

Alan C. Harvey  
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Avondale Estates, GA 30002

August 14, 2018

Dear Mayor and Commissioners,

I see that Trammell Crow (TC) filed an appeal of the ARB's decision to deny their application on the basis that the ARB abused its discretion. I am sharing some of what I have learned about the abuse of discretion standard in my 41 years and counting legal career. I hope this is of some help to you as hear the appeal in this matter, as well as any future appeals.

As TC acknowledges in their appeal, your standard of review is whether or not the ARB "abused its discretion in reaching its decision." See Sec. 1522. IV. set forth below.

Sec. 1522. Appeals IV. Upon consideration of the record sent up from the ARB, the Board of Mayor and Commissioners may approve, modify and approve, defer the appeal to a date certain, or reject the determination made by the Architectural Review Board should the Board of Mayor and Commissioners find that the Architectural Review Board abused its discretion in reaching its decision.

Whether or not you agree with the ARB decision is not relevant. The abuse of discretion standard is a very high standard as I will discuss below. Unlike the PZB making a recommendation which you can follow or not, the ARB makes a decision that can be rejected only if there was an abuse of discretion.

In the ARB appeal process the BOMC in effect acts in the same capacity as an appellate court on an appeal from the decision of a trial level court. I have included portions of two cases in which the Georgia Supreme Court and Court of Appeals have dealt with the abuse of discretion standard.

In Reed v. Reed, the Georgia Supreme Court (BOMC in our situation) stated that it will not interfere with the trial court decision (ARB) unless the evidence shows a clear abuse of discretion and there is no evidence to support the trial court's finding.

Reed v. Reed 289 Ga. 193, 710 S.E.2d 138. "When the trial court has exercised that discretion, this court will not interfere unless the evidence shows a clear abuse of discretion, and where there is any evidence to support the trial court's finding, this court will not find there was an abuse of discretion...."

Therefore, when you consider an appeal of an ARB decision, unless you can point to a "clear abuse of discretion" including that there was no evidence to support any portion of the ARB decision, you have a legal obligation to let stand the determination made by the ARB.

As you will see in Judge Peterson's concurring opinion in The State v. Dowdell, 335 Ga. App. 773, 783 S.E.2d 138, quoted below, under the abuse of discretion standard, unless there is a clear abuse of discretion (including no evidence to support the decision) the BOMC should not and cannot reject the ARB decision even if the BOMC would have gone the other way had it been your call.

From Judge Peterson's concurring opinion:

"The abuse of discretion standard "recognizes the range of possible conclusions the trial judge may reach, and that **there will often be occasions in which we will affirm the evidentiary ruling of a trial court even though we would have gone the other way had it been our call.**" Williams v. State, 328 Ga. App. 876, 763 S.E.2d 261 (2014) (quotations omitted). For me, this is one of those occasions." [Emphasis added]

I know that each of you do and will do the best you can to make the important decisions you have to make for the future of our city. I hope that this information helps in your understanding of the legal standard that you must apply in considering an appeal of an ARB decision. As I stated at the beginning of this letter, the abuse of discretion standard is a very high standard to meet before you can reject the determination of the ARB, as requested by TC.

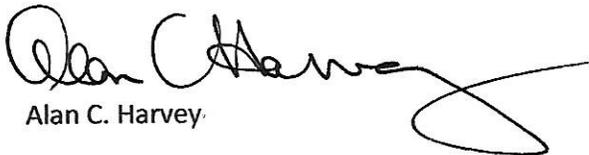
I find it troubling that in their appeal TC states, "Additionally, the subject property is undergoing a rezoning request to a planned development district which will address issues such as building scale and architectural style and features. The denial of the application by the ARB while this rezoning request was pending constitutes an abuse of discretion." This indicates to me that TC does not understand the abuse of discretion standard. What the ARB did, hold a hearing and decide upon an application made to them, is exactly what our zoning code calls upon them to do. How could following the code be an abuse of their discretion? On the other hand, had they refused to hold a hearing to consider the application, that might well have been an abuse of discretion.

It concerns me that this argument by TC appears to relate to the notion, as set forth in the draft development agreement, that the BOMC somehow has the authority to usurp the legal responsibilities of the ARB. I still have not received a response to my request for information on what authority the BOMC could possibly have to do that. I again request a response to that August 6<sup>th</sup> email.

Another procedural matter I see is that Sec. 1522. IV. states that you are to make your decision "upon consideration of the record sent up from the ARB.." I note that two of you attended the ARB meeting. I suggest that you avoid discussing any personal observations you gleaned from the meeting and do the best you can to limit the group consideration to what is in the record you receive. Also, there should not be any additional evidence, documentary or testimonial, accepted during the appeal. In the future it might be best that none of you attend a hearing from which you could be hearing an appeal. The thoughts in this paragraph are an attempt to aid you but I suggest you discuss these points with the City Attorney as a guide to any future actions.

You have my best wishes in making informed decisions in all matters that come before you.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan C. Harvey". The signature is fluid and cursive, with a large loop at the end.

Alan C. Harvey

Cc: Mr. Ken Turner  
Mr. David Sacks