

## Application to Appeal a Decision of the DeKalb County Historic Preservation Commission

**All appeals must comply with the procedures set forth herein.**

An application to appeal a decision of the Historic Preservation Commission on a certificate of appropriateness application must be filed within fifteen (15) calendar days after the issuance or denial of the certificate of appropriateness.

**To be completed by County:**  
**Date Received:**

**To be completed by appellant:**

**Name:** Eugene Hurwitz (Appeal submitted by counsel, Eric C. Lang, Ga. Bar 435515)

**Address of appellant:** 935 Springdale Road, Atlanta, GA 30306.

**Counsel:** 2566 Shallowford Rd. NE Suite 104-230, Atlanta, GA, 30345, 404.384.2591, elang@langlegal.com

**Address of Property:** 935 Springdale Road, Atlanta, GA 30306.

This appeal is a review of the record of the proceedings before the preservation commission by the governing authority of DeKalb County, Georgia. The governing authority is looking for an abuse of discretion as revealed by the record. An abuse of discretion exists where the record presented to the governing authority shows that the preservation commission: (a) **exceeded the limits of its authority**; (b) that the preservation commission's decision was not based on factors set forth in the section 13.5-8(3) or the guidelines adopted by the preservation commission pursuant to section 13.5-6 or; (c) that the preservation commission's decision was otherwise arbitrary and capricious.

**If the governing authority finds no abuse of discretion, then it may affirm the decision of the preservation commission. If the governing authority finds that the preservation commission abused its discretion in reaching a decision, then it may; (a) reverse the preservation commission's decision, or; (b) it may reverse the preservation commission's decision and remand the application to the preservation commission with direction.**

**APPELLANT'S NOTE:** Appellant respectfully submits that this appeal is **NOT** subject to the abuse of discretion standard but rather concerns an **error of law** for failure to issue a Certificate of Appropriateness under DeKalb County Code Sections 13.5-8(7) and (8), under which the **only** standard is the passage of **45 days**.

**Date of application:** August 28, 2020.

**Date(s) of hearing, if any:** October 5, 2020, reset from September 21, 2020. **Date of Historic**

**Preservation Commission decision:** October 19 or 20, 2020.

DEPARTMENT OF PLANNING & SUSTAINABILITY

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Historic Preservation Commission  
Appeal Form  
Page 2 of 2

In the space provided below the Appellant must describe how the preservation commission's decision constitutes an abuse of discretion. Specifically, the appellant must, citing to the preservation commission's written decision, show at least one of the following: that the preservation commission exceeded the limits of its authority, or that the preservation commission's decision was not based on factors set forth in the section 13.5-8(3) of the DeKalb County Code or on the guidelines adopted by the preservation commission pursuant to section 13.5-6 of said code or that the preservation commission's decision was otherwise arbitrary and capricious.

**Grounds for appeal:**

Appellant is entitled to a certificate of appropriateness under DeKalb County Code Sections 13.5-8(7) and (8) which provide that when an application for a certificate is not ruled upon within 45 days, the "[f]ailure of the preservation commission to act within said forty-five (45) days shall constitute approval and a certificate of appropriateness shall be issued." That action requires a signed writing: "The preservation commission's decision, whether to accept or reject an application shall be in writing. The written decision shall be signed by the chair or the vice-chair . . ." Appellant's application was submitted on August 28, 2020 so the 45<sup>th</sup> day was October 12, 2020. The decision, however, was not issued until October 19, 2020. The only thing the DHPC had the power to do at that time was issue the certificate due to the passage of time. No discretion is involved – the denial must be vacated and the DHPC must issue the certificate.

The appellant may submit a written supplementary explanation in support of the appeal. The supplementary explanation shall be submitted with the appeal. The supplementary explanation may not exceed three pages and must be typewritten and double-spaced using a twelve-point font with a one-inch margin on all four sides. The governing authority will not consider text in excess of the page limit set forth herein.

**Date:** 11/2/2020      **Signature:**       Eric C. Lang Bar No. 435515

**Instructions:** The appellant shall also deliver copies of this appeal to the planning department and the county attorney. The appellant and any person who has filed a statement in opposition to, or in support of the appeal may attend the meeting at which the appeal is considered and may be called upon by any member of the governing authority to provide information or answer questions. There shall be no other public participation in the appeal.

**Service of responses:** **Appellant requests that this matter be heard and not decided simply on the papers, and, adequate notice of any opposition to this appeal, and citation to any supporting authorities for such opposition. Appellant consents to service via electronic mail on his counsel at [elang@langlegal.com](mailto:elang@langlegal.com).**

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# Supplement to Appeal

**BEFORE THE DEKALB COUNTY BOARD OF COMMISSIONERS**

APPEAL OF                                 )     **Historic Preservation Commission**  
  )     **Parcel No. 18-002-06-001 Decision**  
EUGENE HURWITZ                    )     **dated October 19 or 20, 2020**

**APPELLANT’S SUPPLEMENT TO APPEAL**

**Introduction:** The Dekalb Historic Preservation Commission (“DHPC”) has the discretion to grant or deny certificates of appropriateness (“COA”) unless the applicant for a COA waits over 45 days for a response. DHPC is then required by law to issue a COA. Eugene Hurwitz (“Appellant”) sought his COA on August 28. DHPC denied his application 52 or 53 days later rather than issuing it as required. DHPC’s denial should be vacated, and a COA should be issued. **The standard of review on this appeal is *not* abuse of discretion** because it relates to a requirement that, after the passage of 45 days, a “certificate of appropriateness **shall be issued**” by DHPC which is not a discretionary act. § 13.5-8(7).

