

**DEPARTMENT OF STATE**  
**DIVISION OF HISTORICAL AND CULTURAL AFFAIRS**

Statutory Authority: 30 Delaware Code, Section 1815(b) (30 **Del.C.** §1815(b))

**FINAL**

**ORDER**

**100 Historic Preservation Tax Credit Program**

**Summary of the Evidence and Information Submitted**

The Historic Preservation Tax Credit Act (30 Del.C. Ch. 18, Subch. II) was amended in the 145th General Assembly (77 Del. Laws. c. 413). The amendments to the legislation provide for a ten-year extension to the Historic Preservation Tax Credit Act, set aside a portion of the annual cap for projects which will receive a credit award under \$300,000 and require annual reporting on the program to the Governor and the Legislature. Additional regulatory clarifications have also been incorporated at this time to more efficiently administer the Program.

The proposed regulatory amendments were published in 14 DE Reg. 148-155. A notice of the proposed amendments to the regulations was published on Wednesday, September 1, 2010 in both the News Journal and Delaware State News. No written or verbal comments were received.

**Finding of Fact**

The proposed regulatory amendments implement the code changes of 2010 and clarify various sections of the regulations in order to more efficiently administer the program. These will remain in effect until such time as further changes to the law require revisions to the regulations.

**Decision to Amend the Regulation**

It is the recommendation of the Director of the Division of Historical and Cultural Affairs that the Secretary of State adopt as final the proposed Amendments as published pursuant to 30 Del.C. Ch.18, Subch. II, §1815(b).

DEPARTMENT OF STATE  
Timothy A. Slavin  
Director, Division of Historical and Cultural Affairs  
Dated: October 13, 2010

**Order and Effective Date**

After review of the law and the recommendation of the Director of the Division of Historical and Cultural Affairs, I hereby adopt the recommended Findings of fact and the Amendments as proposed in 14 DE Reg. 148-155 (09/01/2010) to become effective November 11, 2010.

DEPARTMENT OF STATE  
Jeffrey W. Bullock  
Secretary of State  
Date: October 14, 2010

**100 Historic Preservation Tax Credit Program**

**1.0 Scope**

~~With permission of the property owner, a~~ A person or business entity ~~that owns and who~~ rehabilitates a certified historic property may ~~receive~~ apply for 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 tax credits under this Chapter, except a person engaged in a resident curator relationship, may transfer, sell or assign any or all unused credits.

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

8 DE Reg. 1031 (1/1/05)

## 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"** shall means the 30 **Del.C.** Ch. 18, Subch. II.

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

**"Certified historic property"** or ~~"qualified property"~~ shall 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, which historic district is certified by the Delaware State Historic Preservation Office contributing as meeting the criteria for inclusion in the National Register and which property contributes 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 historic district.

**"Certification of Completion"**, or **"Certificate of Completion"** shall means the certificate issued by the Delaware State Historic Preservation Officer attesting that the 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 (26 USC 47) (whether or not such project would be eligible for such federal tax credit) has been obtained.

**"Certified rehabilitation"** shall means rehabilitation of a certified historic 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 Secretary of the Interior's Standards for Rehabilitation (36 CFR, ~~part~~ 67) or such other standards as the ~~Delaware State Historic Preservation~~ Office shall from time to time adopt.

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

**"Delaware State Historic Preservation Officer"** shall means the person designated and appointed in accordance with National Historic Preservation Act of 1966, as amended (16 USC §470a(b)(1)(A)). The Delaware State Historic Preservation Officer is an appointed position held by the Director, Division of Historical and Cultural Affairs.

**"Federal tax credit"** shall 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 (26 USC 47).

**"Fiscal Year"** shall means the State of Delaware's fiscal year.

**"National Register of Historic Places"** or **"National Register"** shall 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 (16 USC §470(a)(1)(A)).

**"Office"** or **"State Office"** shall means the Delaware State Historic Preservation Office, which is a part of the Division of Historical and Cultural Affairs.

