SUBDIVISION AND DEVELOPMENT APPEAL BOARD
TOWN OF OLDS

NOTICE OF DECISION – October 29, 2015

SUBJECT SITE: 5018-57 Avenue, Portion of NE31-32-1 W5M, Olds, Alberta, (the "Lands").

APPEAL: Appeal of the Stop Order (the "Stop Order") dated August 19, 2015 issued by the Town of Olds (the "Town") pursuant to Section 645 of the *Municipal Government Act, RSA 2000*, as amended, (the "MGA") and Section 2.6(1) of the *Town of Olds Land Use Bylaw #01-23* (the "Land Use Bylaw"), respecting unauthorized sea cans development or use.

APPLICANT: Town of Olds

APPELLANT: Milner's Aloha Mobile Home Park Ltd. (Agent N. Locke Richards (Student-at Law) of Altalaw, LLP).

DATE OF HEARING: October 15, 2015

MEMBERS PRESENT: Leonard Brandson, Debbie Bennett, Rudy Durieux, Edie Connolley, Les Leatherdale.

DECISION:

Having read the materials filed, and having heard the representations of interested parties, including the Appellant by its Agent Mr. Richards (upon his conferring with Mr. Irv Milner, where needed) and a representative of the Town's Planning Department, the Board Members unanimously decide, for the reasons set out herein, to uphold the Stop Order subject to the following change: extending, to 4:00 pm on November 30, 2015, the time for complying with the Land Use Bylaw by removing the two (2) Sea Cans from the Lands. Accordingly, in the second paragraph of page 2 of the Stop Order, the words "October 13, 2015" are replaced with "November 30, 2015".

FINDINGS OF FACT:

The parties agree that two "sea cans" (i.e. shipping or cargo containers used in intermodal (sea, rail, truck) freight transportation or storage) are located on the Lands. Both sea cans were previously used on container ship(s).

The Town submitted that the Stop Order was issued to Mr. Milner. The Appellant submitted that the Stop Order was issued to Milner's Aloha Mobile Home Park Ltd. Upon reviewing the Stop Order, the earlier letters sent by the Town (dated June 2 and July 6, 2015), and the submissions of the Town and the Appellant, the Board finds that the Stop Order was issued to, and is an order to, both the Appellant (Milner's Aloha Mobile Home Park Ltd.) and Mr. Irv Milner. Further, the Board finds that the Appellant and/or its representative Mr. Irv Milner placed the sea

cans on the Lands and both persons are responsible for the sea cans, for the use of the sea cans, and for the Land Use Bylaw contravention.

Since being placed on the Lands, the sea cans have been used as storage space for the maintenance and operation of the Aloha Mobile Home Park (the "Aloha Park"). The Board finds that the Appellant and/or its representative Mr. Irv Milner placed the sea cans on the Lands to serve as storage for the Aloha Park, with no intention to remove the sea cans unless and until the Appellant might determine that the Aloha Park required a different storage solution.

The Aloha Park has been owned by the Appellant since approximately 1988. The Aloha Park is not located on the subject Lands. The Aloha Park lands are districted Residential-Manufactured Home District (R4). The subject Lands are districted Highway Commercial District (CH).

The first of the two sea cans was placed on the Lands approximately two years ago (i.e. approximately October 2013). The second sea can was placed on the Lands approximately one year ago (i.e. approximately October 2014).

The Town sent the Appellant two letters as "formal written notification of violation", prior to issuing the Stop Order. The first violation notice was dated June 2, 2015 and required removal of the sea cans by 4:00 pm on June 29, 2015. The second violation notice was dated July 6, 2015 and required removal of the sea cans by 4:00 pm on August 4, 2015. Both letters advised that failure to remove the sea cans would result in bylaw enforcement action. The Board finds that the Appellant and its representative Mr. Irv Milner received or were aware of the two warning letters, as noted by the Appellant's reply (upon the Agent's conferral with Mr. Irv Milner) to the Board's questioning.

