

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

ORDER

FINAL

Historic Preservation Tax Credit Program

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 (DHCA) published notice of proposed changes to the Historic Preservation Tax Credit Program in the **Delaware Register of Regulations** (“Register”) May 1, 2004 [(7 **DE Reg.** 1501-1504 (05/01/04)]. 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 for public comment concerning the proposed regulations in two newspapers of general circulation throughout the state. The public comment period was from May 1, 2004 through June 1, 2004. The purpose of the proposed changes to the regulations is to implement code revisions of 2003 relating to a resident curator program.

Summary of Evidence

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

Findings 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 July 11, 2004.

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 may transfer, sell or assign any or all unused credits, except a person engaged in a resident curator relationship.

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

2.0 Statutory Authority

These regulations are created pursuant to Chapter 18, Subchapter II of Title 30 Delaware Code (as amended)

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.

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

3.0 Definitions

3.1 **“Act”** means Chapter 18, Subchapter II of Title 30 Delaware Code, as amended.

3.2 **“Application”** means the Delaware Historic Preservation Tax Credit application that shall consist of three 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).

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

3.3.1 individually listed in the National Register of Historic Places; or

3.3.2 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

3.3.3 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

3.3.4 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.

3.4 **“Certification of Completion”**, **“Completion Certificate”** or **“Certificate”** shall mean the certificate issued by the Delaware State Historic Preservation Officer attesting that certified rehabilitation 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.

3.5 **“Certified rehabilitation”** shall mean that rehabilitation of a certified historic structure 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 for Rehabilitation (36 CRF, part 67) or such other standards as the Delaware State Historic Preservation Office shall from time to time adopt.

3.6 **“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 amount as determined in Section 1813 of Chapter 18, Subchapter II of Title 30 Delaware Code, (as amended).

3.7 **“Delaware State Historic Preservation Officer”** shall mean the person designated and appointed in accordance with 16 USC Sec. 470a(b)(1)(a), as amended.

3.8 **“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.

3.9 **“Fiscal Year”** shall mean the State’s fiscal year.

3.10 **“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.

3.11 **“Office”** or **“State Office”** shall mean the Delaware State Historic Preservation Office.

3.12 **“Owner-occupied historic property”** shall mean 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.

3.13 **“Person”** shall include 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 include any governmental entity, pass-through entity, or person under a lease contract for five years or longer.

3.14 **"Property"** shall mean real estate, and shall include any building or structure, including multiple-unit structures.

3.15 **"Qualified expenditure"** shall mean any amount properly expended by a person for the certified rehabilitation of a certified historic property, but shall not include:

3.15.1 acquisition of real property, or acquiring an interest in real property;

3.15.2 any addition to an existing structure, except where the combined square footage of all additions is twenty percent 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:

3.15.2.1 preserving the character-defining features of the certified historic property,

3.15.2.2 adequately differentiating the new construction from the existing structure, and

3.15.2.3 complying with requirements regarding safety and accessibility in a manner reasonably designed to minimize any adverse impact on the certified historic property;

3.15.3 paving or landscaping costs which exceed ten percent (10%) of the total qualified expenditures;

3.15.4 sales and marketing costs; or

3.15.5 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.

3.16 **"Resident Curator"** shall mean 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.

3.167 **"Substantial rehabilitation" or "full restoration"** shall mean rehabilitation of a certified historic property for which the qualified expenditures, during the twenty-four month period selected by the taxpayer and ending with or within the taxable year, exceed:

3.167.1 for income-producing property, and non-income producing property other than owner-occupied historic property, the current standard required by Section 47(c)(I)(C) of the Internal Revenue Code; and

3.167.2 for owner-occupied historic property or property under contract with a resident curator, five thousand dollars (\$5,000).

3.178 **"Taxpayer"** shall include any 'person' as defined in this section, and shall include any individual or corporation taxable under Title 5, or taxable under either Chapter 11 or Chapter 19 of Title 30

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

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 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 taxpayer of the decision.

4.3 Taxpayers of properties individually listed in the National Register do not need to submit a Part 1 application. 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. 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 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 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 The Part 2 application must 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.

5.6 The amount of tax credit applied against the qualified expenditures in accordance with Section 1813 of Title 30 Delaware Code (as amended) shall represent the "credit award."

5.7 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.

5.8 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, taxpayers must file the State of Delaware Part 2 cover form containing the information required under section 5.5 of these regulations.

5.9 All taxpayers must begin construction on the approved Part 2 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 twenty-five percent (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 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 plan or 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, the taxpayer must submit a Part 3 application, with required documentation, 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 Upon approval by the State Office that the completed rehabilitation meets the definition of a certified rehabilitation, the State Office shall submit the documentation to the Division of Revenue or the State Bank Commissioner, as appropriate, and request a determination of the value of the tax credit.

6.3 Upon receipt of the certification of the value of the tax credit 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.

6.4 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. All checks shall be made payable to the State of Delaware.

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

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 may not be used for commercial purposes.

89.0 Administrative Review

89.1 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.

89.2 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.

89.3 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.

89.4 An appellant who has exhausted all administrative remedies shall be entitled to judicial review in accordance with Subchapter V of the Administrative Procedures Act.

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

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