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 NW 15-20-29-4
Appeal filed by:	Spot Ads

The Board heard verbal submissions from the following:

Colleen Thome, Development Officer ("Administration");
Greg Plester, solicitor for Administration;
David De Groot, Burnet Duckworth & Palmer LLP, solicitor for Spot Ads (the "Appellant"); and
Hendrik Van Huigenbos.

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 5 trailer signs.

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.

The Appellants' position is that this type of sign is not prohibited because vehicle signs are not used as a term in section 9.24.10. This may be a legacy holdover of limited relevance. There is a specific prohibition against signs attached to licensed or unlicensed vehicles, and vehicles are specifically defined in the Land Use Bylaw to include trailers.

The signs are also non-compliant with the Land Use Bylaw because of their proximity to the highway. They do not meet the minimum setback of 64 metres from the centreline of a secondary highway, and a sign within 300m of a controlled highway must have a roadside development permit from Alberta Transportation, no such permit has been provided.

Further, the signs are 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 Land Use Bylaw states that the signage shall not be placed until a development permit has been issued unless the sign is exempt. These signs do not fall under any exemption. The permit process can take a long time. It would set a poor example for the contravention to be allowed to continue during this period.

The signs were placed on the subject site after annexation took place.

The Town has not inconsistently applied the Land Use Bylaw. The Town has received and responded to two complaints about this type of development and is not aware of any signs of this nature in its boundaries. There are other such signs outside of Okotoks but the Town cannot enforce in other municipalities. Even if the Town had unequally enforced its bylaws, though, it is not barred from doing so (*Polai v City of Toronto*, [1973] SCR 38).

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. Such a permit is part of the supplementary materials for the development permit application and must be obtained before an application for a development permit. Development permits continue even if the property changes ownership.

Even if the signs are not prohibited, a development permit could not be issued until Alberta Transportation issues a roadside development permit. The Appellant applied for such a permit for the adjacent parcel in October of 2017 but did not include the subject site until June 25, 2018.

The Appellant has put forward a Court of Queen's Bench decision involving Leduc County. That decision still requires the sign company to apply to the province and the County in succession for permits, failing which a permanent injunction will stand. This order does not apply to the Town or prevent the Town from proceeding with enforcement.

The Appellant did not provide any background regarding the Leduc County order, such as a transcript. Administration has not ordered one because transcripts are costly and the Appellant should obtain it if it wants to rely on this order. The details of Leduc County's bylaw are not known, and this type of sign may not be prohibited there.

It is not clear that the Justice issuing the Leduc County order realized the length of time that the court order would allow the contravention to persist. Also, it is possible that the Justice was lenient with Spot Ads in that order because Spot Ads was not aware at the time of the effects of municipal bylaws, but Spot Ads would have been well aware of such effects when the current development was undertaken.

If the court order did apply within the Town, Spot Ads would be in breach of it. The order prohibits moving or adding trailers pending the permit process being completed.

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 5 trailers with signage on them at the subject site.

The Appellants want the contravention to be allowed to continue until Alberta transportation has issued a decision in reference to the application submitted to that ministry. This process is entirely independent of the Town's processes. There is no requirement for the Town to issue a permit if the Appellant receives a permit from Alberta Transportation.

Professor Laux, in *Planning Law and Practice of Alberta*, states "The Board has no jurisdiction to override the stop order and permit the indefinite continuation of the use" where a stop order is issued for a development not authorized by the land use bylaw for the relevant district. That is exactly what the Appellant is asking the Board to do here.

The Appellant has knowingly breached the Land Use Bylaw and has chosen to beg forgiveness rather than ask permission. Allowing this to occur would undermine the permitting process.

Submissions of the Appellant

The Land Use Bylaw does not prohibit the subject signs. It does not prohibit all types of vehicle signs. Vehicle signs are a defined term as follows:

> 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.

Prohibited signs in section 9.24.10 include:

> a. Signs attached to shipping containers or Sea-cans, including signage painted or adhered directly onto a container;
>
> 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;

Section 9.24.10(b) cannot be interpreted to apply to all vehicle signs. Signs on Sea-cans are specifically included in the definition of vehicle signs, so that part of 9.24.10(a) would be redundant if 9.24.10(b) prohibited all vehicle signs. Therefore, a development permit could be issued for the subject signs.

