

Downtown Sudbury
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Phone: 705.674.5115



It is with deep concern we write to you regarding the recent social media and public comments made by City of Greater Sudbury Councillor Robert Kirwan regarding Downtown Sudbury Business Improvement Area and a municipal planning decision that greatly affects the future of our organization.

Our organization contends that social media posts, public statements and newspaper columns produced by Coun. Kirwan are in breach of City of Greater Sudbury's council's Code of Conduct.

Attached are the comments Coun. Kirwan has made through social media as well as in several media articles.

In these materials, we contend that Coun. Kirwan has made public his desire to dissolve the Downtown Sudbury BIA for the express purpose of intimidating the BIA into forfeiting its right to legally defend its interests. He is presenting to the public and to fellow councillors the option of a quid-pro-quo: Either the BIA falls in line with his position and drops its planning appeals and potential legal action or he will urge the council to terminate the BIA.

Background

Downtown Sudbury (formerly Sudbury Metro Centre) is dedicated to the growth of Downtown Sudbury through policy development, advocacy, special events and economic development. All 90-plus property owners and 400-plus businesses that own or lease property within Downtown Sudbury are members. On their behalf, Downtown Sudbury is proactive in terms of program delivery, event co-ordination and advocacy.

For three years, Ward 5 Councillor Robert T. Kirwan has been a vocal advocate for the Kingsway Entertainment District (KED) project and the city's partnership with the casino operator and local businessman Dario Zulich. He has also been a vocal critic of anyone who opposes this development, including Downtown Sudbury.

As is made clear from the attached correspondence, Coun. Kirwan has routinely made veiled threats against Downtown Sudbury, up to and including suggesting that participating in planning appeals "may lead to collateral damage against some innocent downtown merchants."

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His Facebook posts on this topic often generate streams of hateful comments toward Downtown Sudbury, up to and including calls for boycotts of Downtown Sudbury and its members. Coun. Kirwan has made no attempt to moderate or mitigate these hateful posts.

It is our contention that Coun. Kirwan has knowingly and willfully been misleading the public regarding the basic facts of this project and the challenges it faces; has knowingly and willfully defamed the appellants, including Downtown Sudbury and named individuals; and has knowingly and willfully spread discord across the city in a co-ordinated attempt to deter members of the community from pursuing lawful recourse against a decision of City Council; and he has done all of these things in contravention of the City of Greater Sudbury's Code of Conduct.

Complaint

In the offending Facebook post dated Thursday May 16th, Kirwan writes: "Now that they (the BIA) have actually filed a civil suit against the City they have left us with only one option from what I can see. Council needs to repeal the by-law that established the Sudbury BIA and dissolve the association."

The premise of these statements is fundamentally untrue: Downtown Sudbury and other appellants have filed a Notice of Application in Superior Court which would allow it to serve the city in the future. This is required because LPAT's rules at this point are untested, and because the Province is overhauling the process with Bill 108 and appellants, the city and LPAT do not know what will be in the jurisdiction of LPAT by the time this case is heard.

None of the issues being appealed have changed, and all of the issues listed in the Notice of Application are also listed in the original LPAT appeal, all of which have already been deemed valid by the current LPAT process.

In these same writings, Coun. Kirwan makes the spurious claim that the principal purpose of the LPAT appeals and more recent court filing is to tie up the KED projects in legal proceedings and thus delay the project hoping its proponents will give up and withdraw.

That assertion is also completely wrong. It not only defames the appellants, but is also contemptuous of the justice system. This comment dismisses out of hand the fact that the appellants' case is based on planning and case law and has already passed the first hurdle as addressing legitimate planning law.

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In fact, it was City Council that chose to wait until the previous and well-tested OMB process expired before taking the KED project to the planning committee so they could go before what they hoped would be a more favourable body in LPAT. It was this decision that has caused the most delay, and added the most confusion to the process. Because the LPAT rules were untested, the first case, The Rail Deck in Toronto, has endured process appeals and those appeals halted all LPAT appeals across the province until the case law could be decided. It is entirely possible that further delays could occur due to other appeals regarding the process on any case currently before LPAT. Again, this was the process chosen by City Council, including Coun. Kirwan.

Further, Coun. Kirwan has assumed the motives both the BIA and others who have taken action in the case against the city and misrepresented the words of board member Jeff MacIntyre. His commentary about the BIA and fellow appellant Tom Fortin simply trying to delay the process are misleading to the public and damaging to the reputations of Downtown Sudbury as a whole, and Tom Fortin and Jeff MacIntyre in particular.

