[A]s you all know it is raining outside and also inside the library. We did put up tarps and buckets yesterday before leaving for the day. We do not have any damaged books but I have closed off the area most affected by the leaks. I may turn off the lights in that area if water gathers in the diffusers.⁷⁹

On Monday, October 16, 2006, at 12:30 p.m., Ms. Morin sent an email to all members of the Library board, Mr. Derreck, Mr. Gagnon, Ms. Leddy, and Ms. Williams:

I wanted to keep you all informed on what has taken place at the library since Friday. The Library was experiencing leaks in the "drip zone area", French collection area, staff washroom, storage room known as "old swap shop", A/V storage room behind circulation desk, and above the CAP computers.

Tarps had been covering the drip zone area for quite some time and the area most affected had been cordoned off to the public and staff. We had buckets in the aisles to catch the leaks but unfortunately that was still not enough. Water was accumulating on the floor very quickly. We also had 2 air blowers from Quest to help the area.

- 4:00 p.m. called Andrea Leddy (Health & Safety) and Dan Gagnon (Dept. Head) to assess the situation of the library to determine if the library should be closed due to hazardous conditions.
- Andrea Leddy and Dan Gagnon decided that it would be prudent to shut down the library Friday evening for their shift and also Saturday's staff was notified. I contacted all Library Board members to notify them.
- 10:00 a.m. Saturday, Oct. 14th I visited the library with my husband to check on the situation. We noticed that the tarps were starting to form condensation and the books were getting damp. We pulled the tarps away from the books in order the the [sic] air to flow between the books and the tarps.
- 4:00 pm Saturday, Oct. 14th I visited the Library once again to empty the "Drop Box" which was full and I also checked on the situation. It was still leaking quite heavily and I ensured that the books were ok.

I informed Katherine Croxson and we decided to call Bob Stirling from Quest to see if he can have someone take up the water from the floor on Sunday. He confirmed that this was possible at 1pm on Sunday.

- 12:00 noon, Sunday, Oct. 15 I met Katherine Croxson at the library to come up with a plan of action. We decided to move the books from the top and bottom shelves in the drip zone area. Unfortunately, approx. 50 books were damp and they are air drying. The full-time staff were called and they came in to assist with moving the books out of the area. Richard from Quest removed the water from the floor and sprayed a solution to mask the moldy smell. Bob Stirling installed a 3rd air blower. We decided to lift the tarps off of the floor in order for the carpet to dry.

I had the maintenance staff turn off the heat in the Library. The Library has to be kept below 70 degrees F and the humidity has to be below 50% to keep the mold from growing.

- 7:30 p.m. Sunday, I returned to the Library and pulled the tarps down to the floor in case of rain during the night.
- 8:00 a.m. Monday, Oct. 16th arrived at the library to find a very heavy mold smell. Andrea Leddy and Dan Gagnon came to the library at 8:35 a.m. to assess the situation. It was decided to close off all the area other than the non-fiction area, staff office, staff washroom and large print area. The area was closed off. Tom Derreck visited the Library and I gave him a tour of the area with a brief history of the problems. Katherine Croxson also came to the library and we decided that it would be best if she was to visit the new CEO, Tom Derreck.

Bob Stirling came to the Library and did a humidity and temp. test. Temp at 64 F and humidity at 47.6%. Bob did say that the humidity level was very high on the edge of the bookshelves. He will install dehumidifiers and more air blowers later today as they are freed up in different areas of the mall.

... More rain in the forecast for this evening and Tuesday. We will make sure the books are covered and buckets are in place to catch the leaks.

Keeping you all informed.⁸⁰

At 2:42 p.m. that day, Councillor McTaggart responded to Ms. Morin's email, copying the Library board, Mayor Farkouh, all members of council, Mr. Derreck, Ms. Williams, Mr. Gagnon, Ms. Leddy, and Robert deBortoli, who was at that time the City's director of operations. She wrote:

Thank you so much for your e-mail. As you know, Phil and I were at the Library on Friday at around 10 to 5 p.m. when you were busy closing the library down. We observed the awful mess, the water pouring through the ceiling into all of the plastic containers you and your staff had on the

floor, and the tarps covering all of the books and the signs you had posted.

We felt sick about the whole situation as I know you and your staff do as well.

These are definitely extremely unsafe working conditions and a health hazard.

We had discussed this problem at our Library Board meeting on Thursday night and, of course, that night, we had an early winter storm which has only made things worse.

I myself was at the Mall on Saturday afternoon between 2:15 p.m. and 3:00 p.m.

The first place I stopped at was the Library to peek in through the windows. I also observed that the Bank of Nova Scotia has water coming down just inside their sliding doors (if the money starts to get wet, there will be a public outcry)! There are also other stores, as you know, experiencing leaks. *The thing that I am really worried about is the possibility of the roof caving in with cars parked up there.*

*It happened a few years ago at the Station Mall, I think it was, in Sault Ste. Marie, Ontario, but I do not think that they had cars parked on the roof. It could happen here.*⁸¹ [Emphasis added.]

"The thing that I am really worried about is the possibility of the roof caving in with cars parked up there."

– Councillor McTaggart

Despite the dire (and prophetic) warning from Councillor McTaggart, Mayor Farkouh did not recall receiving this email. He had no memory of anyone ever raising the possibility of the roof caving in. Nor did he recall receiving, with all members of council, an email the next day from Ms. McTaggart forwarding a report from Ms. Morin that the humidity in the Library had reached an unacceptable level for books. When asked whether he had ever considered the effects of water on the steel that supported the building, given what he knew about how long the leaks had been ongoing, he replied:

"I didn't really connect the dots, no."

– Mayor Farkouh

"I didn't really connect the dots, no."⁸²

Mr. Derreck takes action

Preliminary inspection

Mr. Derreck, however, reacted quickly after receiving these emails and visiting the Library himself on October 16. He confirmed that, based on what he saw, the email from Ms. Morin accurately described the conditions. He spoke with Councillor McTaggart and she told him she had been addressing this ongoing problem with various municipal officials, the mayor, and council, without success.⁸³ He also responded to Ms. McTaggart's email:

I was over at the library this morning and also discussed the matter with Dan G[agnon] this afternoon and am obtaining a copy of the lease agreement from Lesley [Sprague] for a read-over. As you've correctly advised Sue [Morin], I'm a bear when it comes to libraries and will do all that I reasonably can to

advance the health and well-being of ours. Sue mentioned that this long-standing leakage problem has interfered with her ability to im[p]lement various programs and to make the best use of the funds and resources placed under her care. That won't do at all.⁸⁴

Mr. Derreck made a note in his "Business Action Record," a document he updated regularly, dated October 16. Entitled "Library Closing Due to Water Leakage," that note listed eight questions, among them the following: "Who is in charge of the matter & following up?" and "Past occurrences & ongoing problem – Why no resolution?" The note indicated that these issues would be put on the agenda of the next day's management meeting.⁸⁵

Mr. Derreck testified that he went to the Building Department office to see Mr. Allard, and, because Mr. Allard was out of town, he spoke with Mr. Clouthier.⁸⁶ Mr. Derreck asked to see the Building Department's file on the Library and the Mall, expecting to find inspection notices or perhaps orders relating to building violations. Mr. Clouthier told him that there were no such records and that he knew nothing about leaks at the Library.⁸⁷ This testimony is consistent with Fire Chief Paul Officer's evidence. Chief Officer had been a property standards officer, a building inspector, and then chief building official from 1981 until September 2002.⁸⁸ He testified that the Building Department file, which he reviewed, did not contain any property standards complaints from the Mall tenants, employees, or patrons. He did not issue a Property Standards By-law Order against the Mall or the Hotel during his time in those positions.⁸⁹

The testimony is also somewhat consistent with Mr. Allard's evidence, noted above, that the August 25, 2006, email from Councillor McTaggart was the first he had heard of leaks in the Library. He did not treat the message as a complaint and did not investigate it.⁹⁰ He was not asked if he put it in the Building Department's file on the Mall; not doing so would be consistent with his practice of not treating it as a complaint.

Mr. Clouthier testified that, when Mr. Derreck came to see him on October 18, 2006, he was not aware of the events described in the emails above. He said that, if he had received the email in which Councillor McTaggart expressed her fear that the roof might cave in, it would have been investigated, "If it was a complaint."⁹¹

Mr. Derreck told Mr. Clouthier that he should go over to the Library and do an inspection.⁹² Mr. Derreck testified that he was concerned about the potential liability of the City, given that saturated tiles were falling down. He said that he was concerned that, with leaks of salt-laden water coming from the parking lot above the Mall, and with leaks in various places throughout the Mall over 27 years, there might be a structural concern. There was also potential for problems related to water getting into electrical fixtures. As Mr. Derreck put it in an email to Councillor McTaggart later that day:

[I]t concerned me that no inspection had been done to this point – which could leave the City hanging out to dry – or at least embarrassed – if anyone were to be hurt or made ill, or a business forced to shut down or suffer any loss because of the leakage dilemma. Health and safety in general is another issue that begged action and a report by our inspector.⁹³

Mr. Derreck testified that Mr. Clouthier initially appeared reluctant to conduct the inspection himself, suggesting that Mr. Allard should deal with it on his return to the office the next day. Mr. Derreck told him that he had to conduct an initial inspection that day.⁹⁴

Mr. Clouthier then went over to the Mall. He saw that the Library roof was leaking in many places. Ceiling tiles were missing, buckets had been placed to catch the water, tarps had been put over the books, and the carpet was wet. It was clear to him that it had been leaking badly for quite a while. He did not take a ladder, so was unable to go above the ceiling tiles. He did use a flashlight to look above the ceiling where the tiles had fallen and was surprised at the severity of the leaking. He testified, "[I]t was dripping from everywhere." He did not look at any other locations in the Mall. He took no notes or photographs. A video filmed in the Library on October 18, 2006,

was shown during his evidence, depicting the situation he described. He testified that, when he visited the Mall, the situation was similar to what was shown in the video, but not quite as bad. He returned to city hall and told Mr. Derreck what he had found. They agreed that he and Mr. Allard would conduct a second inspection the following day.⁹⁵

Consultation with Library and health and safety staff

Mr. Derreck met with Ms. Morin, Ms. Croxson, Mr. Gagnon, Ms. Leddy, and Ms. Williams on October 18 as well. Following the meeting, Mr. Derreck prepared a “Draft Action Plan,” which set out what the group had proposed. He circulated it to the attendees at the meeting and to Mayor Farkouh, before implementing all the recommendations. It stated, in part:

Proposed Actions

...

