

**DEPARTMENT OF STATE**  
**DIVISION OF HISTORICAL AND CULTURAL AFFAIRS**  
**Statutory Authority: 30 Delaware Code, Section 1815(b), (30 Del.C. §1815(b))**

**FINAL**

**Historic Preservation Tax Credit Program**

**ORDER**

**Nature of Proceedings:**

In accordance with 29 **Del.C.** §10115 and 30 **Del.C.** §1815(b), the Department of State, Division of Historical and Cultural Affairs (Department) published notice of proposed changes to the Historic Preservation Tax Credit Program in the *Delaware Register of Regulations* (Register) on October 1, 2004 [7 DE Reg. 526-530 (10/1/04)]. The notice provided a full text of the existing Regulations with proposed changes, and provided notice of date and location for receiving written public comment. In addition to the notice published in the *Register*, the Department published notice of the opportunity to comment for public comment concerning the proposed regulations in two newspapers of general circulation throughout the State. The public comment period was from October 1, 2004 through November 1, 2004. The purpose of the proposed changes to the regulations is to implement code revisions of 2004 relating to the phasing of projects and to make technical corrections in order to clarify the regulations.

**Summary of Evidence:**

The Department received no written comments in response to the notice of intention to adopt the proposed regulations.

**Finding of Fact:**

The public was given the required notice of the Department's intention to adopt the proposed regulations and was given ample opportunity to provide the Department with comments opposing the Department's proposals. Thus, the Department concludes that its consideration of the proposed regulations was entirely within its prerogatives and statutory authority and, having received no comments opposed to adoption, is now free to adopt them.

**Order and Effective Date:**

NOW THEREFORE, it is ordered that the proposed regulations, as set forth in the attached copy, are adopted and shall be final effective January 11, 2005.

Harriet N. Smith Windsor  
Secretary of State

**Regulations Governing the Historic Preservation Tax Credit Act:**

**1.0 Scope**

A person or business entity that owns and rehabilitates a certified historic property may receive a credit against personal Delaware State income tax or bank franchise tax liabilities according to procedures and criteria established in these regulations and those that may be promulgated by the Division of Revenue or the State Bank Commissioner. Any person eligible for credits under this Chapter, except a person engaged in a resident curator relationship, may transfer, sell or assign any or all unused credits. ~~except a person engaged in a resident curator relationship.~~

**6 DE Reg. 108 (7/2/02)**

**2.0 Statutory Authority**

These regulations are created pursuant to 30 **Del.C.** Ch. 18, Subch. II which authorizes the Division of Historical and Cultural Affairs to promulgate regulations for implementation of the provisions of this subchapter (except tax-related procedures) including, but not limited to, setting of fees and development of standards for the rehabilitation of

eligible historic properties. The subchapter further authorizes the Division of Historical and Cultural Affairs to promulgate the application and forms governing participation in the certification program.

### 3.0 Definitions

The following words and terms, when used in this regulation, shall have the following meaning unless the context clearly indicates otherwise:

“**Act**” means the 30 Del.C. Ch. 18, Subch. II.

“**Application**” means the Delaware Historic Preservation Tax Credit application that shall consist of ~~three~~ four parts, as follows: the Request for Certification of Historic Property (Part 1); the Request for Certification of Rehabilitation (Part 2); ~~and~~ the Request for Certification of Completion (Part 3), and the Request for Credit Award.

“**Certified historic property**” or “**qualified property**” means a property located within the State of Delaware that is:

- individually listed in the National Register of Historic Places; or
- located in a historic district listed in the National Register of Historic Places and certified by the United States Secretary of the Interior as contributing to the historic significance of that district; or
- individually designated as a historic property by local ordinance and certified by the Delaware State Historic Preservation Office as meeting the criteria for inclusion in the National Register of Historic Places; or
- located in a historic district set apart or registered by a local government, certified by the Delaware State Historic Preservation Office as contributing to the historic significance of such area, and certified by the Delaware State Historic Preservation Office as meeting the criteria for inclusion in the National Register.

“**Certification of Completion**”, “~~Completion Certificate~~” or “**Certificate of Completion**” means the certificate issued by the Delaware State Historic Preservation Officer attesting that certified rehabilitation, or, if applicable, phase thereof, has been completed and that the documentation of qualified expenditures and project plans that would be required in order to qualify for tax credits under Section 47 of the Internal Revenue Code (whether or not such project would be eligible for such federal tax credit) has been obtained.