**"Owner-occupied historic property"** shall 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~~ an applicant as the applicant's taxpayer's principal residence. 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 to apply for tax credits calculated at the percentage available to owner-occupants.

**"Person"** or **"applicant"** shall 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" or "applicant" shall also mean any governmental entity; or any pass-through entity or person under a lease contract for five years or longer.

**"Phased rehabilitation"** shall 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"** shall means real estate and shall include any building or structure, including multiple-unit structures.

**"Qualified expenditure"** shall 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, or any costs associated with the acquisition of the 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;
- sitework, paving or landscaping costs ~~which exceed~~ in excess of 10% of the total qualified expenditures;
- sales and marketing costs; or
- an expenditures not properly charged to a capital account, including, in the case of owner-occupied property, an expenditures that would not properly be charged to a capital account where the ~~owner~~ person using such property is in a trade or business.

**"Reasonable period"** shall 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"** shall means a person who has entered into a contractual agreement with the owner of a ~~qualified~~ certified 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"** shall 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~~ applicant exceeds:

- 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) of the Internal Revenue Code (26 USC 47(c)(1)(C)); and
- for owner-occupied historic property, ~~non-income producing property~~, or property under contract with a resident curator, \$5,000.

**"Taxpayer"** shall 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)

8 DE Reg. 1031 (1/1/05)

#### 4.0 Procedures for Certification of Historic Property

- 4.1 ~~A taxpayer~~ With permission on the property owner, an applicant may request submit a Part 1 application to the State Office requesting that the State Historic Preservation Officer certify that a property in a National Register listed or locally designated historic district be certified by the Delaware State Historic Preservation Officer as is a certified historic property by filing the Part 1 application with the State Office as defined in Section 3.0 of this regulation. The applicant shall file tThe Part 1 application ~~shall be filed on standard forms available from~~ developed by the State Office.
- 4.2 The State Office shall not process an incomplete Part 1 application ~~will not be processed~~ until all required application information ~~has been~~ is received. Where adequate documentation is not provided, the State Office ~~will~~ shall notify the ~~taxpayer~~ applicant 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~~ shall notify the ~~taxpayer~~ applicant of the decision.
- 4.4 If a property is individually listed in the National Register, 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.~~
- 4.5 The Delaware State Historic Preservation Officer may certify as historic any property for which an applicant has obtained a Part 1 certification from the federal government pursuant to 36 CFR 67. Under this provision, an applicant shall file only the cover page of the Delaware Part 1 application.

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

8 DE Reg. 1031 (1/1/05)

#### 5.0 Procedures for Certification of Rehabilitation

- 5.1 ~~An applicant taxpayer may request a determination by the Delaware State Historic Preservation Officer that submit a Part 2 application to the State Office requesting that the Delaware State Historic Preservation Officer determine if a proposed rehabilitation plan meets the criteria for certification by filing a Part 2 application with the State Office as a certified rehabilitation as defined in Section 3.0 of this regulation. The applicant shall file t~~The Part 2 application ~~shall be filed on standard forms available from~~ developed by the State Office.