1. ...

Sue will also provide a summary of the notices given to and conversations had with the building manager about the leakage, damage and other effects and requests made for remedial action (dates & times, written and verbal) and responses received.

2. Andrea Leddy and Tanya Williams will contact the Provincial Ministries of Labour and Health and report issues of work stoppage and dangers to health and safety (from water leakage, mold, etc., and expressed fears of a potential roof cave-in at adjacent units). Inspections will also be requested ...

3. Chris Cloutier, Building Inspector has been directed to perform an inspection of the affected mall areas this afternoon and to thereafter (priority asap) provide Tom with a summary of his findings and recommendations. *(in order to protect the Library and the City from being found in neglect of their responsibilities and/or being assigned culpability in the event that disease or injury should arise from water damage or structural failure. [Emphasis in the original.]*

...

5. Tom will then contact the City Solicitor (M. Virginia MacLean), fill her in, and get her advice about Tom proceeding to contact the mall owner directly, by telephone and subsequent email and written communication – to hopefully elicit a quick and effective resolution of the problem on the owner’s part as well as demonstrating and recording due diligence and a proactive response to the matter on the City’s part ... particularly because the issue impacts other commercial areas of the building and poses a potential health and safety threat to members of the general public as they visit and shop.

...

6. The Mayor and members of Council will be informed – via written summary – of actions taken, so as to ensure that they’re all in the picture before the weekend.

...

7. At Council’s regular meeting on Monday, October 23rd, Tom will provide a general overview of the matter to date – with the attendance and support of Katherine Croxson – together with a recommendation that an In-Camera session be initiated to discuss legal and property issues arising out of the situation.

8. *Council will give direction – particularly if the City’s building inspection report recommends closure of the whole or some part of any affected commercial areas and/or if we receive legal advice suggesting actions that the City or Library might consider as a response to getting no or unsatisfactory remedial action and compensation on the mall owner’s part. [Emphasis added.]*

...

I spoke briefly about this with Mayor Farkouh just after our meeting and have copied this to him with a request for his views and advice.⁹⁶

Consultation with Mayor Farkouh: two different versions

Mr. Derreck spoke with Mayor Farkouh after he met with Mr. Clouthier. He told the mayor that he (Mr. Derreck) had been informed that the City had never responded to the leakage situation and suggested that this report was surely not true. He said that Mr. Farkouh’s reaction was one of surprise that he was “coming on” the way he was; the mayor was skeptical because Mr. Derreck was new in town, and he (the mayor) questioned if all of this action was really necessary. Mr. Derreck testified:

There was some remark, it might not have been that day, it might have been a day or so later, but perhaps understandably too, that I don’t go running off doing something that is going to negatively impact businesses or unnecessarily impact the mall in an inappropriate way. And I think there was a bit of coolness too because if I’m correct the underlying message is that some people had been seriously asleep at the switch. It was a combination of things. But he did not discourage me.⁹⁷

“And I think there was a bit of coolness too because if I’m correct the underlying message is that some people had been seriously asleep at the switch.”

– Tom Derreck

Mr. Derreck made an entry to his Business Action Record which follows a similar vein. He wrote on October 19:

Draft action plan approved by all. Discussed briefly with Mayor, who approved of what has been done to date and noted the economic sensitivity needing care in how we proceed (*ie: We don’t want to bring about a closure of any part of the mall and thereby put it in jeopardy while at the same time showing due diligence of action on the City’s part from the standpoints of health, safety and addressing the costs emanating from leakage – now topping \$12,000.*)⁹⁸ [Emphasis in the original.]

Mr. Derreck, when asked about this entry, testified:

Well, the Mayor was concerned about this ... going very fast. And he was concerned that I don’t do anything or bring anything on that is going to interfere with the ongoing operations of the Mall.

Q. And what was your reaction to that?

A. Well my reaction was, and this was a ... friendly conversation ... I emphasized to the Mayor that these other issues ... are in play. So I’m aware that I’m not going to do anything that’s ... not intended to ... be going about with cleats on my shoes and causing negative conditions to appear suddenly. So no ... closing the Mall was not in my mind.⁹⁹

Mr. Farkouh’s evidence was different. He recalled speaking to Mr. Derreck about the Draft Action Plan and agreed that he had approved of what had been done to that point. He denied discussing the economic sensitivity of the situation at all. He agreed, however, that the situation was economically sensitive and that such sensitivity was even more acute in Elliot Lake than a mall closing would be in another community – because of its importance to the Retirement Living program and to the entire city.¹⁰⁰

Mr. Farkouh’s evidence varied significantly from Mr. Derreck’s note in his Business Action Record as well as his testimony on a potential closure of the Mall. Initially, Mr. Farkouh testified:

And in my recollection, I also pointed out to him that we should follow all the appropriate legal steps to ensure that all the due diligence is being done, and if that should lead to the ultimate closure, partial or otherwise, then we’re on sound foundation.¹⁰¹

After further questioning, however, he not only denied saying “we don’t want to bring about a closure of any part of the mall and thereby put it in jeopardy” – as Mr. Derreck had written in his Business Action Record – but denied discussing the subject of closure in any way.¹⁰²

I conclude, for the reasons set out below, that Mayor Farkouh had given Mr. Derreck a warning against putting the Mall in jeopardy, as set out in italics in his Business Action Record.

Second inspection

On October 19, Mr. Allard returned to Elliot Lake. Mr. Clouthier told him of the events of the previous day, and they then conducted a joint inspection of the Mall. Mr. Allard sent his report to Mr. Derreck. It read in part:

- This appears to be the first time in the past 4 years an ongoing leakage problem with the Mall roof has been brought to the attention of Building Department staff for either structural concerns or property standards compliance matters.
- Three tenant areas of the building were briefly reviewed; Library, Northern Reflections, Zellers. These are locations where roof leakage is evident. Dollarama apparently has leakage problems, as well, but we did not review this area. Northern reflections was closed due to the leakage and some of the stock was removed to other areas of the mall. ... The Zellers Store has ceiling tiles removed and tubs placed on the floor where leakage was occurring. In the one area of the store that we looked into the ceiling space (personal hygiene products dept.) a steel beam was found to be missing a portion of it's [sic] fire protection material where leakage and rust occurred. In Zellers there appeared to be quite a number of isolated leakage points through-out the store.
- The Library tenant space appeared to be the most extensively damaged of the locations reviewed. At the time of the inspection there did not appear to be a lot of water entering the building in the fiction book area, however, a small amount of dripping was occurring from soaked insulation. Tiles were removed along a beam and drain pipe run; tarp covered book shelves; large containers to collect water were on the floor and fans & dehumidifiers were running to dry out the area. This general area of the Library was cordoned off to prevent entry by the public. The exposed ceiling area in view was examined with a flashlight from the floor only. Insulation with a foil-type backing was in place against the roof deck. The main roof beam in this area had approximately a ten foot length of the fire protection material missing from the bottom flange and had a crust of rust over the entire exposed area. Little else could be seen, given the vantage point and remaining material covering the structure.
- In any of the areas observed, there was nothing seen or mentioned that would lead us to believing the structure is in imminent danger of collapse or for that matter that it is any where close to this condition. *However, the information that we were given, and the fact that there is substantial rust in the leak areas is testimony that this is a long standing and ongoing leakage problem. The concern that this raises is that the continuous entry of water onto the steel structure may have had or may still have an adverse impact on the structural elements and it's [sic] connections. To dispel any of these suspicions, a structural review of the leak areas by a Professional Engineer will be necessary.*
- Concerns with respect to the loss of fire protection material from portions of the steel structure has been passed on to the Fire Chief this afternoon and a follow-up inspection has been conducted by Fire Department personnel.

While on site last Thursday, we reviewed the remediation that was being conducted on the Roof/ (Parking Deck) and Mr. English [sic] explained the process in considerable detail. He appeared to be extremely knowledgeable in applying Dow-Corning silicon sealants and claims extensive experience with very similar projects and problems as that at hand. The repairs involve removing the existing urethane sealant at all of the joints and cracks in the concrete slab surface (several hundred thousand linear feet) routing and etching the joint, placing of a closed cell foam backing rod into the crack and applying a specific Dow-Coring silicon product to seal the joint ... When requested, Mr. England was unable to provide a written specification or plan for the overall roof leakage remediation. The level of concern for both the owner and affected tenants that an unwritten remediation program and schedule can not be all that high and should be formalized.

At this point, in accordance with the Levels of Service Policy, we will be involved in Property Standards enforcement based on a complaint of a tenant (the Public Library). The focus of our involvement will be in regards to answering concerns on the structure as a result of the leakage and that the leakage itself be resolved. We will be issuing a notice of violation to the owner tomorrow in this regard.¹⁰³ [Emphasis added.]

Mr. Allard explained in his evidence that his reference to not having seen anything that would lead him to believe that the structure was “in imminent danger of collapse” was inserted in the report as a reaction to Councillor McTaggart’s concern, as expressed in her email, about the roof caving in with cars parked on it. He testified that he concluded there was no such imminent danger because “it didn’t look like there was steel hanging loose or, you know, ready to topple over.” He did not look at any of the connections of the steel beams; he stood on the floor and shone a flashlight from 10 feet away onto a beam.¹⁰⁴

Mr. Allard testified that, as indicated in the portion of the report in italics, he had concerns about the condition of the structural steel and wanted an engineer to give the City advice on whether it was structurally sound. He never got such a report.¹⁰⁵ Nor did his successors until October 2009, three years later. And that report failed to provide the assurances that the City had sought, as I will later explain.

