



United States Department of the Interior

NATIONAL PARK SERVICE
WASHINGTON, D.C. 20240

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Memorandum

To: Regional Directors

From: Associate Director, National Register Programs

Subject: Appeals Under National Park Service Regulations 36 CFR 67

The Economic Recovery Tax Act of 1981 requires the Secretary of the Interior to make certification decisions with respect to the historic qualities of income-producing properties and related rehabilitation work. The regulations for this program (36 CFR Part 67) provide an administrative appeal from any certification decision to the Director, National Park Service. As is characteristic of new programs, the appeals process has gone through a degree of evolution to reach its present form. One predictable result of this is a certain amount of misunderstanding among some State Historic Preservation Officers (SHPOs) and even some regional staff with regard to the scope and the purpose of the appeals process. This memorandum is intended to correct those misunderstandings.

The Secretary is required by law, P.L. 9734 Section 212 (b), to certify rehabilitations that are "consistent with the historic character of the structure or the district in which it is located." This is the Secretary's basic statutory mandate, and it cannot be waived for social, economic, technical or other reasons. More importantly for this discussion, it cannot be waived in the appeals process. In other words, the statutory test must be applied to every rehabilitation project in the initial review and in any subsequent appeal. SHPOs and others who deal with applicants should make recommendations for certification of rehabilitation projects with this statutory test in mind.

The word "rehabilitation," as used in the law does not mean that some form of historic "restoration" is required. It is only necessary that a compatible use be found for the building which preserves its significant portions and features. The Secretary of the Interior's "Standards for Rehabilitation" are used to evaluate whether the historic character of the building is preserved in the process of rehabilitation. The standards deal with the physical aspects of rehabilitation and do not reference either technical or economic feasibility except in such general terms as "every reasonable effort" and "when possible." Project review by a regional office inherently takes into consideration certain economic and technical factors—such as whether to repair or replace deteriorated materials, or whether to accept certain selective demolition—but only to the extent that the actual work carried out on the building still is consistent with the historic character of the property or the district in which it is located.

The certification of rehabilitation work for tax benefits is inherently different from other historic preservation decisions, particularly those related to compliance with Section 106 procedures. The Section 106 process is intended to produce a comment by the Advisory Council on Historic Preservation. There are no legal restrictions on the comment—it can and sometimes does result in significant losses to historic properties, even total demolition. Tax Act review, however, produces a certification attesting that the historic character of the property has been preserved. In the final analysis therefore, the preservation of historic character takes precedence over social, economic, technical or other factors.

The Standards may not be construed to be more stringent than the law itself and indeed were framed to include an essential degree of flexibility. Rehabilitation certification, however, has a substantial impact on the Federal Treasury. For this reason, it is incumbent upon regions to certify only that rehabilitation work which meets the Secretary's "Standards for Rehabilitation." I strongly encourage you to be prudent in your review, continuing to confer with Washington on all projects that could have important policy consequences for the national program.

Although appeals produce useful management by-products, such as drawing attention to areas where technical information or policy guidance may be needed, their basic purpose is to review the initial decision which applied the Standards to the rehabilitation proposal. The appeal decision, just as the initial decision, must turn upon whether the rehabilitation work is consistent with the historic character of the property.

The history of the appeals process may have caused confusion on this issue. In past instances, in fairness to the owner, projects have been approved on appeal because they were substantially underway or completed prior to the publication of the "Standards for Rehabilitation." The Solicitor's office has advised us that such factors may no longer be the basis for overturning a decision on appeal.

Further, a widespread impression exists that "mitigating factors," such as technical or economic feasibility can be the basis for overturning denials of certification on appeal. This needs clarification. For example, while at the appeal level it may be determined that the damage from inappropriate physical treatments can, in part, be rectified by corrective measures, mitigating factors can be considered only insofar as the overall project is consistent with the historic character of the property. Obviously, there will be few cases where economic or technical factors will be the basis for overturning denials of certification.

It is important for all to understand that we have no latitude to make certification decisions outside requirements of law. While errors in professional judgment, substantial procedural error, and technical and economic feasibility are all valid considerations in the appeal process, every rehabilitation certified by the

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Department must at a minimum "be consistent with the historic character of the building or district in which it is located." The only possible exception to this rule might be in a circumstance (hypothetical to date) where improper actions of the Government could be considered as estopping the Government from denying the certification.

To avoid future misunderstandings, I hope you will share this information at the earliest opportunity with your colleagues in State offices and in the private sector.

/s/ Jerry L Rogers