

THE EYE OF THE BEHOLDER

ALBEMARLE COUNTY'S ARCHITECTURAL REVIEW BOARD'S MISSION CREEP

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Executive Summary

The “Beholder” report questions the reach, scope and the legal authority of Albemarle County’s Architectural Review Board. The report also questions if ARB dictated uniformity (sameness) is restricting creativity or helping to preserve important scenic elements of Albemarle County.

The report outlines the legal question regarding the First Amendment constitutionality of the ARB and provides County Attorney Larry Davis defense of the ARB changing corporate logos (StellarOne, Toys ‘r Us, etc.) as an acceptable local regulation.

Through the use of several case studies the “Beholder” report documents the mission creep and expansive nature of the ARB review. From requesting information that is not germane to the Entrance Corridor to accepting public comment regarding the by right use of Entrance Corridor parcels, ARB approval often mandates applicants make costly changes to plans in excess of the original intent of the ARB.

The report also documents a recent (and rare) appeal to the Albemarle County Board of Supervisors by an aggrieved ARB applicant.

Established by the Albemarle County Board of Supervisors in 1990, the Architectural Review Board (ARB) has purview over the appearance, orientation, and landscaping for all development activities in the twenty one designated entrance corridors.

The ARB issues Certificates of Appropriateness based on their interpretation of the project’s compatibility with the historic character of the County. Their stated goal is that development within the corridor is orderly and attractive.

Unintended consequences of the ARB process include stale signage and possible economic retardation. As recent sales tax statistics have shown increasing retail activity moving to the outlying jurisdictions, Albemarle County’s ARB and the large number of entrance corridors they regulate may have a negative impact on economic development.

The “Beholder” report also includes an analysis of the proposed Entrance Corridor Process Improvements scheduled to go before the Board of Supervisors on May 12. While appreciative of the changes as a positive first step the report suggests limiting the ARB further by:

- placing ARB approval below the Planning Commission
- refining the charge of the ARB
- revising design guidelines
- restricting the ARB ability to move buildings on a site
- redirecting staff and applicants to tell the board “no” when they make requests beyond their scope.

The general attitude of the ARB has been one of “our way or the highway” rather than encouraging attractive, orderly development. As an organization, its mission has crept far beyond its original scope. After twenty years of ARB regulation, it is time for the entire community (enterprises, citizens, neighborhood associations) to reassess the impact of the ARB’s interpretation of their “guidelines”.

Acknowledgements:

The “Eye of The Beholder” report is research paper that benefits from personal interviews with applicants, applicant representatives, design professionals, former members of the Architectural Review Board and Albemarle County staff. The Free Enterprise Forum sincerely appreciates the assistance of Albemarle County Planning Staff, most notably, Margaret Maliszewski and Sharon Taylor.

Several applicants spoke to the Free Enterprise Forum with the understanding their specific projects would not be used in the paper as an example. In every case, I have honored this request.

In addition, the Free Enterprise Forum did not speak with all applicants in the case studies presented; the project review information contained in the report is derived from publicly available data sources. The author independently selected these cases for further study. The inclusion of any case study does not indicate the applicant’s support or nonsupport of the author’s analysis.

The author would also like to thank members of the Free Enterprise Forum Board of Directors who encouraged this project and provided important insight to the process.

The author sincerely appreciates the Free Enterprise Forum donors who make this type of work possible. As a privately funded public policy organization, we rely on the generosity of individuals and businesses to keep our lights on.

While this paper would not have been possible without the assistance of others, the representations and recommendations are my own. Any errors or omissions are the responsibility of the author alone.

Respectfully submitted,

Neil Williamson
May 7, 2010

Legal History

The entrance corridor overlay is created to conserve elements of the county's scenic beauty and to preserve and protect corridors: (i) along arterial streets or highways designated as such pursuant to Title 33.1 of the Virginia Code found by the board of supervisors to be significant routes to tourist access to the county; (ii) to historic landmarks as established by the Virginia Landmarks Commission together with any other buildings or structures within the county having an important historic, architectural or cultural interest and any historic areas within the county as defined by Virginia Code § 15.2-2201; or (iii) to designated historic landmarks, buildings, structures, or districts in any contiguous locality.¹

Albemarle County's Architectural Review Board (ARB) was established on October 3, 1990. While the vote to enact the Entrance Corridor regulations was unanimous, there were serious concerns. These concerns were voiced Supervisor Walter Perkins (White Hall), who said "... the Board may be creating a monster".²

The newly appointed Albemarle ARB held its first meeting on December 10, 1990.

Purpose

Albemarle County's Entrance Corridors are roads that provide access to significant historic structures and historic areas. To ensure that development within these corridors reflects the traditional architecture of the area, the Board of Supervisors appointed the Architectural Review Board (ARB) and charged them with the responsibility of reviewing the design of proposed developments within the Entrance Corridors. The goal of the review is to ensure new development is compatible with the historic character of the County and that development within the corridor is orderly and attractive.³

Definition of Entrance Corridor

Entrance Corridor Districts are established from the edge of the right-of-way to the greater of either:

- a) The full depth of the contiguous parcel as the parcel existed on 10/3/90
- b) A depth of five hundred (500) feet.

