

## **TITLE 13. CULTURAL RESOURCES**

### **PART 2. TEXAS HISTORICAL COMMISSION**

#### **CHAPTER 13. TEXAS HISTORIC PRESERVATION TAX CREDIT PROGRAM**

##### **13 TAC §13.6**

The Texas Historical Commission (Commission) adopts amendments to 13 Texas Administrative Code §13.6, relating to the application review process for the state tax credit for certified rehabilitation of historic structures with changes to the text as published in the August 16, 2019, issue of the *Texas Register* (44 TexReg 4267). The rule will be republished.

Amended §13.6 describes the process by which the Commission staff will accept and review applications for tax credit projects, and will allow staff to close inactive applications, which includes those applications that have had no activity for at least twenty-four months, are missing information, or have not paid review fees. Closure of an inactive application will disqualify that applicant from receiving tax credits. The purpose of these amendments is to allow for more accurate tracking of active applications and to assist compliance with record retention requirements.

##### **PUBLIC COMMENT**

The Commission received written comments from Kennedy Sutherland, LLP providing recommendations for minor language changes to clarify elements of the rule and provide clear expectations for reopening closed projects. Kennedy Sutherland, LLC did not expressly support or oppose the rule, but asked that the rule be revised to clarify that the sole effect of the closure of an application is to require its reopening before the application process may proceed. The comment also questioned the statement in §13.6(f)(6) as to whether the Commission may refuse to reopen an application if all conditions in §13.6(f)(5) have been met. Lastly, this comment requested that the 60-day deadline for responding to a request from Commission staff for additional information be extended to 120 days.

##### **COMMISSION RESPONSE**

The Commission agrees with Kennedy Sutherland, LLP that the language in §13.6(f) should be clarified to indicate that closed applications will not be denied the opportunity to seek tax credits if other parts of the new rules have been met and projects are reopened. §13.6(f) has been changed to indicated that closed applications

are not eligible for the tax credit unless the application is reopened in line with the requirements of §13.6(f)(6).

The Commission declines to extend the deadline for responding to a request from Commission staff to 120 days. If applicants cannot prepare all necessary materials within 60 days, they may request an extension, which staff will readily grant. This ensures that the applicant maintains communication with staff as the project progresses. A sentence was added to §13.6(f)(3) to provide assurance that extension requests will be granted.

Finally, the Commission agrees with Kennedy Sutherland, LLC that the proposed language in §13.6(f)(6) could be construed as allowing the Commission to refuse to reopen an application even if all requirements in §13.6(f)(5) were satisfied. That is not the intention of the Commission. Accordingly, the Commission changes §13.6(f)(5) to state that applications will be reopened if the conditions of that paragraph are satisfied.

These amendments are adopted under the authority of Texas Government Code §442.005(q), which provides the Commission with the authority to promulgate rules to reasonably affect the purposes of the Commission and the Texas Tax Code §171.909, which requires the Commission to adopt rules for the implementation of the rehabilitation tax credit program. The Commission interprets Texas Tax Code §171.909 as an authorization to administer the rehabilitation tax credit program, which includes the administrative closure of applications that are inactive due to applicant inaction.

#### *§13.6.Application Review Process.*

(a) Application form. The Commission staff will develop the application and may modify it as needed over time. All required forms, including application Parts A, B, C, and amendment forms, are available from the Commission at no cost.

(b) Delivery. Applications will be accepted beginning on January 1, 2015, and continuously thereafter. Applications should be delivered to the Commission by mail, hand delivery, or courier service. Faxed or emailed applications will not be accepted.

(c) Application Part A - Evaluation of Significance. Part A of the application will be used by the Commission to confirm historic designation or to determine if the property is eligible for qualification as a certified historic structure.

(1) If a property is individually listed in the National Register of Historic Places or designated as a Recorded Texas Historic Landmark or State Antiquities Landmark, the property is qualified as a certified historic structure.

(2) The applicant will be responsible for providing sufficient information to the Commission with which the Commission staff may make a determination. If all requested information is not provided to make a determination that a building is eligible for designation as a certified historic structure, the staff may request additional information from the applicant. If the additional information requested is not provided in a timely manner, the application will be considered incomplete and review of the application will be placed on hold until sufficient information is received.

