



# Polishuk Camman & Steele

Barristers and Solicitors

Alexander P. Polishuk (retired)

Andrew F. Camman

Anthony F. Steele

Susan A. Toth

Kerry McGladdery Dent

Sarah E. Bauer

January 31, 2019

Michael Lerner  
Lerners LLP  
88 Dufferin Ave  
London, ON  
N6A 1K4

Dear Mr. Lerner:

## **Re: London Downtown Business Association (“LDBA”)/ your group**

Further to the AGM that took place on January 22, 2019, we are following up with you and your clients with respect to several important issues that remain outstanding and new issues that we have just become aware of.

### **Transparency**

I should begin by advising you that, in the interest of transparency to its members, the Board has decided that all correspondence, where possible, will be provided to the membership and the public. This includes your previous correspondence to the City and the Chair.

### **Response to Your Previous Correspondence**

First, it is necessary to address some of the issues you raised in your correspondence to the LDBA Chair dated January 10, 2019 (attached as Appendix “A” for the benefit of the members and public reading this correspondence), your letter to the City Manager of the same date (attached as Appendix “B”), your letter to the Mayor dated December 21, 2018 (attached as Appendix “C”), and a letter to the Mayor dated December 5, 2018 (attached as Appendix “D”).

- Unnamed group of clients: In your correspondence, you have stated that you represent a “large base” and “over 100” Members. In the media, this number has ranged between 130 and 140. It appears that even at the AGM, many Members that are included in the list you provided to the Chair on January 10, 2019, (and attached as Appendix “A”) were unsure about whether they were represented by you and bound by the agreement Mr. White signed on their behalf. It is unclear if

the list you provided is a list of your clients. The anonymity is creating confusion and making open communication impossible. In order to continue to work with your clients, we ask that they be identified clearly. You have asked the LDBA for better openness and accountability, please extend the LDBA the same courtesy.

- Allegations of improperly managed funds and mismanagement of funds: the LDBA is audited annually by the City's auditor. The auditor has never raised any concerns and no mismanagement of funds ever identified. The LDBA strenuously denies these serious allegations that have no foundation nor merit. We view these allegations as potentially defamatory against LDBA staff and ask that you refrain from continuing to make these serious assertions, given that they are unfounded and lacking in any particulars.
- Lack of term limit: this will be addressed by the ad hoc committee, however, section 204(10) of the *Municipal Act* does in fact set out the term of the directors as the same as the term of the council that appointed them. This is also reflected in section 4.3 of The London Downtown Business Association Improvement Area By-law (No. CP-2).
- CEO's Contract: the employment contract with Ms. Janette MacDonald is a private personnel matter and will not be provided to the public or the membership. There is no legal basis for your request. In addition, the Board conducts annual reviews of Ms. MacDonald's performance. The Board has no concerns with her competence, management, and work.
- Salaries: the LDBA will gladly disclose the total amount in the budget that goes to pay the salaries of its six staff. However, individual salaries are private personnel information. I can again assure you that those numbers have been audited by the City Auditor and no discrepancies or concerns identified. Staff do not have discretionary spending. The current percentage of the budget that goes towards salaries is well within best practices and expectations in the industry.
- Petition: please provide us with a copy of the petition with the signatures in order to address concerns directly with the signatories.

It is prudent to ensure your clients and the membership understand the impact these allegations and disputes have had on individual staff members of the LDBA. This has been a very difficult time for them. They feel that their reputations have been unfairly tarnished, and feel deeply distressed by the comments they have heard. They are hard-working, dedicated and loyal individuals, who care deeply about downtown London and all members (levy-paying or not, and regardless of the amount of the levy being paid). The LDBA Board unreservedly supports the LDBA staff and asks all Members to consider and allow staff to continue to do the excellent work they have always done with integrity and faithfulness.

## **Conflict of Interest**

The next point concerns you directly and is very serious. It appears your firm has a conflict. My client has just recently advised me that a little over three years ago, Lerner represented the LDBA. As your firm is aware, at that time, the LDBA was drafting an agreement involving Fanshawe College moving into the former Kingsmills location. Mr. James Dunlop had carriage of this file and was concerned about possible litigation. At the time, you were the head of the commercial litigation department. You were aware of this file and you personally chose Mr. Ian Dantzer to provide litigation advice. The result is undoubtedly a success story, and one in which your firm played a significant part.

