

APR 11, 2019 03:40 PM


Rebecca Keaton, Clerk of Superior Court
Cobb County, Georgia

**IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA**

JAMES "JIM" MCCUTCHEON)	
AND ERIN MCCUTCHEON,)	
)	
Petitioners in Certiorari,)	CIVIL CASE NO.
)	
v.)	18-1-5112-51
)	
COBB COUNTY HISTORIC)	
PRESERVATION COMMISSION,)	
M. CHRISTOPHER BALDWIN,)	
ABBIE PARKS, CAL DORTCH,)	
ROSE WING, AND GERALDINE)	
ALDRIDGE, INDIVIDUALLY AND)	
IN THEIR OFFICIAL CAPACITIES,)	
AND COBB COUNTY, GEORGIA,)	
)	
Defendants in Certiorari,)	
)	
BOARD OF COMMISSIONERS OF)	
COBB COUNTY,)	
)	
Respondent in Certiorari,)	
)	
ROWLAND DAVIDSON,)	
)	
Applicant in Proceeding Below.)	

ORDER GRANTING PETITON FOR CERTIORARI

On March 14, 2019, the above-captioned matter came before the Court for hearing on Petitioners James "Jim" McCutcheon and Erin McCutcheon's Petition for Certiorari seeking review of the Cobb County Board of Commissioners' June 19, 2018, decision¹ to affirm the Cobb County History Preservation Commission's issuance of a Certificate of Appropriateness to Applicant Rowland Davidson. Jon Schwartz, Esq. appeared on behalf of Petitioners; Debra L. Blair, Esq. appeared on behalf of Cobb County government entities and officials; and J. Kevin

¹ The Court notes the pleadings submitted by all parties aver that the Cobb County Board of Commissioners' affirmance was recorded on or about July 10, 2018, in the Board of Commissioners' Minutes of Special Called Meeting/Appeal Hearing, Second Appeal of Certificate of Appropriateness.

Moore, Esq. appeared on behalf of Applicant Rowland Davidson (hereinafter referred to as “Davidson”). Upon consideration of the pleadings, the record, evidence presented and argument of counsel, the Court finds as follows:

BACKGROUND & ASSIGNMENT OF ERROR

The instant matter concerns a dispute over proposed new construction of a residential home by Rowland and Nancy Davidson in an area designated by Cobb County as a historic district, *to wit*: the Concord Covered Bridge Historic District.² The Davidson property is a vacant lot located at 45 Concord Road³ and is situated with Petitioners’ historic home, known as the Rock House, on one side, and the Silver Comet Trail right of way on the other.⁴ (R. at 417).

More particularly, the dispute, at least before this Court, involves the Cobb County Board of Commissioners’ decision to affirm the Cobb County Historic Preservation Commission’s issuance of a Certificate of Appropriateness to Davidson permitting construction of a new residential home on his vacant property at 45 Concord Road, which is within the Concord Covered Bridge Historic District.⁵

In their Petition for Certiorari, Petitioners allege that the Board of Commissioners’ affirmance “was unsupported by or contrary to the evidence, and error as a matter of law.” (Pet. at 18). More particularly, as set forth infra in five (5) assignments of error, Petitioners complain that the Cobb County Historic Preservation Commission abused its discretion because it:

² According to a March 26, 2018, application submitted by Davidson, discussed infra, he is an architect and “it has been a lifelong career goal to design [his] own house.” The property at issue was purchased in 2006 and Davidson has “spent the last twelve years designing and planning this project.” (R. at 417).

³ More specifically, Davidson’s vacant lot is approximately 1.521 acres and located at Land Lot 17-171 of the 9th District, in Cobb County, Georgia. (R. at 415-16, 434).

⁴ In addition to being neighboring landowners, Petitioners and Davidson share a driveway. (R. at 434).

⁵ Because the Davidson property is located within a designated historic district, no material changes in appearance of the site can be made without the approval of the Cobb County Historic Preservation Commission and their issuance of a Certificate of Appropriateness. Cobb Code §66-81.

1. Did not adhere to the plain language of the Cobb Code requiring the Cobb County Historic Preservation Commission to approve or deny an application;
2. Based its decision on incorrect information regarding the square footage of the proposed structure;
3. Ignored the plain language of the Cobb Code which distinguishes between the immediate neighborhood and the larger Historic District;
4. Relied upon compatibility with non-historic homes which do not contribute to the historical character of the district; and
5. Reviewed and approved an Application that did not include items required by the Cobb County Historic Preservation Commission's Certificate of Appropriateness Submittal Criteria.

