



**STAFF REPORT
ACTION REQUIRED
Confidential Attachment**

Core Outdoor – Application to *Ontario* Superior Court of Justice

Date:	July 4, 2012
To:	City Council
From:	City Solicitor
Wards:	Wards 14 and 19
Reason for Confidential Information:	This report contains advice or communications that are subject to solicitor-client privilege and pertain to litigation or potential litigation.
Reference Number:	

SUMMARY

On May 8, 2012, a court application was commenced against the City of Toronto in the Ontario Superior Court of Justice by 1289777 Ontario Ltd. and 939932 Ontario Ltd. (which companies together carry on business under the trade name Core Outdoor). In the application, Core Outdoor is seeking an Order quashing City Council's decision to refuse to grant variances for which they applied in connection with a proposal to erect three third party ground signs with electronic static copy at the properties municipally known as 1A Atlantic Avenue and 0 Toronto Terminal.

The City Solicitor is seeking direction with respect to this court application.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council adopt the recommendations set out in Confidential Attachment 1 to this report from the City Solicitor; and
2. City Council direct that Confidential Attachment 1 and Appendix 1 remain confidential as they contain advice that is subject to solicitor-client privilege and pertains to litigation or potential litigation.

FINANCIAL IMPACT

There are no financial implications resulting from the adoption of this report.

DECISION HISTORY

Item SB6.2 - Application by Core Outdoor for Three Variances with Respect to a Third Party Sign Proposal on the Premises Municipally Known as 1A Atlantic Avenue - TP-11-00005 (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.SB6.2>)

Item SB6.3 - Application by Core Outdoor for Three Variances with Respect to a Third Party Sign Proposal on the Premises Municipally Known as 0 Toronto Terminal - TP-11-00006 (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.SB6.3>)

Item SB6.4 - Application by Core Outdoor for Three Variances with Respect to a Third Party Sign Proposal on the Premises Municipally Known as 1A Atlantic Avenue - TP-11-00007 (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.SB6.4>)

Item TE12.98 - Consideration of Sign Variance Applications by City Council (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.TE12.98>)

Item TE12.99 - Application by Core Outdoor for Three Variances with Respect to a Third Party Sign on the Premises Municipally Known as 0 Toronto Terminal - Application to Consider (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.TE12.99>)

Item TE12.101 - Application by Core Outdoor for Three Variances with Respect to a Third Party Sign on the Premises Municipally Known as 1A Atlantic Avenue - TP-11-00005 - Application to Consider (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.TE12.101>)

Item TE12.102 - Application by Core Outdoor for Three Variances with Respect to a Third Party Sign on the Premises Municipally Known as 1A Atlantic Avenue – Application to Consider (<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.TE12.102>)

ISSUE BACKGROUND

Variance Process:

Article V, Variances and By-law Amendments, of Chapter 694, Signs, General of the City of Toronto Municipal Code allows applicants to seek variances to the provisions of Chapter 694 with respect to signage proposals. Chapter 694 establishes the Sign Variance Committee, which is provided the delegated authority to hear and decide upon applications for variances from Chapter 694. The Sign Variance Committee's decision-

making powers are independent of Toronto City Council and are final except where an application to consider is filed by the Ward Councillor.

An Application to Consider may only be filed where the Sign Variance Committee decides to grant a variance or grants a variance with conditions. Decisions of the Sign Variance Committee to refuse an application for a variance are not subject to the possibility of an application to consider and are thus final and binding on the date the decision is made. Subsection 694-30S of Chapter 694 provides the Ward Councillor with the authority to file an application to consider within 20 days of the decision of the Sign Variance Committee to grant a variance or grant a variance with conditions to have the variance considered by City Council in accordance with the established criteria provided for in subsection 694-30A. Due to the possibility of an Application to Consider being filed, the Sign Variance Committee's decisions to grant a variance or grant a variance with conditions are not final and binding until 21 days after the decisions are rendered and only then if there is no Application to consider by the Ward Councillor.

If an Application to Consider is filed, Chapter 694 requires City Council to consider the third party sign variance application in accordance with the criteria established in 694-30A and may: 1) grant a variance; 2) grant a variance with conditions; or, 3) refuse to grant a variance. If Council grants a variance, the proposed variance must satisfy all of the established criteria contained in 694-30A.