In 1990, when the Entrance Corridor Ordinance was approved, some members of the Board of Supervisors were concerned that the 16 roads on the list were too many. The list has since grown to twenty-one entrance corridor roads:

1. U.S. Route 250 East
2. U.S. Route 29 North
3. U.S. Route 29 South

¹ Albemarle County Board of Supervisors Minutes, November 2, 2005 p.25

² Albemarle County Board of Supervisors Minutes October 3, 1990 p.20

³ Albemarle County Entrance Corridors, Attachment B to BOS November 2, 2005 staff report

4. Virginia Route 20 South
5. Virginia Route 631 South from Charlottesville City Limits to Route 708 and from U.S. Route 29 North to Route 743
6. U.S. Route 250 West
7. Virginia Route 6
8. Virginia Route 151
9. Interstate Route 64
10. Virginia Route 20 North
11. Virginia Route 22
12. Virginia Route 53
13. Virginia Route 231
14. Virginia Route 240
15. U.S. Route 29 Business
16. U.S. Route 29/250 Bypass
17. Virginia Route 654 (Added 11-14-90)
18. Virginia Route 742 (Added 11-14-90)
19. Virginia Route 649 from U.S. Route 29 North to Virginia Route 606 (Added 4-12-00)
20. Virginia Route 743 from U.S. Route 29 North to Virginia Route 676. (Added 4-12-00)
21. Virginia Route 631 from U.S. Route 29 easterly to Norfolk Southern Railway tracks (Added 11-2-05).⁴



ARB Appeals

According to the ordinance:

Any person aggrieved by any determination of the architectural review board ...may demand a review of the application by the board of supervisors....The board of supervisors may affirm, reverse or modify, in whole or in part, the decision of the architectural review board.

Any person or persons jointly or severally aggrieved by any decision of the board of supervisors may appeal such decision to the circuit court ...⁵

While there have been a number of ARB decisions that have been appealed to the Board of Supervisors, our research has not located any Albemarle County case that has ever been brought to the Circuit Court.

⁴ Albemarle County Board of Supervisors minutes, November 2, 2005 p.25

⁵ Albemarle County Board of Supervisors minutes, October 3, 1990 p. 27

Legal Question - Can Albemarle County Force A Company to Change A Logo?

In 2001, Mr. Ben Foster of Hightech Signs raised a number of questions regarding the constitutionality of Albemarle County's Architectural Review Board regulations on signs.

Section 1121(b) of the Lanham Act expressly prohibits any state or political subdivision from requiring the alteration of a federally registered mark.

“Federal Trademark Law. As demonstrated by the registration provisions of federal trademark law, one of the basic purposes of a trademark is to serve as a symbol of the uniformity of a company's product or service nationwide. In order to be universally recognizable as such, the mark, with its design and color, is displayed in the same manner everywhere. To ensure uniformity in the display of trademarks, federal law provides: "No state . . . or any political subdivision or agency thereof may require alteration of a registered mark" 15 U.S.C. §1121(b).

“Local Zoning Regulation. Potentially at odds with the federal interest in national trademark uniformity is the local interest in zoning for aesthetic purposes. Local governments, in reliance on the police power, regulate private activities to protect the peace, health, safety and general welfare of their citizens. Aesthetic zoning is within the purview of "general welfare," which, standing alone, is a sufficient basis for an exercise of the police power. *Hawkins v. County of Marin*, 54 Cal.App.3d 593. One way in which municipalities exercise aesthetic zoning authority is by promulgating regulations which dictate the size, shape and color of storefront signs.”⁶

These questions were addressed by Albemarle County Attorney Larry W. Davis in a letter dated April 9, 2001.

The Davis letter stipulates that the county's sign regulations are “content neutral (rather than content based) because they do not benefit or burden protected speech by referring to the content on the face of the signs. See, *American Legion Post 7 v. City of Durham*, ___ F.3d ___ (4th Cir. 2001). As such, the County may impose reasonable time, place and manner restrictions on signs, and those restrictions are valid if the regulations: (1) further a substantial government interest; (2) are narrowly tailored to further that interest; and (3) leave open ample alternative channels of communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), cited in *American Legion Post 7, supra*.”⁷

The Davis letter outlines the answer for each of the three prongs required by the Clark Case:

“The County has substantial government interest in preserving its aesthetic character and promoting traffic safety. See, *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (stating “[i]t is within the constitutional power of the City to improve its appearance”); *Arlington County*

⁶ Gail, Gordon, L., Pillsbury Winthrop Shaw Pittmen LLP *Federal Trademark and Local Zoning Laws Collide*, April 1999

⁷ Albemarle County Attorney Larry Davis letter to Ben Foster, April 9, 2001

Republican Committee v. Arlington County, 983 F.2nd 587, 594 (4th Cir. 1993) (stating that traffic safety and aesthetics are “substantial government goals”); *American Legion Post 7, supra*. The County’s sign regulations were adopted for the express purposes (among others) of implementing the Comprehensive Plan’s goal of “protecting the county’s natural, scenic, and historic, architectural and cultural resources,” protecting and enhancing “the county’s attractiveness to tourists and other visitors,” (*Zoning Ordinance § 30.6.1*) conserving “elements of the county’s scenic beauty”, and preserving and protecting the Entrance Corridors (*Zoning Ordinance § 30.6.1*). In addition, the Guidelines state that their purpose, among other things, is to promote orderly and attractive development” within the Entrance Corridors. Albemarle County Design Guidelines, 1. The County’s sign regulations also were adopted for the express purposes (among others) of protecting the safety of the streets and highways in the County, improving pedestrian and vehicular safety by avoiding saturation and confusion in the field of vision, and regulating unnecessary distracting signs. *Zoning Ordinance § 4.15.01*.

“A regulation is narrowly tailored if the government interest promoted would be achieved less effectively absent the regulation. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)(rejecting the argument that the regulation must be least restrictive or least intrusive means to promote the governmental interest); *American Legion Post 7, supra* (preserving aesthetic character would be undermined by exempting flags or noncommercial entities from regulations). Limiting our analysis to the aesthetic interests promoted by the Entrance Corridor regulations, the County’s interest in promoting the aesthetic values of the Entrance Corridors would be rendered completely ineffective if the guidelines ignored the aesthetic features and qualities of signs.