(Pet. at 17-18). Each of the foregoing assignments of error is reviewed by the Court, infra.

PROCEDURAL HISTORY

The instant matter has a long and tortured procedural history as evidenced by the voluminous record reviewed by the Court. (R. 1-774). The only portion of the procedural history that the Court need concern itself with begins with Davidson's March 27, 2018, application to the Cobb County Historic Preservation Commission for the issuance of a Certificate of Appropriateness permitting him to construct a new house on a vacant lot located in the Concord Covered Bridge Historic District.

On or about April 9, 2018, the Cobb County History Preservation Commission convened a public hearing, approved Davidson's March 27, 2018, application, and issued a Certificate of Appropriateness authorizing the proposed construction over the objection of Petitioners herein.⁶ (R. at 519-521).

⁶ The record reflects Petitioners submitted a lengthy written opposition to Davidson's application. (R. at 437-518).

On or about June 19, 2018, the Cobb County Board of Commissioners affirmed the Cobb County Historic Preservation Commission's decision to issue a Certificate of Appropriateness to Davidson. (R. at 770-774).⁷

On July 10, 2018, Petitioners duly filed a Petition for Writ of Certiorari, a Certiorari Bond, and a Certificate of Payment of Costs.

On or about July 17, 2018, the Sanction of Petition for Writ of Certiorari was filed into the record and the Clerk of Court thereupon issued a Writ of Certiorari.

The parties herein thereafter filed various pleadings, including a Petition for Writ of Certiorari, Answer, Joint Brief in Support of Denial of Petition for Writ of Certiorari, and a Reply Memorandum in Support of Petition for Certiorari.

JURISDICTION OF THE SUPERIOR COURT

The Georgia Historic Preservation Act, codified at O.C.G.A. §44-10-20 et seq., provides that “[a]ppeals from decisions of the governing body made pursuant to this article may be taken to the superior court in the manner provided by law for appeals from a conviction for municipal or county ordinance violations.” O.C.G.A. §44-10-28(j).⁸ Accordingly, the statutes set forth at O.C.G.A. §5-4-1 et seq., “Certiorari to superior court” apply to the instant matter.

STANDARD & SCOPE OF REVIEW

As directed by O.C.G.A. §5-4-12, “[n]o ground of error shall be considered which is not distinctly set forth in the petition.” Id. at (a). Further, “the scope of review shall be limited to all

⁷ The Court notes the pleadings submitted aver that the Cobb County Board of Commissioners' affirmance was recorded on or about July 10, 2018, in the Board of Commissioner's Minutes of Special Called Meeting/Appeal Hearing, Second Appeal of Certificate of Appropriateness.

⁸ *Accord* Cobb Code §66-96 “[a]ppeals from decisions of the board of commissioners made pursuant to the state historic preservation act may be taken to the superior court of the county, in the manner provided by law.”

errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence.” Id. at (b).

In 1991, our Supreme Court held that “in Georgia the substantial-evidence standard is effectively the same as the any-evidence standard.” Emory Univ. v. Levitas, 260 Ga. 894, 897 (1) (1991) (overruling numerous cases to the extent that they recognized a difference between the substantial evidence and the any evidence standards).

The superior court does not “reweigh credibility determinations of the factfinder.” DeKalb County v. Bull, 295 Ga. App. 551, 552 (2009) quoting Jamal v. Thurmond, 263 Ga. App. 320, 322 (2003). “Because the factfinder in the initial proceedings is charged with weighing the evidence and judging the credibility of the witnesses, the superior court . . . must view the evidence in the light most favorable to the factfinder’s decision and must affirm the decision if there is **any evidence** to support it, even when the party challenging the factfinder’s conclusions presented evidence during the initial proceedings that conflicted with those conclusions.” Id. citing Glass v. City of Atlanta, 293 Ga. App. 11, 14 (2009) (emphasis in original).

THE COBB COUNTY HISTORIC PRESERVATION COMMISSION

In 1980, the Georgia legislature adopted the “Georgia Historic Preservation Act.” O.C.G.A. §44-10-20 et seq. The Georgia Historic Preservation Act “establishes a uniform procedure for use by each county and municipality in the state in enacting ordinances providing for the protection, enhancement, perpetuation, and use of places, districts, sites, buildings, structures, and works of art having a special historical, cultural, or esthetic interest or value.” O.C.G.A. §44-10-21.