As I know you are aware, law firms owe a duty of loyalty to their current and former clients. This is, of course, a significant concern to my client. I feel it important to put you on notice that they do not consent to you acting against them. While they were your client, your firm had access to information about the organization obtained as part of the solicitor client relationship. It is our position that you have a conflict of interest and my client objects to you continuing to represent your yet unnamed group of clients.

It is your responsibility to address this conflict immediately. In the meantime, we will continue to correspond with you until your clients have received advice on this issue and have retained new counsel. We do this without prejudice to our ability to raise this matter should you decline to address this serious conflict. It is incumbent on you to see to this matter with alacrity and if you fail to do so we will seek instructions to have you removed by the courts. Should we be required to pursue this we will be presenting the courts with this letter on the issue of costs.

## **Ad Hoc Committee**

Finally, with respect to the ad hoc committee, as you know, the budget failed to pass and your unexpected point of order during the Board slate vote created a great deal of confusion and turmoil<sup>1</sup>. Despite our efforts prior to the AGM, the good faith agreement you participated in achieving was disregarded. However, at the end of the AGM, a motion was passed to put together an ad hoc committee to review Board processes.

In addition, the LDBA feels that it is in the best interests of the organization and London for it to comply with the spirit of the agreement that was put in place. However, we will be making adjustments to the format of the committee based on what we heard at the AGM.

For example, it appears that there are many members that were unaware or unclear about whether you represented them. Further, there were many other members that you do not represent that made important points and raised important questions. It is important to

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<sup>1</sup> To clarify the voting situation definitively, please note that section 204(6) of the *Municipal Act*, section 8.4 of The London Downtown Business Association Improvement Area By-law (No. CP-2), and section 7.1 of the LDBA's Procedure By-Law all state that each member shall receive only one vote, regardless of the number of properties that that member may lease or own.

make sure that a cross-section of these voices participate, and not just your clients and the Board.

Secondly, it is important that the ad hoc committee include representation from non-levy paying Members. Your clients have asserted that if a member does not pay a levy, they do not have “skin in the game”. This is a very unfortunate (and inaccurate) characterization. The LDBA does not provide services to its Members based on the amount of levies that Member pays. The LDBA, like all BIAs, is legislatively mandated to oversee the improvement, beautification and maintenance in its area, and to promote the area as a business and shopping area. Members of the LDBA like the Grand Theatre and Fanshawe have significant “skin in the game”, and a great deal to do with improving and promoting Downtown London, even if they are exempt from paying a levy. The majority of Members appreciate the impact that non-levying members have and understand that all Members are working together for the betterment of London’s Downtown, regardless of how much each Member may pay in levies.

As such, the Board has determined that the ad hoc committee will consist of seven members plus a facilitator of the Board’s choosing. The Board will be appointing two of its own members, as well as approaching three Members-at-Large (including one non-levy paying member) chosen specifically from those who spoke out at the AGM. This is both in keeping with the agreement we had attempted to implement, but also provides for a greater diversity of voices, and will include those who do not identify as your clients. Finally, we invite you add two people from your own group to the committee.

The Board proposes Mr. John Fyfe-Millar and Mr. Keith McAlister to represent the LDBA. With respect to the Members-at-Large, the Board will be approaching Ms. Kathy Navackas, Ms. Gayle Harrison and Mr. Tarek Moharram.

The ad hoc committee will also be empowered and encouraged by the Board to utilize experts such as Mr. Andrew Sancton and Pillar Nonprofit Network, and to seek legal advice where necessary to work through its mandate.

In addition, the committee may well end up asking City Hall to change the municipal by-laws that govern BIAs. As a result, we feel that other BIAs will want and should be able to participate and provide feedback. Similarly, given that the processes this ad hoc committee will be reviewing are directly tied to municipal by-laws, we will be inviting and strongly encouraging the appropriate staff and Councillors from City Hall to attend the meetings.

Finally, all ad hoc committee meetings will be open to the membership and public to ensure the greatest possible participation and transparency. All meeting times and locations will be advertised to the public and to the membership and attendance and regrets will be tracked.