“A regulation leaves open ample alternative channels of communication if the remaining modes of communication are adequate. Within the Entrance Corridors, the County’s regulations merely regulate, rather than ban, signs for the purposes described above. Signs in the Entrance Corridor are subject to the same size, height and setback requirements existing everywhere else in the County. Only the signs’ lighting, coloring and other aesthetic qualities are subject to additional control through the Guideline. *Albemarle County Guidelines, 18*. As mere regulations, rather than outright bans, the County’s sign regulations do not implicate First Amendment interests to a significant degree to fail this prong of the time, place, manner test.”⁸

The 2001 Davis letter, which focused on defending the constitutionality of the ARB sign regulations concluded:

“In conclusion, although you may not agree with the standards or the way the standards are applied in the County regulations, the County regulations are both constitutional and legal in substance and application.”⁹

⁸ Albemarle County Attorney Larry Davis letter to Ben Foster, April 9, 2001

⁹ *ibid*

Analysis: The letter by Albemarle County Attorney Larry Davis makes a strong legal case for Albemarle County to have the ability to change federally protected trademarks. The Free Enterprise Forum believes federally registered trademarks and signage are critical elements of an organization's branding.

The trade literature and empirical data confirm that trademark display has a critical impact on brand identification. Human memory studies indicate a strong correlation between graphics over text and that text memory can be greatly enhanced through the presentation of an accompanying picture with the text or specific color treatment of the text. Significant research has concluded that uniformity of sign display is critical in the maintenance of a business' goodwill. Moreover since multi jurisdictional companies often hire the best graphic designers to produce the most effective graphics, the on premise signs typically involve a great deal of intellectual effort and economic expenditures.¹⁰

Considering the high volume of traffic traveling Albemarle County's 21 Entrance Corridor designated roads, The Free Enterprise Forum is not convinced that the courts would agree that the ARB "guidelines" that prevent thousands of potential customers from identifying with the "Toys 'r Us" brand via their trademarked multi colored sign meet the adequacy requirement of the third prong of the Davis defense: "A regulation leaves open ample alternative channels of communication if the remaining modes of communication are adequate".

To date, no one has ever chosen to appeal an ARB sign decision to the Circuit Court. Until tested, it is unclear if the Davis defense is strong enough to be upheld.

Proposed Entrance Corridor Process Improvements

In 2006, the Development Review Task Force (DRTF) was charged by the Albemarle County Board of Supervisors (BOS) to review legislative land use processes to identify needed improvements in efficiency, effectiveness, quality and public participation. The level of review by the Architectural Review Board process was one area recommended for streamlining. The BOS adopted a Resolution of Intent to amend the ARB ordinance and the Planning Commission held two work sessions on the proposed changes. On December 15, 2009, the Planning Commission held a public hearing on the proposed Zoning Text Amendment (ZTA) and voted 7:0 to approve the ZTA with minor adjustments.¹¹

On March 3, 2010, the BOS held a work session on the ZTA. It was the consensus of the BOS that the categories of County-wide Certificate of Appropriateness would be defined in the ordinance. In addition, the BOS agreed to move forward with a public hearing (now scheduled for May 12, 2010) after the definitions were complete.¹²

¹⁰ Kwall, Roberta Rosenthal REGULATING TRADEMARKS ON EXTERIOR SIGNS: SHOULD LOCAL LAW TRUMP THE LAHAM ACT AND THE CONSTITUTION? Southern California Law Review, September, 1998 p.6

¹¹ ZTA-2009-00009 Entrance Corridor Process Improvements County of Albemarle Staff Report p.1

¹² Albemarle County Board Actions, March 3, 2010 www.albemarle.org retrieved April 27, 2010

The definition of a Certificate of Appropriateness, county-wide reads:

*“Certificate of appropriateness, county-wide: A decision made by the architectural review board establishing specific design criteria consistent with applicable design guidelines for a class of structures, sites, improvements, or architectural elements. The decision applies to any structure, site, improvement or architectural element within that class that complies with the specific design criteria.”*¹³

The specific categories of county wide certificates were added to section 30.6.b.3. As were the ability for establishing design criteria and an allowance for a determination of compliance by Director of Planning.¹⁴

The provision of a County-wide Certificate of Appropriateness represents a new approach to reviewing Entrance Corridor applications. This approach will allow similar classes of structures and improvements to be reviewed by staff without being heard at an ARB meeting, if criteria previously outlined by the ARB for that specific type of improvement or structure have been met. Some examples of structures and improvements for which a County-wide Certificates of Appropriateness might be utilized include telecommunications facilities, buildings located 2000’ or more from the Entrance Corridor, and minor alterations to buildings and landscaping.¹⁵

