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May 14, 2014

Elliot Lake Commission of Inquiry  
2380 St-Laurent Blvd.  
Ottawa, ON  
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Dear Sirs:

**Re: Procedural Rule 8  
Supplemental Submissions Of Elliot Lake Retirement Living and  
NorDev (ELRL)**

Pursuant to the opportunity provided by Rule 8 for additional submissions, I wish to address the issue of board governance which was not covered in our initial submissions.

The reason for this purposeful omission was consideration of the mandate of the Inquiry. The Commission is tasked with inquiring into those matters relating to the structural integrity of the Algo Centre Mall.

Much time was spent exploring the activities of the ELRL Board, and those of its directors, particularly those appointed by the City of Elliot Lake, and the issue of confidentiality.

However, it is submitted that there is absolutely no evidence that links these Board Governance issues to the structural integrity of the Mall.

### **Role of Municipal Members of the Board of Elliot Lake Retirement Living**

To understand this issue it is important to review the creation of ELRL.

The transfer of the housing stock from Rio Algom and Denison was all arranged through Council. The Rio Algom properties were donated to the City of Elliot Lake. The creation of ELRL was entirely determined by the Councillors of the City.

If Council had wished, it could have set up a committee or department to run the retirement living program. Instead, they determined that this important economic stimulus program would be run by an independent, non share corporation to which it would appoint only two of the twelve members. The other 10 members would be three

elected by the Tenants, two elected by the Community at Large, and the remaining five members would be appointed by community stakeholders.

If ELRL was expected to be governed by an elected Council's wishes, the makeup of the Board would clearly have been different. The City could have insisted on a majority of the ELRL Board being Council members.

Instead, Council decided that the retirement living program would be a community initiative. The relationship between ELRL and the citizens of Elliot Lake and the running of the retirement accommodation initiative would be determined not by Council, but by two members of Council and 10 other representatives of the community of Elliot Lake.

In reviewing the performance of Council members on the ELRL Board, two things should be kept in mind:

1. All Council members would be aware that the City appointed two members to the ELRL Board, as the appointees would be appointed by Council each term. It would therefore be open to Council at any time to request/direct that their representatives bring to the ELRL Board any issue that they believed was of public interest, and to report back to them on the decision. This would have been done, of course, in a public forum;
2. Similarly, the appointed City members could independently engage both the ELRL Board and Council on issues of public interest. Again, at least at the Council table, this discussion would occur in a public forum.

In practical terms this means that if roof leaks at the Mall were a public concern, Council, and its appointed members to the Board, had the ability and authority to direct ELRL's attention to it, and demand results, in a public forum.

When Mr. Denley asked for the minutes of the ELRL meetings, in April of 2005, just prior to the sale of the Mall, he received the following response:

*As you know, the City appoints two members to the board of Elliot Lake Retirement Living. If, as a councillor of the City, you wish information on a specific topic, you could direct your request to one of your representatives on the Board, and they in turn could ask the Board at the next meeting to authorize its release to you (Exhibit 4215).*

With respect to the flow of information, when asked about reporting to Council on the business of ELRL, Mr. Hamilton said:

*Well, it was no different than any other Board I sat on, and I sat on a number of Boards. If someone had a question, they could certainly ask me. I sat on the Algoma District Services Administration Board and I have sat on a number of them, and I never brought reports back. If someone had a question, they could ask and I would be happy to try to answer the question (Day 63, P. 14968, LL. 13-20).*

It is important to remember that there were 10 non-Council members of the Board. Counting the Council members, the majority (7) of the Board were elected by the citizens of the City. Each Director would have the ability to bring to the Board table concerns he/she had with respect to any issue, including leaks in the parking deck at the Mall.

The evidence is that the issue of leaks of the parking deck was dealt with at the ELRL board table only once, in May, 2005. It was placed on the agenda as an item for discussion by the General Manager, not by any Director, as part of his Report to the meeting (Exhibit 2295 Page .16). All those Directors at the meeting would hear the information provided to them by staff, and had the authority to pass a resolution to direct their General Manager to take those steps considered necessary to deal with the issue.

It is therefore submitted that there is no evidence that the makeup of the ELRL Board, including Directors appointed by the City, played any adverse role in decisions related to the structural integrity of the Mall.

### **Confidentiality**

The emphasis of the questioning on this issue was mostly related to the effects, if any, that the confidentiality requirements of the Board of ELRL had on the ability of City Directors to engage with City Council.

Firstly, it should be pointed out that any confidentiality terms, and the requirement that any agreement confirming those terms be signed, were determined by the Board. Any Board member would have the ability at any time to have the Board determine, as a whole, whether or not there should continue to be any terms of confidentiality imposed upon its members, and, if so, if they should be amended.

It is submitted that the confidentiality terms contained in the undertaking each Board member was asked to sign were moderate and reasonable (Exhibit 2146):

*The regulations that follow are not intended to discourage me from speaking out about Elliot Lake Retirement Living and my role as a Director.*

*However, I will respect the following guidelines:*

- 1. Written materials provided to me are not to be shared or distributed;*
- 2. Opinions and voting of individual Directors are not to be commented on;*
- 3. Any issues dealing with employees in general or a particular employee are not to be commented on;*

4. *Any ongoing negotiations by the Board, or matters that have not come to a vote are not to be commented on.*

There is nothing in these terms that would prevent a Council member from bringing any issue to the Board, either at the request of Council, or independently, and then confirming to Council that he/she had done so, and the decision made by the ELRL Board, in a public forum.

It is submitted that these terms of confidentiality are significantly less stringent than those standard for non public corporations. ELRL is not a minor hockey association or an arts club. It is a multi-million dollar organization whose success is crucial to the future of Elliot Lake. It needed to and continues to need to be run as a business, in order to accomplish its goals.

As Mr. Farkouh pointed out, Council members sit on other Boards with similar confidentiality rules to that of ELRL:

*As a member of the Police Services Board, and a member of the Algoma District Services Board, the Algoma Health Unit and various other boards and commission that I served on, they had also provisions in there that anything that was private would stay private with that corporation. I didn't see anything unusual with it (Day 37, Pg. 7975, LL. 12-23).*

*I was a member of the – at one time or another of the Algoma Health Unit, the Algoma District Services Board. And all these Boards and Commissions have their own by-laws and their own rules and confidentiality. I know specifically with the Police Services Act, it's - I can't recall, it's by regulation that anything discussed of a confidential nature cannot be shared not even with members of Council (Day 44, PP. 10127-10128, L. 10127 on).*

The one meeting between ELRL staff and the City where Mr. Denley would not sign a confidentiality agreement dealt with the confidential financial information of specific tenants of the Mall tenants (Day 63, Pg. 14958, LL. 7-15).

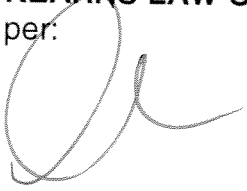
The issue of ELRL Board governance would be relevant if there was evidence that there were reports discussed at ELRL meetings which set out dangers to the structural integrity of the Mall, and that Directors were restrained from releasing this information to the City or otherwise into the public forum.

It is respectfully submitted that no such evidence is before the Commission. The Directors were never restrained from sharing any information available to them on leaks in the roof deck, or any other topic.

Respectfully submitted,

**KEARNS LAW OFFICE**

per:

A handwritten signature in black ink, appearing to be 'DK', written over the word 'per:'.

Douglas Kearns  
Counsel for ELRL/NorDev