“**Certified rehabilitation**” means rehabilitation of a certified historic ~~structure~~ property or portion thereof that has been certified by the Delaware State Historic Preservation Officer as a substantial rehabilitation, and is in conformance with ~~the Standards of~~ the Secretary of the Interior’s Standards for Rehabilitation (36 CRF, part 67) or such other standards as the Delaware State Historic Preservation Office shall from time to time adopt.

“**Credit award**” means the amount of qualified expenditures as determined by the State Office as part of the Part 2 approval multiplied by the appropriate ~~amount~~ percentage as determined in 30 Del.C. §1813.

“**Delaware State Historic Preservation Officer**” means the person designated and appointed in accordance with 16 USC §470a(b)(1)(a).

“**Federal tax credit**” means the Federal Rehabilitation Tax Credit as defined in the United States Tax Code, Title 26, Subtitle A, Chapter 1, Subchapter A, Part IV, Subpart E, Section 47.

“**Fiscal Year**” means the State’s of Delaware’s fiscal year.

“**National Register of Historic Places**” or “**National Register**” means the National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture that the United States Secretary of the Interior is authorized to expand and maintain pursuant to Section 101(a)(1) of the National Historic Preservation Act of 1966, as amended.

“**Office**” or “**State Office**” means the Delaware State Historic Preservation Office.

“**Owner-occupied historic property**” means any certified historic property, or any portion thereof, which is owned by a taxpayer and is being used, or within a reasonable period will be used, by such taxpayer as the taxpayer’s principal residence. “**Reasonable period**” ~~shall mean within six months of the issuance of the Certification of Completion. The State Office, in its sole discretion, may offer one extension, not to exceed three months, for cause.~~ Such property may consist of part of a multiple dwelling or multiple purpose building or series of buildings, including a cooperative or condominium. If only a portion of a building is used as the principal residence, only those qualified expenditures that are properly allocable to such portion shall be eligible under this subchapter.

“**Person**” means any individual, any form of company or corporation which is lawful within the State of Delaware (including limited liability companies and S corporations) whether or not for profit, any form of partnership which is lawful within the State of Delaware (including limited liability partnerships) whether or not for profit, any trust or estate, and any lawful joint venture. “Person” shall also mean any governmental entity, pass-through entity, or

person under a lease contract for five years or longer.

**“Phased rehabilitation”** means any certified rehabilitation of a certified historic property reasonably expected to be completed in two or more distinct stages of development as more fully described in Treasury Regulation 1-48-12(b)(v) or any successor provision.

**“Property”** means real estate and shall include any building or structure, including multiple-unit structures.

**“Qualified expenditure”** means any amount properly expended by a person for the certified rehabilitation of a certified historic property, but shall not include:

- acquisition of real property or acquiring an interest in real property;
- any addition to an existing structure except where the combined square footage of all additions is 20% or less than the total square footage of the historic portion of the property and each such addition is approved by the Delaware State Historic Preservation Officer, pursuant to federal guidelines, as:
  - preserving the character-defining features of the certified historic property,
  - adequately differentiating the new construction from the existing structure, and
  - complying with requirements regarding safety and accessibility in a manner reasonably designed to minimize any adverse impact on the certified historic property;
- paving or landscaping costs which exceed 10% of the total qualified expenditures;
- sales and marketing costs; or
- expenditures not properly charged to a capital account, including in the case of owner-occupied property, expenditures that would not properly be charged to a capital account where the owner using such property is a trade or business.

**“Reasonable period”** means that an owner must occupy the rehabilitated property as their principal residence within six months of the issuance of the Certificate of Completion. The State Office, in its sole discretion, may offer one extension, not to exceed three months, for cause.

**“Resident Curator”** means a person who has entered into a contractual agreement with the owner of a qualified property in which the person agrees to pay for full restoration of the owner’s qualifying property in exchange for a life tenancy in the property without remunerative compensation to the owner for the life tenancy.

**“Substantial rehabilitation”** or **“full restoration”** means rehabilitation of a certified historic property for which the qualified expenditures, during the 24-month period, or the 60-month period for a phased rehabilitation, selected by the taxpayer and ending with or within the taxable year, exceed:

- for income-producing property, and non-income producing property other than owner-occupied historic property, the current standard required by Section 47(c)(1)(C) Internal Revenue Code; and
- for owner-occupied historic property or property under contract with a resident curator, \$5,000.

**“Taxpayer”** means any person as defined in this section, and shall include any individual or corporation taxable under Title 5, or taxable under either 30 Del.C. Ch. 11 or 30 Del.C. Ch. 19.