Legal advice for the City

Mr. Derreck also sought legal advice from Virginia MacLean, a lawyer who had been advising the City of Elliot Lake for many years. He testified that he was concerned that, if the Mall was closed as a result of his actions, he wanted to be certain that “any influence I bring into play is on firm ground.” He was concerned that the Library’s lease with the Algo Centre made it difficult for the Library to have any remedies against the Mall’s owner for damages resulting from the leaks. He was also concerned about the City’s potential responsibility for damages to the Library’s patrons, given that the City funded the Library and was required to approve its lease.¹⁰⁶

City Council approval of Mr. Derreck’s recommendations

Mr. Derreck recommends taking action and advises council that he has not done anything that might result in the Mall’s closure

Mr. Derreck prepared a report to City Council about the issues arising as a result of the water damage to the Algo Mall and the Library before its meeting of Monday, October 23. That report summarized Ms. MacLean’s legal advice:

Members are aware that a severe leakage of roof water has disrupted Library services, damaged and/or destroyed some of the Library’s collection and physical resources, and adversely affected the operations of other commercial tenants.

Inspections of the Library and other tenant and public areas have been completed by the City’s Property Standards and Building officials, Fire Department and Health and Safety officer.

Exposed structural beams display rust and erosion of fire-retardant materials. Wet insulation, plugged and corroded run-off drains and leaky pipes between the roof and interior ceilings are also factors causing concern.

The matter has been discussed with the City’s insurance adjuster and with legal counsel, who has also reviewed the lease agreement.

All appropriate steps have been taken to meet the City’s legislative responsibilities in terms of safeguarding public health and safety, short of actually submitting reports to the Ministries of Health and Labour or doing anything else that might result in the mall’s partial or total closure.

Legal counsel has verbally recommended that;

1. The mall owner be formally provided with written notice of the inspections conducted, their findings, and the remedies to be undertaken and be advised that the cost of all consequential damage, loss and/or injury emanating from *internal as well as external structural failures* will rest with him,
2. The payment of rent be stopped as of the initial date of the leakage and placed in an accumulating trust account pending the final outcome of the matter,

3. Any remedy intended to be applied by the owner be first approved by the City's Building, Fire and Health and Safety officials and be carried out according to a program of inspections and staged approvals established by them,
4. The said notice be sent by registered mail and the owner be given seven (7) days to respond, from the date of his receiving the notice, and,
5. The City identify and provide any mortgagor with a copy of the said notification.¹⁰⁷ [Emphasis added.]

Mr. Derreck concluded his report by recommending to council that he be authorized to forthwith implement Items 1, 2, 3, and 4 of the recommendations provided by Ms. MacLean.¹⁰⁸

Mayor Farkouh warns Mr. Derreck against closing the Mall, and this advice affects Mr. Derreck's recommendations

Mr. Derreck was asked why he had pointed out in the report that "all appropriate steps had been taken to meet the City's legislative responsibilities in terms of safeguarding public health and safety, short of actually submitting reports to the Ministries of Health and Labour or doing anything else that might result in the Mall's partial or total closure." He said he included this sentence because the mayor had already expressed his concern to him about closing the Mall, and he (Mr. Derreck) was going to stop short of anything that would lead to that result; he had no authority to bring about a closure. He testified that he showed this report to Mayor Farkouh before he sent it to council. He described the mayor's reaction as "stoic." He said the mayor did not seem surprised about the possibility of the inspection resulting in an order to fix the leaks.¹⁰⁹

Mr. Derreck was also asked why he had not recommended to council that Ms. Williams and Ms. Leddy contact the provincial ministries of Health and Labour and report dangers to health and safety caused by leaks, as he had said he would in his Draft Action Plan. He said that he had consulted with others, concluded that the situation was in hand, and so removed that recommendation. Instead, he assured council that the provincial government had not been notified. He denied that anyone had directed him to make that change, saying that he had made the decision after talking to other people.¹¹⁰

Mr. Farkouh was directed to this reference in Mr. Derreck's report to council and asked if he had had, at any time, discussions with Mr. Derreck about doing something that might result in the Mall's partial or total closure. He answered, "Not that I recall." He denied having such discussions with anyone else.¹¹¹

There is a clear difference in the evidence between Mr. Derreck and Mr. Farkouh on this point. Mr. Derreck testified that Mr. Farkouh told him at least once that he was concerned that Mr. Derreck not do anything that might bring about the total or partial closure of the Mall. He made a note in his "Business Action Record" which said so specifically. He then made it clear in his report to council that he had not reported anything to the provincial government which might have that effect. That evidence is all consistent with his having been warned by the mayor in his first week of employment to avoid taking any such steps.

Mr. Derreck's testimony is also consistent with the evidence of Fred Bauthus that, in both his first and second tenure as the chief administrative officer, there was a view, on the part of City staff and council, that the Mall was important to the community and the Library was important to the Mall. As Mr. Bauthus explained, the Mall was a major economic centre for the city and an important meeting place for the people. It was a significant part of promoting the city as a retirement community and, without it, the Retirement Living Program would suffer. According to his testimony, that view was shared by Mayor Farkouh and the council before he left in 2000, and by Mayor Hamilton and council throughout his second tenure between September 2007 and June 2010. City hall staff had an "understanding that it was important."¹¹²

Mr. Allard testified to this “understanding”:

And you know, you can, I guess, surmise ... what the political feelings of the community would be, certainly. The mall was a very important structure and I can see that there would be concern, that if it was gone, there would be big issues with the City.¹¹³

This “understanding” is also reflected in the email that Councillor McTaggart sent to Mr. Derreck on October 19, 2006, in which she suggested that the Building Department would not have inspected the Mall without a request from Mr. Speck. She wrote:

The building department was definitely aware of the problem. Why they have not been involved until now, I have no idea. In all fairness to Syl Allard, for whom I have the utmost respect, would Troy Speck have had to request them to do an inspection? If that is the case, then that is your answer.¹¹⁴

Mr. Farkouh denied saying that steps should not be taken which could lead to the Mall’s closure, but his testimony on this point was contradictory, as explained above. Furthermore, given Mr. Farkouh’s own acknowledgment of the importance of the Mall to the community, it is difficult to believe that he did not even mention the potential for closure of the Mall when it was front and centre in documents on which he was asked to comment.

I conclude that Mr. Farkouh did speak to Mr. Derreck, as the note in his Business Action Record (a contemporaneous record) indicates, and told him that the City should not take any steps to bring about closure of any part of the Mall. He did so knowing that the ongoing leaks could potentially cause structural damage to the Mall. He was aware of the long history of the leaks and probably knew that such leaks were potentially harmful to steel. Furthermore, the Draft Action Plan itself said, in italics, that there was a potential for structural failure. I also conclude that, as a result of receiving this advice from Mayor Farkouh, Mr. Derreck did not direct that the Ministry of Labour and the Ministry of Health be notified and took pains to assure council in his October 23 report that he had stopped short of taking any steps that might result in the Mall’s total or partial closure.

Council members know of the potential for structural damage to the Mall, yet they avoid any measures that might cause closure

Members of council knew that Mayor Farkouh had stopped short of taking any steps that could result in the Mall’s total or partial closure. They also knew that the leaking water could potentially cause structural damage that could lead to injuries. Mr. Derreck had explicitly referred to the risk of such damage in his report.

Not all councillors testified before me, but Mr. Hamilton did give evidence. He was a councillor in October 2006 and was at the meeting of October 23. He answered questions from Commission counsel as follows:

- Q. So he was telling you that the lawyer said, and he agreed, that there [were] potential structural failures which could cause injury, right?
- A. That is what he was telling us, yes.
- Q. And that is just common sense if there is rust on the structural beams, right?
- A. No, I don’t think I could give you a competent answer whether a rust on a structural beam would cause a failure. I’m not a structural engineer, sir.
- Q. Well, did you know that the beams held the building up?
- A. I knew some beams held the building up, yeah.

Members of council knew that Mayor Farkouh had stopped short of taking any steps that could result in the Mall’s total or partial closure. They also knew that the leaking water could potentially cause structural damage that could lead to injuries.

Q. Well, would you know that a beam that is called a structural beam held the building up?

A. Yes.

Q. And did you know that when metal rusts, it loses its strength?

A. It depends on the extent of the rust, sir, I would think. But again, I'm not a structural engineer, so I don't think this discussion is going to take us very far.

...

Q. So you knew, as you said, that rust on metal could cause it to lose its strength depending on how far it went, right?

A. Well, that makes sense, yeah.

Q. So can't we agree that you and all Council knew as of the time you got this report that there was rust on the beams that might cause structural problems?

A. According to this report, yes.

Q. And you had no information to the contrary, right?

A. No.¹¹⁵

Council went into private session (appropriately since they were discussing legal advice) and, on resuming the public session, passed a resolution authorizing Mr. Derreck to "forthwith implement remedies as detailed in the report."¹¹⁶

Mr. Hamilton testified that there was no discussion of Mr. Derreck's recommendation to refrain from notifying the ministries of Labour and Health or of his assertion that he had taken no steps to bring about partial or total closure of the Mall.¹¹⁷ In approving Mr. Derreck's remedies, however, council was tacitly endorsing this approach.

Mr. Allard was present at the meeting and knew that council had made this decision while in receipt of the advice, which may well have originated in his report, that there was potential structural damage at the Mall.¹¹⁸ This, together with his knowledge of the "political feelings of the community," probably influenced his actions (or inaction) regarding the Mall before he left the City's employ.