(3) The Commission staff review of Part A of a complete application, unless otherwise provided in §13.8 of this title (relating to Relationship with the Federal Rehabilitation Tax Credit Program), and shall notify the applicant in writing of any determination it makes upon completing the review of Part A of the application.

(4) There is no fee to review Part A of the application.

(d) Application Part B - Description of Rehabilitation. Part B of the application will be used by the Commission to review proposed projects for compliance with the Standards for Rehabilitation.

(1) The applicant will be responsible for providing sufficient information, including photographs taken prior to the project, to the Commission with which the Commission staff may make a determination. If all requested information is not provided to make a determination that a project is eligible as a certified rehabilitation, staff may request additional information from the applicant, usually required to be submitted within 30 days. If the additional information requested is not provided in a timely manner, the application will be considered incomplete and review of the application will be placed on hold until sufficient information is received.

(2) The Commission staff will review Part B of a complete application, unless otherwise provided in §13.8 of this title, and shall notify the applicant in writing of any determination it makes upon completing the review of Part B of the application. In reviewing Part B of the application, the Commission shall determine if Part B is approved or not as follows:

(A) Consistent with the Standards for Rehabilitation as determined by the Commission. If all aspects of the Part B of the application meet the standards for

rehabilitation, no additional information is required, and no conditions are imposed on the work, Part B is approved.

(B) Consistent with the Standards for Rehabilitation with specific conditions of work required. The Commission may determine that the work described in the plan must be performed in a specific manner or with specific materials in order to fully comply with the Standards for Rehabilitation. In such cases, the Part B may be approved with specific conditions required. For applications found to be consistent with the Standards for Rehabilitation with specific conditions required, the applicant shall provide written acceptance to the Commission of all specific conditions required. Otherwise the application will be determined to be not consistent with the Standards for Rehabilitation; applications found to be consistent with the Standards for Rehabilitation with specific conditions required may proceed with the work but will only be eligible for the credit if the conditions listed are met as part of the rehabilitation work. Failure to follow the conditions may result in a determination by the Commission that the project is not consistent with the Standards for Rehabilitation.

(C) Not consistent with the Standards for Rehabilitation. Applications found not to be consistent with the Standards for Rehabilitation will be considered to be ineligible applications; the Commission shall make recommendations to the applicant that might bring the project into conformance with the Standards for Rehabilitation, however no warranty is made that the recommendations will bring the project into compliance with the Standards for Rehabilitation; the applicant may reapply and it will be treated as a new application and will be subject to a new application fee.

(3) An application fee is required to be received by the Commission before Commission review of Part B of the application. The fee is based on the estimated amount of eligible costs and expenses listed by the applicant on Part B of the application.

(A) Applicants must submit the fee with their Part B application or the application will be placed on hold until the fee is received. The fee is calculated according to a fee schedule approved by the Commission and included in the application.

(B) The fee is based on the estimated aggregate eligible costs and expenses indicated in the Part B application and is not refundable. Resubmission of a rejected application or under any other circumstances will require a new fee. Amendments to a pending application or approved project do not require additional fees.

(4) Amendment Sheet. Changes to the project not anticipated in the original application shall be submitted to the Commission on an amendment sheet and must be

approved by the Commission as consistent with the Standards for Rehabilitation before they are included in the project. The Commission shall review the amendment sheet and issue a determination in writing regarding whether or not the proposed change in the project is consistent with the Standards for Rehabilitation.

(5) Scope of Review. The review encompasses the building's site and environment as well as any buildings that were functionally related historically. Therefore, any new construction and site improvements occurring on the historic property are considered part of the project. Individual condominiums or commercial spaces within a larger historic building are not considered individual properties apart from the whole. The scope of review for a project is not limited to the work that qualifies as an eligible expense. Likewise, all work completed by the current owner twenty-four (24) months before the submission of the application is considered part of the project, as is the cumulative effect of any work in previously completed or future phases.

(A) An applicant may elect to apply to receive the credit on only the exterior portions of a larger project that includes other work, in which case the scope of review will be limited to the exterior work. For properties that are individually listed on the National Register of Historic Places, are designated as a Recorded Texas Historic Landmark or State Antiquities Landmark, or determined to be eligible for these designations, the scope of review must also include primary interior spaces.

(B) For these projects described in subparagraph (A) of this paragraph, all work completed by the current owner twenty-four (24) months before the submission of the application, and within the same scope of review (e.g. exterior and/or primary interior) is considered part of the project, as is the cumulative effect of any work in previously completed or future phases within the same scope of review.