Variance Applications:

On September 9, 2011, 1289777 Ontario Ltd. and 939923 Ontario Ltd. (collectively "Core Outdoor") filed with the Sign By-law Unit, Toronto Building, three complete applications for variances concerning third party signs proposed for the neighbouring premises of 1A Atlantic Avenue, and 0 Toronto Terminal, located at the boundary of Wards 14 and 19.

1A Atlantic Avenue and 0 Toronto Terminal were formerly used for railway purposes. Neither 1A Atlantic Avenue nor 0 Toronto Terminal has been significantly improved by the installation of buildings, but the two premises collectively contain a "cluster" of six existing third party signs. Both of these premises are located in the area colloquially referred to as "Billboard Alley" which, due a historical pattern of installation of large, illuminated, spectacular-type advertising billboards, has established signage as a defining element of its character and resultantly has been designated as the Gardiner Gateway Special Sign District for purposes of Chapter 694. The Gardiner Gateway Special Sign District has specific signage permissions that allow for the installation of a sign containing electronic static copy if it replaces an existing third party sign already containing such copy or containing electronic moving copy.

Core Outdoor proposed to remove the cluster of six existing third party signs - and to replace these signs with three third party signs containing electronic static copy that would be subject to Chapter 694. However, each of the three replacement signs proposed

to be erected did not comply in all respects with the signage regulations applicable to the subject premises.

Due to the fact that Core Outdoor's proposals did not fully comply with the as-of-right provisions of Chapter 694, variances were required to be obtained before sign permits could be issued.

The three variance applications were added as Items SB6.2, SB6.3 & SB6.4 to the Sign Variance Committee's November 22, 2011 meeting agenda. Public notice for the variance applications was provided as required by Chapter 694. During the preparation of the Staff Reports to be presented to the Sign Variance Committee, Toronto Building staff met with both of the affected Ward Councillors. Toronto Building reviewed the outstanding applications and recommended that the variances be granted on the basis that specific conditions be imposed to address community concerns, including the explicit condition with respect to Items SB6.2 & SB6.4 that "screening", such as shields, louvers or partitions, be installed to the edges of each sign face to mitigate the potential visual impacts on the existing and future residential community in proximity of the proposed third party ground sign, and that each sign was conditional on two existing signs being removed and the associated permits revoked.

Procedural History of the Variance Applications:

Items SB6.2, SB6.3 and SB6.4 were heard and considered by the Sign Variance Committee at its November 22, 2011 meeting. With respect to Items SB6.2, SB6.3, and SB6.4, after conducting a hearing, the Sign Variance Committee adopted the recommendations contained in the Staff Reports and granted all the variances requested for each of the three proposals on the conditions proposed.

On December 10, 2011, Councillor Layton filed an Application to Consider with respect to Items SB6.2 & SB6.4, and on December 12, 2011, Councillor Perks filed an Application to Consider with respect to Item SB6.3. The effect of this was that the Sign Variance Committee's decisions with respect to Items SB6.2, SB6.3 and SB6.4 did not become final and binding. Each of Core Outdoor's variance applications were required to be heard by Toronto East York Community Council ("TEYCC") for recommendation to City Council for a final decision on the variances sought.

Items SB6.2, SB6.3 and SB6.4, were added to the January 10, 2012 meeting of TEYCC as Items TE12.99, TE12.101 & TE12.102. Prior to conducting a hearing on these items, a presentation was made by staff to inform TEYCC members on the role played by Community Councils and City Council in deciding whether to grant variances. After receiving the staff presentation, TEYCC conducted hearings with respect to each of Core Outdoor's three applications. TEYCC received a written communication dated January 6, 2012 from the lawyer on behalf of Core Outdoor which provided submissions in favour of the variances sought and raised procedural concerns with the processing of the variance applications. TEYCC also received a written communication dated January 9,

2012, from an individual on behalf of the Toronto Public Space Initiative which provided submissions in favour of refusing the variances sought.