October 24, 2006: Notice of Violation and Order to Conform to the Fire Code

Earlier on October 23, Mr. Allard had telephoned Chief Paul Officer to advise him that, during his inspection at the Library and at Zellers, he had noticed that the fireproofing material protecting the structural steel had fallen off, leaving sections of the beam exposed. Mr. Allard advised Chief Officer that he felt this decay was a *Fire Code* issue. Chief Officer asked Ken Barnes, an officer with the Elliot Lake Fire Department, to conduct an inspection. Mr. Barnes confirmed Mr. Allard's observations.¹¹⁹

The next day, October 24, 2006, Mr. Allard issued a Notice of Violation to Eastwood Mall Inc. The notice stated:

An inspection on October 19, 2006 has revealed that a provision or requirement of the following By-Law(s) have been contravened. Legal action may be instituted unless this violation is rectified. You are hereby directed to correct the following violation(s) forthwith.

VIOLATION: section 5.(1)(a) [of By-law 03-29, the Property Standards By-law] The Roof of a building shall be maintained in a watertight condition so as to prevent leakage of water into the building, and where necessary, shall be maintained by the repair of the roof and flashing or by applying waterproof coatings or coverings ... The roof drainage system, where present, shall be kept in good repair, watertight, and free of health and accident hazards. Leakage was observed at various points within the Algo Centre Mall including numerous locations in Zellers, Northern Reflections, and the City of Elliot Lake Public Library.

REMEDY: Carry out repairs of the existing mall roof/parking surface to prevent leakage of water into the building including repairs to the roof drainage system. Within 14 days of receipt of this notice, provide a written description of a repair program that will be undertaken to achieve a watertight roof and include a schedule outlining the time frames necessary to have the work completed.

VIOLATION: Structural Capacity – Every part of a building shall be maintained in a structurally sound condition and so as to be capable of sustaining safely its own weight and any load to which it may normally be subjected. Materials that have been damaged or show evidence of dry rot or deterioration shall be repaired or replaced in a workmanlike manner. Water leakage over a long period of time at various locations in the mall has caused extensive rust on structural members and their location in some areas.

REMEDY: A review by a Professional Engineer of building structural frame in leakage areas must be conducted forthwith and a report certifying the acceptability of the existing condition or the remediation steps necessary to be taken to ensure structural capacity must be provided to the Chief Building Official by December 15, 2006.

Your property will be inspected within 3 days of receiving this notice to ensure compliance with the By-Law. If you wish to discuss this matter with the By-Law Officer, please phone 461-7230 during office hours. [Emphasis in the original.]¹²⁰

On October 30, 2006, in accordance with the resolution of council, Mr. Derreck wrote to Bob Nazarian, advising him that City Council had directed that

- inspections that had been conducted disclosed “conditions that violate various provisions of Provincial Acts and regulations and of City by-laws regarding the structural integrity of the mall building, and the health and safety of tenants and members of the public who visit and shop at the mall”;
- the cost of all damages would rest with Eastwood;
- the City would stop paying rent for the Library space pending a satisfactory outcome; and
- any remedy must first be approved by the City’s building, property standards, fire, and health and safety officials and be carried out by a program of inspections and scheduled approvals staged by them.¹²¹

The letter specified that Eastwood had seven days to respond. It was copied to a number of City officials, including Mayor Farkouh, Ms. Croxson, Chief Officer, and Mr. Allard.¹²²

On November 1, 2006, Chief Officer sent a letter to Bob Nazarian, advising him that the fire inspection had disclosed contraventions of the *Fire Code* and requested that he repair or replace the fireproofing material that had been removed or dislodged from the structural steel in accordance with the requirements of the Ontario *Building Code*. He also advised him that a building permit was required.¹²³

Conclusion: Mr. Derreck’s actions initiate the City’s first official action to try to fix the roof

With these steps, the City of Elliot Lake had taken the first official action, in its capacity as regulator of property standards, against the Mall. This building had been leaking, to the knowledge of the entire town, for the previous 27 years. Although conditions at the Library at this time were severe, similar conditions had existed before. Only 15 months earlier, Mr. Kennealy had told the chief librarian, Mayor Farkouh, and Mr. Speck that the experts had advised that a solution to the Mall’s “structural issues” would cost \$1.5 million, and that NorDev was not prepared to spend the money. That disclosure did not result in any action on the part of the City. I have no hesitation in concluding that, if Mr. Derreck had not been hired as the chief administrative officer in October 2006, these actions would not have been taken. Mr. Derreck had successfully caused City Council to take action. As a result, it could not be said by any member of the council that they were unaware of the situation.

At least one councillor exploited the situation and used it as the basis of his campaign in the election three weeks later, November 13, 2006. On October 24, 2006, Councillor Ken Rastin sent an email to a citizen who had left a note on his website complaining about the state of the Library. Carolyn Davie wrote:

My concern, and the concern of many people, is the deplorable condition of our public library. A quick visit would show you the situation. Approximately half of the library is closed due to water damage – *people are afraid that one of these days a car will come through the roof.*¹²⁴ [Emphasis added.]

Councillor Rastin's lengthy reply concluded:

I fully agree with you with regards to the deplorable state that it is in and has been in on numerous occasions over the years ... The library is in the top 5 issues that have been mentioned to me either through phone calls, email or during my in person visits at doors

...

Last night council began addressing the library issues and more specifically the leakage issues in the mall. The item went in camera and I intend to continue following up on it to find what details I can about current plans, and how, if elected, I can help effect these plans.¹²⁵

Councillor Rastin was re-elected. Unfortunately, the new council did not take any further steps to “effect these plans” until September 2009, almost three years later, despite numerous reminders about the state of the Library. In fact, it does not appear that council even inquired about the status of its only attempt at enforcement of its Property Standards By-law at the Mall.

Eastwood's initial response to the Notice of Violation: talk but no action

October 2006: Bob Nazarian, knowing about the potential for structural damage from the leaking roof, decides to sell the Mall

Bob Nazarian admitted that he knew about the severe water damage at the Library over the weekend of October 14 and 15, 2006.¹²⁶ He also admitted that at that time he “was certain that the roof was not repairable”¹²⁷ and “felt the roof was never going to work.”¹²⁸ He testified that, when he received the letter of October 30 which enclosed the Notice of Violation, he realized he had to deal with the roof. He decided then and there to sell the Mall at any price. He was asked for his reaction when he got the letter and testified:

A. I knew that I have to stop people parking on the roof. That roof is not made for the parking, and I don't know how did they come to the conclusion to make a parking on top of the roof with all kind of default regarding the core slabs, not being proper and topping which cracked all over the place, and dumped everything on me to repair and remedy and suddenly a City that is wake up with orders after orders, if you don't do it, we will do this, if not, if this, if that, there was not much I could do.

The only thing was that either I had to put a dome on top of it so that the water would not come in or I had to stop the cars from parking on top of the roof or I had to make additional parking.

This was the true advice that I could have got from myself. As an experienced person that I have worked so many years and I have solved so many problems, for the first time I am on the corner, that I cannot do it and I cannot back up.

So, that is the time when I asked my son to start marketing and get rid of this under any price or any situation.

Q. And was that when you made the decision to sell the mall?

A. Yes.¹²⁹

Bob Nazarian also admitted that, at this time, he knew that there was a potential for damage to the structural members and their connections caused by the salt-laden water. He attempted to resile from this admission but then reiterated it. He gave the following evidence:

Q. And when you read it [the notice of October 24] you realized Mr. Allard was concerned about the effect of water, which caused rust both on structural members and their connections. Did that surprise you?

A. No. Not at all.

Q. And were you aware at the time that there was a potential risk of damage to the structural members, that is the steel beams and the core slabs and their connections?

A. Under no circumstances, sir, I had any doubt that the structure of the building is sound and nothing to worry about. The only thing I was worried about is why I cannot repair this damned building.

Q. Mr. Allard – you'll agree with me that Mr. Allard was concerned, that there might be structural damage as a result of the leaks and the rust to the beams and their connections, right?

A. Yes.

Q. That's what he's telling you in this?

A. Yes, yes.

Q. And you knew that when you read it?

A. That's right. But at the same time, sir, I'm sorry I interrupt you but at the same time, this leak was continuing for over 30 years and nobody issued any violation order.

Q. And you knew it had been continuing.

A. Yes.

Q. At this time, in October –

A. At this time I knew.

Q. You knew that it had been continuing since the building was built?

A. Yes.

Q. And you knew that Mr. Allard had the concern that it might cause – might have caused structural damage to the beams and the connections?

A. Yes, Mr. Allard was doing his job.

Q. And did you agree with that there might be –

A. Possible.

Q. You agreed it was possible?

A. Possible, yeah.

Q. Possible that there was structural –

A. I didn't have doubt but – there is possibility.

Q. Possibility that, just to be clear, that there was damage to the structural steel and connections; right?

A. Right. Possible.¹³⁰

October 2006: Mr. Derreck speaks to Mall management

Mr. Derreck decided to speak to the responsible persons at the Mall personally before sending the Notice of Violation so that he could explain why this step had been taken. He met with Mr. Turner, the Mall manager, on October 24 or 25. Mr. Derreck testified that Mr. Turner was frustrated because, as he told him, he had been working hard to address the problem for some time. Mr. Derreck tried to explain to Mr. Turner that this action was necessary for the City's purposes, and now that he had the notice, the City would work with him.¹³¹ I presume Mr. Turner's reference to his hard work was the attempt to apply the silicone product suggested by Mr. England, which was abandoned that fall and not revived in the spring.

