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## Local Landmark Commissions and the Historic Tax Credit

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In addition to design review from the National Park Service (NPS) and the state historic preservation office (SHPO), local landmark commissions may also have a say in how historic tax credit (HTC) projects are renovated. From the outside looking in, it may be tempting to assume local landmark review and the HTC process are two sides of the same coin. That is to say, if a project receives NPS approval for HTCs, developers might suppose the local approval would be nearly pro forma, or vice versa. But, the reality is considerably more complicated.

### Which Projects Get Reviewed

Not every HTC project faces local design review. To be a certified historic structure for federal and in most cases state HTC purposes, a property must be individually listed on the National Register or be a contributing structure within a National Register district. In instances where a property is not listed but meets the criteria to be listed, the Part 1 process allows for a preliminary determination of eligibility and allows the credits to be secured, provided that the National Register process is completed during the renovations.

According to the NPS website, "National Register listing places no obligation on private property owners. There is no restriction in the use, treatment, transfer or disposition of private property."

Federal law and perspective aside, many communities have opted to use the National Register as one basis for triggering local historic design review. The requirement is typically found in the zoning code and is called a "historic resource

overlay," but it may also hide in the code's "definitions" section. For example, the city of Portland's zoning code details a process for local designation of a historic landmark in the same section where it discusses "alterations to a historic landmark," but it makes no mention of the National Register. This might lead some to conclude that a National Register property and a Portland Historic Landmark are two different things and that the code does not apply to a National Register property. Closer examination of the definitions section, however, shows that "Historic Landmark refers to resources that the City or the Keeper of the National Register of Historic Places has designated or listed for their special historic, cultural, archaeological or architectural merit."

There are three wrinkles in the question of whether an HTC project also faces local historic design review. First, not all communities link National Register designation with local historic design review. In some communities, a property may not face local review to claim federal or state HTCs, but it may be subject to local review if the developer or owner wants to claim local incentives. One of the largest exceptions is New York City.

Second, many of these same communities that do not have a direct link between National Register status and local design review offer historic preservation incentives which then require historic design review. The city of Chicago's Class L license is an example of a program in which local design review is one of the qualifiers for property tax abatement for a historic rehabilitation project.

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Third, some communities may have written their zoning laws to address “potential historic resources,” often with the local planning staff making that assessment. This gray area can be problematic because, as noted earlier, the HTC program is available to rehabilitation projects where NPS has made a preliminary determination of individual listing on the National Register. In many cases if a property is not formally listed on the National Register, it is not deemed to be historic for purposes of local design review.

### **NPS and Local Historic Commission Approvals**

Many HTC projects that are approved by the NPS also get approved for local historic design review. When they are not, the result can be months of added time and thousands of dollars in added costs.

There are four core areas of potential conflict between the HTC and local historic design review:

First, the HTC process and the local historic design review process are entirely separate with entirely separate decision-makers. The tax credits are an incentive for which a developer may opt to apply. Local design review is a regulatory process that the developer must successfully navigate. Not only does approval from one not translate to approval for the other, sometimes, depending on personalities, the reviews can have the contrarian effect.

Second, the people involved in each process are considerably different. The HTC review staffs at the state and federal levels specialize in this niche of the historic preservation field. They often have decades of experience doing what they do. On the local side, historic landmark committees are generally comprised of local community volunteers. Many of these are slotted; meaning, by code, a commission might require an “architect,” “historian,” “archaeologist” or “public-at-large.” Generally, these are local professionals with appropriate credentials. In all instances, they are people who have volunteered to give up an afternoon or evening at least once a month because they care about historic resources and historic preservation in their community. Because of the time and effort required for service, commission members typically have strong opinions about what is appropriate for their community.

Third, the review rights for each body are often quite different. To secure the 20 percent HTC, developers subject the project to 100 percent design review. This includes the property’s exterior, as well as the interior and new construction. In most instances, local design review as a regulatory process is limited to the exterior of a building. In instances where a local incentive is offered, program

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rules may extend design review to the interior but only in return for a benefit. That is not to say that local historic design review commission members do not attempt to assert their influence on the interior treatments, particularly if a building is considered iconic. As a tactical matter, it is preferable not to discuss design elements outside the commission's purview. Rarely does that result in a kinder review, and a more thorough review can be troublesome. Although it may be inappropriate for commission members to consider design elements outside of their review authority, it may still color the way they assess the project.

Finally, the fourth area of conflict is the set standards by which a project is reviewed. For the HTC, NPS relies on the Secretary of the Interior's Standards for Rehabilitation, guided by more than 35 years of interpretations. Many local historic design codes rely on something that is locally defined and which may only broadly parallel the Secretary's Standards. Even when the local review standards replicate the Secretary's Standards, the local commission members, who are often not always practitioners in the field, are not always well informed about the guidance and may not understand the nuances.

Although the local application of historic rehabilitation standards may vary widely from those of the NPS and from city to city, window replacement and rooftop additions are common areas of conflict for developers. The NPS has endeavored to establish a consistent policy for when windows may be replaced based on conditions and code requirements. Some local historic commissions are much more strident that existing windows must be retained at all costs. Similarly, conflicts often arise around rooftop additions. The NPS has established fairly consistent guidelines for rooftop additions with a standard setback of one-bay. Some local design commissions are much more open, even allowing rooftop additions without any setback. The issue of screening or not screening mechanicals can also be problematic; the NPS has deemed rooftop mechanical screens are inappropriate, whereas some local commissions can be adamant that screens be installed.

### **Resolving Conflicts and Moving Forward**

Obviously any conflicts between local historic review and HTC review can cost substantial time and money. So what can be done to minimize the problems? The key is to establish a strategic plan of when to submit applications to each program. That plan is informed by the project timetable, the nature of the project design, the review timetables and an understanding of what the "hot buttons" may be. Because local historic design review is a legal land use process, it is typically better to secure at least conditional project approval from the NPS before submitting the appropriate applications to the city. For its part, the NPS –

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within reason – attempts to cooperate with a developer who encounters a conflicting position from the local landmark commission. Those conflicts can often be worked out in conversation and conceptually approved. By contrast, local historic commission staff only have so much latitude before the developer must submit a formal application to revise a design review decision. In practical terms, this means an entirely new application. The added benefit of securing tax credit approval prior to a landmark commission review is that, if properly presented, the NPS decision may define a conflict with the local historic commission as a preference rather than as a substantial dispute. That said, a developer should never be surprised when a local historic commission nonetheless asserts its preference.

In establishing this strategic plan, the HTC project team must have people who understand the HTC program, as well as the local land use code, the historic design

review standards, the personalities of the players, the traditions of the local commissions and appeal rights and processes.

The fundamental lesson is that it is never too early to begin developing this strategic plan. ❖



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