

## **TITLE 13. CULTURAL RESOURCES**

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

#### **CHAPTER 11. ADMINISTRATION DEPARTMENT**

##### **SUBCHAPTER A. ADMINISTRATION**

###### **13 TAC §11.24**

The Texas Historical Commission (Commission) adopts new rule §11.24, related to Delegation of Authority to the Executive Director. The rule is adopted without changes to the text published in the August 16, 2019, issue of the *Texas Register* (44 TexReg 4265) and will not be republished.

The adoption of the new rule is needed to clarify the executive director's authority to exercise the powers of the Commission and to perform the duties provided by Federal or State law.

No comments were received regarding adoption of the new rule.

The new rule is 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 that chapter.

This rule is also authorized under Texas Government Code §442.0045 (included in HB 1422 from the 86th Legislative Session effective September 1, 2019), which allows the Commission to delegate its authority to the executive director by rule or order. No other statutes, articles, or codes are affected by this new rule.

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 11, 2019.

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Mark Wolfe

Executive Director

Texas Historical Commission

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For further information, please call: (512) 463-6100

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

### **13 TAC §13.9**

The Texas Historical Commission (Commission) adopts new rule 13 Texas Administrative Code §13.9, concerning the appeal of denials of applications for rehabilitation tax credits, without changes to the text as published in the August 16, 2019, issue of the *Texas Register* (44 TexReg 4269). The adopted rule will not be republished.

New Section 13.9 describes the process by which an applicant may appeal the denial of tax credits based on a finding that proposed or completed work does not meet the Secretary of the Interior's Standards for Rehabilitation. The purpose of the new rule is to set standards under which tax credit applicants may appeal a determination on Part B or Part C of the application.

### **PUBLIC COMMENT**

The Commission received written comments from Kennedy Sutherland, LLP, Preservation Texas, and McDoux Preservation, LLC. All commenters generally support the adoption of a tax credit appeal rule, but all three commenters expressed concern over the proposed rule that appeals would be heard and decided by the Executive Director of the Commission rather than an entity independent from Commission staff. The Executive Director is sometimes involved in staff decisions on tax credit applications, and the comments suggest that a subsequent decision of the Executive Director may not, therefore, be impartial. The comments recommend review of appeals by an administrative law judge, the Commission or one of its committees, an independent body, or the State Board of Review. McDoux Preservation, LLC, owned by Steph McDougal, a current member of the State Board of Review, specifically disagreed with the suggestion that the State Board of Review consider and act on tax credit appeals due to a lack of knowledge of the program.

Kennedy Sutherland, LLP and Preservation Texas requested that the 30-day time limit for filing an appeal be extended, as applicants may not be able to gather necessary documentation within that time frame.

Finally, Kennedy Sutherland, LLP suggested that the appeals process should be treated as a contested case under the Texas Administrative Procedures Act, because the program determines "legal rights, duties, and privileges" for a project and its applicants.

## COMMISSION RESPONSE

Given the absence of a statutory right to a contested case hearing, the Commission declines to create a contested case right by rule in the appeal process that the rule contemplates. When the Legislature created the rehabilitation tax credit program it did not create a contested case process for the adjudication of tax credit applications in Chapter 171 of the Tax Code. The Commission infers that this was an intentional legislative decision, purposely designed to allow the Commission to review and take action on tax credit applications without referring them to the State Office of Administrative Hearings. The Commission takes the position that the creation of a contested case right would not be harmonious with the legislation that created the rehabilitation tax credit program. No changes have been made to the rules in response to this comment.

The Commission declines to assign appeal review responsibility to person or entity other than the Executive Director. The purpose of the rule is to set standards that provide applicants an opportunity to explain why Commission staff made an incorrect determination on Part B or Part C of an application. The Commission believes that the agency's Executive Director is the person best equipped to process requests for review of THC staff decisions on tax credit issues. The program has been operated successfully by agency staff since its inception and there is no compelling reason for the Commission to delegate the decision-making process to another individual or entity.

The 30-day period stated in the proposed rule is consistent with the 30-day appeal period provided in federal law for appeal of denials under the Federal Historic Preservation Tax Credit, and the Commission believes it to be adequate in this instance. No changes have been made to the rules in response to this comment.

This new rule is 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 these statutes as authorizing an appeal opportunity so applicants may seek Commission review of determinations regarding the satisfaction of rehabilitation standards related to tax credits.

The adopted rule implements 13 Texas Administrative Code §13.6. No other statutes, articles, or codes are affected by this rule.

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

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