Bob Nazarian came to Elliot Lake about a week later and met with Mr. Derreck. Mr. Allard was not at the meeting. Mr. Derreck testified that Mr. Nazarian was upset because, in his view, he had been doing his best to deal with a problem that he had inherited. He complained that he had not been given full disclosure about the state of the leaks before he bought the building. Mr. Derreck impressed upon Mr. Nazarian the importance of getting the leaks fixed.¹³²

October 2006: Tom Turner recommends retaining an engineer

Bruce Caughill, who had done work in the Mall while it was owned by both Algocen and NorDev, heard there was a new Mall manager. He went to see him in the hope of getting some architectural work and found Mr. Turner supervising the workers who were applying sealant to the deck in an attempt to fix the leaks. Mr. Turner asked if he had any drawings for the Mall, and Mr. Caughill advised that he did.¹³³

The following day, October 25, Mr. Caughill emailed Mr. Turner, telling him that the drawings showed a 3-inch concrete topping on 8-inch precast concrete slabs. The slabs were 4 feet wide, so some of the cracks on the surface might be over the panel joints below. He advised that the parking deck drawings showed a total superimposed design load of 120 pounds per square foot (psf), so that, with the 3-inch topping of about 36 psf, about 84 psf would be left for cars and/or snow. He also told him that the *Building Code* required that garages be designed for 50 psf for passenger cars and 125 psf for unloaded light trucks. Finally, he advised Mr. Turner that snow can be quite dense and that they had measured it in other places at up to 10 to 12 psf.¹³⁴

Mr. Caughill noted in the email that the topping was not shown on the structural drawings, so it was not considered an integral part of the structure.¹³⁵ He did not tell him that the 1999 Halsall Associates engineering report on the roof said the opposite – that the topping *was* required to provide adequate structural capacity.¹³⁶ This issue, which had caused problems during the time Algocen owned the Mall, would also be important during Eastwood's repair efforts, such as they were.

Mr. Caughill testified that he also provided Mr. Turner with a copy of both the November 1998 and May 1999 Halsall reports: the first had spoken of the potential for structural damage;¹³⁷ and the second had proposed two methods to stop the leaks.¹³⁸ He did not, however, provide him with a copy of the email he received from Randy Beltramin of STEM Engineering dated September 8, 2003.¹³⁹ It noted that the Halsall report did not address the "continue as is' scenario, which NorDev is doing" (and which Eastwood had continued), instead of doing the extensive work that his firm had recommended, and stated that "this can have long-term detrimental results as the structure slowly deteriorates."¹⁴⁰ Bob Nazarian denied ever seeing the Halsall reports, although Mr. Turner testified that he sent them to him.¹⁴¹

Mr. Turner forwarded Mr. Caughill's email to Bob Nazarian the next day, recommending that he retain Mr. Caughill to review the structure of the Mall as required by the Notice of Violation.¹⁴² Bob Nazarian recalled reading the email from Mr. Turner, but not Mr. Caughill's email, which was part of and immediately below Mr. Turner's email forwarding it to him.¹⁴³

November 2006: Eastwood makes promises that are not fulfilled

On November 13, 2006 (one day before the deadline set out in Mr. Derreck's letter of October 30), Mr. Turner wrote to Mr. Derreck, providing Eastwood's "action plan regarding leaks in the roof of the mall." The letter enclosed a copy of the "project timetable" covering the repairs to be completed before the forthcoming snow conditions would stop the work. The timetable set out dates when certain portions of the roof would be repaired by ripping out the old caulking, then grinding, re-sealing, and caulking with the silicone product. More than half the target dates were in October; the latest date was November 14. Mr. Turner advised in the letter that they were already nine days behind schedule as a result of poor weather. He wrote:

As you are aware, this roof has leaked for the last 25 years and during that time a multitude of methods were used to patch joints and plug holes. Contrary to previous practices, our company has decided to repair the roof completely ...

Our plan is

1. to replace the aged urethane products in over 15,000 linear feet of joint with Dow-Corning 890SL silicone;
2. to replace five major expansion joint systems;
3. to remove at least ten drains and install new ones;
4. to cut out and epoxy some 12,500 linear feet of crack-line; and;
5. to repair damaged cement areas with a polymer-cement products; specifically Sika-Dur 35 and Armatek.¹⁴⁴

Mr. Turner continued: "We expect to have an engineer's report available to us in the near future and I will forward it on to you once it is received."¹⁴⁵ He testified that he made this promise because he had received Bob Nazarian's assurance that he would take care of it and get an engineer's report.¹⁴⁶ Mr. Turner noted: "[O]ne leak area continues to elude us in the library and we suspect it may be caused by the major expansion joint at the north ramp. Our crew started working on it today."¹⁴⁷ Mr. Derreck sent a copy of the letter to all members of council, Ms. Morin, Chief Officer, Mr. Allard, and Ms. Leddy, with a notation beside the last three names "for follow up as appropriate."¹⁴⁸

The promises made by Mr. Turner on behalf of Eastwood were not fulfilled. In his testimony, Mr. Turner said that Bob Nazarian responded to his suggestion that Bruce Caughill be retained by telling him that he (Mr. Nazarian) would take care of that.¹⁴⁹ He took no steps to do so, however, until months later. As explained below, he told Mr. Turner in January 2007 that he had agreed to retain Mr. Caughill.¹⁵⁰

Bob Nazarian gave a number of evasive answers when asked why it took him so long to retain an engineer. Initially, he testified that it was not surprising that it would take three or four months to hire an engineer.¹⁵¹ When asked why it was reasonable to wait that long when the Notice of Violation had required an engineer's report by December 15, less than two months later, he answered, "No comment."¹⁵² When asked whether there was anything else he could say to explain the delay in hiring the engineer, he testified: "Guilty as charged. What can I say?"¹⁵³

Bob Nazarian admitted that the promises made by Mr. Turner were not fulfilled. He testified that

- he was “not sure” whether they finished replacing the aged urethane products in over 15,000 linear feet of joint with Dow Corning silicone, but the result was “not good”,¹⁵⁴
- none of the expansion joints was replaced until the summer of 2008;¹⁵⁵
- the work to replace the 10 drains and install new ones was “probably” done;¹⁵⁶ and
- some of the cracks were cut out and treated with epoxy in 2006 and some in 2007.¹⁵⁷

As I have indicated above, in the spring of 2007 Bob Nazarian told Mr. Turner that the new product was too expensive and to return to using the product used by Retirement Living.¹⁵⁸

November–December 2006: The City does nothing to enforce the order

Mr. Hamilton became mayor on December 1, 2006. He testified that he never asked what remedies Mr. Allard had required Eastwood to undertake or what remedies had been implemented. He took no steps, until September 2009, to deal with these issues or to see that they were fixed.¹⁵⁹

Mr. Hamilton became mayor on December 1, 2006. He testified that he never asked what remedies Mr. Allard had required Eastwood to undertake or what remedies had been implemented. He took no steps, until September 2009, to deal with these issues or to see that they were fixed.

Mr. Derreck testified that, after he received the November 13, 2006, letter from Mr. Turner, he spoke to Mr. Allard on a few occasions and asked him “how things were going.” He received no specific information from him. Mr. Turner told Mr. Derreck that he had provided a copy of the Halsall report to Mr. Allard, and, although Mr. Derreck spoke to Mr. Allard about his having received the report from Mr. Turner, he did not read it himself. Mr. Allard did not tell Mr. Derreck anything about its contents. Mr. Derreck did not ask Mr. Allard whether an engineer’s report had been received by December 15, as required by the order. As he testified, “[I]t was his [Mr. Allard’s] order.” He did not speak to Mr. Allard after December 2006 about the notice.¹⁶⁰

Mr. Allard recalled receiving the November 13, 2006, letter from Mr. Turner. When asked whether he followed up on the letter, he said, “I think we basically monitored the situation.” When asked what that included, he testified that he “kept an eye on the documentation that was coming in” (which consisted of an email from Mr. Turner in January 2007 and one from Mr. Caughill in February) and, while he was visiting the Mall for other purposes, he noticed that they had equipment on the roof and were making some progress. He did not go to the Mall to see if there were still leaks. He did not ask the Library if there were still leaks, although he testified “there was absolutely not a word from the Library.” Until he left the position of chief building officer and property standards officer on May 30, 2008, Mr. Allard did not ask for any plans in addition to what was contained in the letter of November 13, 2006. He never received an engineering report.¹⁶¹

Mr. Clouthier was not provided with the letter of November 13, 2006. He was not aware, as the letter stated, that the leaks had been ongoing for 25 years. He did not know what steps Mr. Allard had taken to follow up on the notice. He was not asked to conduct any further inspections. He testified that, as far as he knew, Mr. Allard was handling matters following the inspection of October 2006. He also testified that, in his opinion, a building permit would have been required for the work outlined in the November 13 letter.¹⁶²

Had Mr. Allard checked, or had he been kept advised of the situation by City staff, he would have learned that the Library continued to suffer from leaks. On December 14, 2006, Ms. Morin sent an email to Mr. Derreck, Ms. Leddy, Ms. Williams, Mr. Gagnon, Councillor McTaggart, and the members of the Library board. She wrote:

I wanted to keep you all up-to-date with the situation of the leaks in the library.

Nov. 6: leaks in the French collection area, bucket req'd. Three wet tiles in Fiction area, no buckets req'd.

Nov. 7: leaks in French collection area, bucket req'd. Two wet tiles in Fiction area; no buckets req'd.

Nov. 8: leaks in French collection area, bucket req'd. Leaks in Fiction area over M-N authors, buckets placed on floor, area cordoned off.

Nov. 9: leaks in most problem areas; Fiction, French, wall between circulation desk and large print collection, office behind circ. Desk. Buckets were placed in French and fiction areas and fiction area cordoned off.

Nov. 13: leaked over the weekend, water gathered on tarps in fiction area. Carpets had just been cleaned on Nov. 10th.

Nov. 14: leaks in Fiction area, 2 buckets on floor, tarp covering small area, cordoned off.

Nov. 29: leaks between circulation desk and large print area. Bucket placed on floor.

Dec. 11: 3 wet tiles in fiction area but did not leak through. No buckets req'd.

Dec. 12: 3 wet tiles in fiction area, 1 wet tile between circ. Desk and large print area. Stained tiles had just been changed on Friday, Dec. 8th.

Dec. 13: leaks in fiction, French, wall between circ. Desk and L.P. area, and office behind circ. Desk. Maintenance removed "pregnant" wet tile between circ. Desk and L.P. area.

Dec. 14: 3 wet tiles in fiction area, no buckets req'd. Small tarp covering section.