In 1984, as permitted by O.C.G.A. §44-10-24(a), the Cobb County Historic Preservation Commission was established by ordinance. Cobb Code §66-26. The functions and powers of a

historic preservation commission are set forth at O.C.G.A. §44-10-25; the functions and powers of the Cobb County Historic Preservation Commission are set forth at Cobb Code §66-29 and are nearly verbatim to the statute.

CONCORD COVERED BRIDGE HISTORIC DISTRICT

The Concord Covered Bridge Historic District was created in 1986 and was Cobb County's first historic district.⁹ Prior to designating the Concord Covered Bridge area as a historic district, Cobb County provided a Nominating Report to the Georgia Department of Natural Resources' Historic Preservation Division describing the historic and architectural significance of the proposed historic district. (R. at 439). The Nominating Report also included a map identifying the proposed Concord Covered Bridge Historic District, as well as a smaller "intact historic area" within the Concord Covered Bridge Historic District that included historic structures, *to wit*: the Concord Covered Bridge, the Rock House, the Grist Mill, Miller's House, and the Woolen Mills Ruins.¹⁰ (R. at 440).

Davidson's property is located within the Concord Covered Bridge Historic District. Further, Davidson's property is located within the "intact historic area" as identified by Cobb County in its Nominating Report. (R. at 441).

CERTIFICATE OF APPROPRIATENESS

Pursuant to O.C.G.A. §44-10-27, "[a]fter the designation by ordinance of . . . a historic district, no material change in the appearance of the historic property or of a [] site . . . within the historic district shall be made or be permitted to be made by the owner . . . thereof unless and

⁹ <http://concordcoveredbridge.org/>

¹⁰ Notably, the Concord Covered Bridge, Rock House, Grist Mill, and Miller's House are listed on the National Register of Historic Places.

until application for a certificate of appropriateness has been submitted to and approved by the commission.” *Id.* at (a); *accord* Cobb Code §66-81.

A “[c]ertificate of appropriateness” is defined as “a document approving a proposal to make a material change in the appearance of a designated historic property or of a structure, site, or work of art located within a designated historic district.” O.C.G.A. §44-10-22(1); *accord* Cobb Code §66-1 (defining a certificate of appropriateness as “a document evidencing approval by the historic preservation commission of an application to make a material change in the appearance of a designated historic property or of a property located within a designated historic district.”).

Applications for a Certificate of Appropriateness must be submitted and approved by the Cobb County Historic Preservation Commission for “new structures constructed within designated historic districts.” Cobb Code §66-82. “An application for a certificate of appropriateness shall be accompanied by such drawings, photographs or plans as may be required by the commission.” O.C.G.A. §44-10-27(a); Cobb Code §66-84.

The Cobb County Historic Preservation Commission is empowered to “[r]eview applications for certificates of appropriateness, and grant or deny same.” O.C.G.A. §44-10-25(3); Cobb Code §66-29(a)(3).

DAVIDSON’S APPLICATION FOR CERTIFICATE OF APPROPRIATENESS

As mentioned *supra*, this matter has a long and tortured procedural history involving multiple applications for a Certificate of Appropriateness filed by Davidson and opposed by Petitioners. However, in the instant matter, the Court concerns itself only with Davidson’s March 27, 2018, application for a Certificate of Appropriateness submitted to the Cobb County Historic Preservation Commission for the construction of a new single-family residence on a

vacant lot located on Concord Road. (R. at 415-33). On April 9, 2018, the Cobb County Historic Preservation Commission approved Davidson’s application for a Certificate of Appropriateness. (R. at 519-521).

THE COBB COUNTY BOARD OF COMMISSIONERS

Petitioners properly appealed the Cobb County Historic Preservation Commission’s April 9, 2018, determination to the Cobb County Board of Commissioners by letter dated April 20, 2018. (R. at 523-627).

Pursuant to Cobb Code §66-96, “[a]ny person adversely affected by any determination made by the commission relative to the issuance or denial of a certificate of appropriateness may appeal such determination to the board of commissioners.” *Accord* O.C.G.A. §44-10-28(j).

