SUBDIVISION AND DEVELOPMENT APPEAL BOARD OF THE TOWN OF OKOTOKS DATED JULY 20, 2018

DECISION

Hearing held at:	Town of Okotoks Municipal Centre Council Chamber 5 Elizabeth Street, Okotoks
Date of Hearing:	June 5, 2018 and July 5, 2018
Members present:	Jasse Chan, Chair Councillor Matt Rockley Corey Brandt
Staff present:	Colleen Thome, Development Officer Michelle Grenwich, SDAB Clerk
Town Solicitor:	Greg Plester, Brownlee LLP
Board Solicitor:	Jennifer Sykes, Caron & Partners LLP
Summary of Appeal:	This is an appeal against the stop order issued by the Town requiring removal of a sign at NE 16-20-29-4.
Appeal filed by:	360Ads Inc. (per Justin Nordin)

The Board heard verbal submissions from the following:

Colleen Thome, Development Officer ("Administration");
Greg Plester, solicitor for Administration; and
Justin Nordin on behalf of 360Ads Inc. (the "Appellant).

The Board reviewed the materials contained in its agenda package and additional written submissions received at the hearing.

SUMMARY OF SUBMISSIONS:

The following is a summary of the submissions made to the Board in respect of this appeal.

Submissions of Administration

Ms. Thome and Mr. Plester provided a joint presentation to the Board.

This appeal concerns a Stop Order for unauthorized signs on land which was annexed from the MD of Foothills into the Town on July 1, 2018.

On April 9, 2018, the development officer noted unauthorized signage consisting of 4 trailer signs, 1 truck sign and 1 portable sign at the subject site.

Signs on trailers are prohibited by section 9.24.10 of the Land Use Bylaw, which states:

> The following signs are prohibited in the municipality b. Signs attached to licensed or unlicensed vehicles, not including imagery or wording either painted or adhered by magnetic or glued on decals directly onto the vehicle in question.

The exception to this rule (images attached directly to vehicles) is intended to allow for company vehicles.

Even if the signs are not prohibited by section 9.24.10, they are still non-compliant pursuant to section 9.24.6 of the Land Use Bylaw, which requires development permits to be obtained. No development permits were issued for these signs.

The signs are also non-compliant with the Land Use Bylaw because of their proximity to the highway. A sign within 300m of a controlled highway must have a roadside development permit from Alberta Transportation, no such permit has been provided.

According to Professor Laux's textbook *Planning Law and Practice in Alberta*, the question in this appeal is whether the Stop Order was properly issued.

The use of the land is contrary to the Land Use Bylaw and should be discontinued until properly approved. Proper approvals include a roadside development permit from Alberta Transportation. Development permits continue even if the property changes ownership.

When the Stop Order was issued, the MD of Foothills Land Use Bylaw applied. On June 25, 2018, the Town amended its own Land Use Bylaw to apply to the parcel. The Stop Order was issued under the MD Land Use Bylaw but a new application would be considered under the Town's Land Use Bylaw. The amendments to the land use bylaw do not change the fundamental aspects of this appeal.

During the afternoon of July 5th, Ms. Thome observed 2 portable signs and 4 semis with signage on them at the subject site.

The Appellant has suggested that the MD of Foothills Land Use Bylaw is unenforceable pursuant to a Court of Queen's Bench action. That action involved the MD seeking an injunction to stop certain development. The Court did not determine that the Land Use Bylaw was unenforceable, it dismissed the case on procedural grounds pursuant to a rule that allows actions to be struck if nothing occurs for a period of time.

The Appellant might be arguing that *res judicata* (the rule against relitigation) applies here. This would require a full and final determination of the substantive issue and would need to involve the same parties. Here there was no final determination about the enforceability

of the Land Use Bylaw, and the parties were a different municipality and a different sign company.

The fact that the order was issued after the annexation suggests that the MD did not want to proceed with an action regarding lands outside of its jurisdiction. There is no evidence that the action was abandoned out of a concern that the Bylaw was unenforceable.