To say the least, I am not looking forward to Spring '07.

Keeping you informed.¹⁶³

Both Mr. Allard and Mr. Clouthier denied any knowledge of the continuing leaks at the Library and testified that they had not been sent a copy of this email. Mr. Allard commented that he found it "curious" they were not copied with these types of communications.¹⁶⁴ I find it more than curious that he did nothing to determine whether the leaks were being dealt with.

Mr. Allard testified that he did nothing on December 14, 2006, about the fact that Eastwood had failed to comply with the requirement in the Notice of Violation to deliver an engineering report by that day. He testified that he "essentially accepted the statement made in the middle of November by Mr. Turner that they were retaining an engineer."¹⁶⁵

2007: Eastwood's promises to the City continue unfulfilled

January–February 2007: Eastwood gives the appearance of retaining Bruce Caughill to provide the engineering services required by the Notice of Violation

On January 9, 2007, after Bob Nazarian had authorized him to do so, Mr. Turner contacted Mr. Caughill and sent him:

- the Notice of Violation;
- Chief Officer's letter of November 1, 2006, outlining the *Fire Code* issues that needed to be dealt with; and
- Mr. Turner's letter to Mr. Derreck of November 13, 2006, and related correspondence and documents.¹⁶⁶

Mr. Caughill testified that, when he read the Notice of Violation, he realized that it was a "huge undertaking, and it was not anything that I would do. I would hire people to do [it]." He explained that the structural aspects of the work required were beyond his capability, and he would not have the resources to do it on his own.¹⁶⁷ The same day, Mr. Caughill wrote to Michael Kesin, a structural engineer, advising him that he had received the Notice of Violation, noting that "to answer the CBO's concerns there's quite an inspection regimen required. It's a small Mall but there are quite a few ceilings involved."¹⁶⁸

Mr. Caughill met Mr. Turner on February 20, 2007. Mr. Turner testified that, during that meeting, he and Mr. Caughill discussed what Eastwood was doing to address the leaks. They discussed the concept of putting a roof over the parking deck or paving it. He said that Mr. Caughill had concerns about the weight of the pavement on the roof. Mr. Caughill was not, however, being retained to fix the leaks. He was being retained to provide an opinion on the structural integrity of the building.¹⁶⁹

Two days later, on February 22, 2007, Mr. Caughill sent an email to Mr. Allard, writing:

To keep you informed.

Algo Centre Mall (Eastwood Mall Inc.) has retained us to provide assistance in this matter.

On February 20, 2007 I met with Mr. Turner on site to review the Notice of Violation. I provided Mr. Turner with a copy of a report that we had in our files: Structural Condition Assessment, prepared in May 1999 by Halsall Associates Limited.*

I believe this report addressed the water penetration and possible deterioration of structure that is the subject of the current Notice of Violation – but in 1999.

I have suggested that Mr. Turner provide a copy of this report for your records.

We will be working with Algo Centre Mall as they continue to repair the water leakage paths and any damaged members/components they come across.

An overall assessment will be conducted and a report submitted within six months. Copies of inspection reports will be submitted as they occur.

Should any changes in our relationship with Algo Centre Mall (Eastwood Mall Inc.) change in the interim, we will advise you immediately.¹⁷⁰

.....

* Note that earlier in his testimony, as explained above, Mr. Caughill testified that he had provided both the 1998 and the 1999 Halsall reports to Mr. Turner after his initial meeting with him at the Mall on October 24, 2006, the day of the Notice of Violation (Bruce Caughill testimony, May 10, 2013, pp. 9207–12). Mr. Allard testified that he received them in or about February 2007 (Allard testimony, April 29, 2013, p. 7045). Whenever the reports were sent, it is clear that they were received by Mr. Turner and the City (Turner testimony, June 4, 2013, pp. 12727–8).

Mr. Caughill does no work, contrary to his and Eastwood's promises to the City

As matters turned out, none of the expectations set out in this email came to fruition. Mr. Caughill did not do any work “with Algo Centre as they continue to repair the water leakage paths and any damaged members/ components they come across.”¹⁷¹ He did no work in relation to the Notice of Violation and never discussed any such work with Mr. Nazarian. He testified that he received nothing in writing from Eastwood about retaining him other than the copy of the email from Mr. Turner to Mr. Allard of January 15, 2007.¹⁷² He never presented a proposal to Eastwood or Mr. Turner for the work that he was going to do, and he did not get any scope of work instructions from Mr. Turner. Mr. Turner never raised the issue again.¹⁷³

Mr. Caughill testified that he did not do the work he had told the City he was going to do because he was not able to work out a retainer with Eastwood.¹⁷⁴ Mr. Turner testified that Mr. Caughill had told him that he and Bob Nazarian had had a dispute about getting paid – that Mr. Caughill had said he did not work for nothing.¹⁷⁵ Mr. Caughill testified that he had a dispute with Mr. Nazarian about payment for other work he had done for Eastwood in June and July 2007. It was his evidence that he was ultimately paid for that work by Eastwood, although Bob Nazarian initially refused to pay, saying that he had not approved the expenditure. Mr. Caughill testified that he was terminated in July 2007 and was paid in November 2007 after he wrote Mr. Nazarian a letter on September 4, 2007, outlining the work he had done for him and demanding payment.¹⁷⁶

Bob Nazarian's evidence was different. He testified that he was dissatisfied with Mr. Caughill's services on the other work he had done. He did agree, however, that he had not paid Mr. Caughill's invoices and that he terminated his services. Although Mr. Caughill testified that his termination occurred in July 2007, Mr. Nazarian's evidence was that it happened in November 2007.¹⁷⁷

I prefer Mr. Caughill's evidence about the termination of his services relating to the Notice of Violation.

Bob Nazarian never intended to hire an engineer to deal with the Notice of Violation

Other than telling Mr. Turner to retain Mr. Caughill, Mr. Nazarian had done nothing since October 2006 to comply with the Notice of Violation and produce an engineering report about the structural capacity of the building. He knew as of September 4, 2007, that Mr. Caughill was not going to do the work for him. In his letter of that date to Bob Nazarian, Mr. Caughill advised that he would notify the City of Elliot Lake of Eastwood's termination of his services on the fire safety and structural issues raised by the Elliot Lake Fire and Building Departments.¹⁷⁸ (He did not do so until September 2008.)

Bob Nazarian was asked why he did nothing to hire another engineer after Mr. Caughill's services were terminated, given his own knowledge of the potential structural problems caused by the water on the steel. He responded:

The water penetration was nothing new. And I wonder, suddenly, how come the City back up and start ordering one after another do it now and do it now or else.¹⁷⁹

I conclude that Bob Nazarian never intended to spend the money required to obtain an engineering report following the Notice of Violation. The best evidence of his intentions consists entirely of his inaction. Nor did his treatment of the leaks change through the spring, summer, and fall of 2007. He continued to deal with them the same way that they had always been treated.

The City does nothing to ensure compliance with the Notice of Violation

Mr. Turner advises Mr. Allard that he will be meeting with Bruce Caughill during the week of January 22, 2007, but Mr. Caughill does not provide a report

On January 15, 2007, Mr. Turner emailed Mr. Allard, advising him that he would be meeting with Caughill and Associates at the Mall the following week to begin an onsite inspection of the roof to identify any fire-retarding materials needing replacement. Mr. Allard wrote on a copy of the email: "Follow-up regarding the structural report from P. Eng. Listed in the Order to Comply – do further follow-up on Thurs. Jan. 25/07."¹⁸⁰ As noted above, the meeting between Mr. Turner and Mr. Caughill took place on February 20, not the week following this email. It appears that Mr. Allard did not follow up on January 25, as he had noted he would. Had he done so, he would have learned that Eastwood was moving more slowly than promised.

Mr. Caughill had no communications with anyone at the City of Elliot Lake about his work with respect to the Notice of Violation after sending the email to Mr. Allard on February 22, 2007, until, as is seen in a later section of this Report, he advised Bruce Ewald, Mr. Allard's replacement as chief building official, and Chief Officer in September 2008 that he would not be submitting a report.¹⁸¹ Mr. Caughill testified that neither Mr. Allard nor Chief Officer ever followed up with him after February 2007, although Chief Officer's evidence was that he was "almost positive" that he had called Mr. Caughill in September 2008, the week before that letter was sent.¹⁸²

The Halsall reports are provided to the City and ignored

The Halsall reports, which were provided to Mr. Allard, did not revive the City's interest in compelling Eastwood to obtain an engineering report about the structural capacity of the Mall or to repair the leaks. Mr. Allard acknowledged that he received them and that he realized they articulated concerns about the Mall: that water was leaking onto the structural members, that water was penetrating the roof, and that the roof was far from watertight.¹⁸³ Nevertheless, Mr. Allard did nothing to enforce compliance after receiving the reports.¹⁸⁴

Senior City staff know of the ongoing leaks

City officials were well aware of the continued leaks at the Mall. Indeed, it was common knowledge in the City. Mr. Turner testified that when he saw staff from city hall – Mr. Allard, Mr. Derreck, and Mr. Clouthier – in the Mall during lunch hour, he would speak with them. The topic was often the leaks. He testified:

You know, it was a standing piece of conversation around Elliot Lake when there was heavy rains going on. You know, instead of saying, hi, how are you? It would be more like, hi, how are the leaks. So very common.¹⁸⁵

Mr. Derreck's replacement, Mr. Bauthus, is not told about the Notice of Violation; despite learning of continuing problems, he does nothing

Mr. Derreck's employment with the City of Elliot Lake was terminated on July 24, 2007, a bare nine months after he was hired.¹⁸⁶ On September 4, 2007, Mr. Bauthus commenced his second term as the chief administrative officer.¹⁸⁷ Mr. Bauthus testified that, on his return, he met with various City managers to bring himself up to date on what was happening and what the current issues were. He met with Ms. Sprague (the City clerk, to whom Mr. Allard reported), Mr. Allard, and Fire Chief Officer. He was not told about the Notice of Violation. I have difficulty understanding that he would not have been given that information within two weeks of his taking on the job. Mr. Derreck had learned of the history of the leaks, caused inspections to be made, and had it discussed and dealt with at council.¹⁸⁸