The Appellant requests that the Board grant permits for the signs. The Board has this power under section 687(3)(c) of the *Municipal Government Act*, which allows the Board to make or substitute its own order. Professor Laux has provided a good summary of the Board's jurisdiction as follows:

> On the other hand, if a stop order was issued because there was no subsisting permit for the use, but the use is one that is authorized by the land use bylaw for the district in which the subject land is located, the board likely has jurisdiction to set aside the order. In such a case, the board should decide the appeal as though it were an appeal from a denial of a development permit application by the development authority. A decision favourable to the appellant would, in law, likely constitute a development permit. In its decision, the board could impose the same conditions as it could in the case of a development permit appeal. It may also exercise the same variance power as in the case of a development permit appeal.

The Appellant discussed its own history and the Leduc County order in respect of the Board's exercise of its discretion to issue such a permit.

The current owners of the Appellant corporation purchased the company in 2015 and were unaware of the specifics of local bylaws at that time. In 2015, Leduc County brought enforcement proceedings. As with the subject bylaw, the Leduc County land use bylaw requires a roadside development permit before an applicant can obtain a local development permit. The Appellant applied for permits from Alberta Transportation.

The matter came to the Court of Queen's Bench for an injunction against the signs for non-compliance with the local bylaw. The Court agreed that the Appellant was trying to comply, so it stayed enforcement pending the permitting process.

Alberta Transportation denied the roadside development permit within a month of the Court of Queen's Bench decision, but that decision was overturned on judicial review. New applications were made but no decision has been issued.

Part of Justice Hall's judicial review decision was that:

> The decision not to permit trailer signs of Spot Ads Inc results in a wholly discriminatory situation. Spot Ads Inc. is not allowed to place its billboard advertising within 300 m of the major highways, yet all other billboards in the province within the 300 m of the highway would continue to be in existence. Such a prejudicial and discriminatory result cannot be within the range of reasonableness.

If the Town does not allow the Appellant's trailer signs, this would also result in a wholly discriminatory situation, since the Appellant will not be able to place its advertising within 300 m of the major highway in Okotoks but other billboards would continue to exist. This cannot be within the range of reasonableness.

While there has been a significant delay since the Leduc County order was issued, Spot Ads has been doing all it can to obtain permits. The delay has been caused by Alberta Transportation. The Appellant had applied for permits from Alberta Transportation, and updated that application when it realized that this parcel had not been included. The Appellant suggested that Alberta Transportation is working with municipalities and delaying issuing its permits while municipalities proceed with enforcement action.

The Board can impose conditions to mitigate its concerns about an indeterminate duration of non-compliance or an Alberta Transportation decision.

The signs are on trailers, not semi-trailers. The Appellant is not arguing that they fall under an exception to the prohibition because of the images being glued on.

The Appellant's representative has notified the Town of similar signs along the highway in the annexed lands. These may not have been formal complaints, but they were enough to make Administration aware of the signs.

This is not a case of seeking forgiveness instead of permission, this is an attempt to bring the signs into compliance. Spot Ads is trying to make its signs legal, while other companies make no such effort. This should be kept in mind when deciding whether to grant a permit.

The Board should consider the issuance of the development permit under the land use bylaw as it existed as of the time of the Stop Order.

Submissions of Other Persons

Mr. Van Huigenbos was the previous owner of the Appellant corporation and is now involved in litigation with its new owners. The new owners delayed commencing and serving the lawsuit. Spot Ads made the exact same appeal in Red Deer County as it is making here. In the meantime, Spot Ads has taken the opposite position in its lawsuit and claimed that the signs are illegal. The Appellant's lawyer should not be allowed to take contradictory positions.

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 Spot Ads. 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 Board had to determine whether the notice of appeal was filed on time. The appeal was filed on May 11th, more than 21 days after the Stop Order was issued. Administration supported this appeal being heard.

The Appellant argues that the appeal period must begin to run upon receipt of the written stop order. The Board makes no finding on this argument, but for other reasons finds that the appeal was filed in time. The Appellant appealed as a person affected by the Stop Order. Affected persons appeal pursuant to section 685(2) of the *Municipal Government Act*. Section 686(1) gives persons filing under section 685(2) 21 days to file their appeal after notice is given according to the Land Use Bylaw.

Where the Land Use Bylaw does not specify notice for affected persons (as is the case here), the Court of Appeal has held that the appeal period begins when the affected person has actual or constructive notice of the order (*Coventry Homes Inc. v Beaumont (Town of) Subdivision and Development Appeal Board*, 2001 ABCA 49). The Board is satisfied that the Appellant had notice on May 9th. The Appellant filed its notice of appeal less than 21 days after May 9th, so the appeal was commenced in time.