**6 DE Reg. 108 (7/1/02)**

**8 DE Reg. 194 (7/1/04)**

#### **4.0 Procedures for Certification of Historic Property**

4.1 A taxpayer may request that a property in a National Register listed or locally designated historic district be certified by the Delaware State Historic Preservation Officer as a certified historic property by filing the Part 1 application with the State Office. The Part 1 application shall be filed on standard forms available from the State Office. ~~An incomplete application will not be processed until all required application information has been received. The State Office will notify the taxpayer of the additional information needed to undertake or complete the review.~~

4.2 An incomplete Part 1 application will not be processed until all required application information has been received. Where adequate documentation is not provided, the State Office will notify the taxpayer of the additional information needed to undertake or complete the review.

4.3 The Delaware State Historic Preservation Officer shall determine whether the property for which a complete Part 1 application is received meets the definition of certified historic property and will notify the taxpayer of the decision.

4.4 ~~Taxpayers of properties~~ If a property is individually listed in the National Register, ~~do not need to submit submission of~~ a Part 1 application is not required. The name of the historic property and its date of listing in the National Register must be provided in the Part 2 application.

**6 DE Reg 108 (7/1/02)**

#### **5.0 Procedures for Certification of Rehabilitation**

5.1 A taxpayer may request a determination by the Delaware State Historic Preservation Officer that a proposed ~~substantial~~ rehabilitation plan meets the criteria for certification by filing a Part 2 application with the State Office.

The Part 2 application shall be filed on standard forms available from the State Office.

5.2 A taxpayer must submit Part 1 of the application prior to, or with, Part 2. ~~The Part 2 of the application will not be processed until an adequately documented and approved Part 1 application, where required as outlined in Section 4.0 of these regulations, is on file.~~

5.3 An incomplete Part 2 application will not be processed until all required application information has been received. Where adequate documentation is not provided, the State Office will notify the taxpayer of the additional information needed to undertake or complete review.

5.4 A taxpayer requesting approval of a phased rehabilitation plan shall provide the State Office with a description of the phases and their completion dates when submitting the Part 2 application. The Delaware State Historic Preservation Officer will notify the taxpayer if the phased rehabilitation plan is approved. The final completion date for a phased rehabilitation is binding unless the taxpayer requests a change in writing. For a phased rehabilitation, the taxpayer has 60 months to meet the substantial rehabilitation test.

~~5.4.5~~ The Delaware State Historic Preservation Officer shall determine whether the proposed ~~substantial~~ rehabilitation for which a complete application is received under Section 5.1 of this regulation meets the definition of a certified rehabilitation and shall send the taxpayer notice of the determination ~~and of the credit award~~. The State Office may require modifications to the plan in order to meet the definition of a certified rehabilitation.

~~5.5.6~~ A Request for Credit Award application must be submitted with the Part 2 application. The Part 2 application A taxpayer must also provide cost estimates of qualified expenditures prepared by a licensed architect, engineer, or contractor or a certified construction cost estimator. ~~for the proposed rehabilitation. This information will be used to determine the credit award for approved Part 2 applications.~~

5.5.7 The amount of tax credit applied against the qualified expenditures in accordance with 30 Del.C. §1813 shall represent the credit award. The cost estimate supplied by the taxpayer in accordance with Section 5.6 will be used to determine the credit award for approved Part 2 applications.

5.5.8 Credits will be awarded in chronological order based upon the date and time on which each application receives Part 2 approval from the State Office. The State Historic Preservation Officer shall notify the taxpayer of the amount of the credit award.

5.5.9 In the alternative, the Delaware State Historic Preservation Officer may ~~certify a rehabilitation plan and~~ issue a Part 2 approval to any taxpayer who has obtained a ~~Part 1 and~~ Part 2 certification from the federal government pursuant to 36 CFR 67. ~~where applicable~~. Under this provision, a taxpayers must file the State of Delaware Part 2 cover form containing as well as the information required under Section ~~5.5~~ 5.6 of these regulations.

5.5.10 All taxpayers must begin construction on the approved ~~Part 2~~ certified rehabilitation plan within one year of receiving the Part 2 approval. ~~Taxpayers, having received Part 2 approval, must notify the State Office in writing of the start date of the rehabilitation work.~~ If construction on the rehabilitation plan is not substantially commenced and ~~is being~~ diligently pursued within this time period, the taxpayer will forfeit the awarded credits, and the credits awarded to such taxpayer will become available for award to other taxpayers. Substantially commenced and diligently pursued means that at a minimum 25% of the estimated rehabilitation costs must have been expended. The State Office reserves the right to obtain documentation from the applicant supporting the expenditure.

~~5.10.11~~ The project may be inspected by the Delaware State Historic Preservation Officer or his/her designated representative to determine if the work is consistent with the approved ~~Part 2~~ certified rehabilitation plan, or ~~and if~~ the project has substantially commenced and is being diligently pursued.