Mr. Bauthus learned, however, very shortly after his return that the Library wanted to move out of the Mall because the people who worked there were completely fed up with the situation with the leaks.¹⁸⁹ In October 2007, Ms. Morin prepared a report for the purpose of obtaining a new facility for the Library. It contained, among other things, a summary of a survey of Library users which had been conducted earlier that year. When asked what they liked least about the Library, the most frequent response – more than twice as frequent as the next – was "leaky roof / water damage."¹⁹⁰

On October 18, 2007, Ms. Williams, the City's representative on the Joint Health and Safety Committee, prepared a report entitled "Library Leaks." It noted that on October 13, 2007, the employees who came in on Saturday noticed leaks starting in the Library, so they set up the "drip zone"; when they turned on the lights, sparks were noticed in the ceiling lights; the lights were turned off and remained off; Ms. Williams and the employee representative on the committee decided on October 18 to leave the lights off. The report also noted that large amounts of water were still dripping from the roof, missing the tarps intended to protect the books, and that Councillors Doug Souliere and Reinhardt "came in to view the leaky situation to get a better idea of what the Library was dealing with and how important it is to get the Library out of the Mall."¹⁹¹ Mr. Bauthus testified that he saw this document and knew that Ms. Williams thought it was important for the Library to move out of the Mall for health and safety reasons.¹⁹²

As was indicated by a document produced by the City, Mr. Bauthus also testified that, as of October 26, 2007, the City had reserves set aside of \$208,938 for future Library rent, and \$485,674 for the Library building. In his testimony, Mr. Bauthus said that these reserves meant that the City had set aside this amount of cash, from prior years' excess of revenues over expenditures, to be spent on Library accommodation. These were real, not nominal, accounts – the money was in the bank.¹⁹³ Given the available funds, the concerns expressed by the Library and Ms. Williams, and the fact that the lease at the Mall was coming to an end, Mr. Bauthus testified that he had engaged in a discussion with Mayor Hamilton about whether the City should be looking for alternative accommodation for the Library. He said that, although he could not recall what was said at that specific discussion, Mayor Hamilton was not generally in favour of the Library moving out of the Mall. As I explained above, he testified that the mayor felt the Mall was important to the community, and the Library was important to the Mall.¹⁹⁴

The mayor and the council know of the continuing leaks and do nothing to inquire about the response to the Notice of Violation

On November 5, 2007, the City's Economics and Finance Committee received a report from the Library board about the need for a new or renovated Library facility. The minutes of the meeting note that water leakage

It was also clear that there were ongoing health and safety concerns resulting from the leaks. Yet no steps were taken to enforce the Notice of Violation issued a year earlier after a full discussion in council. Remarkably, council did not even ask for a status report from the Building Department.

has been a problem in the Mall and that the Library board had passed a motion the previous week rejecting relocation within the Mall. The mayor, Councillors Reinhardt, Morissette, Patrie, and Freitag, and Mr. Bauthus were all in attendance. I conclude, as Mayor Hamilton admitted in testimony, that it was clear to them that the leaks were continuing and that the Library, being extremely dissatisfied with its situation, again wanted to move out of the Mall – just as it had two years earlier.¹⁹⁵ It was also clear that there were ongoing health and safety concerns resulting from the leaks. Yet no steps were taken to enforce the Notice of Violation issued a year earlier after a full discussion in council. Remarkably, council did not even ask for a status report from the Building Department.

Mr. Allard knows of the potential risks and does nothing

Mr. Allard was questioned closely about his conclusion that there was no imminent danger or a structurally compromised situation in the Mall when he conducted his inspection on October 19, 2006. He testified that, if he were of the opinion that it was unsafe, he would have issued an emergency order under the *Building Code Act*. He agreed, however, that the only basis for his conclusion was one instance of looking at a beam from a distance of 10 feet with a flashlight. Mr. Allard confirmed that he did not have the qualifications to come to any significant conclusions about structural integrity – both in his evidence before me and in requiring a report from an engineer on that crucial issue.¹⁹⁶ His failure to follow up on Eastwood's failure to comply with the Notice of Violation and obtain an evaluation from a qualified professional of the risk faced by persons inside the Mall is both inexplicable and mystifying. It causes me great concern.

Notes

- ¹ Bob Nazarian testimony, July 23, 2013, pp. 17492–3.
- ² Bob Nazarian testimony, July 23, 2013, p. 17616.
- ³ Bob Nazarian testimony, July 23, 2013, p. 17616.
- ⁴ Bob Nazarian testimony, July 23, 2013, p. 17483.
- ⁵ Kennealy testimony, April 18, 2013, p. 5649.
- ⁶ Snow testimony, April 3, 2013, pp. 3948–9.
- ⁷ Bob Nazarian testimony, July 23, 2013, pp. 17616–19.
- ⁸ McCulloch testimony, June 13, 2013, pp. 14346, 14382–3.
- ⁹ Fazekas testimony, March 12, 2013, p. 1271.
- ¹⁰ Exhibit 11-111.
- ¹¹ Bob Nazarian testimony, July 23, 2013, pp. 17625–8.
- ¹² Exhibit 13-11.
- ¹³ Bob Nazarian testimony, July 23, 2013, pp. 17628–30.
- ¹⁴ Turner testimony, June 4, 2013, pp. 12682–5.
- ¹⁵ Turner testimony, June 4, 2013, pp. 12685–91.
- ¹⁶ Turner testimony, June 4, 2013, pp. 12692–3.
- ¹⁷ Exhibit 4127.
- ¹⁸ England testimony, May 8, 2013, p. 8439.
- ¹⁹ Turner testimony, June 4, 2013, pp. 12693–6.
- ²⁰ Exhibit 235.
- ²¹ Bob Nazarian testimony, July 23, 2013, p. 17634.
- ²² Bob Nazarian testimony, July 23, 2013, p. 17634.
- ²³ Exhibit 4128.
- ²⁴ Bob Nazarian testimony, July 23, 2013, pp. 17639–40.
- ²⁵ Turner testimony, June 4, 2013, p. 12762.
- ²⁶ Turner testimony, June 4, 2013, pp. 12757–80.
- ²⁷ Exhibit 235, p. 002.
- ²⁸ Bob Nazarian testimony, July 23, 2013, pp. 17653–4.
- ²⁹ Turner testimony, June 4, 2013, p. 12703.
- ³⁰ Exhibit 10-89.
- ³¹ Turner testimony, June 4, 2013, p. 12790.
- ³² Bob Nazarian testimony, July 23, 2013, pp. 17657–8.
- ³³ Turner testimony, June 4, 2013, pp. 12696–8.
- ³⁴ Exhibit 985, p. 01.
- ³⁵ Exhibit 3339, pp. 205–14.
- ³⁶ Exhibit 3339, p. 203.
- ³⁷ Exhibit 3339, p. 208.
- ³⁸ Speck testimony, April 24, 2013, pp. 6680–1; Farkouh testimony, May 2, 2013, p. 7960.
- ³⁹ Exhibit 3349.
- ⁴⁰ Allard testimony, April 29, 2013, pp. 7014–20, 7029–32.
- ⁴¹ Exhibit 2026.
- ⁴² Speck testimony, April 25, 2013, p. 6855.
- ⁴³ Exhibit 11-6.
- ⁴⁴ Speck testimony, April 25, 2013, pp. 6855–6.
- ⁴⁵ Speck testimony, April 25, pp. 6856–7.
- ⁴⁶ Exhibit 1699, pp. 01–02.
- ⁴⁷ Exhibit 1699, p. 01.
- ⁴⁸ Exhibit 1699, pp. 00–01.
- ⁴⁹ Exhibit 11-113.
- ⁵⁰ Exhibit 11-113.
- ⁵¹ Farkouh testimony, May 7, 2013, pp. 8303–4.
- ⁵² Farkouh testimony, May 7, 2013, pp. 8308–9.
- ⁵³ Hamilton testimony, July 9, 2013, pp. 15035–46.
- ⁵⁴ Speck testimony, April 25, 2013, pp. 6870–5.
- ⁵⁵ Speck testimony, April 25, pp. 6957–9.
- ⁵⁶ Sprague testimony, July 12, 2013, p. 16031.
- ⁵⁷ Sprague testimony, July 12, 2013, pp. 16029–30.
- ⁵⁸ Sprague testimony, July 12, 2013, pp. 16030–2.
- ⁵⁹ Speck testimony, April 24, 2013, pp. 6644–5.
- ⁶⁰ Allard testimony, April 29, 2013, p. 7001.
- ⁶¹ Sprague testimony, July 12, 2013, pp. 15973–7.
- ⁶² Allard testimony, April 29, 2013, pp. 7022–31.
- ⁶³ Allard testimony, April 29, 2013, pp. 7074–8; Exhibit 11-113.
- ⁶⁴ Clouthier testimony, April 23, 2013, pp. 6346–7, 6356–8.
- ⁶⁵ Exhibit 1698.
- ⁶⁶ Exhibit 1698.
- ⁶⁷ Farkouh testimony, May 7, 2013, pp. 8311–13.
- ⁶⁸ Allard testimony, April 29, 2013, p. 7082.
- ⁶⁹ Allard testimony, April 29, 2013, pp. 7081–8.
- ⁷⁰ Clouthier testimony, April 23, 2013, pp. 6362–3.
- ⁷¹ Derreck testimony, May 13, 2013, pp. 9335–9.
- ⁷² Derreck testimony, May 13, 2013, p. 9346.
- ⁷³ Derreck testimony, May 13, 2013, pp. 9342–3.
- ⁷⁴ Exhibit 11-116.
- ⁷⁵ Derreck testimony, May 13, 2013, pp. 9360–1.
- ⁷⁶ Derreck testimony, May 13, 2013, pp. 9362–4.
- ⁷⁷ Derreck testimony, May 13, 2013, pp. 9363–4.
- ⁷⁸ Derreck testimony, May 13, 2013, p. 9365.
- ⁷⁹ Exhibit 11-119.
- ⁸⁰ Exhibit 3356.
- ⁸¹ Exhibit 11-20.
- ⁸² Farkouh testimony, May 7, 2013, pp. 8317–23; Exhibit 3357.
- ⁸³ Derreck testimony, May 13, 2013, p. 9373.
- ⁸⁴ Exhibit 11-121.
- ⁸⁵ Exhibit 3355.
- ⁸⁶ Mr. Derreck testified that this meeting took place on October 16; other evidence establishes that it took place on Wednesday, October 18; Exhibit 3374, p. 003; Clouthier testimony, April 23, 2013, p. 6373.
- ⁸⁷ Derreck testimony, May 13, 2013, p. 9381.
- ⁸⁸ Officer testimony, April 23, 2013, p. 6234.
- ⁸⁹ Officer testimony, April 23, 2013, pp. 6258–9.
- ⁹⁰ Allard testimony, April 29, 2013, p. 7082.
- ⁹¹ Clouthier testimony, April 23, 2013, p. 6375.
- ⁹² Derreck testimony, May 13, 2013, p. 9382; Clouthier testimony, April 23, 2013, p. 6378.
- ⁹³ Derreck testimony, May 13, 2013, pp. 9382–6; Exhibit 11-124.
- ⁹⁴ Derreck testimony, May 13, 2013, p. 9383.
- ⁹⁵ Clouthier testimony, April 23, 2013, pp. 6378–86; Exhibit 11-47.
- ⁹⁶ Exhibit 1706.
- ⁹⁷ Derreck testimony, May 13, 2013, pp. 9386–7.
- ⁹⁸ Exhibit 3374.
- ⁹⁹ Derreck testimony, May 13, 2013, p. 9400.
- ¹⁰⁰ Farkouh testimony, May 7, 2013, pp. 8329–31.
- ¹⁰¹ Farkouh testimony, May 7, 2013, p. 8329.
- ¹⁰² Farkouh testimony, May 7, 2013, p. 8332.
- ¹⁰³ Exhibit 177.
- ¹⁰⁴ Allard testimony, April 29, 2013, pp. 7132–4, 7186–7.
- ¹⁰⁵ Allard testimony, April 29, 2013, pp. 7134–6.
- ¹⁰⁶ Derrick testimony, May 13, 2013, pp. 9401–4.
- ¹⁰⁷ Exhibit 11-129.
- ¹⁰⁸ Exhibit 11-129.
- ¹⁰⁹ Derreck testimony, May 13, 2013, pp. 9417–20.
- ¹¹⁰ Derreck testimony, May 13, 2013, pp. 9512–16.
- ¹¹¹ Farkouh testimony, May 7, 2013, pp. 8334–5.
- ¹¹² Bauthus testimony, May 16, 2013, pp. 10190–1.