The Stop Order dated August 19, 2015 stated the following:

> *"At present, the Lands do not comply with the Town of Olds Land Use Bylaw #01-23 given:*
>
> - *Two (2) Sea Cans (shipping containers) are located on the parcel located at 5018-57 Avenue which is in the Highway Commercial land use district of the Land Use Bylaw."*
>
> *The Town of Olds Land Use Bylaw 01-23,…(noting Land Use Bylaw Amendment Bylaw 2014-17), states in Schedule B: Part 1(2) Building Orientation and Design by adding "b) Sea cans or similar forms of shipping or cargo containers, shall not be permitted on a site in any district except for Light Industrial, Industrial Business and Heavy Industrial"*
>
> *Accordingly, you are hereby ordered to take action to comply…by removing the two (2) Sea Cans…"*

Bylaw 2014-17 was passed on November 25, 2014. Among other changes, Bylaw 2014-17 introduced the following changes to the Land Use Bylaw:

- Part One, Section 1.3 -- a definition of "sea can" was added to the Land Use Bylaw. The definition being, "*"sea can" means a shipping or cargo container used in intermodal (sea, rail, truck) freight transportation or storage*";
- The listed use "sea can" – "sea can" was added as separately listed (discretionary) use from "accessory building" (permitted use) in three districts of the Land Use Bylaw (Light Industrial (I1), Industrial Business(1B), and Heavy Industrial (I2)];
- Schedule B: Part 1(2) Building Orientation and Design - adding, *"(b) Sea cans or similar forms of shipping or cargo containers, shall not be permitted on a site in any district except for Light Industrial, Industrial Business and Heavy Industrial*";

- In Schedule C – adding "accessory buildings" as a discretionary use in the CH district; and
- In Part Two, Section 2.2(15) – adding a development permit exemption for, "*construction or placement of an accessory building with a floor area of less than 10m^2 (108 ft^2) not exceeding 4.5m (14.76 ft) in height, meeting all requirements of accessory buildings in the Land Use Bylaw."*

There was no evidence of any existing development permit or development permit application respecting the sea cans. The Appellant submitted that prior to receiving the Stop Order, the Appellant was unaware that any sort of development permit was required to have the sea cans on the Lands. The Board finds that no development permit has ever been obtained for, or applied for, respecting the location of, or use of, the sea cans on the Lands.

REASONS

The Board finds that the Stop Order is lawful and is reasonable in directing compliance with the Land Use Bylaw by requiring removal of the sea cans. The Board finds that the sea cans development on the Lands is not authorized and is in breach of the Land Use Bylaw. The sea cans development is in breach of Land Use Bylaw Schedule B: Part 1(2)(b) and in breach of the Land Use Bylaw requirement for a development permit. There is no development permit authorizing the sea cans location or use on the Lands. Further, the use of the sea cans is beyond the listed uses of the applicable CH District.

Section 643 and 616 of the MGA (and Land Use Bylaw Part One Section 1.3 and Schedule B: Part 4) recognize that there may be cases where a lawfully commenced development can be carried on without a development permit, even after municipal land use bylaw changes would otherwise render the development noncompliant. However, the Board finds on the evidence that even before the passing of Bylaw 2014-17, the sea cans development on the Lands required a development permit and was not a lawful development. Accordingly, the development is not protected from the Stop Order by MGA Sections 643 and 616 (and Land Use Bylaw Part One Section 1.3 and Schedule B: Part 4).

Breach of Schedule B: Part 1(2)(b) of the Land Use Bylaw (Amended by Bylaw 2014-17):

Pursuant to Land Use Bylaw Schedule B: part 1(2)(b), *"Sea cans or similar forms of shipping or cargo containers, shall not be permitted on a site in any district except for Light Industrial, Industrial Business and Heavy Industrial"*.

The parties agree that there are two sea cans on the Lands and the Lands are districted Highway Commercial (CH). There is no Land Use Bylaw amendment or development permit authorizing the sea cans or their use on the Lands. Therefore, the presence and use of the sea cans on the Lands is in breach of Schedule B:Part 1(2)(b) of the Land Use Bylaw.

No Development Permit - Breach of Part Two, Sections 2.1 and 2.2 of the Land Use Bylaw (as Amended by Bylaw 2014-17):

In considering whether the Stop Order was properly issued pursuant to MGA Section 645 and Land Use Bylaw Section 2.6, the Appellant's description of the sea cans use, the grounds of appeal, the Appellant's requested relief (including issuance of a development permit), and the Board's authority under Section 687 of the MGA, the Board considered whether the sea cans development required, and requires, a development permit.