This development is not a non-conforming use. It would have to meet the requirements of section 643 of the *Municipal Government Act* to be a non-conforming use. A non-conforming use must have once been legal, and the Appellant has not established that this is the case here.

The fact that the signs were present before annexation does not mean that they were legal. The same Land Use Bylaw applied both before and after annexation. There is no legal authority to support the position that annexation can trigger an alternative form of non-conforming use other than what is set out in the *Municipal Government Act*.

The Appellant's argument that the Town accepted the current development when it annexed the lands may be a type of estoppel argument (the Town cannot act in a manner contrary to its prior actions). The Supreme Court of Canada has held that even if the municipality has said that the use of lands is lawful, estoppel still does not apply to prevent the municipality from later enforcing its bylaws to stop the use. Also, the Town proceeded expeditiously with enforcement following annexation, it has not accepted this use.

Administration acknowledges the error on the Stop Order with respect to the time to file an appeal, but this error has created no prejudice to the Appellant that was not cured through the adjournment of the appeal.

Submissions of the Appellant

When the enforcement of the MD's Land Use Bylaw was before the Court, the Court denied the request for a permanent injunction because the MD could not proceed with the action due to substantial issues with the Land Use Bylaw. The MD did not want to expose itself to risk that its bylaw would be declared unenforceable. Therefore, it did not take steps for over 3 years.

Also, the MD hasn't taken enforcement action against other similar developments because it is aware that its bylaw may not be enforceable.

In the excerpts of his book provided by Administration, Professor Laux states that if a SDAB would not have jurisdiction to issue a permit in the first place, the SDAB does not have jurisdiction over the stop order. In this instance, the Board would not have had jurisdiction to issue a permit in the first place because the lands were in the MD of Foothills at the time rather than the Town of Okotoks. Therefore, the Board does not have jurisdiction over the Stop Order.

The signs are not prohibited uses. This is because the use is not exclusively signage. The signs are mounted on trailers which are used as storage units. The trailers have never been solely for advertising, the Appellant's secondary line of business is leasing out storage space.

The Land Use Bylaw defines Vehicle signs as signs affixed to vehicles that are not normally used in the daily activity of the business. These trailers are normally used in the daily activity of the business, being the leasing of storage space. The Land Use Bylaw does not prohibit these signs because they are not exclusively signage.

The fact of the trailers' secondary use for storage was the reason that the justice in the MD Court of Queen's Bench action sent the case to a special chambers application.

The Land Use Bylaw prohibits signs attached to vehicles, not including images either painted or adhered by magnets or glue directly onto the vehicles in question. These signs are affixed to the trailers using adhesive, they are then mechanically fastened as a further safeguard.

Since these signs are not prohibited, they are allowed without a permit.

According to Professor Laux's textbook, there are two definitions of lawful. It either means that something is not prohibited, or it means that a permit was issued or was not required. These signs are not prohibited, and do not require a permit, so either way these signs are lawful.

The signs are legal non-conforming uses and are allowed to be maintained and extended throughout a building. The Appellant maintains the trailers as required and as weather and landowner needs permit. There was a change in jurisdiction with the annexation but no change in the rules. The Town is still applying the MD's bylaw, which does not prohibit the trailer ads.

The Stop Order was not properly issued because it states that there are 14 days to appeal, really the Appellant was entitled to 21 days to appeal. The Stop Order should be reissued with the correct appeal period.

Submissions of Other Persons

The Board received a letter from Brent Pavelich in opposition to the appeal. He objects to development of this nature on the basis of traffic safety, since the signs are designed to draw the attention of drivers. He also objects to these signs because of the impact they have on his view of the mountains and prairie.

DECISION:

The Board denies the appeal and upholds the stop order.

REASONS:

The Board's Jurisdiction

There were two issues relating to the Board's jurisdiction to hear this appeal.