The ad hoc committee's mandate will include (but will not be limited to) reviewing nominations, board structure, elections, term limits and the Procedural By-Laws as well as municipal by-laws.

We hope that your clients will move quickly to recuse yourself from this file, appoint new counsel and that the two names put forward by your clients will devote extensive time to doing this very important work.

**Conclusion:**

The Board is deeply troubled by the alleged loss of confidence of its Members, but the Board is also heartened by the participation at the last AGM. As you know, it is often difficult to attract participation, and we hope Members continue to attend events and reach out to the LDBA with concerns.

We are also pleased to note that the Members were willing to share difficult feedback openly, frankly, and without fear. The LDBA recognizes how vital it is that Members feel able to share input publicly and confidently and this suggests that the organization is already well on its way to positive change.

When it comes to London's Downtown, all Londoners have skin in the game. The LDBA recognizes it has work to do to address the concerns of the membership. The LDBA is committed to listening to its Members and the public and undergoing a transparent and inclusive process to address and respond to these concerns.

Yours very truly,

POLISHUK, CAMMAN & STEELE



Susan A. Toth



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Direct Fax: 519.932.3321  
mmlerner@lerners.ca

January 10, 2019

FILE NUMBER 111581-00002

Gerald Gallacher  
Nicholson Sheffield Architects Inc.  
358 Talbot Street  
London ON N6A 2R6

Dear Mr. Gallacher:

**Re: Downtown Business Improvement Area**

As I believe you know, I represent over 100 property owners and tenants all of whom are levied to support the work of the DBIA who are concerned with the administration and management of the organization. It is the widely held opinion that the actions of the Board do not reflect the best interests of those who are levied by the municipality to support the activities of the Association. I have attached a list of those who have come forward to express their concern.

I am concerned that without further discussion, the AGM will contrary to the best interests of the Board, its members and most importantly the citizens of London.

As part of my research, I have also conducted a review of the by-law that creates the DBIA. There are significant flaws in the by-law that could call into question the actions of the Board and some of those actions may be subject to judicial review. I recently met with the City Solicitor and discussed with him the existing by-law. It is agreed that the by-law should be comprehensively reviewed and amended as may be required. I have written to the City asking that the by-law be referred to the City Solicitor for review.

I am advised that the AGM of the DBIA is scheduled for Tuesday, January 22, 2019. I respectfully request that the Board support a rescheduling of the annual meeting until such time as certain concerns have been considered and documents that are requested have been produced. The concerns of those who have come forward include but are not limited to the following:

1. The lack of transparency relating to the revenue and expenditures and the preparation of financial reports of the Association.
2. The amount of the annual expenditures that relates specifically to salaries.
3. The process by which individuals are nominated to serve on the Board.
4. The inability of members to be nominated from the floor at the AGM that would likely require an election by ballot.

The members do not feel that the CEO and the Board accurately reflect the best interest in opinions of the members on critical issues that have arisen in the last four years. A substantial number of members no longer have confidence in the Board of Directors.

Those who I represent do not wish this to become a disruptive and divisive process that will jeopardize the ongoing efficiency of the DBIA. Accordingly, it is my respectful request that all steps be taken to avoid a situation that could well embarrass the Board and its members. I have instructions to meet with the Board or its delegate to try to come up with an interim solution of the identified problem. A solution may well be to adjourn some part of the AGM to a date to be determined with the uncontentious issue going forward on January 22.

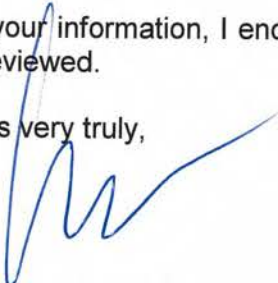
I previously requested a copy of the contract of employment of the CEO. To date, my request has been ignored. It is not in the interests of anyone if I am required to make the required application under the *Freedom of Information Act* to obtain access to the contract. In addition to production of the contract, I seek clarification as to which Board member or members negotiate the contract with the CEO and the manner in which the contract is approved by the Board and the membership. It has come to my attention that there are members of the Board who have not been privy to something as fundamental as the terms of the contract of employment in order to satisfy themselves that they have fulfilled their fiduciary duty to the organization and to its members.