Coun. Kirwan's comments are clearly an act of coercion designed to stop the BIA from proceeding with its right to take legal action. He is making it clear that if the BIA does not want to have itself voted out of existence, it should comply with his coercive demand to back out of legal action against the city.

On May 23, Coun. Kirwan is quoted by CBC:

(<https://www.cbc.ca/news/canada/sudbury/kingsway-entertainment-district-notice-superior-court-1.5145679?fbclid=IwAR1gU8X5RH8rjcQnHNgorejJfquPI7cS6GBNI7ygQR-iuOYoayDiu4IH5M>)

"We don't mind the Sudbury BIA filing an appeal against the applications, but to actually take the city to court with Tom Fortin and ask the court to overturn the decisions is just going too far," he said.

"I see no other choice but to dissolve the Sudbury BIA and let them go on their own. Dissolving the BIA really basically takes them out of the court application because they will no longer exist, it'll leave Tom Fortin by himself."

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Who is the “We” Coun. Kirwan refers to? Since he is writing and speaking as a member of City Council, the only reasonable conclusion is that he is speaking on behalf of City Council. Do his fellow city councillors agree with his assessment, as he is clearly saying they do?

Further, he says there’s only one choice for a course of action: “to dissolve the Sudbury BIA.” That is not a course of action an individual councillor can take; only council as a whole can take such an action and he presents no evidence that council will make such a determination. Nevertheless, Coun. Kirwan goes on to describe what will happen to the BIA when it is dissolved: That “Dissolving the BIA really basically takes them out of the court application because they will no longer exist, it’ll leave Tom Fortin by himself.”

The same opinions are expressed in a column in The Sudbury Star on May 24 (<https://www.thesudburystar.com/news/local-news/sudbury-column-why-the-downtown-bia-should-be-scrapped>).

In it, he writes: “This leaves council no choice but to set in motion the process of repealing the bylaw that established the BIA and effectively dissolving the organization. Downtown businesses will be free to form their own private association if they wish, but that will have to be done without any city involvement or assistance. They will also have to approach all of the downtown businesses to see if they still want to be members.

“The ‘death’ of the BIA will leave Fortin as the sole applicant in this matter and city lawyers can then determine a legal course of action that will have the application removed from the Superior Court of Justice.”

Again, Coun. Kirwan is prescribing the decision City Council will make, failing to differentiate from a decision council might make. It’s an important distinction given that no councillor has yet brought such a motion before council.

Further, Coun. Kirwan goes on to describe what the downtown BIA’s options will be once council has taken this theoretical action, suggesting this action is fait accompli.

Further, Mr Kirwan states in an additional Facebook posting that: “Clearly, the Sudbury BIA is acting beyond its mandate. The action taken in the Superior Court of Justice may place all of the commercial property owners in the Downtown CIP as well as the City of Greater Sudbury at significant risk if the court case is lost and costs are awarded against the Sudbury BIA. There is also the potential for the private sector parties to initiate a civil action to recover lost revenue

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as a result of the actions taken by the Sudbury BIA. These damages could result in huge legal costs and damages which would be the responsibility of the commercial property owners in the Downtown CIP as well as the City of Greater Sudbury.”

Coun. Kirwan possesses no legal designations or expertise, and neither does he reference any in his writings. At no time in his Facebook posts or newspaper column does Coun. Kirwan present evidence that he is representing other city councillors or decisions made by city council. Neither does Coun. Kirwan preface any of these communications as his personal opinion only.

Lastly, Coun. Kirwan again reiterates that the “death of the BIA” will secure the city’s path to legal victory over the various appeals ... thus revealing his true motive.

His unsolicited opinions as a councillor as to the legal ramifications of any action furthers the pressure on the BIA to change course on its lawsuit to meet his opinions. It also goes against General Principle 4(3) from the code of conduct: “Every member shall perform their official duties in a manner that promotes public confidence.”

This is clearly an attempt by Coun. Kirwan to spread fear about the consequences of decisions taken by Downtown Sudbury and other appellants in consultations with their own legal counsel.

Code of Conduct

[Greater Sudbury City Council’s Code of Conduct, General Principles](#)

4.(1) Every Member shall serve, and be seen to serve, the public in a conscientious and diligent manner.

(2) Every Member shall perform their functions with integrity, accountability and transparency and avoid the improper use of the influence of their office, and conflicts of interest, both apparent and real.

(3) Every Member shall perform their Official Duties in a manner that promotes public confidence.