First, the Stop Order was issued to individuals appearing to be the owners of the subject site, but the Appellant was 360Ads Inc. The Court of Appeal has previously limited the appeal rights of persons other than the recipients of stop orders (*Cross Country Marketing (1993) Ltd. v Grande Cache (Town of)*, 2000 ABCA 27), but more recently suggested that the right of appeal may be broader (*Kalinski v Cold Lake (City)*, 2014 ABCA 375). Administration did not challenge the Appellant's right to appeal the Stop Order. Given the recent Court direction, the Board is satisfied that it may proceed to hear this appeal.

Second, the Appellant argues that (notwithstanding that the Appellant brought this appeal before the Board), Professor Laux's textbook indicates that the Board has no jurisdiction over this appeal. Since much weight was put on this particular passage, it is appropriate to reproduce it here:

> Where a stop order has been issued because the subject development is contrary to the terms and conditions of a subsisting development permit, the problem usually is that a development standard has been breached. For example, a building may have been constructed, or be in the course of construction, in breach of an express or implicit condition pertaining to yard requirements, or a development may have been effected without the requisite number of parking spaces. In such cases, in determining an appeal from a stop order, a board can set aside the order and authorize the developments to proceed or remain as built. In that event, the board decision amounts to a new development permit that, in law, operates to supersede the original permit. It must be emphasized, however, that the board has no jurisdiction to allow an appeal against a stop order if the board would have lacked jurisdiction to grant a development permit in the first place. [Emphasis added]

The Appellant argues that the Okotoks SDAB would have lacked jurisdiction to grant a development permit in the first place since the lands were outside of Okotoks, therefore the Board lacks jurisdiction in this appeal.

The Board disagrees with the Appellant's interpretation of this passage. If SDABs could not hear appeals of stop orders when the subject development took place prior to annexation, a regulatory gap would exist which would not have been intended, particularly given the content of section 135 of the *Municipal Government Act*.

Also, the Appellant's interpretation is contrary to the wording of the passage. Professor Laux states that if the Board could not have issued a permit, the Board could not "allow an appeal against a stop order". Allowing an appeal against a stop order means allowing

the development to continue – the Board cannot allow a development to continue if the Board would not have been able to approve the development in the first place. This passage does not say that the Board lacks jurisdiction to hear the appeal.

The Board finds that it has jurisdiction to hear this appeal and consider the merits of the stop order. The Board acknowledges that its jurisdiction in the appeal does not allow it to overturn the stop order and approve the development permit if the Board would not have been able to approve the development permit in the context of a development permit appeal.

The Error in the Stop Order

The Stop Order directs that the Appellant has 14 days rather than 21 to file an appeal. The Appellant argues that this error invalidates the Stop Order and that a new one should be issued.

The Appellant argues that the error caused him prejudice. He had to scramble to file his appeal in 14 days when he should have had more time. On June 5th, the Appellant requested an adjournment to allow him to prepare for the appeal and retain counsel. He did not bring counsel to the July 5th meeting and did not request any further adjournment to retain counsel (although near the end of the hearing he commented that even with the 1-month adjournment he did not feel he had adequate time to retain a lawyer and prepare for the appeal).

Administration's position is that the error did not cause any prejudice that was not cured by the 1-month adjournment.

The Board finds that the substance of the Stop Order was clear and unambiguous, and that the Stop Order contained all of the information required by the *Municipal Government Act*. The Appellant has not satisfied the Board that he suffered any prejudice that was not remedied by the adjournment. The error on the Stop Order was technical in nature and did not affect its substance or validity.

While the Appellant stated that he would have liked to have had more time to prepare for the hearing, he argued the merits on July 5th and did not request an adjournment, and he never provided any information about what other evidence or submissions he would have provided if he had more time. Further, the Board is conscious of the fact that the Appellant had more time to prepare for this hearing than the *Municipal Government Act* contemplates, given that the *Act* requires the Board to conduct the hearing within 30 days of receiving the notice of appeal.