The lawyers and a consultant for Core Outdoor and a representative of the property owner all appeared before TEYCC to speak in favour of granting the variances requested. Additionally, the lawyer for Core Outdoor, in his oral submissions raised several concerns with the proceeding before TEYCC concerning procedural issues, (including, but not limited to, an appearance of bias on the part of Councillor Perks and procedural irregularities with respect to the conduct of the hearing before TEYCC). An individual on behalf of the Toronto Public Space Initiative appeared before TEYCC and spoke in opposition to the variances sought by Core Outdoor.

After considering the Staff Report and written and oral submissions of Core Outdoor and members of the public, TEYCC engaged in debate regarding the variance applications. As a result of this debate and consideration, TEYCC recommended City Council refuse all of the variances sought.

At the City Council meeting of February 6 & 7, 2012, City Council, after debate and consideration of Items TE12.99, TE12.101 & TE12.102, adopted the recommendations of TEYCC. By adopting the recommendations of TEYCC, City Council rendered a decision to refuse all of the variances sought in connection with the proposal to remove six existing third party signs and to replace the existing signs with three third party ground signs, each containing electronic static copy.

Current Application before the Ontario Superior Court of Justice:

On May 8, 2012, a court application was commenced against the City in the Ontario Superior Court of Justice by Core Outdoor. In the application, Core Outdoor is seeking an Order quashing City Council's decision to refuse to grant the variances for which it applied and reinstating the decisions of the Sign Variance Committee granting these variances.

In seeking to quash the decision of City Council, Core Outdoor is relying on the following allegations set out in the Application Record:

- Written notice to Core Outdoor of the Sign Variance Committee's decisions granting the variances did not indicate that the decisions were not final;
- Requests to reconsider the decisions of the Sign Variance Committee were made by the Ward Councillors notwithstanding they had not expressed material concerns in earlier meetings regarding the variance applications;
- No reasons were provided for the decisions of the Ward Councillors to request reconsideration of the decisions of the Sign Variance Committee;

- Toronto and East York Community Council ("TEYCC") allegedly debated the merits of the variance applications in closed session;
- During the closed session, members of TEYCC allegedly were in contact electronically (via text and/or e-mail) with members of the public who were opposed to Core Outdoor's variance applications. In particular, it is alleged Mr. Tabello announced to the crowd in the hallway of City Hall that he had received an electronic message that members of TEYCC were finished their closed session;
- During the public hearing, members of TEYCC would frequently leave their chairs to speak directly with members of the public opposed to Core Outdoor's applications, and these discussions occurred privately and were not shared with Core Outdoor or its legal counsel;
- During the public hearing, members of TEYCC allegedly received documents from members of the public opposed to Core Outdoor's applications without sharing such information with Core Outdoor or its legal counsel;
- During the hearing, it was disclosed that the Chair of TEYCC, had previously authored an article which was published in NOW Magazine, opposing new LED display signage (otherwise known in Chapter 694 as electronic static copy) in the City of Toronto; Core Outdoor's legal counsel indicated that Core Outdoor had a reasonable apprehension of bias and/or a closed mind on the part of the Chair, but the Chair refused to recuse himself;
- The hearing did not proceed in accordance with the principles of natural justice, and that this was pointed out several times during the hearing by Core Outdoor's legal counsel, but the members of TEYCC denied that this was the case;
- The deliberations of TEYCC included consideration of issues that were not relevant to Core Outdoor's applications or the nine variance criteria (for example, TEYCC discussed whether LED display signs should ever be permitted in the Gardiner Gateway Special Sign District and whether previous approvals of LED display signs were in error). Core Outdoor was not provided with an opportunity to respond to these additional, extraneous issues;
- The recommendation adopted by TEYCC that City Council refuse the variances had allegedly been prepared prior to TEYCC's public deliberations; and
- TEYCC failed to act in a quasi-judicial capacity including a failure to provide notice of the request to reconsider, a failure to provide reasons for said request, a failure to conduct a fair hearing, and a failure to provide reasons for overturning the decisions of the Sign Variance Committee.

COMMENTS

Further legal advice is contained within Confidential Attachment 1.

CONTACT

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SIGNATURE

Anna Kinastowski
City Solicitor

ATTACHMENTS

Confidential Attachment 1 – Confidential Information