

**STATEMENT IN SUPPORT OF
APPLICATION FOR CERTIFICATE OF APPROPRIATENESS**

**To Retain Painted Brick on Residence At
932 Clifton Road**

Submitted on behalf of Applicants/Owners: Louis and Jill Hengen

By:

**GIACOMA ROBERTS
& DAUGHDRILL, LLC**
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INTRODUCTION

This application seeks a certificate of appropriateness¹ (“COA”), retroactively, to permit the exterior painting of the modern brick on a non-historic home located at 932 Clifton Road. The existing home was built in 2014. Mr. and Mrs. Hengen purchased their home on March 20, 2017. No manual or other document related to any historic district was included as part of the closing. See Hengen Affidavit, ¶ 5, attached hereto. A copy of the transfer deed is attached hereto and incorporated herein as an exhibit. While they knew they were buying in a historic district, they understood the home was non-historic and their agent indicated his understanding that they did not need a COA to paint their house because it was a non-historic home. No other disclosures were made by the seller and no notice was provided in the Sales Contract to contradict this information. A copy of the Sales Contract is attached hereto and incorporated herein as an exhibit. Painting the home was planned from the beginning. See Hengen affidavit, ¶ 2. The Hengens reviewed numerous homes in the neighborhood, including the neighboring home which is similarly painted and had no reason to believe, given the number of painted *historic* homes, that there was any restriction on painting a non-historic home. Hengen Affidavit, ¶ 4.

Almost immediately upon closing, in late March, they retained the service of painters who began working. They had five painters working from 8:30 a.m. until 6:30 p.m. for six or 7 days per week for approximately two full months. Hengen Aff., ¶ 5-6. There were work trucks and vans parked along the street and numerous ladders alongside the house as the painters worked. Id. The only people who did stop by and address the work being performed were the neighbors who wanted to compliment the color and new look of the home. Id. The work done included painting the siding as well as the brick on the home. Id. At no time during that entire two months did anyone issue a warning, comment adversely, issue a citation or even stop, as they were riding down the street, to provide any kind of notice to the Hengen’s that there might be a violation of the Design Guidelines. Id. More than \$11,800 was spent painting the exterior of the home. See Painting Contract attached hereto.

¹ Subject to the constitutional and legal objections set forth below.

On June 8, 2017 and again on June 10, 2017, weeks after completion of the paint work and after they spent \$11,800 painting the home, warning citations were issued by DeKalb County. See a copy of the Receipt for paint work and the citations attached hereto and incorporated by reference herein. Subsequently, they filed this Application in an effort to bring their home into compliance with any alleged District regulations.

A. COA Is Not Necessary For The Hengen’s Non-Historic Home

1. Guideline 6.1.1 recites on its face that it is only applicable to historical homes in need of preservation and rehabilitation.

The citation (incorrectly) recites an alleged violation of Code Section “27-13-5.8(c)” a non-existent Code Section. Staff, in its report to the HPC, identified Guideline 6.1.1 as being the sole guideline applicable to the Hengen property as support of the allegation that painting the brick was a violation of the Design Guidelines. Section 6.1.1 states that the original masonry should not be painted. Masonry is not defined anywhere in the Guidelines and brick is never specifically identified as precluded from being painted.

More importantly Section 6.1.1 is part of the larger Chapter 6.0 entitled “Architectural Rehabilitation Guidelines,” which specifically states: “These guidelines are intended not only to assist the DeKalb County Historic Preservation Commission in evaluating Applications for Certificates of Appropriateness but also to assist property owners planning *preservation* projects. These guidelines seek to ensure the preservation of the historic character of individual **historic buildings** within the district as well as the district as a whole.” Even if the Hengens had been on notice of the applicability of the Design Manual to a *non*-historic home, the Hengen’s home indisputably and unquestionably is not a historic building in need of rehabilitation or preservation. It was built in 2014 and painting was an aesthetic choice of the homeowner. Guidelines 6.1.1 refers to the “original” masonry needing to be retained

which, read in the context of the total Chapter 6.0, clearly applies to *original* masonry on a historic home undergoing preservation. There is no *original* masonry on the Hengen home to preserve or rehabilitate. Thus, Staff’s application of 6.1.1 is inappropriate and nothing in this section applies.