The Characterization of the Development

The Appellant argues that the development does not meet the definition of "vehicle sign" found in the Land Use Bylaw. Section 9.24.1 of the Land Use Bylaw states:

> Vehicle Sign: a sign that is affixed or painted onto a vehicle, including but not limited to: trailers, with or without wheels, Sea-cans, wagons, cars, trucks, tractors, recreational vehicles and mobile billboards, that are not normally used in the daily activity of the business and that is visible from a road so as to act as a sign for the advertisement of products or services or to direct people to a business or activity.

The Appellant argued that the trailer signs do not meet this definition because they are normally used in the daily activity of the business, that being the storage component of the Appellant's business.

The Appellant also argued that the trailer signs are not prohibited signs because they fall under an exception in section 9.24.10, which states:

> The following signs are prohibited in the municipality:
>
> b. Signs attached to licensed or unlicensed vehicles, not including imagery or wording either painted or adhered by magnetic or glued on decals directly onto the vehicle in question. [Emphasis added]

The Appellant argues that since the images are affixed to the trailers with glue, they fall under the exception for images glued directly onto vehicles.

The Appellant argues that since the signs are not vehicle signs and are not prohibited, they are entitled exist without a development permit. This does not address the portable signs which were identified on the subject site, but the Board considered this argument *vis a vis* the trailer signs.

Regardless of whether the trailer signs meet the definition of "vehicle sign" and/or are prohibited signs, they meet the definition of "sign" in the Land Use Bylaw:

> Sign: any device or structure used for the display of advertisements, pictures and/or messages and without, in any way, restricting the generality of the foregoing, includes posters, notices, panels and boarding.

The Appellant argues that since the signs are not expressly prohibited by the Land Use Bylaw, they must be allowed without a permit. However, the Land Use Bylaw does contain such a prohibition. Section 9.24.6 states:

> Unless otherwise exempted under Section 4.2 of this bylaw, a Development Permit shall be obtained for all signs, structures for signs and any enlargement, relocation, erection, construction or alteration of an existing sign.

The Land Use Bylaw provides a specific list of signs which may be erected without a development permit. That list is contained within the materials that were before the Board. None of the exceptions to the permit requirement apply to this development. Therefore, a permit is required for these signs, and no permit has been issued.

Legal Non-Conforming Use

The Appellant argued that the signs are a non-conforming use. He referred to Professor Laux's textbook for the meaning of "lawful", noting that it could mean not prohibited, or could mean that a permit was either issued or not required.

As discussed above, the Board is not satisfied that the signs are not prohibited, at least not without a development permit. Therefore, they were not lawful such that they could become non-conforming through a change in the law.

The Board is not satisfied that annexation rendered the signs a non-conforming use. The same Land Use Bylaw applied both before and after the annexation, and the development was contrary to the Land Use Bylaw at both times. No legal authority was provided to the Board confirming that annexation renders existing uses on lands lawful when they would have been contrary to the land use bylaw both before and after annexation.

The Board is also not satisfied that the signs have been "accepted" by the Town. The Town has diligently pursued enforcement since annexation, and no evidence of any representation by the Town that the use could continue was provided.

Court of Queen's Bench Action

The Appellant argues that the MD's Land Use Bylaw is unenforceable. The Court of Appeal has directed that a person cannot challenge the validity of a Land Use Bylaw through an appeal to a SDAB. The Board must comply with the bylaw and has no power to declare it invalid (*Mather v Gull Lake (Summer Village of)*, 2007 ABCA 123). The Court of Queen's Bench order provided was a dismissal on procedural grounds, not a declaration that the Bylaw is unenforceable.

Further, the Appellant has not satisfied the Board that the Land Use Bylaw is ambiguous or invalid. Even if there is an ambiguity regarding the storage use of the trailers, the signs would still be "signs" for which a development permit would be required.

SUMMARY:

For the reasons set out above the appeal is denied and the stop order is upheld.

Michelle Grenwich

Michelle Grenwich

SDAB Clerk