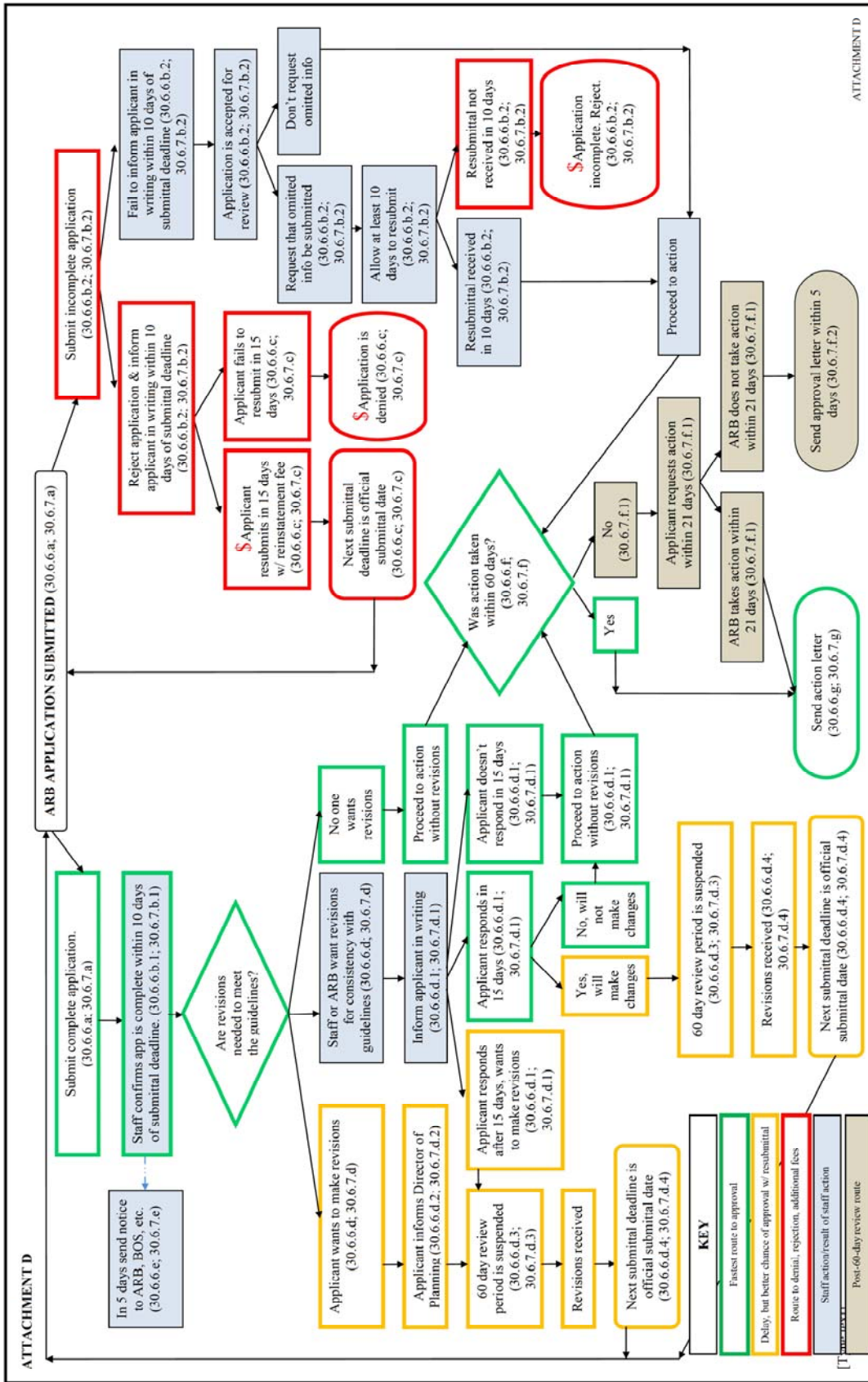
Additional changes allow for the empowerment of staff to determine that an ARB application is complete. Currently, the applicant is permitted to push an application even if the staff has made a determination that the application is incomplete.

In an attempt to explain the ARB process, staff created a flow chart [next page] that outlines the important milestones and decision points in the process.

¹³ Albemarle County Ordinance No.10-18 Draft 4/26/10 p.2

¹⁴ *ibid*, p. 8-10

¹⁵ ZTA-2009-00009 Entrance Corridor Process Improvements County of Albemarle Staff Report p.1



ATTACHMENT D

Return to over summary

Analysis The Entrance Corridor Process Improvements are a solid first step. The concept of a County-wide Certificate of Appropriateness has the potential to streamline a number of applications but it will all depend on the implementation of the certificates. In addition, the codification of several common sense policies currently being implemented by the ARB is helpful in adding predictability to the process. With that being said, the ZTA still fails to address several key issues:

The power to say no The new ZTA provides staff the power to deem an applicant's plan incomplete but it does not clearly empower applicants (or staff) to say no to ARB requests that are outside of their purview. One applicant indicated the ARB required the elevations of the rear of their L shaped building (with county mandated relegated parking). While the rear of the building could not be seen from any Entrance Corridor, the applicant provided the elevations, rather than fight on the merits of the case, in order to gain a timely approval.



Photo Credit: Free Enterprise Forum

The power to move buildings The proposed ZTA retains open language regarding the ARB power over size and arrangement of structures. The Free Enterprise Forum believes this power should be limited only to the orientation of structures to the Entrance Corridor and zoning regulations, and should not include authority over size of structures.

In a recent case, an applicant refused to move a building as such relocation would impair possible future development on the site. According to the applicant, the ARB required an elevation of the possible addition, that the applicant had no intention of building in the

near term. In addition, when the applicant did want to put in the addition, the ARB would have the opportunity to weigh in¹⁶.

Revise Design Guidelines and Sign Ordinances. As with many industries, the sign industry is rapidly changing with advancements in technology. Albemarle County has committed to a review of the sign ordinance this year. It would be a critical mistake not to include the ARB design guidelines (last updated in October 2004) as a part of that review.

In addition, Albemarle County has several prominent sign companies that work in multiple jurisdictions; and the County staff should utilize the experiences of these companies when conducting their comprehensive review.

The Free Enterprise Forum believes attractive signage can be a part of the streetscape and serve as a way finder for customers. Too often, we cannot see the very signs for the businesses along the entrance corridor.

Northbound U.S. 29 @ Zan Road



Northbound U.S. 29 @ Timberwood Blvd



Photo Credit: Free Enterprise Forum

Refine the charge of the ARB

As was warned when the ARB was first established in 1990, there is a clear potential to be a monster.¹⁷ All too often, applicants sense the ARB disapproves of the use, often already permitted by right, and are report that they are “gunning” to make it as difficult as possible to get a Certificate of Appropriateness. This is wholly inappropriate and significantly beyond the scope of the ARB’s authority.