**Factual Background:** Appellant sought a COA on August 28 (the “Application”). Exhibit 1. DHPC was to meet on September 21 on the Application but delayed meeting until October 5. DHPC took an interim step at that meeting to reject the Application by holding a vote. Exhibit 2. DHPC actually rejected the Application on October 19 (or October 20) when DHPC’s vice chair signed and sent a rejection to Appellant – 53 days after the Application and 8 days late. Exhibit 3. Communications between Appellant and David Cullison, the Senior Planner who supports DHPC show that DHPC (not Mr. Cullison) did nothing to act on the Application. Hearing nothing after the meeting, Appellant on October 12 contacted Mr. Cullison seeking information. Mr. Cullison responded: “The appeal will be due no later than 15 days **after the date the commission chair signs the decision form. I'm having some trouble getting that done**, but hope to have it cleared up tomorrow.” Exhibit 4, emphasis added. On October 19,

Appellant sought further information. Mr. Cullison replied: “**I am still waiting for the chair to send me the signed denial.**” Exhibit 5. The signed documents followed on October 21, bearing dates of October 19 and October 20. Exhibit 6. Mr. Cullison then refused to implement § 13.5-8(7)’s mandate of issuing the COA because “The action was taken on October 5. Your application for a certificate of appropriateness was denied.” Exhibit 7. Mr. Cullison is incorrect – DHPC is required to issue the COA.

**Legal Argument:** The issuance of a COA due to delay is not a discretionary act, rather, it is an express legal mandate. The COA application procedure is governed by DeKalb County Code § 13.5-8. First, an applicant must seek a COA “at least forty-five (45) days prior to beginning or undertaking any work. . . .” § 13.5-8(1). Second, DHPC *must act* before the end of that 45-day period. “Failure of the preservation commission to **act within said forty-five (45) days shall constitute approval and a certificate of appropriateness shall be issued.**” § 13.5-8(7) (emphasis added). Dekalb County Code strictly defines what act is required: “The preservation commission's decision, whether to accept or reject an application **shall be in writing.** The written decision shall be **signed by the chair or the vice-chair . . .**” § 13.5-8(8) (emphasis added).<sup>1</sup> Further support for the proposition that the signed writing controls the issue is found in the appeal subsections of the county code governing. The section of the county code governing appeals from actions of DHPC is clear that the 15 day period runs from “the date of issuance or denial of the certificate of appropriateness” without reference to any meeting. § 13.5-

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<sup>1</sup> These provisions are based on similar provisions in the state enabling legislation governing historic preservation commissions. The state law counterpart to § 13.5-8(7)’s 45-day requirement is contained in O.C.G.A. § 44-10-28(d) which states “Failure of the commission to act within the 45 day period shall constitute approval . . .” The writing mandate follows: “state its reasons for doing so and shall transmit a record of such action and the reasons therefor, in writing.” O.C.G.A. § 44-10-28(d). Dekalb County affords extra protection to its citizens by adding the requirement of signature.

8(12)(a). That section distinguishes between the dates of meeting and issuance. § 13.5-8(12)(d).

There is additional context for DHPC's tardiness. First, the October 5 meeting was the only DHPC meeting in 2020 which resulted in any application of the automatic issue rule.<sup>2</sup> Indeed, two applications were noted as being automatically granted during that meeting. It is possible – though this statement is wholly conjectural – that DHPC did not want to admit to a third missed deadline in a one month period, so the Application was denied and Appellant was improperly told the denial was timely. Second, over the last three years Appellant has been adverse to a series of COAs and amendments issued by DHPC to the owner of the property adjoining Appellant's property. DHPC approved a zero-lot-line driveway, the installation of which nearly destroyed the root structure of Appellant's old-growth trees near the lot line. Currently, Appellant is seeking the enforcement of the COA because the neighboring owner has built an unauthorized twelve foot wall. Though DHPC acknowledges the violation it has addressed it. Exhibit 8. Though both of these items provide context for DHPC's failure to follow §13.5-8(7), context is not needed at all – more than 45 days passed, regardless of the reason.

**This appeal is not based on an abuse of discretion.** DHPC had no discretion other than to follow the unambiguous mandate of § 13.5-8(7) that after the passage of 45 days, a “certificate of appropriateness shall be issued.” The law is clear that the action required is a “written decision . . . signed by the chair or the vice-chair.” § 13.5-8(8). The forty-fifth day after the Application was October 12, yet the signed written decision did not exist until October 19 or 20. The denial must be vacated, and a COA must be issued. Appellant requests that this matter be heard and not decided simply on the papers, and, adequate notice of any opposition to this appeal, and citation to any supporting authorities for such opposition

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<sup>2</sup> <https://www.dekalbcountyga.gov/planning-and-sustainability/public-hearing-agendas-info>