

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

On Tuesday, July 1, 2014, the Division of Historical and Cultural Affairs published proposed changes to its regulations in the *Delaware Register of Regulations*, Volume 18, Issue 1, pages 24-30. The notice indicated that written comments would be accepted by the Director of the Division for thirty days thereafter. Notice of the proposed amendments to the regulations was also published in both the **News Journal** and **Delaware State News** on July 1, 2014.

FINDINGS OF FACT AND CONCLUSIONS

The Historic Preservation Tax Credit Act (30 **Del.C.** Ch. 18, Subch. II) was amended in the 147th General Assembly (79 **Del. Laws.** c. 240). The amendments to the legislation provide that 30% of the state's yearly allocation of Historic Preservation Tax Credits (HPTCs) will be reserved for projects in Downtown Development Districts (DDD), and also that any such credits not allocated to projects in DDDs by April 1 of each year will be made available to any eligible project statewide.

The public was given notice and an opportunity to provide the Division of Historical and Cultural Affairs with comments in writing on the proposed adoption of the changes to the regulations. There were no public comments received during the comment period.

Pursuant to 30 **Del.C.** §1815(b), the Division has the statutory authority to promulgate rules and regulations amending or clarifying specific sections of this statute. Additional regulatory clarifications have also been incorporated at this time to more efficiently administer the Program.

Since no public comments were received, the text of the regulation remains as proposed in the July 1, 2014 *Delaware Register of Regulations*.

DECISION AND ORDER REGARDING THE PROPOSED REGULATIONS

Pursuant to 30 **Del.C.** §1815(b), Timothy A. Slavin, Director, Division of Historical and Cultural Affairs, Department of State has proposed amendments to the regulations governing the Historic Preservation Tax Credit Act and has published these amendments in *Delaware Register of Regulations* 18 **DE Reg.** 24-30 (07/01/2014).

NOW THEREFORE, Jeffrey A. Bullock, Secretary of State, does hereby order that the proposed amendments be adopted and shall be final effective September 11, 2014, ten days after publication in the *Delaware Register of Regulations*.

The new regulations are attached hereto as Exhibit A.

SO ORDERED this 15th day of August, 2014.

DEPARTMENT OF STATE

Jeffrey A. Bullock, Secretary of State

100 Historic Preservation Tax Credit Program

1.0 Scope

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

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

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

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

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 mean the 30 **Del.C.** Ch. 18, Subch. II.

"Application" shall mean 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 Certificate of Completion (Part 3), and the Request for Credit Award.

"Building" means created principally to shelter any form of human activity.

"Certified historic property" shall mean 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 State 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 State Office as meeting the criteria for inclusion in the National Register and which property contributes to the historic significance of ~~such~~ the historic district.

"Certification of Completion", or **"Certificate of Completion"** shall mean the certificate issued by the Delaware State Historic Preservation Officer attesting that the certified rehabilitation, or, if applicable, a phase ~~thereof~~ of the certified rehabilitation project, 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~~ the project would be eligible for ~~such~~ the federal tax credit) has been obtained.

"Certified rehabilitation" shall mean rehabilitation of a certified historic property, or portion ~~thereof~~ of the property, 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 CRF 67) or ~~such~~ other standards as the State Office shall from time to time adopt.

"Credit award" shall mean 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 mean 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.

"Downtown Development District" or **"DDD"** means an area within a municipality or unincorporated area designated by the governor as a Downtown Development District under 79 Del. Laws c. 240.

"Federal tax credit" shall mean 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 mean the State of Delaware's fiscal year.

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

"Owner-occupied historic property" shall mean any a certified historic property, or any portion thereof of the property, which is being used, or within a reasonable period will be used, by an applicant as the applicant's principal residence. ~~Such~~ The 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~~ that portion shall be

eligible under this subchapter to apply for tax credits calculated at the percentage available to owner-occupants.

"Person" or "applicant" shall mean ~~any an~~ 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 a non-state~~ governmental entity; or ~~any a~~ pass-through entity or person under a lease contract for five years or longer.

"Phased rehabilitation" shall mean ~~any a~~ 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 a~~ successor provision.

"Property" shall mean real estate and shall include any building ~~or structure~~ which meets the definition in this section, including multiple-unit ~~structures~~ buildings.

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

"Reasonable period" shall mean that an owner ~~must~~ shall 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 mean a person who has entered into a contractual agreement with the owner of a certified property in which the person agrees to pay for full restoration of the owner's 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 mean 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 applicant exceeds:

- for income-producing 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, a minimum expenditure of \$5,000.

"Taxpayer" shall mean ~~any a~~ person, as defined in this section, and shall include ~~any an~~ 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)

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

4.0 Procedures for Certification of Historic Property

4.1 With permission of the property owner, an applicant may 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 is a certified historic property as defined in Section 3.0 of this regulation. The applicant shall file the Part 1 application on standard forms developed by the State Office.