2. Paint Color is expressly exempted from review by DeKalb County Preservation Commission

Even if Chapter 6 applied despite reciting that the guidelines are intended . . . to assist property owners planning *preservation* projects, Guideline 6.8 Exterior Color, expressly states: “Paint color will **not** be reviewed by the DeKalb County Preservation Commission.” Further and additional support is found in the Appendices to the Guidelines, Page ix, Overview of Local Historic Districts, wherein the Design Manual specifically states, under “What Does It Mean To Me?”, Property owners in historic districts are subject to a design review process . . . Ordinary maintenance and repair are excluded from the review process. Designation **does NOT** . . . (4) require permission to paint your house.”² Thus, no COA should have been required for the paint color Mr. and Mrs. Hengen chose for their home.

3. Guideline 11.0 is not applicable if a COA is not required

Because Guideline 6.1.1 is inapplicable to the Hengen’s non-historic home and HPC has no authority to review paint color, Staff has not asserted any valid guideline that establishes the Hengens’ requirement to seek a COA. Guideline 11.0 states in relevant part:

² Email submitted to David Cullison from Ian Bogost on August 18, 2017 with subject listed as “932 Clifton Rd DHCA comment August HPC” wherein he urges the HPC to require Mr. and Mrs. Hengen to restore the dark contrast of the faux half-timbering and perhaps the trim as well, must be disregarded because even if the Design Manual is applicable to a non-historic home, it expressly recites that the HPC expressly shall not review or dictate paint color. A copy of said email is attached hereto and incorporated by reference.

“In reviewing an application for a Certificate of Appropriateness for a material change to a non-historic building . . .” In this instance, Staff has not alleged any valid or applicable Guideline that applies to the Hengens’ painting their non-historic home. Guideline 11.0 only comes into play if the Hengens actually should have been required to seek a COA. Thus, no COA should be required and this application should be dismissed for lack of subject matter jurisdiction.

B. Should a COA actually be required, the Hengens satisfy the Design Manual

Assuming arguendo that Mr. and Mrs. Hengen are required to seek a COA, to which they do not concede or waive their objections, they satisfied any applicable guidelines. If the painting of the “masonry” is the only alleged material change to their non-historic home then, when evaluating Guideline 11.0, “the Preservation Commission should evaluate the change for its potential impacts to any historic development (architecture and natural and cultural landscapes) in the area of influence of the non-historic property.” And it states that Chapter 7 should be considered in this analysis, which is intended to provide guidance for Additions and New Construction. Mr. and Mrs. Hengen did not add onto the 2014 house nor did they build a new home – they simply painted their existing, non-historic home. Section 7.2 lists the basic design concepts which should be considered when reviewing additions and new construction, which include: Building Orientation and Setback (N/A); Directional Emphasis (N/A); Shape (N/A); Massing (N/A); Proportions (N/A); Rhythm (N/A); Scale/Height (N/A) and Materials/Architectural Elements, which is the only concept that could arguably be applicable. Guideline 7.2.8 states: “New construction and additions should be compatible and not conflict with the predominant site and architectural elements – and their design relationship – of existing properties in the area of influence.”

The Hengens' home is one of no less than twenty-one houses on Clifton Road alone, no more than one-half mile from the Hengens' home, that have painted brick. See the Area of Influence Package with the list of homes, their proximity to the Hengen's home, a map indicating all painted brick homes, and photos of each home, that is attached hereto and incorporated by reference. There are also three (3) painted homes approximately one mile away on Lullwater that are also painted brick. More particularly, two homes immediately to the north and two homes immediately to the south of the Hengen's home have painted brick. The Hengens are, literally, surrounded by painted "masonry" homes, including painted *historic* homes. Clearly, with 24 painted brick homes in the area of influence and two painted brick homes immediately on each side of their home, it is difficult to imagine how anyone can say that the Hengens painting their home conflicts with or is incompatible with the predominant site and architectural elements of existing properties in the area of influence. Thus, should the COA even been necessary, the HPC should grant it based upon the evidence presented herein.