(4) Members shall seek to serve the public interest by upholding both the letter and the spirit of the laws and policies established by the Federal Parliament, Ontario Legislature, and the

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By-laws, rules, procedures and policies of Council pertaining to their position as an elected official.

(5) Members should act in a manner which recognizes that the public has a right to open government and transparent decision making while acknowledging all rules regarding confidentiality contained in this Code of Conduct and in other legislation.

We contend that Coun. Kirwan has violated the general principles of City Council's Code of Conduct:

1. He is not serving the public in a **conscientious and diligent manner**. Rather, Coun. Kirwan is willfully spreading misinformation, defaming individuals and maliciously sowing discord in the community.
2. Coun. Kirwan is deliberately using **the influence of his office** to spread misinformation and to sow discord.
3. Coun. Kirwan has, over the past four years as well as the past couple of weeks, deliberately blurred the lines between his work as a city councillor, his private business interests and his opinions as a private citizen. As a result, he has created numerous **conflicts of interest, both apparent and real**.
4. Coun. Kirwan **has not performed his Official Duties in a manner that promotes public confidence**. He has done the opposite by willfully spreading misinformation and maliciously sowing discord in the community.
5. Coun. Kirwan is not **servicing the public interest by upholding both the letter and the spirit of the laws and policies established by the Federal Parliament, Ontario Legislature, and the By-laws, rules, procedures and policies of Council pertaining to their position as an elected official**. Instead, he is deliberately and publically trying to coerce lawful citizens and organizations into abandoning their constitutional right to a fair trial.

To sum up, Coun. Kirwan has deliberately and repeatedly used his position as a city councillor to 1) defame known individuals, 2) spread misinformation in the community, 3) maliciously sow discord in the community, and 4) attempt to coerce known individuals and organizations to abandon their legal right to defend their interests in courts of law.

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We further contend that Coun. Kirwan has violated the general principles of City Council's Code of Conduct: Section 13:

1) No Member shall use the influence of their office for any purpose other than the performance of the Member's responsibilities as a Member, and other Official Duties.

(2) In addition to the general requirement contained in subsection 13.(1): (a) No Member shall use their status as a Member to influence, or try to influence, improperly, any action or decision of another person or entity to the private advantage of:

(i) the Member;

(ii) any Family Member;

(iii) any business or other associate; or attempt to secure preferential treatment beyond activities in which Members normally engage on behalf of constituents as part of their Official Duties;

- 1) Coun. Kirwan is very clearly and openly used the influence of his office for a purpose other than the performance of the Member's responsibilities as a Member, and other Official Duties. He has worked diligently over the years to use his councillor position to promote the KED project and support its promoter, even though the project is not in his ward.

At no time over the two-week period in which Coun. Kirwan made these spurious, defamatory and damaging allegations and arguments has he attempted to distinguish between his personal opinion, his work as a city councillor and his business enterprise. The Facebook post was made on a page he created and describes as the official town hall for Ward 5 and Valley East, his newspaper column was attributed to "Robert Kirwan is the councillor for Ward 5 in the City of Greater Sudbury," and in his media interviews he presented himself as "City councillor Robert Kirwan."

- 2) Coun. Kirwan has clearly used his status as a Member to influence, to try to influence, improperly, any action or decision of another person or entity to the private advantage of a business or other associate; or attempt to secure preferential treatment beyond

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activities in which Members normally engage on behalf of constituents as part of their Official Duties;

Coun. Kirwan provides both editorial advertising and political opinion through his Facebook page <https://www.facebook.com/groups/valleyeasttoday/> and has continually lobbied for the Casino, The Sudbury Wolves, The Sudbury Five as well as the KED project on his city councillor page. He has, over the years, also provided advertorial content for which he has been paid in this same Facebook page. It is impossible to know what has been his political opinion vs. paid editorial placement (in his words “education-based marketing”), therefore it is hard to discern whose interests he has been serving over the past two weeks.

Conclusion

In conclusion, we contend that Coun. Kirwan is deliberately spread misinformation, is defaming known individuals and maliciously sowing discord in the Greater Sudbury community.

We contend that Coun. Kirwan is willfully and purposely trying to coerce an organization and individuals to abandon their constitutional right to defend their interests in a court of law.




We contend that Coun. Kirwan is doing all of these things with the use of councillor resources, such as his City of Greater Sudbury email address and internet service.




Lastly, we contend that Coun. Kirwan is doing all of these things in violation of the General principles and Section 13 of the City of Greater Sudbury’s Code of Conduct.