- ¹¹³ Allard testimony, April 29, 2013, p. 7186.
- ¹¹⁴ Exhibit 11-19.
- ¹¹⁵ Hamilton testimony, July 9, 2013, pp. 15055–7.
- ¹¹⁶ Exhibit 167.
- ¹¹⁷ Hamilton testimony, July 9, 2013, pp. 15057–9.
- ¹¹⁸ Allard testimony, April 29, 2013, pp. 7142–3; Exhibit 167.
- ¹¹⁹ Exhibit 3367.
- ¹²⁰ Exhibit 175.
- ¹²¹ Exhibit 11-23, pp. 002–003.
- ¹²² Exhibit 11-23, pp. 002–003.
- ¹²³ Exhibit 11-23.
- ¹²⁴ Exhibit 11-133.
- ¹²⁵ Exhibit 11-133.
- ¹²⁶ Bob Nazarian testimony, July 23, 2013, p. 17660.
- ¹²⁷ Bob Nazarian testimony, July 23, 2013, p. 17664.
- ¹²⁸ Bob Nazarian testimony, July 23, 2013, p. 17676.
- ¹²⁹ Bob Nazarian testimony, July 23, 2013, pp. 17700–1.
- ¹³⁰ Bob Nazarian testimony, July 23, 2013, pp. 17680–2; see also p. 17692.
- ¹³¹ Derreck testimony, May 13, 2013, pp. 9424–5.
- ¹³² Derreck testimony, May 13, 2013, pp. 9433–5.
- ¹³³ Bruce Caughill testimony, May 10, 2013, pp. 9205–7.
- ¹³⁴ Exhibit 90.
- ¹³⁵ Exhibit 90.
- ¹³⁶ Exhibit 70, p. 007.
- ¹³⁷ Exhibit 66, pp. 0035–6.
- ¹³⁸ Exhibit 70, p. 006.
- ¹³⁹ Exhibit 85.
- ¹⁴⁰ Exhibit 85; Bruce Caughill testimony, May 10, 2013, pp. 9178–9, 9211.
- ¹⁴¹ Bob Nazarian testimony, July 23, 2013, pp. 17609–10; Turner testimony, June 4, 2013, p. 12736.
- ¹⁴² Exhibit 5371.
- ¹⁴³ Bob Nazarian testimony, July 23, 2013, pp. 17695–8.
- ¹⁴⁴ Exhibit 11-23, pp. 006–9.
- ¹⁴⁵ Exhibit 11-23, p. 007.
- ¹⁴⁶ Turner testimony, June 4, 2013, p. 12725.
- ¹⁴⁷ Exhibit 11-23, p. 007.
- ¹⁴⁸ Exhibit 11-23, p. 006.
- ¹⁴⁹ Turner testimony, June 4, 2013, pp. 12717–18.
- ¹⁵⁰ Turner testimony, June 4, 2013, pp. 12722, 12725; Exhibit 990.
- ¹⁵¹ Bob Nazarian testimony, July 23, 2013, pp. 17701–2.
- ¹⁵² Bob Nazarian testimony, July 23, 2013, p. 17704.
- ¹⁵³ Bob Nazarian testimony, July 23, 2013, p. 17705.
- ¹⁵⁴ Bob Nazarian testimony, July 23, 2013, p. 17688.
- ¹⁵⁵ Bob Nazarian testimony, July 23, 2013, pp. 17688–90.
- ¹⁵⁶ Bob Nazarian testimony, July 23, 2013, p. 17690.
- ¹⁵⁷ Bob Nazarian testimony, July 23, 2013, pp. 17690–1.
- ¹⁵⁸ Turner testimony, June 4, 2013, pp. 12696–8.
- ¹⁵⁹ Hamilton testimony, July 9, 2013, pp. 15067–8.
- ¹⁶⁰ Derreck testimony, May 13, 2013, pp. 9443–6.
- ¹⁶¹ Allard testimony, April 29, 2013, pp. 7149–61.
- ¹⁶² Clouthier testimony, April 23, 2013, pp. 6426–8.
- ¹⁶³ Exhibit 11-139.
- ¹⁶⁴ Allard testimony, April 29, 2013, pp. 7161–3; Clouthier testimony, April 23, 2013, pp. 6428–9.
- ¹⁶⁵ Allard testimony, April 29, 2013, pp. 7166–7.
- ¹⁶⁶ Turner testimony, June 4, 2013, p. 12722; Exhibit 990.
- ¹⁶⁷ Bruce Caughill testimony, May 10, 2013, p. 9217.
- ¹⁶⁸ Exhibit 989.
- ¹⁶⁹ Turner testimony, June 4, 2013, pp. 12729–31.
- ¹⁷⁰ Exhibit 11-23, p. 0013.
- ¹⁷¹ Exhibit 11-23, p. 0013.
- ¹⁷² Bruce Caughill testimony, May 10, 2013, p. 9220; Turner testimony, June 4, 2013, pp. 12731–3.
- ¹⁷³ Bruce Caughill testimony, May 10, 2013, p. 9227.
- ¹⁷⁴ Bruce Caughill testimony, May 10, 2013, p. 9225.
- ¹⁷⁵ Turner testimony, June 4, 2013, p. 12732.
- ¹⁷⁶ Bruce Caughill testimony, May 10, 2013, pp. 9228–9.
- ¹⁷⁷ Bob Nazarian testimony, July 23, 2013, pp. 17706–8.
- ¹⁷⁸ Exhibit 822.
- ¹⁷⁹ Bob Nazarian testimony, July 23, 2013, p. 17710.
- ¹⁸⁰ Exhibit 2348.
- ¹⁸¹ Exhibits 350 and 3436.
- ¹⁸² Bruce Caughill testimony, May 10, 2013, p. 9227; Officer testimony, April 22, 2013, pp. 6128–9.
- ¹⁸³ Allard testimony, April 29, 2013, pp. 7045–6.
- ¹⁸⁴ Allard testimony, April 29, 2013, pp. 7198–214.
- ¹⁸⁵ Turner testimony, June 4, 2013, p. 12727.
- ¹⁸⁶ Derreck testimony, May 13, 2013, p. 9503.
- ¹⁸⁷ Bauthus testimony, May 16, 2013, p. 10142.
- ¹⁸⁸ Bauthus testimony, May 16, 2013, pp. 10172–4.
- ¹⁸⁹ Bauthus testimony, May 16, 2013, pp. 10181–2.
- ¹⁹⁰ Exhibit 11-2, p. 6048.
- ¹⁹¹ Exhibit 11-148.
- ¹⁹² Bauthus testimony, May 16, 2013, p. 10184.
- ¹⁹³ Bauthus testimony, May 16, 2013, pp. 10185–7.
- ¹⁹⁴ Bauthus testimony, May 16, 2013, pp. 10188–90.
- ¹⁹⁵ Exhibit 3401; Hamilton testimony, July 9, 2013, p. 15071.
- ¹⁹⁶ Allard testimony, April 29, 2013, pp. 7186–8.