On June 19, 2018, the Board of Commissioners affirmed the Cobb County Historic Preservation Commission’s determination to approve Davidson’s application for a Certificate of Appropriateness. (R. at 770-774).¹¹

ANALYSIS OF ASSIGNMENTS OF ERROR

- 1. The Cobb County Historic Preservation Commission did not adhere to the plain language of the Cobb Code requiring the Historic Preservation Commission to only approve or deny an application.*

The Cobb County Historic Preservation Commission has only two options when reviewing an application for a Certificate of Appropriateness, *to wit*: approve or reject. O.C.G.A. §44-10-28(d); Cobb Code §66-85. However, when the approval of a Certificate of Appropriateness is appealed to the Cobb County Board of Commissioners, “[t]he [Board of

¹¹ For reasons unclear to this Court, all parties herein contend that the Board of Commissioners’ affirmance was not recorded in the Board of Commissioners’ Minutes until July 10, 2018.

Commissioners] may approve, modify or reject the determination made by the [Cobb County Historic Preservation] [C]ommission.” Cobb Code §66-96.¹²

In the instant matter, the Certificate of Appropriateness issued by the Cobb County Historic Preservation Commission to Davidson on April 9, 2018, approved “[c]onstruction of a new two-story single-family house on a vacant parcel based on the submitted architectural plans, with the stipulation that the house be under 4,000 square feet, as calculated by Cobb County.” (R. at 522).

Petitioners complain that the architectural plans submitted by Davidson exceed 4,000 square feet and that the Cobb County Historic Preservation Commission modified the architectural plans by issuing a Certificate of Appropriateness that limits the size of the structure to “under 4,000 square feet.” Accordingly, Petitioners complain that the Cobb County Historic Preservation Commission exceeded the scope of its authority to only approve or reject applications.

By including a condition, the Cobb County Historic Preservation Commission effectively modified the application. Whether the proposed residence as set forth within the application was indeed “under 4,000 square feet” matters naught, by adding a condition “that the house be under 4,000 square feet” the Cobb County Historic Preservation Commission sanctioned a modification to the application.

Accordingly, the Court **FINDS** that the Cobb County Historic Preservation Commission erred as a matter of law by including a stipulation fashioned by its members to the Certificate of Appropriateness issued to Davidson that modified his March 27, 2018, application. The law concerning the Cobb County Historic Preservation Commission’s authority is clear and it is

¹² The county’s approval, modification or rejection of the Cobb County Historic Preservation Commission’s determination is based upon the Board of Commissioner’s finding that the Cobb County Historic Preservation Commission “abused its discretion in reaching its decision.” Cobb Code §66-96, *accord* O.C.G.A. §44-10-28(j).

strictly limited to accepting or rejecting applications for Certificates of Appropriateness.

O.C.G.A. §44-10-28(d); Cobb Code §66-85.

2. The Cobb County Historic Preservation Commission based its decision on incorrect information regarding the square footage of the proposed structure.

According to Davidson's March 27, 2018, Certificate of Appropriateness application, "based on the Cobb County permitting process the square footage of occupied space is approximately 3,800 square feet." (R. at 418). However, according to an affidavit by Cobb County Chief Appraiser Stephen D. White, Cobb County calculates square footage using "exterior measurements of the structure." (R. at 454).¹³

In the instant matter, it is unambiguous that Davidson presented the interior measurements, *i.e.*, "occupied space" as opposed to the "exterior measurements of the structure" as used by Cobb County. (R. at 418). The Cobb County Historic Preservation Commission's Staff Report indicates that "occupied space" square footage of other homes in the district was considered in comparison to Davidson's "occupied space" measurements without any consideration of the "exterior measurements of the structure" as used by Cobb County. (R. at 435). When the issue of square footage was taken up by the Board of Commissioners on June 19, 2018, they also accepted Davidson's "occupied space" measurements and then compared his measurements "with different online websites . . . for Realtors . . . about what is considered square footage of the home." (R. at 773).

Upon the Court's review of the Georgia Historic Preservation Act and Cobb County Code's Chapter 66, "Historic Preservation" it is clear that the **exterior** of the structure should be

¹³ "[T]he 'square feet living area' figure is calculated using exterior measurements of the structure [and] it only includes square footage that is heated or cooled." White's affidavit further states that "the square footage of unheated/cooled spaces such as garages, porches or sheds are not added into the 'square feet living area' figure although the number is calculated and reflected on the website under 'sketch' tab." (R. at 454).

considered. See O.C.G.A. §44-10-28(b) and (c) (providing that the commission “shall consider . . . the exterior architectural style. . . . [and] the commission shall not consider interior arrangement or uses having no effect on exterior architectural features.”); Cobb Code §§66-85; 66-87.