Yours,
Brian McCallagh
Kendra McLissac
Co-Chairs
Downtown Sudbury BIA

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10:26   






 **Councillor Robert Kirwan** uploaded a file in the group: **Valley East.** 
Thursday at 6:10 PM · 




City Councillors are elected every four years and assume responsibility for running the city. We are the ones who are obliged to consider all of the information available and make decisions that are in the best interests of the residents. It is understandable that there will always be people who will disagree with any decision, but at the end of the day it is City Council that must make a decision.

And so, back in June 2017, City Council made decisions that will eventually launch the City of Greater Sudbury into a whole new level with the Kingsway Entertainment District and the Downtown Junction projects. Hundreds of jobs will be created and hundreds of millions of investment will be forthcoming. Millions of additional tax revenue will be realized.

When we approved the applications for zoning amendments and official plan amendments that would allow for the casino and the municipal arena to be built on the site that was selected, we accepted that there would be appeals simply because we knew that some people wanted the arena downtown. A total of 12 appeals have been filed and they are going through the LPAT process. Once that decision is rendered, we can proceed with construction.

There was an election held in October 2018, and that would have been a perfect opportunity for the public to let us know that they disagreed with our decisions about the KED and the Junction. However, "every" single person who ran was re-elected. That was a pretty good indication that the public supported our

10:26   






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And so, it is disheartening to read the Application that has been filed in the Ontario Superior Court of Justice. What this amounts to is the same appeal, but filed in the Superior Court just in case the appeals are unsuccessful at LPAT. I reviewed the Court File at the Sudbury Court House today and it is attached as a file below. You can look at it and see that what is being asked is the same that has been asked for at LPAT.

However, you will also see that one of the Applicants in this file is the Sudbury Business Improvement Area as well as Tom Fortin. They are both being represented by Gordon Petch, the lawyer from Oakville who is also representing 10 of the 12 appeals with LPAT.

I have a lot of problems with what has been written in the Application. There are many false and misleading statements as well as unfounded accusations.

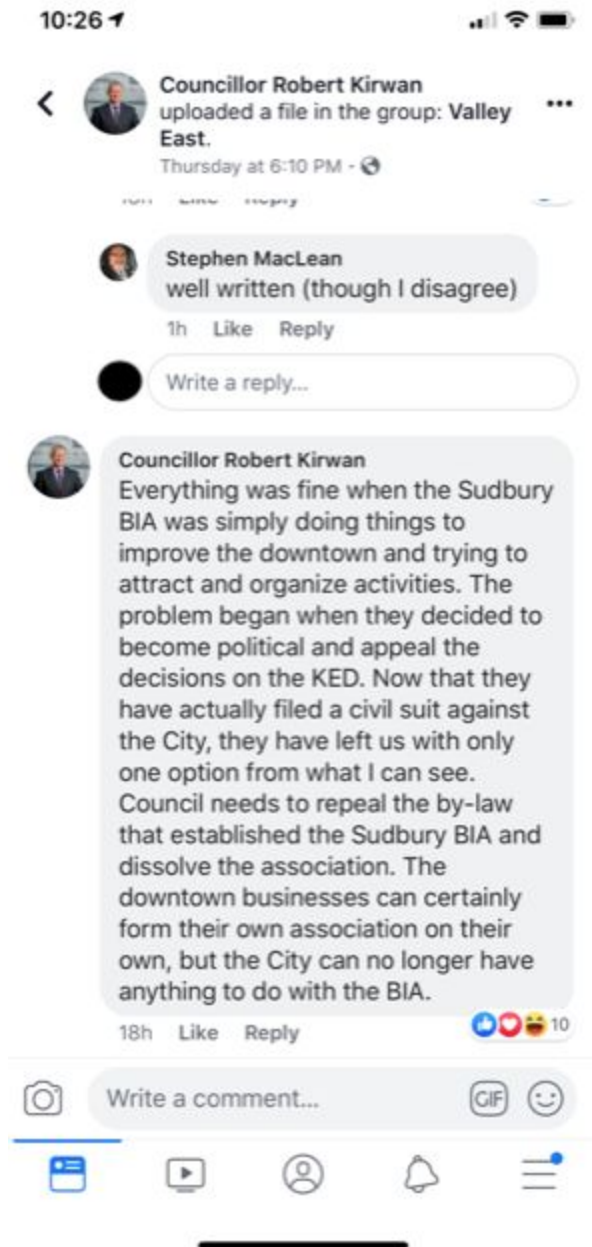
I just wonder how many of the Downtown businesses knew that their BIA filed this application? I wonder how many of them know that one of the things that is being asked for is "costs"? But with the Superior Court of Justice, costs are awarded to the "winning" side. If the city "wins", then the Sudbury BIA will have to pay "costs". I wonder if the Downtown Businesses are prepared to pay for those costs through the levy that is imposed on them every year. Costs in this case can be hundreds of thousands of dollars by the time it

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Councillor Robert Kirwan shared a link.