The scope of the ARB is not as clearly delineated as it could be in the regulations. There are few, if any, limiting factors on their requests. Staff is placed in a position where they effectively work for the ARB and do not question their authority (see “the power to say

¹⁶ Albemarle County Principal Planner Eryn Brennan February 6, 2009 letter RE: ARB-2008-00150 Re-Stor’n Station p.1

¹⁷ Albemarle County Board of Supervisors minutes, October 3, 1990 p. 27

no” above). Applicants, who may have to appear in the future before the ARB, are not in a position to make enemies with long serving members with long memories by questioning their authority; much less appealing to the Board of Supervisors. The Board of Supervisors does not even receive the minutes of ARB meetings.

Restructure Reporting Requirements

Various County Departments, such as Engineering, EMS, Park and Recreation, Planning as well as outside agencies (VDOT etc.) report to the Board of Supervisors through the Planning Commission, why not include the ARB to this list? Currently, plans run on parallel but unequal tracks.

As currently arranged, engineering reports in on a project prior to ARB. Does this mean that aesthetics are more important to the community than safety?

As currently designed, the Planning Commission balances the demands of all the departments on an application and renders their decision. In the Entrance Corridor a condition of approval is ARB Certificate of Appropriateness. If the ARB has an issue with their guidelines that is in conflict with engineering regulations, the applicant may be forced to appeal to the Board of Supervisors to have this conflict considered. Putting the ARB below the Planning Commission would increase efficiency and predictability for applicants.

Case Studies:

Note: The Free Enterprise Forum does not take positions regarding projects. These case studies have been selected for inclusion in this report based on the process and application of regulations. The Free Enterprise Forum has never advocated for any particular project, application or applicant.

The Free Enterprise Forum did not speak with all applicants in the case studies presented; the project review information contained in the report is derived from publicly available data sources. The author independently selected these cases for further study. The inclusion of any case study does not indicate the applicant's support or nonsupport of the author's analysis.

Case Study #1

Homogeneous Business Appearance v. Loss of Trademark value- **ARB-2008-105 Stellar One Signs – Certificate of Appropriateness for Signs**

In this case the Stellar One signs were installed without a certificate of appropriateness. The sign company, which was enacting a multi-jurisdictional re-branding of the bank, believed that the mere application for a permit was the same as the permit (as it is in some jurisdictions). The installed wall sign utilized StellarOne's trademarked two-tone logo as seen here in Fredericksburg:



Photo Credit: Free Enterprise Forum

At the September 2, 2008 ARB meeting, representatives from Stellar One indicated they did not believe the sign as installed detracted from the building and due to the high cost (\$10,000) of having the signs refaced to match the color of the Sprint sign already on the building.

The ARB required the signs be refaced within 90 days. The motion carried 5:0¹⁸

¹⁸ Albemarle County Architectural Review Board Minutes September 2, 2008 p.1-2



Photo Credit: Free Enterprise Forum

Analysis: StellarOne has invested significantly in its two tone branding. All of their collateral marketing materials (letterhead, space advertising, brochures, internet presence, etc.) feature their trademarked white and gold two-tone logo. A review of StellarOne branch locations in other jurisdictions shows how they have integrated their branding into their other signage:



Photo Credit: Free Enterprise Forum

In a January 9, 2008 Board of Supervisors meeting, County Executive Bob Tucker remarked that Albemarle is one of the few localities that does not have a giant giraffe at Toys ‘R Us. Supervisor David Slutzky remarked that “Albemarle also does not have big golden arches. This is a testimony to the value and benefit of what the ARB does.”¹⁹

The value judgment made by Mr. Slutzky is subjective; the value of consistent branding to the commercial entity is objective.

The trade literature and empirical data confirm that trademark display has a critical impact on brand identification. Human memory studies indicate a strong correlation between graphics over text and that text memory can be greatly enhanced through the presentation of an accompanying picture with the text or specific color treatment of the text. Significant research has concluded that uniformity of sign display is critical in the maintenance of a business’ goodwill. Moreover since multi-jurisdictional companies often hire the best graphic designers to produce the most effective graphics, the on-premise signs typically involve a great deal of intellectual effort and economic expenditures.²⁰

¹⁹ Albemarle County Board of Supervisors Minutes, January 9, 2008 p.20

²⁰ Kwall, Roberta Rosenthal REGULATING TRADEMARKS ON EXTERIOR SIGNS: SHOULD LOCAL LAW TRUMP THE LAHAM ACT AND THE CONSTITUTION? Southern California Law Review, September, 1998 p.6

While the value and benefit to the community are subjective, the costs are not.

In this case, it can be demonstrated (due to an error by the sign company) that there was an additional hard cost of \$10,000 for the applicant. There also is for all applicants in the Entrance Corridor a loss of trademark value due to color restrictions. Is the community benefit great enough to support this loss of value? What exactly is the ARB protecting the community from in this case? Is there an unstated Albemarle desire to keep out national chains with trademarked corporate identities in favor of local companies?

Case Study #2

The Activist ARB - Overreaching Beyond their Legal Scope

ARB-2008-141: Mill Creek (AT&T) Preliminary Review of a Site Development Plan

In the November 17, 2008 ARB meeting the Board heard a preliminary site plan review regarding increasing the height of an existing cell tower monopole. The actual height of the structure would be reduced as the applicant proposed removing an existing 20' lightning rod. The final pole would be 93' instead of the current 100'. The monopole had been originally approved in the late 1990's.