In order to resolve these matters in a responsible, respectful and dignified manner, I request the opportunity to meet with you and discuss these concerns in greater detail. I repeat that I do not believe it is in the interests of the downtown to ignore the concerns of over 100 members and some attempt should be made to come to a resolution that not only will be in the best interests of the DBIA but the downtown in general.

Given that time is of the essence, I ask that you favour me with a prompt reply.

For your information, I enclose a copy of the letter to the City Manager asking that the existing by-law be reviewed.

Yours very truly,



Michael M. Lerner

MML/jl  
Encl.

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This is a list of current LDBA dues paying members requesting major changes to the organization's operation. The list only includes businesses that pay the levy.

J.B Simpson Jewellers

Bertoldi's

David's Bistro

Urban Outfitters

London International Academy

Lofthouse Living

Abruzzi

Donohue Funeral Home

To Wheels

The Ceeps/Barneys

Richmond Diamonds

Marienbad/ Chaucers

The Barre Pilates

Cyclepath



May McConville (Vivid) Insurance

Big Blue Bubble

Pfaff Jewellers

Bluland Enterprises

Tillmann Ruth Robinson Architects

Bella Booteek

Elizabeth Noel

Marky's Crepe Café

Gleed Commercial

Fellini Koolini's

Wine Rack

Endo Jewellers

McDonalds

Rebirth Wellness Centre

Eyes on Richmond

Entitled

Hanger 9

La Casa

Jill's Table

Healthy Obsession Fitness

Frankly Scarlet

Kosmos

Joe Kool's

Nova Vita Hair Salon

Blucor Group

Bikini Paradise

Ann's Tailoring & Design

Salon Thairapy

Cushman Wakefield

Your Highness

J.Deer's Market Grill

Grow and Bloom Co.

Tim Horton's

B.W.K. Developemnts

Redtail G.C.

Michael Gibson Gallery

Desi's boutique

Quesada

Privit Inc.

Vision Travel

Plant Matter Café

Joe Kool's

Raital Limited

Studio H

European Fashion

Roman's Leather

Dundas Pawn Brokers

The Tasting Room

Metrix Realty Group

Walter's Barbers

C.B.R.E. Limited

Framing and Art Centre

Wich Is Wich

CIBC Wood Gundy

Toboggan Brewing  
Black Trumpet  
Fahri Holdings  
Smooth Wax Bar  
Itawtrar Limited  
Boxwoods  
Mythic Grill  
Anita Morris Models  
S & H Health Food  
Salon Prespa  
Tantrum Sun Lux Spa  
Krumms  
Seychelles Swimwear  
Burman's Beauty Supplies  
Mugfords  
Fogged Up  
Dimi's Greek House  
Stronghold

Fresno's

David E. White Clothiers

Brightstone Capital

Prince Albert's Diner

King's Inn Diner

London Rock

Todd R. Cook Professional Corporation

Nine Of Water

Bulk Barrel

Good Value

Barking Frog

Andrew Douglas Clothiers

Scope Gap

Healthy Obsession Fitness

Burger Burger

Fresh and Fast Food Mart



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January 10, 2019

FILE NUMBER 111581-00002

Martin Hayward, City Manager  
The Corporation of the City of London  
300 Dufferin Avenue, P.O. Box 5035  
London ON N6A 4L9

Dear Mr. Hayward:

**Re: Downtown Business Improvement Area**

I enclose a copy of my previous letters dated December 5 and December 21, 2018 with reference to the Downtown Business Improvement Area. In those letters, I have identified some of the concerns of the members of the Association that relate to the administration of the Association and the manner in which business is conducted. I am also enclosing a list of those members of the Association who are concerned that the Association fails to represent the majority of its members.


Following upon my letters of December 5 and 21, I have had an opportunity to meet with the City Solicitor on Monday, January 7, 2019. In the course of the meeting, Mr. Card and I conducted a cursory review of the existing by-law. While I do not intend to speak on his behalf, we discussed several obvious irregularities or flaws in the by-law that may call into question the manner in which the Board of Directors is "selected" which in turn calls into question some of the decisions of the Board.

Currently, I have requested certain documentation from the Chair of the Board that has not been forthcoming. I may be obliged to make an application under the *Freedom of Information Act*. I am enclosing my most recent letter to Mr. Gallacher.