**6 DE Reg. 108 (7/1/02)**

## **6.0 Procedures for Certification of Completion**

6.1 Upon completion of a certified rehabilitation, or an approved project phase thereof, the taxpayer must submit a Part 3 application with required documentation and a final accounting of qualified expenditures, to the Delaware State Historic Preservation Office. ~~The completed project may be inspected by the Delaware State Historic Preservation Officer or his/her designated representative to determine if the work meets the definition of a certified rehabilitation.~~

6.2 An incomplete Part 3 application will not be processed until all required application information has been received. Where adequate documentation is not provided, the State Office will notify the taxpayer of the additional information needed to undertake or complete the review. The completed project may be inspected by the Delaware State Historic Preservation Officer or his/her designated representative to determine if the work meets the definition of a certified rehabilitation.

~~6.2.3~~ Upon approval by the State Office that the completed rehabilitation, or an approved phase thereof,

meets the definition of a certified rehabilitation, the State Office shall submit the documentation of qualified expenditures to the Division of Revenue ~~or the State Bank Commissioner, as appropriate,~~ and request a determination of the value of the tax credit for the completed project or an approved phase.

~~6.3~~ 4 Upon receipt from the Division of Revenue of the certification of the value of the tax credit for the project, or an approved phase thereof, ~~associated with the Certificate of Completion by the Division of Revenue or the State Bank Commissioner,~~ the Delaware State Historic Preservation Officer shall issue a Certificate of Completion to the taxpayer. For approved phased rehabilitations, each phase must receive a Certificate of Completion indicating that each phase is a certified rehabilitation in order for the overall project to be considered to be a certified rehabilitation.

6.5 In the case of approved phased projects, more than one Certificate of Completion may be awarded to a single rehabilitation project. Credits issued to the initial assignee, or in the case of a tax-exempt assignee, to the first taxable transferee after the associated phase completion, shall be subject to revocation and repayment to the Delaware Division of Revenue or the Office of the State Bank Commissioner if, under regulations issued by the State Office, a phased rehabilitation is not completed by the agreed upon completion date indicating that the applicant for the credit award is unable or unwilling to complete it, or in the event that the project does not meet the certification requirements previously agreed to with the State Office.

~~6.4~~ 6 In no event shall the credit claimed by a taxpayer exceed the approved Part 2 credit award.

**6 DE Reg. 108 (7/1/02)**

## **7.0 Fees for Processing Rehabilitation Certification Request**

7.1 The fee for review of rehabilitation work for projects where the qualified expenditures are over \$100,000 is \$250 for each separate application. The fee from a single taxpayer for multiple projects submitted at the same time shall not exceed \$2,500. Final action will not be taken on any application until the appropriate remittance is received. No fee will be charged for rehabilitation projects where the qualified expenditures are under \$100,000.

7.2 The fee, where applicable, must be submitted with the Part 3 application. For phased projects, the fee must be submitted with the first Part 3 submitted. All checks shall be made payable to the State of Delaware.

## **8.0 Resident Curator Program**

8.1 Curatorship property is subject to periodic inspection by the State Office during the tax years in which the credit is applicable.

8.2 Improvements to curatorship property must be completed within five years from the date of execution of the contract between the owner and the resident curator.

8.3 Curatorship property must not be used for commercial purposes.

**8 DE Reg. 194 (7/1/04)**

## **9.0 Administrative Review**

9.1 A taxpayer whose application has been disapproved by the Delaware State Historic Preservation Officer under these regulations may file a written request for review with the Secretary of State or the Secretary's designee within 60 days after the notice of disapproval is sent.

9.2 The Secretary of State or the Secretary's designee shall review the request within 60 days after receipt of the request. If the Secretary of State or the Secretary's designee determines that the application filed meets the standards set forth in these regulations the application shall be considered approved. If the Secretary of State or Secretary's designee determines that the application filed does not meet the standards set forth in these regulations, the application shall be disapproved. The Secretary of State or Secretary's designee shall promptly notify the taxpayer of the Secretary's determination.

9.3 A taxpayer whose application has been disapproved by the Secretary of State may appeal that action in accordance with the Administrative Procedures Act, 29 **Del.C.** §10101 et. seq.

9.4 An appellant who has exhausted all administrative remedies shall be entitled to judicial review in accordance with 29 **Del.C.** Ch. 101, Subch. V of the Administrative Procedures Act.

**6 DE Reg. 108 (7/1/02)**

**8 DE Reg. 1031 (01/01/05)**