

THE CASE AGAINST FAIRWAY'S PROPOSED CHANGES TO DURHAM'S BILLBOARD RULES

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“Outdoor is not an on-demand medium. You can’t choose to see it, you have to see it.” -
Advertising Age

I. Background

A. History

Prior to 1984, billboards were allowed in Durham as long as they were erected only in certain commercial and industrial zoned areas. Since nearly all of the land along major traffic corridors was zoned for commercial uses, billboards proliferated; not only on the interstates and four-lane highways, but on ordinary city commercial strips like Hillsborough Road, Roxboro Road, and even Ninth Street.

During the 1980s, to improve the city's image and to reduce visual clutter, the city began a campaign to regulate signs, including billboards, more effectively. This effort culminated in 1984 when the city adopted new rules which, among other things, banned all billboards. Those that were already in place were allowed to remain as non-conforming uses, but would have to be taken down at the end of their useful life under a 5 1/2 -year amortization schedule. Existing billboards along roadways governed by the federal Highway Beautification Act (I-85, U.S. 70, and 15-501) also became nonconforming under the city zoning code, but were immune from the amortization method of removal. These signs could be removed only through abandonment or condemnation. Durham's effort was part of a nation-wide effort to conserve America's scenic landscape and to lift declining cities.

The billboard industry fought back in the courts and in the North Carolina General Assembly. The InterNeighborhood Council Durham became involved in the debate.

B. In the Courts

The billboard industry sued Durham in federal court raising issues of free speech and illegal takings. The case was heard in the United States District Court in Greensboro and on appeal to the Fourth Circuit Court of Appeals in Richmond. Durham won at every level. The industry sought review by the United States Supreme Court, but the court declined to hear their appeal. The litigation lasted nine years and cost Durham between 1 and 1.5 million dollars.

C. In the Legislature

Beginning in 1984, the billboard industry, through their lobbyists, caused bills to be introduced in every session of the general assembly which would overturn Durham's ordinance and others like it. These bills did not only concern billboards, however. The billboard industry allied itself with the homebuilders and pushed bills which would, if passed, make government pay property owners for all land use regulation that arguably diminished the value of property. These bills would have effectively ended all neighborhood protections in zoning codes and all environmental regulations at the state and local level. The Durham INC mobilized neighborhood organizations across the state to combat these bills and for a number of years was successful. In fact, for much of INC's existence, the fight against the annual 'billboard bill' was the organization's principal business. Even in 2003 and 2004, when Rev. Whitley was INC president, the INC opposed the billboard industry's legislation to end amortization as a means of eliminating unwanted signs. Unfortunately, the industry won and now, by state law, local government must pay full market value to remove a nonconforming billboard.

II. Effect of the Billboard Ban

In 1984, there were nearly 200 billboards in Durham. They lined most major arteries and commercial strips. Naegele (now Fairway) owned 109, more than one-half of the total. Of Naegele's signs, 65 were removed as a result of the implementation of Durham's ordinance. Dozens more, belonging to other businesses and operators were also removed. Today, only 89 remain and 46 of these belong to Fairway.

III. Current Billboard Regulation in Durham City and County

A. Under the UDO

Under the UDO, the erection of most new 'off-premises' signs, including all billboards, is illegal. Those that exist are permitted as non-conforming uses because they were put up prior to 1984 when the original ban went into place.

B. Nonconforming Uses

As with all other nonconforming uses, billboards may not be moved, enlarged, or improved by upgrading materials. Billboards on wooden polls cannot be placed on steel masts. Unlit billboards cannot be illuminated. A billboard must be removed if it is damaged and the cost of repair exceeds 25% of its replacement value. A billboard must also be removed if it is abandoned and not used for more than a specified period of time. Billboards, like other nonconforming uses, may be maintained as they are.

As a parenthetical to this section, the North Carolina Supreme Court has recently affirmed a decision of the North Carolina Court of Appeals that certain billboards which are nonconforming under local zoning regulations may, under the regulations of the N. C. D. O. T., be moved as much as 53 feet when their original site is threatened by highway widening. Even these signs may not be upgraded, however.

C. Purposes of the Ordinance

Of course, the purpose of the ordinance is to effectively maintain and enhance Durham's environment by reducing visual clutter and by making the city more attractive. The ordinance was also designed to promote pedestrian and traffic safety and to protect nearby residential areas from the visual imposition of gigantic off-premise signs. Citizens who lived in Durham in the 70s and 80s often complained how ugly and cluttered Durham's roadways were. A standard neighborhood argument against the expansion of commercial zoning was the sad appearance of the city's automobile-oriented commercial lined roadways. The purpose of Durham's billboard ban has withstood every legal challenge. As with all nonconforming uses, billboards are tolerated, but the purpose of the law is to encourage their ultimate removal.