Notably, the footprint of Davidson’s proposed home was calculated by a licensed architect and found to be approximately 6,535 square feet. (Pet. Ex. 15).

Accordingly, the Court **FINDS** that the Cobb County Historic Preservation Commission erred as a matter of law in accepting Davidson’s “occupied space” measurements instead of “exterior measurements of the structure” as contemplated by the Georgia Historic Preservation Act and Cobb County Code’s chapter on historic preservation.

3. *The Cobb County Historic Preservation Commission ignored the plain language of the Cobb Code which distinguishes between the immediate neighborhood and the larger Historic District.*

The provisions of O.C.G.A. §44-10-28(b) are duplicated at Cobb Code §66-85(a) and provide:

The commission shall approve the application and issue a certificate of appropriateness if it finds that the proposed material changes in the appearance would not have a substantial adverse effect on the aesthetic, historic or architectural significance and value of the historic property or the historic district. In making this determination, the commission shall consider, in addition to any other pertinent factors, the historical and architectural value and significance, architectural style, general design arrangements, texture and material of the architectural features involved, and the relationship thereof to the exterior architectural style and pertinent features of the other structures in the **immediate neighborhood**.

(emphasis added).

Petitioners take issue with the Cobb County Historic Preservation Commission’s refusal to consider a distinction between the terms “immediate neighborhood” and “historic district.”

Respondents¹⁴ contend that consideration of the entire historic district is the proper area to consider when reviewing a Certificate of Appropriateness for construction of a new home. Respondents reject the notion that Cobb Code §66-85 applies to new construction and claim it is only applicable to existing buildings. Respondents instead assert that Cobb Code §66-82 is the only pertinent provision and note that it only refers to “the district” as opposed to “the immediate neighborhood.” Alternatively, Respondents contend that if Cobb Code §66-85 does apply to new construction, that the undefined term “immediate neighborhood” should be given the same definition as the defined term “historic district.” According to Respondents, “it would be improper to pick one area out of the entire District.” (Joint Br. at 13).

A review of the Cobb County Historic Preservation Commission’s Staff Report reveals that no consideration was given to the term “immediate neighborhood” and the entirety of the historic district was instead considered, *to wit*: the “proposed new house . . . reflects the surroundings of [] the district in terms of materials, size, scale, and design.” (R. at 436). When taken up by the Board of Commissioner’s at its June 19, 2018, meeting, the meeting minutes reflect that the commissioners “think the record shows that [the Cobb County Historic Preservation Commission] considered the character of those [historic] homes. . . . In fact, the broader homes in that area in determining whether or not this home fit.” (R. at 772).

As enunciated in Mooney v. Webster, the Court is “to presume that the General Assembly ‘meant what it said and said what it meant’; consequently, the statutory text is to be given its ‘plain and ordinary meaning,’ viewed in the ‘context in which it appears.’ In other words, the text is to be read in its ‘most natural and reasonable way.’” 300 Ga. 283, 289 (2016) quoting Deal v. Coleman, 294 Ga. 170, 172 (1) (a) (2013). Therefore, the Cobb County Historic Preservation Commission should have afforded the words “immediate neighborhood” their “plain and ordinary

¹⁴ The Court generally refers to all parties opposing Petitioners as “Respondents.”

meaning and to avoid a construction that makes some language mere surplusage.” Slakman v. Cont’l Cas. Co., 277 Ga. 189, 191 (2003).

In the instant matter, the Court finds that the “immediate neighborhood” is an area smaller than the entirety of the Concord Covered Bridge Historic District. As discussed briefly supra, the “intact historic area” is a small part of the larger Concord Covered Bridge Historic District. (R. at 440). All of the structures within the “intact historic area” of the Concord Covered Bridge Historic District are historic and most are listed on the National Register of Historic Places. The record reflects that Davidson’s vacant property is clearly situated within the confines of the “intact historic area.” (R. at 441).

Accordingly, the Court **FINDS** that the Cobb County Historic Preservation Commission erred as a matter of law in its refusal to distinguish the meaning and import of the terms “immediate neighborhood” and “historic district.”

4. *The Cobb County Historic Preservation Commission relied upon compatibility with non-historic homes which do not contribute to the historical character of the district.*

As discussed supra, O.C.G.A. §44-10-28(b) and Cobb Code §66-85(a), direct that “the commission **shall consider . . .** the historical and architectural value and significance, architectural style, general design arrangements, texture and material of the architectural features involved, and the relationship thereof to the exterior architectural style and pertinent features of the other structures in the **immediate neighborhood.**” (emphasis added).