C. The Hengen's Were DENIED Due Process and Notice of Any Alleged COA Requirement

Nothing of record regarding the Hengens' home puts them on notice that *painting* their non-historic home required permission from anyone. There is no statutory provision of the Code which imposes or requires the Hengens to receive or be given any sort of disclosure at closing outlining those matters which are and are not subject to COA review. The Guidelines, as shown above, are at best, ambiguous and, at the worst, expressly provide that "Designation does **NOT** . . . (4) require permission to paint your house." Without question, even the Chapter of the Design Manual under which they have been cited itself provides that:

“Paint color will **not** be reviewed by the DeKalb County Preservation Commission.” Guideline 6.8. They knew their home was non-historic and the only information they were provided was that no COA was necessary to paint their home. The Guidelines fail to express or define that “original” masonry includes *modern* brick. Unlike other types of work done within the District on the exterior of houses, painting does not require a building permit so there is no built-in governmental oversight or opportunity for notice when painting your house.³ There is no requirement that painting contractors in DeKalb be trained on or made aware of these alleged restrictions.

Indeed, on the County’s own website, a citizen trying to determine if they needed a COA would observe the HP Process being described, in relevant part, as follows:

“The ordinance defines a material change in appearance as follows: "a change that will affect either the exterior architectural or environmental features of a historic property or any building, site, object, landscape feature or work of art within a historic district such as:

1. A reconstruction or alteration of the size, shape or facade of a historic property, including relocation of any doors or windows or removal or alteration of any architectural features, details or elements;
2. Demolition or relocation of a historic structure;
3. Commencement of excavation for construction purposes;
4. A change in the location of advertising visible from the public right-of-way; or
5. The erection, alteration, restoration or removal of any building or other structure within a historic property or district, including walls, fences, steps and pavements, or other appurtenant features."

<https://www.dekalbcountyga.gov/planning-and-sustainability/hp-process>. Nowhere in this

description does it even hint that painting your house would require a COA.

³ Arguably, the fact that a building permit is not required for painting in the District is further evidence that the requirement of a COA was never contemplated as a prerequisite to painting your home. It is inappropriate to retroactively try to impose it now.

Moreover, when Mr. and Mrs. Hengen look around their neighborhood, there is nothing to alert them to the Guidelines or its application. This is especially true considering there are 21 painted brick homes on the half-mile stretch of Clifton Road in the immediate vicinity of the Hengens' home. There are three more on Lullwater only a mile away. See photos attached and incorporated herein. There are at least 12 painted homes on Springdale, including 1351 Springdale Road which the HPC recently approved its retroactive application for painted brick on a *historic* home.

All of the homes, except one on Springdale, appear, by way of the Historical Inventory map maintained by the County, to be "historic." Most have fairly recent coats of paint. See the attached locations of the Springdale painted homes as well as other painted homes in the District. In 2006, the HPC also approved the painting of a historic brick home at 1459 Cornell Road, as well as a brick apartment building at 1793 North Decatur. Looking at all the painted brick homes in their area of influence and in the entire District, why would Mr. and Mrs. Hengen ever think painting their home, brick or otherwise, was impermissible or required prior approval?

Clearly, based upon the foregoing, Mr. and Mrs. Hengen have not been given proper notice or due process regarding the imposition of a requirement to seek a COA. No one warned them or cited them during the 2 months the painters were obviously painting their home, and it was 6 weeks after completion that they were finally issued a warning notice. So without any notice or warning, the Hengen's have now spent almost \$12,000 to paint their home.