All one has to do to see the effects of Durham's ban is to drive to other communities where no ban exists. In places such as Guilford and Johnston Counties, billboards continue to clutter the highways.

IV. Billboards in Durham Today

A. Location

Of the 89 billboards remaining in Durham, only about one-half are located on the largest traffic corridors. There are none along I-40. There are only a handful along Hwy 147. There are still a fair number on U.S. 70 and I-85, but most of these are located to the far west and east of the city because the I-85 widening project took the rest and they cannot now be replaced. The rest, mostly smaller signs, are located along commercial strips like 15-501, Alston Avenue, and Roxboro Road.

Some billboards are located in or near poor neighborhoods where zoning and land use are mismatched and where no effective neighborhood opposition could keep them out.

B. Attrition

With the amortization tool no longer available to speed the removal of billboards, the principal means of removal are takings for highway projects and abandonment. When billboards are located within state-owned right of way, the state may withdraw permits and end the life of a billboard.

Within the next two years, it is anticipated that as many as eight billboards will be taken down as the result of right-of-way acquisition for the East End Connector project. Most of these signs belong to Fairway. Another 1-2 signs will come down as a part of the Alston Avenue widening project in 2011. Again, if moving these billboards less than 53 ft. can save them, the D.O. T. may allow it.

The national attrition rate for existing billboards is 1.5-2%. Between 2000 and 2008, 11% of Durham's existing billboard stock has been removed, matching the national average.

With as many as eight more coming down in the next two years, Durham's attrition rate may far exceed the national average. Even without amortization, Durham's billboard ban is working effectively to remove billboards. While it is unlikely that billboard owners will eventually abandon every billboard which is not taken in highway projects, there is no compelling need to compromise Durham's strict standards to accelerate billboard attrition. This is especially true if the bargain grants the remaining signs legal and thus permanent status.

C. Lucrative Signs

According to *Inc.* magazine, the revenue from standard billboards is \$1-2,000 per month. A digital billboard should earn about \$14,000 per month. Since billboard companies employ very few people (mostly managers and sales personnel), their business is very lucrative. Digital billboards offer the added benefit of eliminating the need to employ people to change the images on the signs. Fairway's offices are in Augusta, Georgia and Raleigh. Their employment impact on Durham's economy is negligible.

D. Tax Revenues

Billboards are taxed as personal property at their value in materials, not based upon their income capitalization. As a result, they pay very little in taxes to Durham. According to the planning department, in 2008 Fairway paid just \$2,605.60 in taxes to Durham County. The owner of every single family residence on the 1110 block of Virginia Avenue paid more.

E. A Billboard Problem

From the industry's point of view, the billboards remaining in Durham are poorly placed to maximize advertising revenue. Much of the town's population and business activity has shifted south where no signs exist or may be built. The widening of I-85 eliminated many signs and those directed at downtown consumers were eliminated by attrition and amortization. The resurgence of downtown has left the industry with few billboards to aim at new downtown residents and customers.

V. Regulation in Nearby Communities

- Chapel Hill prohibits all billboards.
- Cary prohibits all billboards.
- Morrisville prohibits all billboards.
- Raleigh strictly regulates billboards and caused most to be removed in the 1990s. No digital billboards are allowed in Raleigh.

The combined effect of these regulatory bans is that the triangle is a billboard free zone. If Durham, in the center, were to overturn its ban, the combined effect of triangle communities working together would be lost.

VI. The Industry's Proposal To Durham

Six Elements:

1) Allow relocation of "qualified" billboards. To "qualify" a billboard it need only be "registered." Qualified billboards could then be relocated to specially created "Qualified Billboard Overlay Zones." These zones would cover the areas adjacent to the rights-of-way along NC 147 from Briggs Ave to I-85, Hwy 70, US 15-501, US 501, and I-85. Billboards would have to be 1000 feet apart, 500 feet from an historic district, and 200 feet from a residence.

2) Allow qualified billboards to be upgraded. Those on wooden poles could be converted to steel masts, etc.

3) All signs which are relocated or reconstructed could have face areas the same size as they did before relocation or reconstruction.

4) Require landscaping for billboards which are relocated or rebuilt unless it is impractical in the opinion of the bill board owner in which case the billboard owner may pay a fee to the city for beautification.

5) Allow digital billboards and allow them to change their displays up to every eight seconds. At times, the industry has coupled this element with a limit on the number of such billboards.

6) The owners of digital billboards will display, for free, amber and silver alerts, certain emergency alerts, and advertising for nonprofit organizations.

VII. The Argument Against

A. The Best Possible Regulatory Scheme

Durham currently has the best possible regulatory scheme. Billboards are banned. Those that exist are aging, nonconforming uses which cannot be moved, replaced or upgraded. They are disappearing at a faster rate than the national average.