After significant discussion, "Mr. [Paul] Wright said that he would be more amendable (*sic*) about increasing the size if they could get the people below them to do something about that antenna or the array. That is his problem with the antenna because that is the big visual element going up. Right now going up in height they were getting nothing really for it except three more antennas. The way they do antennas now they are not visible and would have to go looking for them. Mr. Lebo noted that the other carriers or competitors were not going to decrease their coverage and antennas."²¹

The applicant's representative replied to Mr. Wright's comment, "the top carrier is Alltel according to their documentation. That is the one set off with the antennas. If they [AT&T] could convince them to change their antenna array they would. But Mr. Lebo was correct that they would have no reason to want to do that and diminish their coverage. They do not have any leverage over them at all. They have a lease with the tower owner."

Mr. Wright replied that he understood that. He was just saying that if they could convince them to do something that it would save them more money than what the extension cost in avoiding two to three other sites.

The applicant's representative said based on her previous experiences she could say they would not be willing to do that. Right now they have a competitive advantage over other carriers on the pole. Not only is it higher but their antennas work better because they are flush mounted.

Mr. Wright said it was a non-complying tower right now. They don't want to make it more non-complying. If they could change the array, which is doubtful, then he could

²¹ Albemarle County Architectural Review Board Minutes November 17, 2008 p.7

support it because the visual impact would be ultimately less. If they can't do that it is fine. That is where he gets into a problem on this because it is nothing they would approve now.”²² In the end, the ARB denied the application.

Analysis: The troubling aspect of this application is the activist role the ARB played in requesting something the applicant did not have the ability to provide and the statement that they would be more amendable (*sic*) if they could get this concession from someone who was not party to the application and in fact is a competitor of the applicant. What was gained by denying this application that would have reduced the visual impact on the Entrance Corridor (lowering the top from 100' to 93')?

Case Study #3

Regulating the Invisible or Nearly Invisible

SDP 08-125 - Pavilions at Pantops Phase 3 – Visibility & Level of Review

Pavilions Phase 3 is a by-right residential subdivision of townhouses. The site of Phase 3 is in the very back of the Pavilions site, directly adjacent to the existing Fontana neighborhood. The closest house proposed in Phase 3 is more than 1,500 feet from the Entrance Corridor, but at that point the topography on the site blocks the line of sight between the buildings and the entrance corridor. The only possible sight line is at the 250/Rolkin Road intersection which is 1,800 feet (more than 1/3 of a mile) from the closest Pavilions Phase 3 house. To see that specific point, one must stop between the Rite Aid and the Wachovia Bank currently under construction. Even from there it is difficult today to see the orange construction fencing protecting the top of the site. After construction, one may be able to see the top of the roof of one unit of the Pavilions Phase

3 townhouses.



This photo was taken from the Rite Aid parking lot on U.S. Route 250 with a 10X zoom lens.

Note the small amount of orange fencing at the top left center of the image.

This is the site in question

Photo Credit: Free Enterprise Forum

In the end, the ARB allowed for an administrative approval pending the following conditions:

1. Roof color and material for the townhouses shall match the roof color and material approved for Pavilions Phase 2.

²² Albemarle County Architectural Review Board Minutes, November 17, 2008 p.8

2. Wall colors for the townhouses shall match the colors approved for Pavilions Phase 2.²³

Analysis: This application raises the question of how far reaching should the ARB purview be. Granted there is a traffic light near the Rite Aid Parking lot, but the vast majority of the vehicles will be passing this tight visibility window at speeds of 45 miles per hour or greater. Should the ARB guidelines even be imposed on a project with such limited visibility? Perhaps a set of clear performance standards could be established to eliminate the need for any ARB review.

Case Study #4

Determining the Balance of Conflicting Comprehensive Plan Goals

ARB-2007-80 Montessori Community School Final Review of a Site Development Plan Appealed to Albemarle Board of Supervisors January 9, 2008 Proposal to construct a new 5,500 square foot classroom building with the associated landscape and site work as Phase I of the schools' proposed expansion



In the Board of Supervisors appeal hearing, Planner Margaret Maliszewski explained that the applicant had been to the ARB on three separate occasions, and made alterations, but the applicant's plan still did not meet with ARB approval so the ARB denied the application. The majority of the design conflicts for the ARB were due to the applicant's desire for a "green" building. Ms. Maliszewski said that the Entrance Corridor Guidelines do not address green building, but that it is possible for a building to be both green and still meet the Entrance Corridor Guidelines²⁴.

Prior to the meeting, Will Goldsmith of *C-Ville Weekly* quoted ARB Chairman Paul Wright, "I think it was a little modern for that site, with that adjoining building, than the other members would like. These people have done things for really great reasons that we applaud, but we think it can be done better. How energy efficient a building is isn't in our criteria. It's unfortunate, but we've been charged by the supervisors to deal with the aesthetics of the entrance corridor."²⁵

²³ Albemarle County Architectural Review Board Minutes, February 10, 2010 p. 4

²⁴ Albemarle County Board of Supervisors Minutes January 9, 2008 p.19

²⁵ Goldsmith, Will *ARB denies proposed Montessori School*, C-Ville Issue #19.45: 11/06/07

On November 13, 2007 Mr. Wright posted a comment to the Cvillenews.com blog. His comments included “This will be one of the few buildings that the ARB will have any control over at Montessori.”²⁶

During the meeting, Supervisor David Slutzky was very clear in his support of green building and his belief that some of the green elements should be supported with equal or even greater weight than the aesthetic qualities. Supervisors Sally Thomas disagreed that the Board had to take an “either, or approach.”