The Board finds that no development permit has ever been obtained, or applied for, respecting the sea cans development on the Lands. The Appellant submitted that prior to receiving the Stop Order, the Appellant was unaware that any sort of development permit was required to have the sea cans on the Lands.

However, the sea cans and their use constitute a "development" as defined in Part One Section 1.3 of the Land Use Bylaw and Section 616 of the MGA; and, prior to and since 2013, the Land Use Bylaw Part Two Section 2.1(1) has stated that, "*No development other than that designated in Section 2.2 shall be undertaken within the municipality unless an application for it has been approved and development permit has been issued*."

Moreover, under the current Land Use Bylaw (as amended by Bylaw 2014-17) there is no applicable Part Two Section 2.2 exemption from the requirement of a development permit.

For example, the Board finds on the facts that the sea cans development is beyond the scope of Part Two Section 2.2(5), which provides a development permit exemption for, "*a temporary building, the sole purpose of which is incidental to the carrying out of a development for which a permit has been issued under this Land Use Bylaw*. "Temporary building" under the Land Use Bylaw (Part One, Section 1.3) means, "*a building constructed without any foundation, and the use or placement of which is intended to be for periods of time that are less than six months*". The Appellant submitted that the sea cans development was commenced and continued without anticipation that the sea cans were a problem (e.g. were without authority) or could be subject to removal. Further, the Appellant has yet to determine, and would prefer at least 5 more years to determine, whether the Aloha Park requires a different storage solution than the sea cans. The Appellant's first relief requested is to allow the sea cans to remain permanently. Accordingly, the Board is not persuaded, on the facts provided, that the sea cans are "temporary buildings".

Further, the Board finds on the facts that the sea cans development is beyond the scope of Part Two Section 2.2(15), which provides a development permit exemption for, "*construction or placement of an accessory building with a floor area of less than 10m^2 (108 ft^2) not exceeding 4.5m (14.76 ft) in height, meeting all requirements of accessory buildings in the Land Use Bylaw*. Although the Appellant submitted that the sea cans are being used as "accessory buildings", the Appellant's explanation was that the sea cans are storage space for accessory items required for the maintenance and operation of the Aloha Park. "Accessory Building" under the Land Use Bylaw (Part One, Section 1.3) means, "*a building separate and subordinate to the main building, the use of which is incidental to that main building and is located on the same parcel of land*." The Aloha Park is not located on the same parcel of land as the two sea cans at issue. The Board finds that the sea cans are not being used as accessory buildings as defined in the Land Use Bylaw; rather, the sea cans are being used subordinate and incidental to a main building and use on different lands or for a mobile home park storage use not listed within the CH District.

In the alternative, the Board finds that, for the subject CH District, "sea can" is not a use that falls within "accessory building". Phrased otherwise, the listed use "accessory building" under the CH District does not include "sea can", considering the following context in the Land Use Bylaw as amended by Bylaw 2014-17:

- "sea can" is a separately defined term from "accessory building";
- "sea can" is a separately listed use from "accessory building" in three land use districts (I1, I2, IB);

- "sea can" is not a listed use within the CH District while "accessory building" is a listed discretionary use; and,
- Schedule B: Part 1(2)(b) prohibits sea cans within all districts excepting the three districts which separately list both "sea cans" and "accessory buildings" (I1, I2, IB).

In the alternative, if the sea cans at issue are "accessory buildings", they do not meet "all the requirements of accessory buildings" in the Land Use Bylaw (e.g. Schedule B: Part 1(2)(b)), as required by the Land Use Bylaw Part Two Section 2.2(15) exemption from a development permit.

Accordingly, the sea cans development on the Lands does not fall within the Part Two Section 2.2 development permit exemptions and the sea cans development is in breach of Part Two Sections 2.1 and 2.2 of the Land Use Bylaw (as amended by Bylaw 2014-17), being development undertaken without a development permit.