If we vote to allow billboards to be rebuilt ore relocated, we give up the best regulatory tool we have - the nonconforming status of all billboards. Under the industry's proposal, all "qualified" billboards would become legal again. Having made them legal we would not be able to make them illegal again. All attrition would be arrested. Durham would be left with relocated, upgraded billboards and some of them would be digital. All of them would be permanent.

B. Exchanging Old for New

From time-to-time there has been discussion of requiring a reduction in the number of billboards in exchange for allowing digital billboards. The industry has not actually offered this exchange and we should not propose it. It would create significant legal problems

insofar as it favors Fairway and would create for this dominant company at least the appearance of a Durham sanctioned local monopoly.

C. Limited Numbers of Digital Signs

Again, this element, if granted, favors Fairway in an unfair way. If six or eight digital billboards are allowed, it is not unlikely that Fairway, given its dominant position in the local marketplace, will snap up the locations. Once they have them it is also unlikely that they would give them up. It is inappropriate for Durham to create a regulatory scheme which appears to confer a special or favored status on the largest operator.

D. Enhanced Revenues

While it is true that digital billboards would generate more tax revenue than ordinary billboards, the difference in overall revenues would be negligible and by far and away insufficient to justify giving up our ideal regulatory position.

E. Billboards under the New Scheme Would Not Be Good for the Local Economy

Digital billboards advertise mostly national products and products which often cannot advertise elsewhere such as adult entertainment, retail cigarette outlets, and liquor. None of this revenue would flow into Durham. Fairway and its rivals are not based here and their employees do not live and work here. Fairway's profits would flow out of Durham. Digital billboards even eliminate billboard industry jobs. Since the number of billboards would not go up, arguably, the advertising benefit to local businesses would be relatively small.

F. Billboards Are Not Environmentally Friendly

No new building or structure is "greener" than an existing structure. To demolish and reconstruct existing billboards would use resources which will never be expended under the current ban. Digital billboards could add lighted billboards in areas which previously had none and the visual pollution and impact on the city would be significantly worse than the current problem.

Dressing up existing billboards with landscaping is a regulatory red herring. If the industry is made up of such good corporate citizens, then billboard owners would not need an ordinance provision to require them to landscape their holdings. Ordinary homeowners landscape their properties out of self respect and respect for their neighbors. We should not allow the billboard industry sell us on the idea of digital or upgraded billboards with the offer of landscaping that good neighbors provide with no expectation of anything in return. Finally, it is important to remember that this is the same industry that only last year applied to the legislature to be allowed to cut 50% more vegetation out of the right of way to provide wider lines of sight for their products.

G. Local Government Cannot Regulate the Content of Commercial Speech

The proposal that the industry would give time and space to public service advertising is just bait. Government cannot require any commercial advertiser to donate content to the government or to nonprofit agencies. Any provision presuming to require the industry to display public notices or advertising for nonprofit organizations would be unenforceable.

H. Digital Billboards Would Create a Greater Distraction and Hazard than Existing Billboards in Durham

Studies and arguments have been prepared and published by both proponents and opponents on the question of whether digital billboards are more distracting to motorists than ordinary billboards. It is not necessary to resolve this question as a part of the Durham debate, however, because it is indisputable that a digital billboard is more distracting to motorists on busy interstates and freeways than no billboard at all. Remember that Fairway wants to erect digital billboards and move existing billboards to highway corridors in Durham where today only a very few billboards survive. It is not a contest of new billboards versus old, but some versus none.

I. The Billboard Industry Is Not Neighborhood Friendly and Not a Good Durham Citizen.

One only has to look at billboards towering over private residences to see that the billboard industry in Durham has very little regard for the welfare of Durham's neighborhoods. For years the industry has attacked the power of local governments to protect neighborhoods with effective zoning regulations. The Durham InterNeighborhood Council, along with the North Carolina League of Municipalities, fought one billboard bill after another from the 1980s to 2004. The City of Durham expended more than \$1,000,000 in legal fees to defend the city's zoning regulations against incessant and hopeless lawsuits by the billboard industry.

The billboard industry employs virtually no one in Durham. Mysteriously, it pays little in taxes. The considerable revenue it generates here flows to coffers in other cities and other states. The industry does nothing for Durham and there is no compelling interest in favoring it.

Whatever benefit anyone might possibly imagine flows from a billboard is not worth its cost to the community in terms of its beauty, dignity, and self-respect. The areas along I-85, Hwy 147, U.S. 15-501, and 501 are lined by established neighborhoods – some prospering and some struggling. If the InterNeighborhood Council does not vigorously oppose Fairway's proposal to loosen Durham's ban on billboards, how will any delegate be able to face our neighbors on Knox Circle, Vickers Avenue, Club Boulevard, Duke Street, Merrick Street, or Grant Street ever again?