At this time, my request is that you ask the City Solicitor to conduct a comprehensive review of the by-law with a view to proposing such amendments that will bring greater clarity and transparency of all aspects of the Association's mandate and the manner in which business is conducted.

I have confirmed with Mr. Card my willingness to work with him and the Board of Directors of the DBIA to avoid a conflict that may well jeopardize the work of the Association. The widespread concerns may reflect that the Board may have well lost the confidence of the membership.

Yours very truly,



Michael M. Lerner

MML/jl  
Encls.

cc. Mayor Ed Holder  
Kathy Saunders, City Clerk  
Barry Card, City Solicitor  
Gerald Gallacher, Chair DBIA

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**LERNERS**  
LAWYERS

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January 10, 2019

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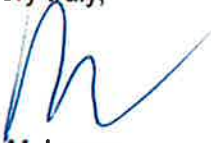
# LERNERS

LAWYERS

Page 2

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Yours very truly,



Michael M. Lerner

MML/jl

Encls.

cc. Mayor Ed Holder  
Kathy Saunders, City Clerk  
Barry Card, City Solicitor  
Gerald Gallacher, Chair DBIA

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December 21, 2018

FILE NUMBER 111581-00002

**Personal and Confidential**

**Delivered Via Mail**

Mayor Ed Holder  
The Corporation of the City of London  
300 Dufferin Avenue  
PO Box 5035  
London ON N6A 4L9

Dear Mayor:

**Re: Downtown Business Association Improvement Area By-Law**

This is further to Mr. Lerner's letter of December 5, 2018. That letter advised among other things, that we were retained by a large group of disgruntled members of the LDBA; raised a number of concerns including concerns about the current Executive Director; and, proposed that the AGM not be convened and no other steps be taken, until such time as the issues referred to in the letter have been resolved. In the interim, please provide us with a copy of the Executive Director's contract of employment within the next seven (7) days, failing which we will have no choice but to advise our clients to pursue an alternative resolution to the problems. We have previously requested a copy of the contract but that request has been denied increasing the suspicion and frustration that have arisen with regard to the conduct of the Board of Directors and the Association management.

Yours very truly,



Paul Brooks  
PB/cd

cc. Martin Hayward, City Treasurer (via email)  
Cathy Saunders, City Clerk (via email)  
Gerald Gallacher, Chair DBIA (via email)  
Barry Card, City Solicitor (via email)  
Mike Smith (via email)

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# LERNERS

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December 5, 2018

FILE NUMBER 000111

COPY

Mayor Ed Holder  
The Corporation of the City of London  
300 Dufferin Avenue  
P.O. Box 5035  
London ON N6A 4L9

Dear Mayor:

**Re: Downtown Business Association Improvement Area By-law**

I have been retained to represent a large base of disgruntled members of the Downtown Business Association Improvement Area. Generally, those who have consulted me have expressed their disappointment and frustration with the manner in which the Association business has been conducted. It is their steadfast belief that, overall, the LDBA CEO of the Association does not reflect the collective views and concerns of the levy paying membership (landlords, tenants and merchants etc.). There is an ingrained perception that the Association does not advocate convincingly on their behalf which is their very reason for being. While we greatly appreciate the efforts of the Board of Directors, it is our belief that the chain of governance has broken down to the point that the committee has become dysfunctional. As such, it has resulted in fostering a toxic atmosphere of distrust and alienation. Furthermore, there is a belief that the funds with which they are entrusted are not being properly managed for the benefit of the membership. Therefore there are certain remedies that require immediate attention.

More specifically, with respect, I believe the current by-law CCP-2-15002 is incomplete and ambiguous. To allow the day to day business of the Association to function in an orderly manner the by-law ought to be amended. Upon review, it is my view that the changes that need to be made ought to be done without delay in anticipation of the AGM when Directors will be elected.

The deficiency and ambiguities of the by-laws that I have noted upon a cursory review include but are not limited to the following:

- The Board of Management consists of nine directors Clause 1.1 defines "member" but in clause 4.1 the term "director" is used but not defined. Can only "members" be elected "Directors"? There is no provision that a director must be a member of the Association One could argue that a "Director" need not be a "member" which was likely not intended when the by-law was drafted.