- 5.2 ~~An applicant taxpayer must~~ shall submit Part 1 of the application prior to, or with, Part 2. ~~The State Office shall not process the~~ Part 2 application ~~will not be processed~~ until an adequately documented and approved Part 1 application, where required as outlined in Section ~~4-0~~ 4.4 of these regulations, is on file.
- 5.3 ~~The State Office shall not process~~ an incomplete Part 2 application ~~will not be processed~~ until all required application information is ~~has been~~ received. Where adequate documentation is not provided, the State Office ~~will~~ shall notify the ~~taxpayer~~ applicant of the additional information needed to undertake or complete review.
- 5.4 Applicants may submit subsequent Part 2 applications for the same property as long as the following criteria are met:
- For certified properties held for income (depreciable properties, as often as the project work qualifies for income tax credits under Section 47(c)(1)(C) of the Internal Revenue Code (26 USC 47(c)(1)(C))
  - For all other certified properties, no sooner than 24 months from the date of the prior Part 2 approval as long as other program requirements have been met.
- ~~5.4~~ 5.5 An ~~applicant 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 ~~shall~~ will notify the ~~applicant taxpayer~~ applicant if the phased rehabilitation plan is approved. The final completion date for a phased rehabilitation is binding unless the ~~applicant taxpayer~~ applicant requests a change in writing. For a phased rehabilitation, the ~~applicant is allowed up to taxpayer has~~ 60 months to meet the substantial rehabilitation test.
- 5.56 The Delaware State Historic Preservation Officer shall determine whether the proposed 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~~ applicant notice of the determination. The State Office may require modifications to the plan in order to meet the definition of a certified rehabilitation.
- 5.6 ~~A Request for Credit Award application must be submitted with 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.~~
- 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.~~
- 5.8 ~~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.~~
- 5.97 ~~In the alternative, the Delaware State Historic Preservation Officer may issue a Part 2 approval to any applicant taxpayer who has obtained a Part 2 certification from the federal government pursuant to 36 CFR 67. Under this provision, an applicant taxpayer shall must file only the cover page of the State of Delaware Part 2 application cover form as well as the information required under Section 5.6 of these regulations.~~
- 5.408 ~~All Applicants taxpayers must begin construction on the approved certified rehabilitation plan within one year of receiving the Part 2 approval. If construction on the rehabilitation plan is not substantially commenced and diligently pursued within this time period, the applicant taxpayer will shall forfeit any assigned credit award. the awarded credits and the Any forfeited tax credits may awarded to such taxpayer will become available for award to other applicants taxpayers. Substantially commenced and diligently pursued shall means that the applicant can demonstrate that at a minimum, 25% of the estimated rehabilitation costs was must have been expended within the first year after the tax credits are assigned. The State Office reserves the right to obtain documentation from the applicant supporting the expenditure.~~
- 5.419 ~~The project may be inspected by the Delaware State Historic Preservation Officer, or his/her designated representative, may inspect the property to determine if the work is consistent with the approved certified rehabilitation plan, and if the project has substantially commenced and is being diligently pursued.~~

- 5.10 The applicant may request that the State Office review changes to the project plan after the Part 2 application is approved. The Delaware State Historic Preservation Officer shall determine whether the proposed change meets the definition of a certified rehabilitation and shall send the applicant notice of the determination.

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

**8 DE Reg. 1031 (1/1/05)**

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

- 6.1 ~~Upon completion of a certified the rehabilitation work outlined in the Part 2 application, or an approved project phase thereof, the taxpayer applicant must submit to the State Office a Part 3 application with required documentation supporting any conditions in the Part 2 application approval, the form(s) required in the Division of Revenue's regulations indicating the name of the taxpayer who will claim the tax credit, and a final accounting of qualified expenditures, to the Delaware State Historic Preservation Office.~~
- 6.2 ~~The State Office shall not process a~~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~~ shall notify the ~~taxpayer applicant~~ of the additional information needed to undertake or complete the review. ~~The State Office may inspect 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.~~
- 6.3 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 and request a determination of the value of the tax credit for the completed project or an approved phase thereof, meets the definition of a certified rehabilitation, the Delaware State Historic Preservation Officer shall issue a Certificate of Completion for the project, or phase thereof. For approved phased rehabilitations, each phase must receive a Certificate of Completion in order for the overall project to be considered a certified rehabilitation.
- 6.4 ~~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, 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. After a project, or phase thereof, receives its Certificate of Completion, the State Office shall submit the documentation outlined in 6.3 of these regulations to the Division of Revenue, and request a determination of the value of the tax credit for the completed project or an approved phase. For all projects in which the tax credits are to be applied against franchise taxes, and at other times as requested by the Division of Revenue, the forms and documentation will also be submitted to the State Bank Commissioner's Office.~~
- 6.5 The Division of Revenue will return the forms certifying the value of the tax credit for the project, or an approved phase thereof, to the State Officer which shall transmit the Certificate of Completion and the Revenue form(s) to the taxpayer who will claim the tax credits.
- 6.56 ~~In the case of approved phased projects, a single rehabilitation project may receive 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 are~~ 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.
- 6.6 ~~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 Procedures for Requesting a Credit Award**