The Error in the Stop Order

The Stop Order directs that the Appellant has 14 days rather than 21 to file an appeal.

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 error on the Stop Order was technical in nature and did not affect its substance or validity or cause any prejudice to the Appellant.

The Stop Order

The first issue the Board must consider is whether the Stop Order was properly issued. It was not disputed that the development exists, that a development permit would be required under the applicable Land Use Bylaw, or that no development permit had been obtained.

Section 9.24.6 of the applicable Land Use Bylaw requires signs to have development permits as follows:

> 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 subject signs do not fall under any of the exemptions found in section 4.2 of the Land Use Bylaw.

Accordingly, the Board is satisfied that the subject development is a contravention of the Land Use Bylaw in force when the Stop Order was issued, and that the Stop Order was properly issued.

Issuance of a Development Permit

The Appellant argues that the Board should exercise its discretion and issue a development permit (or an order having the effect of a development permit) to allow the signs to remain pending approval from Alberta Transportation.

There are two reasons that the Board may not have such discretion.

First, there were arguments about whether the signs are prohibited by section 9.24.10. The Appellant argues that 9.24.10(b) does not apply to all signs on vehicles, since

otherwise 9.24.10(a) would be redundant, while Administration argues that "vehicles" are a defined term that includes trailers, and since 9.24.10(b) prohibits signs attached to vehicles, these signs attached to trailers would be included in the prohibition.

Second, if the Board were to issue a permit, this would mean varying section 9.24.8 of the Land Use Bylaw, which requires an applicant to have an approved roadside development permit from Alberta Transportation before applying for a development permit. The Board has the power to vary development standards contained in the Land Use Bylaw, but this is not a development standard, it is a process, and the Board's jurisdiction might not extend to varying this process (*Thomas v Edmonton (City)*, 2016 ABCA 57).

It is not necessary for the Board to determine whether the relief the Appellant is requesting is within the Board's jurisdiction, because if it is, the Board would not exercise its discretion to grant such relief.

The subject development is a significant development, and it should go through the normal development approval processing by the Town's planners who can consider the suitability of this proposed development based on appropriate planning principles.

The Board acknowledges the Appellant's submissions regarding the delays it is experiencing in obtaining a roadside development permit from Alberta Transportation. The Board is also conscious of the express direction in the Land Use Bylaw that a roadside development permit must precede an application for a development permit.

The Appellant argues that it would be unreasonable for the Board not to grant relief and allow the signs to remain while the Appellant waits for a roadside development permit, because other billboards could still exist within 300 m of the major highway in the Town of Okotoks.

The Board finds that it is not unreasonable for the Town to enforce the Land Use Bylaw and require compliance by the Appellant. If the Appellant is hindered in its ability to apply for a development permit because it is being unfairly treated by Alberta Transportation in its roadside development permit application (and the Board makes no finding in that regard), that is a matter between the Appellant and Alberta Transportation.

The Appellant has argued that the Board should allow these signs to remain because the Town has unevenly enforced the Land Use Bylaw and allowed other similar signs to remain. The Board has no information regarding the particulars of those signs or the basis (if any) on which they exist.

Even if there is uneven enforcement of the Land Use Bylaw, the Board is not satisfied that this is a valid reason to exercise any discretion it might have to allow the use to remain. The Town is not obligated to commence all enforcement actions against a

particular type of development simultaneously, and there would have to be a first enforcement action.

Other Matters

The Board makes no findings regarding the motives of Alberta Transportation. While the suggestion was made that Alberta Transportation is either deliberately delaying the processing of roadside development permit applications to give time for municipalities to take enforcement action, or somehow targeting Spot Ads. There was not sufficient evidence before the Board to satisfy it that this was the case, and even if it was, this would be a matter between the Appellant and Alberta Transportation.

Administration also made a number of statements regarding the motives of the Appellant, specifically that the Appellant was knowingly breaching the Land Use Bylaw and applying an "beg forgiveness rather than ask permission" approach. The Board did not take these allegations into consideration in this decision. The Board's decision is based on the nature of the development and the appropriateness for the development to follow the ordinary course, not on any alleged ill intend by the Appellant.

SUMMARY:

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

Michelle Grenwich

Michelle Grenwich

SDAB Clerk