Notably, and problematically, a Cobb County Historic Preservation Commission Staff Report dated April 7, 2017,¹⁵ notes that “[s]tructures in the district range in size from 2,200 sq. ft. to 5,000 sq. ft. The Rock House next door is approximately 3,500 sq. ft. with other structures around 3,500 sq. ft., 3,100 sq. ft., 3,700 sq. ft. nearby. The proposed structure is to be

¹⁵ The Court believes this date is a scrivener’s error and should have been 2018.

approximately 3,800 sq. ft., which is similar to other homes in the district.” (R. at 435). In addition to failing to consider the exterior measurements of the proposed structure, as discussed supra, it is unclear whether the Cobb County Historic Preservation Commission considered the exterior measurements of the structures listed in its April 9, 2018, Report. Further, the Cobb County Historic Preservation Commission wholly failed to limit its discussion to the proposed structure’s compatibility with the immediate neighborhood. For example, regarding design, the Staff Report stated “[t]he proposed new house is modern or contemporary in design. However, there are existing modern houses **within the historic district** in a variety of styles and designs.” (R. at 435) (emphasis added).

On appeal to the Board of Commissioners repeated the Cobb County Historic Preservation Commission’s error by failing to limit consideration to the “immediate neighborhood” and instead considered “the broader homes in that area in determining whether or not this home fit. Some of the homes in that area did have geometric designs; some had very traditional designs.” (R. at 772)

Imperative to bear in mind when deliberating whether an application conforms to O.C.G.A. §44-10-28(b) and Cobb Code §66-85(a) is “[c]ompatibility **does not equate to sameness; it is the existing together of different things in harmony with one another.**” Shoemaker v. Bd. of Appeals for Anne Arundel County, 2017 Md. App. LEXIS 206 (Feb. 22, 2017) (emphasis added).

As discussed supra, the Court **FINDS** that the Cobb County Historic Preservation Commission erred as matter of law in comparing the proposed structure’s interior measurements to other structures in the Concord Covered Bridge Historic District. The Court further **FINDS** the Cobb County Historic Preservation Commission erred as a matter of law by failing to properly assign meaning to “immediate neighborhood” and instead considering the entirety of the Concord

Covered Bridge Historic District, as discussed supra. Further, the Court **FINDS** the Cobb County Historic Preservation Commission erred as a matter of law by considering the proposed structure's compatibility with homes within the historic district but not necessarily within the "immediate neighborhood." The record reflects that Davidson's vacant property is clearly situated within the confines of the "intact historic area" and such should be considered as the "immediate neighborhood." (R. at 735).

5. *The Cobb County Historic Preservation Commission reviewed and approved an Application that did not include items required by the Cobb County Historic Preservation Commission Certificate of Appropriateness Application Submittal Criteria.*

Petitioners complain that the Cobb County Historic Preservation Commission violated its own rules by considering, and later accepting, Davidson's incomplete application for a Certificate of Appropriateness. More specifically, Petitioners object to Davidson's failure to submit items listed in the Submittal Criteria document created and maintained by the Cobb County Historic Preservation Commission as part of its application for a Certificate of Appropriateness. (Pet. Ex. 10). Petitioners allege that Davidson failed to submit documents complying with 8(a), *to wit*: "[e]levation drawings in scale showing relationship to structures immediately adjacent" and 10(e), *to wit*: "[p]rojected undue economic hardship which would result from denial of the Certificate of Appropriateness." (Pet. at 17).¹⁶

The June 19, 2018, minutes of the Board of Commissioners states "the Cobb County Historic Preservation Commission [] did provide evidence that items required were submitted." (R. at 771). However, the record before the Court is completely devoid

¹⁶ The Court notes that Petitioners later complain Davidson failed to comply with 8(c) and submit a "[s]ite plan showing building foot print . . . and texture samples." Petitioners are correct that Davidson failed to comply with those requirements; however, those particular omissions cannot be considered by the Court at this time as Petitioners failed to allege these errors specifically as mandated by O.C.G.A. §5-4-12(a).

of evidence that the Cobb County Historic Preservation Commission “provide[d] evidence that items required were [indeed] submitted.” (*Id.*).

