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ATLANTA, GA 30334-1300**SAMUEL S. OLENS**
ATTORNEY GENERALwww.law.ga.gov
(404) 656-3300**Unofficial Opinion 2014-1**

May 20, 2014

To:
City Attorney**Re:**

A local Historic Preservation Commission does not have the authority to regulate the alteration of the exterior paint color of a building within a historic district.

As the City Attorney for the City of Roswell, you have asked for this office's opinion about the scope of authority that the Roswell Historic Preservation Commission (hereinafter "HPC") has to regulate the "alteration in exterior paint color of a building within [Roswell's] historic district."¹¹ As legal counsel for the City, you have already opined to the City Administrator that "state law prohibits the HPC from regulating color within the historic district." Memorandum from David Davidson and Bob Hulsey to Kay Love (July 19, 2013). After reviewing the statutory basis for the creation of such a commission, I agree with your legal conclusion.

I. Statutory Background**A. The National Historic Preservation Act**

The National Historic Preservation Act of 1966 (16 U.S.C. § 470, hereinafter "the National Act") was enacted based, in part, on Congress' declarations that "historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency," and that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b)(3) and (4). In order to encourage the preservation of historic properties, the National Act established a policy and program to "assist State and local governments . . . to expand and accelerate their historic preservation programs and activities." 16 U.S.C. § 470-1 (6).

To accomplish this, the National Act provides for the approval of State Historic Preservation Programs. 16 U.S.C. § 470a(b). Approval under the National Act gives states access to

federal aid in the form of grants and other assistance from the U.S. Department of the Interior for the purpose of maintaining historic preservation programs. Similarly, the National Act authorizes the State Historic Preservation Officer to certify "local governments to carry out the purposes of [the National Act]." 16 U.S.C. § 470a(c)(1).

B. Georgia's Historic Preservation Statutes

In 1980 Georgia enacted its own Historic Preservation Act ("the State Act"). 1980 Ga. Laws 1723. The State Act authorizes Georgia's counties and municipalities to enact "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 aesthetic interest or value." *Id.* at 1724–25. The State Act, codified at O.C.G.A. §§ 44–10–1 through –31 (2002 and Supp. 2013), requires a local government desiring to enact an ordinance providing for the protection of historic properties or districts to establish a historic preservation commission. O.C.G.A. § 44–10–24. For a local government to become certified under the National Act, it must obtain certification from the Georgia Department of Natural Resources' Division of Historic Preservation ("the Division"). 16 U.S.C. § 470a(c)(1).

The Division has developed an application procedures manual entitled "*Georgia Certified Local Government Program: Application and Procedures*," and a "*Checklist for the Review of Local Historic Preservation Ordinances*." The Procedures Manual identifies the two primary requirements for a local government to become certified: the appointment of a qualified historic preservation commission, and the enactment of a historic preservation ordinance. (Manual at 6.) The ordinances adopted by the local government are to be consistent with the State Act and a Model Ordinance developed by the Division. (Manual at 8.)

Under the State Act, owners of properties designated as historic, whether the designation is for a specific historic property or for properties within a designated historic district, must obtain "a certificate of appropriateness [from the local commission] prior to undertaking any material change in the appearance of the historic property designated or within the historic district designated." O.C.G.A. § 44–10–26(c). "Material change in appearance" is defined as

a change that will affect only the exterior architectural features of a historic property or of any structure, site, or work of art within a historic district and may include any one or more of the following:

* * *

(E) The erection, alteration, restoration, or removal of any building or other structures within a designated historic district, including walls, fences, steps, and pavements, or other appurtenant features, *except exterior paint alterations*.

O.C.G.A. § 44-10-22(9) (emphasis added). The State Model Ordinance defines the term in exactly the same manner.[2]

C. City of Roswell Historic Preservation Ordinance

Roswell's Historic Preservation program has been certified under the State and National Acts since January 15, 1992.[3] The provisions that comprise Roswell's historic preservation ordinance can be found in the city's Zoning Ordinance. The City of Roswell established its Historic Preservation Commission ("the Commission") pursuant to the authorization contained in the State Act. Roswell Zoning Ordinance ("RZO") § 30.4.1. Under the ordinance, the Commission was "designated, pursuant to the authority set forth in O.C.G.A. § 44-10-24 of the Georgia Historic Preservation Act, to exercise all of the powers and duties authorized in said

act for said commissions.” *Id.* Consistent with the State Act and DNR’s Model Ordinance, the Roswell ordinance requires that a person must first obtain a Certificate of Appropriateness from the Commission in order to make a material change in the appearance of a historic property. RZO § 31.3.4(a). Also consistent with the State Act and DNR’s Model Ordinance, the Roswell ordinance defines a “material change in appearance” to mean, among other things, “[t]he erection, alteration, restoration, or removal of any building or other structures, including walls, fences, steps, and pavements, or other appurtenant features, *except exterior paint alterations.*” RZO § 3.2 (emphasis added).

II. Analysis

It is clear from the plain language used in the State Act, DNR’s Model Ordinance, and Roswell’s Zoning Ordinance that exterior paint alterations are expressly excluded from the definition of “material change in appearance” and, therefore, do not require a certificate of appropriateness in order to be carried out. Consequently, my response to your question is that the Commission does not have the authority to regulate alteration of the exterior paint color of a building within the historic district under Roswell’s existing ordinance, as you had already concluded. However, it is possible that the question was being asked with an eye toward changing the ordinance itself to expressly allow for regulation of exterior paint colors. Assuming that to be the case, however, my response would still be the same because a local government does not have the power to enact an ordinance that conflicts with a general law. Pursuant to the Georgia Constitution:

Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.

Ga. Const., Art. III, Sec. VI, Para. IV(a). This provision is the basis for a preemption analysis of local ordinances by state law. As was opined in a previous unofficial opinion:

From the court decisions commencing with the *Fieldale Farms* case [*Franklin County v. Fieldale Farms Corp.*, 270 Ga. 272 (1998)], it is apparent that a preemption analysis involves the following sequence of inquiries. Is there a general law that covers the same subject matter being addressed by the local ordinance? If not, there is no preemption issue. If such a general law exists, the next question posed is whether the legislature has allowed local law on the same subject by way of a general law. If not, the local law is barred by the uniformity clause. If there is general law authorization for concurrent local law, the final question is whether the local law conflicts with the general law.

2009 Op. Att’y Gen. U09-1.

In this case, it is the final question quoted above that would be applicable. Should a local government attempt to enact an ordinance that includes exterior paint alterations as a material change in appearance and, thus, subject to regulation, such an ordinance would be in direct conflict with state law which expressly excludes exterior paint alterations from the definition of material change in appearance. Such an ordinance would be preempted by state law.

III. Conclusion

Therefore, it is my unofficial opinion that neither the City of Roswell’s Historic Preservation Commission, nor any other local historic preservation commission established pursuant to the

State Act, has the authority under existing state law to require that a certificate of appropriateness be applied for and approved by the Commission before a person may alter an exterior paint color of a building within a historic district.

Prepared by:

John E. Hennelly

Senior Assistant Attorney General

[1] The Office of the Attorney General by law provides legal opinions only to state agencies or officers. However, an exception is made in this case because the issue presented involves a matter of statewide application and concern.

[2] The model ordinance for the creation of a local commission can be found at <http://georgiashpo.org/sites/uploads/hpd/pdf/modelhpo.pdf>.

[3] http://grants.cr.nps.gov/CLG_NEW/CLG_REVIEW/Get_All_CLG.cfm

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