D. There is no realistic remedy if the HPC denies the COA Application.

The Hengens have requested multiple paint contractors to determine what would be required to *remove* the paint from the brick should the HPC deny their application. Included in their package are two statements from such contractors that such removal is virtually impossible without destroying the integrity of the brick. Most contractors have refused to bid the project because it cannot be done safely. See the attached letter from Winston DuBose, President of ECO Vapor Blasting Solutions attached hereto and incorporated by reference, identifying, in a detailed analysis, why this is not possible. Mr. DuBose recites that the integrity of the brick would be compromised if he attempted to remove the paint, and he refuses to provide a bid for the work. Additionally, the Hengens procured a letter from Rex Friedlein of Pupshire Builders, reciting that there is no totally effective way to remove the paint and that sand-blasting would be particularly invasive, dangerous for the neighbors and the Hengens and ineffective in removing all of the paint unless the surface is of the brick and mortar is compromised. The email from DHCA's Ian Bogost, even acknowledges the probable impossibility of such removal. Given the risks posed by removal, the current aesthetically pleasing appearance of the painted house on the Subject Property and the prevalence of painted brick in the immediate vicinity of the Subject Property and throughout the District, requiring removal of the paint would seem unwarranted and ill-advised.

SUMMARY

The Hengens' application is arguably not even required for a non-historic home considering, (1) Chapter 6.0 pertains to the rehabilitation of historical homes; (2) Guidelines 6.8 and the Appendices

expressly exempt paint color and painting from HPC review; (3) Guideline 11.0 is not invoked until it is established that a COA is even required; and (4) the County web-site does not identify that painting requires COA review. Assuming arguendo a COA is required, Mr. and Mrs. Hengen's application does not run afoul of any relevant Guidelines. The manner in which they painted their home, including the brick, would not have any adverse impact on surrounding properties because there are numerous houses, both historical and non-historical, within the immediate area of influence and in the whole District that have painted brick. Removal of the paint could cause damage to the brick, the mortar and the overall aesthetics of the home, and they have not been able to find a contractor who is willing to perform the work. Based on the foregoing and for all of the reasons set forth above, the DeKalb County Historic Preservation Commission should grant the Applicant's request for a Certificate of Appropriateness so that the existing painted brick on the Hengens' home may remain.

PRESERVATION OF CONSTITUTIONAL & LEGAL RIGHTS

The Applicant respectfully submits that, should the DeKalb County Historic Preservation Commission refuse to grant the requested Certificate of Appropriateness, such an action would be unconstitutional as a taking of property, a denial of equal protection, an arbitrary and capricious act, and a denial of due process of law under the United States Constitution and the Constitution of the State of Georgia.

Refusal to issue the requested Certificate of Appropriateness would deprive the Applicant of a reasonable use of the Subject Property, a use which has been accorded to numerous other property owners in Druid Hills with painted brick homes. Refusal to issue a COA would be insubstantially related to the health and welfare of the public while substantially harming the Property owner. The Applicants further object to this process as violative of their equal protection rights in that the HPC has, this year, approved a CoA for paint on masonry on a *historic* home and recognized, in the hearing

thereon, that neither the Code, the Design Manual nor the County process provide notice of any requirement for a COA.

Applicant specifically objects to the standing of any party that opposes this Application for Certificate of Appropriateness on the basis that such opponents do not have a substantial interest which is affected by this application and cannot show that they are specially aggrieved by the application as that term is defined by Georgia law. Applicant further objects to any appeal brought by any party on the basis that the full governing authority is the only entity authorized to enforce COA requirements pursuant to DeKalb Code § 13.5-8(14).

Respectfully submitted this 6th day of November, 2017.

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STATE OF GEORGIA

COUNTY OF DEKALB

AFFIDAVIT OF JILL KELLER HENGEN

Personally, appeared before me, the undersigned notary public, duly authorized to administer oaths, **JILL KELLER HENGEN**, who being first sworn, states the facts set forth in the paragraphs below are true and correct, to the best of her knowledge and belief.

1.

My name is Jill Keller Hengen, and I am over eighteen (18) years of age and am competent to give this affidavit. The statements contained herein are true and accurate and based on my own personal knowledge.

2.