- 7.1 An applicant shall request a credit award by filing a Request for Credit Award application with the State Office. The Request for Credit Award application may be submitted at the same time or subsequent to the submission of the Part 2 application, but no latter than simultaneously with the Part 3 application.
- 7.2 The applicant shall support the amount of qualified expenditures indicated on the Request for Credit Award by submitting a cost estimate prepared by a licensed architect or engineer; an accountant; a contractor or a certified construction cost estimator. Where the rehabilitation work is complete, documentation of costs may be prepared by a licensed architect or engineer; an accountant; a contractor or a certified construction cost estimator; or may be documented by paid invoices or cancelled checks for contractual work; and store invoices for material purchases. The State Office may prescribe the format in which the documentation of qualified expenditures is submitted. The cost estimate is verified by and may be adjusted by the State Office if documentation is inadequate or costs are disallowed.
- 7.3 The State Office will not process an incomplete Request for Credit Award application until all documentation as required in Section 7.3 of the regulations is received. Where adequate documentation is not provided, the State Office shall notify the applicant of the additional information needed to undertake or complete the review.
- 7.4 The credit award is calculated as a percentage of the qualified expenditures and will be rounded down to the nearest whole dollar. The criteria for applying the percentages to establish the credit award are:
- For depreciable (income-producing) certified properties, 20% of qualified expenditures;
  - For depreciable certified properties where the whole or a part, receives low income housing credits, 30% to be applied to that portion of the square footage;
  - For all other certified properties, 30% except where an owner would meet HUD established low income criteria, then 40%.
- 7.5 The State Historic Preservation Officer shall notify the applicant of the amount of the credit award. The Delaware State Historic Preservation Officer will consider increasing the credit award where there has been an increase in qualified costs of greater than 5% of the total.
- 7.6 Each fiscal year, \$2 million of the \$5 million assigned to make credit awards under these regulations is reserved for projects receiving a credit award of not more than \$300,000. After April 1, any unassigned portion of the \$2 million is released to be available for credit awards to any eligible project.

#### **7-0 8.0 Fees for Processing Rehabilitation Certification Request**

- 78.1 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~~ less than \$100,000.
- 78.2 The applicant shall submit the fee, where applicable, ~~must be submitted~~ with the Part 3 application. For phased projects, ~~the applicant shall submit the fee must be submitted~~ with the first Part 3 submitted. All checks shall be made payable to the State of Delaware.

6 DE Reg. 108 (7/1/02)  
8 DE Reg. 1031 (1/1/05)

#### **8-0 9.0 Requirements for Resident Curator Program Properties**

- 89.1 Curatorship property is subject to periodic inspection by the State Office during the tax years in which the credit is applicable.
- 89.2 Improvements to curatorship property ~~must~~ shall be completed within five years from the date of execution of the contract between the owner and the resident curator.
- 89.3 Curatorship property ~~may~~ shall not be used for commercial purposes.

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

#### **9-0 10.0 Administrative Review**

- 910.1 A taxpayer whose application ~~has been~~ is 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.
- 910.2 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.
- 910.3 A taxpayer whose application ~~has been~~ is disapproved by the Secretary of State may appeal that action in accordance with the Administrative Procedures Act, 29 **Del.C.** §10101 et. seq.
- 910.4 An appellant who ~~has exhausted~~ exhausts all administrative remedies ~~shall be~~ is 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)**

**11.0 Reporting Requirements**

- 11.1 Annually, on or before January 31<sup>st</sup>, the Delaware State Historic Preservation Officer shall issue an annual report on the restoration and rehabilitation status of all tax credit projects approved in the previous calendar year.
- 11.2 The annual report shall include a list of all tax credit projects issued in previous years for which the tax credits have not been claimed.
- 11.3 The annual report will be distributed to the Governor and the General Assembly.

**14 DE Reg. 485 (11/01/10) (Final)**