Admin · 16 hrs

Like Page

As you will see in this article below, the Business Improvement Areas in Windsor are facing dissolution by the Windsor City Council for acting outside their legislative mandates. They too have supported appeals against a Council decision.

In the case of the Sudbury BIA, not only have they supported appeals financially, they have also filed 4 appeals and now initiated legal action in the Superior Court of Justice in opposition to Council decisions.

So, I am not alone in taking a position that City Council must repeal the by-law that established the Sudbury BIA Board of Management in order to mitigate any future damages as a result of the actions that have been taken by the Sudbury BIA Board.

The Sudbury BIA is a Board of Management that was established by City Council. The responsibilities entrusted to the Board of Management include "the improvement, beautification and maintenance of municipally-owned lands, buildings and structures in the area beyond such improvement, beautification and maintenance as provided at the expense of the municipality at large and the promotion of the area as a business or shopping area."

That is why the Sudbury BIA was formed. It was to enhance the "improvement, beautification and maintenance of municipally-owned land, buildings and structures" over and above what the City provided.

The second responsibility of the Sudbury BIA is "the promotion of the area as a business or shopping area."

In order for the Sudbury BIA to fulfil its responsibilities, the legislation allowed the City to create a Community Improvement Plan (CIP) and designate the area that the Sudbury BIA would operate within. The legislation also allowed for the Sudbury BIA to establish a budget and have the city collect the funds from all of the commercial property owners in the CIP. Hence, approximately 140 commercial property owners contribute to the close to \$600,000 annual budget through a special levy

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on their municipal taxes. This levy adds about 15% to their tax bill and is

Discussion the Sudbury BIA Board of Management to administer. The commercial property owners must pay this levy. They cannot opt out.

The City must appoint Board members; approve the Board budget; and collect the funds from the commercial property owners.

The Sudbury BIA has filed 4 of the 12 appeals against the decision by City Council to approve the applications made to amend the zoning and official plan to permit the arena and casino to be part of the KED.

On April 8, 2019, the Sudbury BIA initiated legal action in the Ontario Superior Court of Justice against the City of Greater Sudbury, asking the court to overturn the decisions made by City Council.



Clearly, the Sudbury BIA is acting beyond its mandate. The action taken in the Superior Court of Justice may place all of the commercial property owners in the Downtown CIP as well as the City of Greater Sudbury at significant risk if the court case is lost and costs are awarded against the Sudbury BIA. There is also the potential for the private sector parties to initiate civil action to recover lost revenue as a result of the actions taken by the Sudbury BIA. These damages could result in huge legal costs and damages which would be the responsibility of the commercial property owners in the Downtown CIP as well as the City of Greater Sudbury.



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Screen Shot from December 2017:

A screenshot of a social media thread with three posts. The first post is from a user with a blacked-out profile picture, discussing a public campaign for TNS. The second post is from Robert T. Kirwan, Matt Saroka, discussing a site design plan and mentioning collateral damage against merchants. The third post is from another user with a blacked-out profile picture, referring to a previous post.

 [Redacted] i thnk there needs to be some kind of organized, public campaign by majority of the citizens who support TNS.....enough with the minority being louder with the majority..... Robert T. Kirwan.maybe if in your travels you have a chance to talk to Dario Zulich bring it up with him ...tell me how i can help, i have a few ideas... i am sick of these whiney, petulant babies being the only ones who are heard
Like ·  2 · December 7 at 6:43pm · Edited

 **Robert T. Kirwan** Matt Saroka The application is going through the regular procedures right now. All citizens have the right to exercise certain options. We are going forward with the confidence that we have made the right decisions and we are doing everything properly. There is no reason for anyone to object to the decision or the integrated site design plan and we know the kind of return we will get on our investment. All that the Kingsway opponents are doing is getting everyone upset and there may even be some collateral damage against some innocent downtown merchants as a result. I know that not all downtown merchants are against the plan that Council is implementing, but they are all being painted with the same brush.
Like ·  2 · December 7 at 6:51pm

 [Redacted] made a post somewhere recently saying the same thing...
Like · December 7 at 6:54pm