The applicant indicated that the plan presented to the ARB originally came back with a lot of comments that had an effect on their LEED scoring. In the beginning they had hoped to achieve SILVER level for schools, which is above basic certification. The question was how they could make the required changes and maintain certification. In addition, the applicant stated that they did not have unlimited resources, so they tried to find the most economical way to be green in very real terms and at the same time meet the important criteria set forth by the ARB.

After significant discussion and public comment, the matter was discussed by Board members. There did not seem to be support to overturn the ARB, but there did seem to be an opportunity to redirect the ARB. Mr. Slutzky said prior to today the ARB has had no empowerment through their guidance to even take into consideration the ecological benefits of one design versus another. He said there seems to be unanimity on the notion that the Board wants the ARB to modify its charge to reflect that value judgment. Mr. Slutzky said he did not want to compromise the ecological by the aesthetic. For him, if the two are in direct competition, he would favor the more ecological benefit over the aesthetic.

Rather than reach a decision, the matter was deferred to allow the ARB and the applicant an opportunity to review based on the Board’s comments.²⁷

Analysis:

It is important to note Montessori Community School had lots less at risk by appealing the ARB decision than most applicants because they have just one building of their complex designated in the entrance corridor, they are unlikely to have to appear before the ARB again

This application raises an interesting question regarding competing Comprehensive Plan goals. Is green building a higher priority than the roofline design?

The Free Enterprise Forum believes this question is beyond the ability of the ARB to consider. Moving the ARB below the Planning Commission would allow that body to weigh the competing priorities in context of the larger application.

²⁶ Montessori: Too Ugly for Pantops? At cvillenews.com comment #9 retrieved 3/30/2010

²⁷ Albemarle County Board of Supervisors Minutes January 9, 2008 p.20-29

Another question revolves around how many applicants would have rolled over rather than going forward with an appeal to the Board of Supervisors? The concern is that such acquiescence is critical to keep a specific project moving but serves as a precedent for the next project that comes forward. Real estate development companies, design professionals, and attorneys that do business in Albemarle County, know that with twenty-one Entrance Corridors the likelihood of a return to the ARB for another project is very high.

The Free Enterprise Forum believes too few applications have been appealed since 1990. The appeal is designed as a check valve in the system; absent regular appeals the Board of Supervisors does not have an active role in the ARB process except to appoint members. Furthermore, the Board of Supervisors members are largely unaware of the actions of the ARB, none attend the meetings (until recently), and the outcomes are rarely made public.

Case Study #5

Public Comment Drives ARB into Land Use Issues

ARB2008-00150 Re-Store'n Station Fuel Pump Station and Signs Proposal: To construct a by-right convenience store and gas station with associated fuel pump canopies on land zoned Highway Commercial along U.S. Route 250. To construct an LED illuminated freestanding fuel sign, a gas pump canopy sign, a building entrance sign and an externally lit building sign.

This application is still making its way through the Albemarle County Review process but it is illustrative of the myriad of competing interests and influences on the ARB. In this by-right development, the ARB is limited to aesthetics and what can be seen from the entrance corridor.

In their third appearance before the ARB, the applicant was told the plan did not meet with ARB approval. Brian Wheeler of Charlottesville Tomorrow reported on the meeting:

A proposed gas station on U.S. 250 in Crozet is coming under increased scrutiny by the public and the Albemarle County Architectural Review Board.

At its meeting Monday, the ARB told the applicant's representative, Jo Higgins, that the Re-Store'n Station plan had not improved enough over the past year and still had a negative impact on the adjacent neighborhood and historic area of Free Town.

"It is less worse than it was in the beginning, yet it is still not good," said board member Paul Wright. "I think it's too big and its scale is significant, and I think the site [plan] makes it currently unacceptable to ARB guidelines.".....



Photo Credit Charlottesville Tomorrow

Higgins, a former Albemarle County Planning Commission member, first brought the Re-Store'n Station proposal before the ARB in February 2009. The 4-acre parcel owned by Michelle and Jeff Sprouse was previously the location of a small-engine repair shop and is zoned for highway commercial activity. It is located across the street from an Exxon gas station and next door to the Crozet Moose Lodge. "We are on our third visit to the ARB," said a frustrated Higgins after the meeting. "We find there is inconsistency with respect to their review of this project."

Higgins said she was "disappointed" with the ARB's feedback and suggested the ARB was overstepping its mandate.

"There seems to be blurred lines between the Planning Commission and the Architectural Review Board, and there is no appeal process that works," Higgins said. "We have proceeded diligently to present something we thought was appropriate for highway commercial zoning."²⁸

At the opening of the meeting, ARB Chair Fred Missel invited public comment "limited to those that apply to the ARB purview – aesthetics and what can be seen from the entrance corridor."

Despite this admonition, comments from the public included issues such as food preparation, impact on adjoining residential properties, water usage, the environment, future parking, and the fueling of tractor trailers²⁹

²⁸ Wheeler, Brian, *Architectural Review Board voices concerns about Crozet gas station proposal*, Charlottesville Tomorrow February 2, 2010 retrieved April 25, 2010

²⁹ Albemarle County Architectural Review Board Minutes, February 1, 2010 p.2

In the Charlottesville Tomorrow article, ARB member Paul Wright indicated the public input was a significant factor. “We can go through weeks and never have [the public] come talk to us,” Wright said. “Just the fact that they are here and objecting to it, to me makes a great difference.”³⁰

Analysis: If the Architectural Review Board has specific guidelines regarding their actions and is truly limited by its charge to the aesthetics and what can be seen from the entrance corridor, why does this body take public comment?

In considering an analogy, does the umpire, who has specific guidelines and a defined scope of authority, ask the crowd to call balls and strikes?

If public input is truly important, why are the ARB agendas, board packets and minutes not available online at www.albemarle.org?

The arguments raised by neighbors surround the use of the property not the appearance from the Entrance Corridor.

