State of California
Office of Administrative Law

In re: **Office of Historic Preservation**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action: **Title 14, California Code of Regulations**	**Government Code Section 11349.3**
Adopt sections: 4859.01, 4859.02, 4859.03, 4859.04, 4859.05, 4859.06	**OAL Matter Number: 2024-0429-03**
	OAL Matter Type: Regular Resubmittal (SR)

SUMMARY OF REGULATORY ACTION

This action proposes to adopt the procedures for taxpayers to apply for the State Historic Rehabilitation Tax Credit, a 20% or 25% tax credit for qualified rehabilitation expenditures of certified historic structures or qualified residences as defined in Revenue and Taxation Code sections 17053.91 and 23691.

On October 16, 2023, the Office of Historic Preservation (Office) initially submitted its regulatory action (OAL Matter No. 2023-1016-03S) to the Office of Administrative Law (OAL) for review. On November 29, 2023, the Office withdrew OAL Matter No. 2023-1016-03S from OAL review.

The Office subsequently modified its regulatory text and made the text available for public comment from March 19, 2024, to April 3, 2024. On April 29, 2024, the above-referenced regulatory action was resubmitted to OAL for review. On June 11, 2024, OAL notified the Office that OAL disapproved the proposed regulatory action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action for the following reasons:

1. The Office failed to follow the required APA procedures and;
2. The Office failed to comply with the "necessity" standard of Government Code section 11349.1.

DISCUSSION

The Office's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.) No exemption applies to this regulatory action.

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the APA standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency regarding the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Failure to Follow Required APA Procedure

The APA requires agencies to follow specific procedures when conducting a regulatory action. In this action, the Office failed to comply with the following:

1.1 Failure to notice substantive revisions to the regulation text

The Office failed to provide notice of all substantive revisions to the regulation text. Government Code section 11346.8, subdivision (c), provides, in part:

> No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation.

After the Office provided its second 15 day notice, ending on April 3, 2024, the Office made substantive changes to the regulation text to incorporate California Tax Credit Allocation Committee (Committee) materials and to accommodate public comments made during the second 15 day notice period. The public was not provided with an opportunity to comment on these changes, as is required by Government Code section 11346.8, subdivision (c).

These substantive changes include:

1. Proposed Section 4859.01:
    a. Addition of subsections (1) and (2) to subsection (d) of section 4859.01.
2. Proposed State Historic Rehabilitation Tax Credit Instructions, version 5/24
    a. Amendments to Application Fee remittance, page 3.
    b. Amendments to Section 4 Completed Project Application, pages 8 through 10:
        i. Item 3.a. Applicant Instructions.
        ii. Item 7. Cost Certification Document.
    c. Amendments to Appendix B.
    d. Amendments to Appendix C.
    e. Appendix D:
        i. Amendments to Item A, sub-item Federal Surplus Property Obtained through local agency under Government Code 54142.
        ii. Amendments to Item B.
        iii. Amendments to Item E.
3. Amendments and additions to the State Historic Rehabilitation Tax Credit Application form, Completed Project Application, version 5/24.

All of the changes described above materially altered the requirements, rights, responsibilities, conditions, or prescriptions contained in the originally noticed text, resulting in substantial changes that are subject to public comment.

1.2 Failure to follow required procedure in adopting the State Historic Rehabilitation Tax Credit Application form, version 5/24

Subdivision (g) of Revenue and Taxation Code sections 17053.91and 23691 states:

> (g) For purposes of this section, the Office of Historic Preservation shall do all of the following:
> (1) Adopt regulations to implement the requirements of this section. The regulations shall comply with the requirements of the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).
> (2) Establish a written application, ***on a form jointly prescribed*** by the office and the California Tax Credit Allocation Committee, for the allocation of the tax credit…[Emphasis added.]

In this action, the Office proposes to adopt the State Historic Rehabilitation Tax Credit Application forms (Initial, Amendment, and Completed) version 5/24, pursuant to subdivision (g) of Revenue and Taxation Code sections 17053.91 and 23691. However, the rulemaking record does not document that the Office and Committee jointly prescribed the proposed Application forms in accordance with subdivision (g)(2) of Revenue and Taxation Code sections 17053.91 and 23691.

1.3 Failure to follow APA procedure in adopting a fee

Revenue and Taxation Code section 17053.91, subdivision (n), provides:

> The California Tax Credit Allocation Committee and the Office of Historic Preservation may charge a reasonable fee in an amount that does not exceed the reasonable costs incurred by the California Tax Credit Allocation Committee and the Office of Historic Preservation in fulfilling the responsibilities described in paragraphs (4) and (5) of subdivision (g) and subdivision (h) and paragraphs (4) and (5) of subdivision (g) and subdivision (h) of Section 23691.

As previously noted, any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.) Here, the Office is proposing to implement Revenue and Taxation Code section 17053.91, subdivision (n), by adopting both fees for the reasonable costs incurred by itself

and the Committee. However, the rulemaking record does not document that the Committee's fees were adopted in compliance with the APA.

2. Necessity Standard

OAL must review regulations for compliance with the necessity standard of Government Code section 11349.1, subdivision (a)(1). Government Code section 11349, subdivision (a), defines "necessity" as follows:

> "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

To further explain the meaning of "substantial evidence" in the context of the necessity standard, subsection (b) of section 10 of title 1 of the CCR provides:

> (b) In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:
> (1) A statement of the specific purpose of each adoption, amendment, or repeal; and
> (2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

Page 3 of the Instructions, version 5/24, incorporated by reference in subsection (c)(1) of section 4859.03, established new fees for the Office and the Committee:

A. OHP Fees:
Qualified Residence fees are set at a flat rate of $900. $450 is paid with the Initial Project Application and $450 is paid with the Completed Project Application.

All income-producing properties incur a fee of 1% of the Completed Qualified Rehabilitation Expense (QRE) up to the first $125,000. An additional 0.15% for the QRE expenses above $125,000 is added to the 1% base fee. Fees are capped at $6000.

The Initial Project Application fee is one half of the estimated QRE cost declared on the Initial Project Application.

The Completed Project Application fee is the balance of the final fee calculated from the final total QRE cost declared on the form minus the Initial Application fee.

The Office did not provide any specific necessity for adopting fees in these amounts. Pursuant to Revenue and Taxation Code section 17053.91, subdivision (n), the Office must include an explanation as to why the fee amounts do "not exceed the reasonable costs incurred by … the Office of Historic Preservation in fulfilling the responsibilities…" Additionally, if the Office is relying upon a new technical, theoretical, or empirical study, report, or similar document in proposing the fees, it must make the document available for at least 15 days pursuant to Government Code section 11347.1.

For the reasons discussed above, the proposed regulatory changes failed to comply with the necessity standard of the APA.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Office may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to the Office on the date indicated below.

The Office must make any substantive regulatory text changes, which are sufficiently related to the originally noticed text, available for public comment for at least 15 days pursuant to subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Additionally, any supplement to the Initial Statement of Reasons or other relied upon document the Office may create or propose to add to the rulemaking record to address the issues

discussed above must be made available for public comment for at least 15 days pursuant to Government Code section 11347.1. Any comments containing objections or recommendations must be summarized and responded to in the Final Statement of Reasons. The Office must resolve all other issues raised in this Decision of Disapproval of Regulatory Action and any issues raised by or in response to public comments prior to the resubmittal of this regulatory action.

Date: June 18, 2024

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