(e) Application Part C - Request for Certification of Completed Work. Part C of the application will be used by the Commission to review completed projects for compliance with the work approved under Part B.

(1) The applicant shall file Part C of the application after the building is placed in service.

(2) The applicant will be responsible for providing sufficient information, including photographs before and after the project, to the Commission by which the Commission staff may verify compliance with the approved Part B. If all requested information is not provided to make a determination that a project is eligible as a certified rehabilitation, the application is incomplete and review of the application will be placed on hold until sufficient information is received.

(3) The Commission staff will review Part C of a complete application, unless otherwise provided in §13.8 of this title, and shall notify the applicant in writing of any determination it makes upon completing the review of Part C of the application.

(A) If the completed project is found to be in compliance with the approved Part B and any required conditions; consistent with the Standards for Rehabilitation, and the building is a certified historic structure at the time of the application, the Commission shall approve the project. The Commission then shall issue to the applicant a certificate of eligibility that confirms the property to which the eligible costs and expenses relate is a certified historic structure and the rehabilitation qualifies as a certified rehabilitation and specifies the date the certified historic structure was first placed in service after the rehabilitation.

(B) If the completed project is not consistent with the Standards for Rehabilitation, with the approved Part B, and/or the specific conditions required, and the project cannot, in the opinion of the Commission, be brought into compliance, or if the building is not a certified historic structure at the time of the application, then the Commission shall deny Part C of the application and no certificate of eligibility shall be issued.

(C) If the completed project is not consistent with the Standards for Rehabilitation, with the approved Part B, and/or the specific conditions required, and the project can, in the opinion of the Commission, be brought into compliance, the Commission may issue remedial conditions that will bring the project into compliance. The applicant shall complete the remedial work and file an amended Part C. If the remedial work, in the opinion of the Commission, brings the project into compliance, then the Commission shall issue a certificate of eligibility.

(4) An application fee is charged before Commission review of the Part C of the application based on the amount of eligible costs and expenses listed by applicant on Part C of the application.

(A) Applicants must submit the fee with their Part C application or the application will be placed on hold until the fee is received. The fee is calculated according to a fee schedule approved by the Commission and included in the application.

(B) The fee is based on the eligible costs and expenses as indicated in the audited cost report and is not refundable. Resubmission of a rejected application or under any other circumstances will require a new fee. Amendments do not require additional fees.

(f) Closure of Inactive Applications. The Commission staff may close applications that have been deemed inactive. Closed applications do not qualify as certified

rehabilitations and are not eligible for the Texas Historic Preservation Tax Credit unless reopened per paragraph (6) of this subsection.

(1) Applications may be deemed inactive and closed under any of the following circumstances: Part B and Part C application fees have not been received within sixty (60) days of receipt of the application parts; written requests for information necessary to complete the application and provide sufficient documentation to fully review the application are not responded to within sixty (60) days; or, approved application Parts have not progressed to subsequent Parts (for example: a Part B has not been submitted following approval of a Part A, etc.) and there has been no communication from the applicant to the Commission for a period of twenty-four (24) months or greater.

(2) Applications for projects that are simultaneously applying for federal historic tax credits, per §13.8 of this title may also be closed upon closure of the federal application by the National Park Service.

(3) Applicants will be notified in writing of the potential closure and given sixty (60) days to respond, in writing, with a request for the application to remain open; supplying missing or requested information; or to request an extension allowing additional time to compile missing or requested information. If no response is received, the application will be closed. Such requests shall not be unreasonably denied but shall not exceed an additional 60 days.

(4) Extensions will be granted, in writing, for a period of time agreed upon by the Commission and the Applicant, based on the status of the project. If an extension is not met, further extensions may be granted if the Applicant documents to the Commission that the project is progressing.

(5) Applications that have been closed will be reopened under the following conditions: the project applicant has not changed; the overall scope of work presented in the Part B application has not substantially changed; and the request to reopen the application is made in writing within twenty-four (24) months from the date the application was closed.

(6) If all conditions in paragraph (5) of this subsection are not met, a new application must be filed, including new Part B and Part C application fees.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 15, 2019.

TRD-201903758

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Effective date: November 4, 2019

Proposal publication date: August 16, 2019

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