Considering their limited purview, neighboring landowners come to the ARB with unrealistic expectations of stopping or greatly reducing by-right development. The ARB, seemingly seeking to please the public, has routinely exceeded their charge and required buildings to be moved to mitigate neighbor concerns that have no direct connection to the entrance corridors.

Additionally, comments regarding the size of the permitted use are out of place at the ARB.

Albemarle County staff has not been assertive in directing ARB members that they should not request information that is not directly germane to the proper approval of the application.

The Albemarle County Board of Supervisors has not provided active management over this appointed group. The BOS does not currently receive copies of the ARB minutes. As mentioned above, these minutes are not available online. The BOS must be more engaged with the ARB concerning their policy directives.

³⁰ Wheeler, Brian, *Architectural Review Board voices concerns about Crozet gas station proposal*, **Charlottesville Tomorrow** February 2, 2010 retrieved April 25, 2010

Unintended Consequences of the Architectural Review Board

Stale signage

As a community, it appears Albemarle County has more “out dated” signs than the average community. At first glance one might surmise that the owners do not desire to make changes to their signs. Our research has determined many sign owners do not wish to risk losing their grandfathered way-finding signs by placing them under ARB scrutiny. In some cases, older tenant lease agreements may stipulate specific signage provisions that now may be in conflict with current Albemarle County code.



Economic Impacts

In one of the first meetings of the ARB, Board member Frank Kessler warned that the ARB determination has to be done by zoning and wanted to make sure this was done for aesthetic reasons and not for “no growth reasons”³¹

Mr. Kessler was concerned that by tightly defining the aesthetics one might be able to preclude some forms of development from occurring in Albemarle County.

Based on our research, we know the mere existence of the ARB and the ARB guidelines has prevented some businesses from choosing to locate in Albemarle. According to several individuals familiar with the site review process, potential businesses were told that if they wanted to locate in Albemarle County the ARB regulations would apply, if this did not fit their business model it was suggested they change their business model.

Others, such as Toys ‘R Us, abandoned their multi colored logo and accepted that Geoffery the giraffe would not be a part of their Albemarle location.³²

³¹ Albemarle County Architectural Review Board Minutes August 3, 1992 p.3

³² Albemarle County Architectural Review Board Minutes March 11, 1991 p.9

Albemarle County



Photo Credit: Free Enterprise Forum

Rome, Georgia



Photo Credit: Wikipedia

In another recent case, the ARB instructed the new Red Lobster to “Revise the red color proposed for the “Red Lobster” channel letter signs to one that is less intense and more appropriate in the EC. It is suggested that the red color for the sign be coordinated with the red color of the siding”³³



Photo Credit: www.iloveranchdressing.com

Other businesses, such as Cracker Barrel, chose not to change their business model and chose not to locate in Albemarle County.

To be fair, the ARB has never heard a Cracker Barrel application. This potential new business was advised by design professionals of the ARB requirements and made their location decision based on ARB precedent.

Some have suggested Albemarle County’s attitude of strict adherence to form based guidelines is designed to favor local businesses and hinder national chains from locating their “anywhere USA” model franchise in the Entrance Corridor.

Regardless if this is an example of economic retardation or simply one of many economic factors that needs to be calculated operating in Albemarle, it is an important question asked by enterprises seeking to locate in the central Virginia region.

³³ Albemarle County Architectural Review Board Minutes May, 9, 2009 p. 4

Conclusion

Founded in late 1990, the Albemarle County Architectural Review Board (ARB) has expanded its reach both in number of entrance corridors (now 21) and scope of review. While ARB decisions have been appealed to the Board of Supervisors, in twenty years no Albemarle County ARB case has ever been appealed to the Circuit Court.

The legal standing of the ARB's ability to alter federally registered trademarks has not been tested.

The case studies presented in this report, along with many other cases, demonstrate the expanding role of the ARB beyond "making the use look good" to changing corporate logos, restricting the types of enterprises locating in the Entrance Corridor, and making requests of applicants that far exceed their legislative authority.

ARB reviews often include public comment that is not helpful to the ARB's core mission and are misplaced as the comments are in opposition to the intended land use over which the ARB has no legal authority.

While the proposed revisions to the ARB process are positive, much more needs to be done:

- placing ARB approval below the Planning Commission
- refining the charge of the ARB
- revising design guidelines
- restricting the ARB ability to move buildings on a site
- redirecting staff and applicants to tell the board "no" when they make requests beyond their scope.

Many in the community speak lovingly of urban centers that have eclectic variety of aesthetics that together create a unique tapestry.

The Free Enterprise Forum asks:

Is the complete homogenization of Albemarle County's Entrance Corridors a good thing?

Are the unintended consequences of stale signage and missed opportunities a positive for the community?

The general attitude of the ARB has been one of "our way or the highway" rather than encouraging attractive, orderly development. As an organization, its mission has crept far beyond its original scope. After twenty years of ARB regulation, now is the time for the entire community (enterprises, citizens, neighborhood associations) to reassess the impact of the ARB's interpretation of their "guidelines" on aesthetics.



About The Free Enterprise Forum

The Free Enterprise Forum is a privately funded public policy organization dedicated to providing clear positive balance to the discussions of important issues of the day.

The Free Enterprise Forum:

- Promotes dialogue with local government
- Sets a positive tone and pro business agenda with local government
- Encourages government policies that support our free enterprise system
- Provides critical information and analysis of issues of the day
- Tracks more than 100 appointed commissions and boards
- Researches issues to evaluate the situation and find potential solutions
- Alerts businesses to issues that will impact their sphere of endeavor
- Mobilizes businesses and citizens affected by government action
- Offers expertise to monitor and analyze city, county, and state public policy and its impact on the business community

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