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- Clause 6.8 - provides that the Board of Management shall make its books and records available to such persons as the City Treasurer may require. Some members of the Association who are levied have asked to see the books and records and not just the summary budget and statement of profit and loss. More particularly, board members have asked to see the line by line revenue and expenditures but that request has been denied. There is currently no provision that entitles each member of the Association to inspect or review the books and records upon request.
- Clause 4.1 - Unlike the formal structure of similar associations there is no provision for the length of term of a director.
- Similarly, there is no provision for term limits that would insure that the Association is revitalized with new thoughts and strategies to promote the downtown. With respect to the hiring and termination of the paid manager, there is no reference to the process by which the business manager is hired or the manner in which the manager is terminated.
- The nomination of Directors does not appear to follow the spirit of election by membership. At other similar BIA boards, anyone can put forth their nomination and have the membership elect their desired representatives based on the full slate of nominees. The Downtown London BIA's existing Executive Committee vets nominees and only puts forth those they deem worthy for a membership vote. This does not reflect the intention to have members vote for their representatives. Furthermore, the process of selecting the Executive Committee is not clearly laid out and as a result has created a perception of lack of due process. This in particular is troublesome as they are the stewards of the organization.

In addition to the by-law amendments which I have identified above, the day-to-day management and execution of duties by the CEO and other paid staff has been called into question. Specifically, membership has expressed their concern that:

- The Executive Director's publicly stated beliefs are often opposed to the views of the members that she is paid to represent. As a result, she has exhibited an unwillingness to properly collect member views and represent those. Notable issues where this has been witnessed has been with:
  - Parking amendments
  - Food truck zoning
  - Supported BRT against majority of members wishes
  - Safe injection sites
  - Changes to property taxes in the downtown
  - Live, Work, Play initiative
- It is believed that there has been a mismanagement of funds and lack of due process in awarding contracts. Formal requests to get detailed financials have been circumvented. In comparing Downtown London expenditures with other BIAs in the province of Ontario ranging from Ottawa,

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Toronto, Waterloo, Hamilton, etc. it can be seen that expenditures are exponentially higher in London for:

- Salaries and wages
- Meals and entertainment
- Sponsorships
- Conferences
- Third party contracts

I believe a complete and thorough analysis of the bylaw and financials needs to be undertaken. I am advised that the Board intends to convene an annual general meeting in January. I respectfully suggest that an AGM not be convened until such time as the issues are resolved. Until these procedural issues have been properly addressed any such meeting would be premature and ought to be delayed or postponed. Further, to proceed prior to the passage of an amended by-law may will nullify any action taken given the identified issues that need to be addressed.

Given the number of pressing issues that will dramatically impact on the conduct of the business within the designated area, I respectfully request that these matters be addressed without delay. I am available to assist in the drafting of the amendments to the By-law upon request.

I have also enclosed a formal complaint that will be signed by the individual members of the Association expressing their displeasure with the conduct and management of the DBIA.

Given the pressing urgency, I look forward to your prompt response.

Yours very truly,

Michael M. Lerner

MML/jl  
Encl.

cc. Martin Hayward, City Treasurer  
Kathy Saunders, City Clerk  
Gerald Gallacher, Chair LDBIA

This is a broad representation of LDBA due paying members request for a full and comprehensive review of the operations of the London Downtown Business Association and its CEO General Manager, with a clear intent to see a demonstrative change in management, philosophy and future financial planning.

As business and property owners in the LDBA we continue to find the LDBA office has not represented our interests in a manner that we desire. The manager and the offices publicly stated beliefs are more often than not opposed to the views of we the dues paying members. The manager and the office have exhibited a blatant unwillingness to properly consult member views and represent them in a manner that we desire. Major expenditures and decisions have been made without the opinions of the members.

There has been very little or no consultation on such notable issues as elimination of street parking, B.R.T., food trucks, policing, safe injections sites, the hiring and cost of Live, Work and Play, etc.

We also believe that there has been a mismanagement on the spending of our funds and lack of due process in awarding contracts. Formal requests to get detailed financials have been circumvented. In comparing Downtown London expenditures with other BIAs in the province of Ontario, it can be seen that expenditures are exponentially higher in London for such things as staff salaries, entertainment costs, sponsorships, conferences and third party contracts.

Based on the above concerns, we formally request an investigation into the governance and financial investments of the LDBA by an independent third party.