In late 2016, my husband, Louis Hengen, and I, began to look for homes in order to relocate to Atlanta with our 2-year-old daughter, after having lived in Washington, D.C. for over a decade. We engaged Chase Mizell to show us homes throughout the city, and fell in love with the beauty of Druid Hills. While we appreciated the structural bones of 932 Clifton Road, we knew that the only way we would consider purchasing the home was if we could paint it white.

3.

The home is beautifully built and felt close to brand new, having only been completed in 2014. Because painting the home was such an important consideration for us, we did our best, with the help of Mr. Mizell, to determine if there were any constraints on our ability to do so, because while we knew we were buying a home in a historic district, there was nothing historic about the home. Mr. Mizell confirmed, based on the information available to him, that we were allowed to paint the home without having to obtain any sort of approval, such as a COA.

4.

In addition, we were unconcerned that our plans to paint the home white would be met with any criticism, as our next-door neighbor's historic home is white painted brick, and we observed at least 21 white painted brick homes on our block alone. We have even seen similar-style homes with painted brick. We had no reason to believe, given the large number of painted brick historic homes in close proximity, that there was any restriction on painting the home.

5.

We closed on 932 Clifton Road on March 20, 2017, and immediately retained the service of painters. At no time during the closing did we ever receive a manual informing us of any rules pertaining to the historic district, nor were we informed of any verbally. In other words, at no time was any notice given to us, even upon reasonable inquiry, that we could not paint our new, non-historic home.

6.

Beginning in late March, we had five painters working from 8:30 a.m. until 6:30 p.m. for six or 7 days per week for approximately two full months, weather permitting. There were work trucks and vans parked along the street and numerous ladders alongside the house as the painters worked. It is noteworthy that Clifton Road is a busy street, so the paint job we were undertaking was quite conspicuous. During this timeframe, the only people to stop by and comment on the work being performed were neighbors who wanted to compliment the new color of our home, and how bright and clean it looked. The work performed included painting the siding as well as the brick on the home. At no time during that entire two months did anyone issue a warning, comment adversely, issue a citation, or even stop as they were driving down the street, to provide any kind of notice to us that there might be a violation of the Design Guidelines. We spent

approximately \$11,500 to perform this exterior work, which is a significant amount of money to us, and a sum we would never have spent had there been any doubt that we were not at liberty to undertake this work.

6.

Then, on June 8, 2017, when we returned from taking our daughter to her swim lesson at the Emory pool on a Saturday afternoon, we had a citation on our door stating we had violated the Design Guidelines by painting our home, and that we had been required to obtain a COA. We were quite distraught by this notice, and were also very concerned, as we believed we had undertaken this large amount of work, and spent this large sum of money, appropriately. We immediately contacted Mr. Mizell, who worked with us to file the Application in an effort to bring our home into compliance with any alleged District regulations. We also received a citation on June 10, 2017. It is still unclear to us why two citations were needed.

7.

The stress caused to my family by this situation cannot be understated. My husband and I feel strongly that we were denied due process. We took reasonable steps to ensure that the painting of our home was done in accordance with any applicable rules, and spent a significant amount of money to do so. The work we did on our home was in good faith, and the fact that we could be forced to undue it puts us in an untenable situation, especially given the health risks associated with the work that would need to be done to remove the paint from the brick. Both contractors we asked to provide us with estimates refused to do so, saying that to undertake this work would be too dangerous, and that the amount of silica that would be released into the air would be a hazard to our neighbors, let alone ourselves and above all, our young daughter. We

also understand the structural integrity of the brick would be compromised, which could also make our home unsafe.

8.

We moved to Druid Hills after many years in a city we loved, hoping to start a new chapter for our young, and hopefully growing, family. Sadly, this issue has only served to make us feel unwelcome, and to inject an additional level of stress as we settle our family into Atlanta, which my husband and I feel is unwarranted, and unjustified. We hope to be able to call this neighborhood home for many years to come, and to put this unfortunate incident behind us, without any further stress or undue expense.

FURTHER AFFIANT SAYETH NOT.


JILL KELLER HENGEN

Subscribed and sworn to before me
this 6th day of November, 2017.


Notary Public
My Commission Expires: 1/4/2021