Davidson’s application clearly lacks “[e]levation drawings in scale showing relationship to structures immediately adjacent” as required by 8(a) and the “[p]rojected undue economic hardship which would result from denial of the Certificate of Appropriateness” as required by 10(e). (R. at 415-33).

A review of the Cobb County Historic Preservation Commission’s application for Certificate of Appropriateness reveals applicants are to “[u]se the attached submittal checklist to guide you in your description.” (Pet. Ex. 11). The document entitled “Submittal Criteria” clearly states “[c]riteria listed below comprise **the minimum material necessary for review. . . . To be placed on the agenda, the application must be complete. . . . It is imperative that all the necessary materials, drawings, etc. listed about be available for consideration by the [Cobb County Historic Preservation Commission].**” (Pet. Ex. 10) (emphasis added). Clearly, the Submittal Criteria document represents the requirements of the Cobb County Historic Preservation Commission and should have been submitted with Davidson’s application. Cobb Code §§66-82, 66-84.

Concerning 8(a)’s requirement for “[e]levation drawings in scale showing relationship to structures immediately adjacent,” Respondents aver that “the application has photographs of the adjacent property and also included is a site plan of the new construction and the adjacent property.” Davidson’s application indeed contains photographs of adjacent property and contains a site plan of the new construction indicating the location of the adjacent property. Further, Davidson’s application contains elevation drawings. However, the application clearly lacks a one cohesive document that

has “[e]levation drawings in scale showing relationship to structures immediately adjacent.”

Concerning 10(e)’s requirement for submission of “[p]rojected undue economic hardship which would result from denial of the Certificate of Appropriateness,” Respondents admit it is “not included.” However, Respondents defend Davidson’s failure and state “this is new construction and it is obvious that the denial of a certificate of appropriateness would result in inability to use his property in any way.” (Joint Br. at 16). Respondents’ argument is misplaced. It is not “obvious that the denial of a certificate of appropriateness would result in inability to use his property in any way.” There is no inability for Davidson “to use his property in any way.” Davidson’s property is a vacant lot in a historic district zoned for a residential usage. There is no limit on the number of times an applicant may seek a Certificate of Appropriateness. Davidson is free to revise and submit his application any number of times seeking a Certificate of Appropriateness. Further, there was no evidence adduced that Davidson would experience any economic hardship by being prohibited from building the proposed structure.

Accordingly, the Court **FINDS** that the Cobb County Historic Preservation Commission erred as a matter of law by accepting, and subsequently approving, an application for a Certificate for Appropriateness that did not include items required by the Submittal Criteria document.

WHEREFORE,

IT IS HEREBY ORDERED, that for the reasons set forth supra, and in conformance with O.C.G.A. §5-4-14(a), Petitioner’s Petition for Certiorari is **GRANTED**; the Board of Commissioners’ June 19, 2018, decision affirming the Cobb County Historic Preservation Commission’s April 9, 2018, issuance of a Certificate of Appropriateness to Applicant Rowland

Davidson is **REVERSED**; and this matter is **REMANDED** to the Cobb County Historic Preservation Commission for review in conformance with this decision, the Georgia Historic Preservation Act, Chapter 66 of the Cobb County Code, and the Cobb County Historic Preservation Commission's Application and Submittal Criteria for a Certificate of Appropriateness.

IT IS FURTHER ORDERED, that Petitioners' security bond is **DISCHARGED**.

O.C.G.A. §5-4-16

SO ORDERED, this the 11 day of April, 2019.


HON. ADELE P. GRUBBS
SENIOR SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

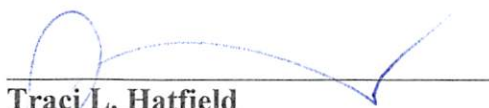
This is to certify that I have this day served all interested parties in the within and foregoing matter by depositing a copy of the Order by delivering a copy in open court, electronic mail and/or in the Cobb County Mail System in the properly addressed envelopes with adequate postage thereon addressed as follows:

Deborah L. Dance, County Attorney
100 Cherokee Street, Suite 350
Marietta, GA 30090

J. Kevin Moore
Moore Ingram Johnson & Steele
326 Roswell Road
Marietta, GA 30060

Jon Schwartz
Jon Schwartz, P.C.
1170 Peachtree Street, NE
Suite 1200
Atlanta, GA 30309

This 12 day of April, 2019.



Traci L. Hatfield
Judicial Administrative Assistant to
Judge Reuben M. Green