No Development Permit – A Permit Was Always Required (Prior to and After Bylaw 2014-17); The Sea Cans are Not an Existing Lawful or Non-Conforming Use:

The Board accepts that both sea cans were placed on the Lands and used for storage for the off-site Aloha Park since the fall of 2013 and 2014, respectively. Accordingly, the sea cans development at issue started prior to the passing and coming into force of Bylaw 2014-17 and the current Land Use Bylaw definition of "sea can" and Schedule B: Part 1(2)(b).

However, to be a potentially protected development ('grandfathered') under MGA Sections 643 and 616 (and Land Use Bylaw Part One Section 1.3 and Schedule B: Part 4), the sea cans development must have been lawful and authorized by a development permit or exempt from requiring a development permit under the Land Use Bylaw prior the passing of Bylaw 2014-17.

The Board finds that no development permit has ever been obtained for, or applied for, respecting the location of, or use of, the sea cans on the Lands.

Moreover, the Board finds no applicable exemption from the Land Use Bylaw Part Two Sections 2.1 and 2.2 requirement of a development permit; the Board was not persuaded by any evidence submitted that the sea cans development met the parameters of any development permit exemptions prior to Bylaw 2014-17. For example, as noted above, the Board was not persuaded that the sea cans were intended to be "temporary buildings" (i.e. intended to be placed for periods of time that are less than six months). The Board finds that the sea cans were placed on the Lands to serve as storage for Aloha Park with no intention to remove the sea cans unless and until the Appellant might determine that the Aloha Park required a different storage solution. The Appellant still seeks years to make that determination. The Board concludes on the facts that at all times from the commencement of the development, a development permit was required but no development permit was obtained.

Further, the Board finds, on the evidence, that the sea cans development was not lawfully within any listed uses under the applicable CH District prior to the passing of Bylaw 2014-17.

Even prior to adoption of Bylaw 2014-17, the sea cans at issue were beyond the scope of the Land Use Bylaw's definition of "accessory building" or "accessory use". Further, "accessory building" was not a listed use in the CH District prior to Bylaw 2014-14. The Board earlier set out the definition of "accessory building"; and, "accessory use" means, "*a use customarily*

incidental and subordinate to the main use and is located on the same parcel of lands with such main use."

The evidence provided to, and accepted by the Board, was that from the time the sea cans were placed on the Lands, their purpose and use has been storage for the Aloha Park. As such, the two sea cans were not, prior to Bylaw 2014-17, "accessory uses" subordinate and incidental to the main use on the same lands. Rather, even prior to Bylaw 2014-17, the sea cans were a use subordinate or incidental to a main use located on other lands (the Aloha Park's lands).

The Board finds that the development has never been exempt from the requirement of a development permit. Further, the Board finds that the development contravenes the current Land Use Bylaw and is not protected by Section 643 and Section 616 of the MGA. There has never been a development permit issued for the current use. The current use is not a continuation of a use that may have been lawfully occurring under a prior Land Use Bylaw without a development permit.

Time Extension For Removal Only:

The Board finds that the Stop Order is lawful and reasonable in directing compliance with the Land Use Bylaw by requiring removal of the sea cans. The Board has extended the time for compliance, to require removal of the sea cans by 4:00pm on November 30, 2015, considering:

- The October 13, 2015 Stop Order date for compliance is prior to the date of the Board's decision;
- That the use involves storage containers which are relatively movable;
- The Appellant and its representative Mr. Irv Milner have been on notice that the sea cans violate the Land Use Bylaw since June, 2015, accordingly, the Appellant has had considerable time to review its options for submitting land use or permit applications, or to make arrangements for removal of the sea cans, if necessary;
- The Appellant is expected to be aware of the Land Use Bylaw prior to commencing development. The Appellant's unlawful use of the Lands did not become lawful due to a perceived delay in Town enforcement;
- The Board is required to review the Land Use Bylaw as it applies to the subject Lands and therefore was not persuaded by arguments respecting other sea can developments in Town (e.g. Walmart); and
- The Board cannot authorize long-term continuation of, or a development permit for, a use not listed within the CH District -- the Board has no authority to vary the "use" provisions of the Land Use Bylaw per Section 687(3)(d)(ii) of the MGA.

Kelly Lloyd
SDAB Secretary