4.2 The State Office shall not process an incomplete Part 1 application until all required application information 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.

- 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 shall notify the 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.
- 4.5 The Delaware State Historic Preservation Officer may certify as historic ~~any~~ a 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)

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

5.0 Procedures for Certification of Rehabilitation

- 5.1 An applicant may 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 as a certified rehabilitation as defined in Section 3.0 of this regulation. The applicant shall file the Part 2 application on standard forms developed by the State Office.
- 5.2 An applicant shall submit Part 1 of the application prior to, or with, Part 2. The State Office shall not process the Part 2 application until an adequately documented and approved Part 1 application, where required as outlined in Section 4.4 of these regulations, is on file.
- 5.3 The State Office shall not process an incomplete Part 2 application until all required application information is received. Where adequate documentation is not provided, the State Office shall notify the 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.
- 5.5 An applicant 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 notify the applicant if the phased rehabilitation plan is approved. The final completion date for a phased rehabilitation is binding unless the applicant requests a change in writing. For a phased rehabilitation, the applicant is allowed up to 60 months to meet the substantial rehabilitation test.
- 5.6 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 applicant notice of the determination. The State Office may require modifications to the plan in order to meet the definition of a certified rehabilitation.
- 5.7 The Delaware State Historic Preservation Officer may issue a Part 2 approval to an applicant who has obtained a Part 2 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 2 application.
- 5.8 Applicants ~~must~~ shall 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 State Historic Preservation Officer may require that the applicant ~~shall~~ forfeit any assigned credit award. Any forfeited tax credits may become available for award to other applicants. Substantially commenced and diligently pursued shall mean the applicant can demonstrate that ~~at~~ a minimum, 25% of the estimated rehabilitation costs was 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.
- 5.9 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)

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

6.0 Procedures for Certification of Completion

- 6.1 Upon completion of the rehabilitation work outlined in the Part 2 application, or an approved project phase ~~thereof~~, the applicant ~~must~~ shall submit to the State Office a Part 3 application with 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.
- 6.2 The State Office shall not process an incomplete Part 3 application until all required application information 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. The State Office may inspect the completed project 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 approved 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 After a project, or an approved 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.
- 6.6 In the case of approved phased projects, a single rehabilitation project may receive more than one Certificate of Completion. 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, 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 DE Reg. 108 (7/1/02)

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

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 ~~later~~ later than simultaneously with the Part 3 application.
- 7.2 If submitted with the Part 2 application, ~~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 7.32 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%; and

- For resident curators, 100% of the qualified expenses submitted up to \$5,000.

The State Historic Preservation Officer shall notify the applicant of the amount of their credit award.

- 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 may consider increasing the an increase in a credit award where there has been an increase in qualified costs of greater than 5% of the total.

- 7.6 Despite having been assigned a certain credit award, an applicant may only claim the amount of tax credits which are supported by their actual rehabilitation costs. Excess tax credits made available in these circumstances are not eligible for subsequent award to other applicants.

- 7.7 Each fiscal year, \$100,000 of the \$5 million assigned to make credit awards under these regulations is reserved for distribution to qualified resident curators. If in any fiscal year there are insufficient qualified resident curators to exhaust this allotment, the unused credit amount will be available in the next fiscal year for award to any eligible project.

- 7.68 Each fiscal year, \$2 \$1.5 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 \$1.5 million is released to be available for credit awards to any eligible project.

- 7.9 Each fiscal year, \$1.5 million of the \$5 million assigned to make credit awards under these regulations is reserved for projects located in Downtown Development Districts, of which \$500,000 is reserved for projects in DDDs receiving tax credits of not more than \$300,000. After April 1, any unassigned portion of the \$1.5 million is released to be available for credit awards to any eligible project.

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

8.0 Fees for Processing Rehabilitation Certification Request

- 8.1 The fee for review of rehabilitation work for projects where the qualified expenditures are over \$100,000 is \$250 for each separate application. Final action will not be taken on ~~any an~~ application until the appropriate remittance is received. No fee will be charged for rehabilitation projects where the qualified expenditures are less than \$100,000.

- 8.2 The applicant shall submit the fee, where applicable, with the Part 3 application. For phased projects, the applicant shall submit the fee 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)

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

9.0 Requirements for Resident Curator Properties

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

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

- 9.3 Curatorship property shall not be used for commercial purposes.

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

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

10.0 Administrative Review

- 10.1 A taxpayer whose application 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.

- 10.2 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.

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

- 10.4 An appellant who exhausts all administrative remedies 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)

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

11.0 Reporting Requirements

- 11.1 Annually, on or before January 31st, 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~~ fiscal 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)

18 DE Reg. 237 (09/01/14) (Final)