Robert Grimaldi

Environmental Advocacy

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Polishing the Rust Belt: Re-Opening New York State's Historic Homeownership Rehabilitation Tax Credit

The federal government of the United States, along with the governments of all fifty states, has long recognized that historic preservation is an important governmental objective. Historic preservation is a means of displaying patriotism, educating future generations, enjoying aesthetic beauty in architecture, and also achieving environmental and social justice. New York is currently in a state of economic distress, in the midst of a nation shrouded in financial uncertainty. In the current era of state economic problems, New York state government must re-open the book on historic preservation and look to its ability to foster civic pride, economic development, and environmental justice. Particularly, New York should amend the Historic Homeownership Rehabilitation Tax Credit, making the credit both more accessible and more beneficial for low-income homeowners, which will stimulate our economic and affect social change.

Historic preservation has been recognized for over forty years in the United States as an effective means of increasing the aesthetic and cultural quality of our communities. The value of residential preservation, however, lies not in its aesthetic contributions, but in its ability to cure the impacts of environmental injustice and hazards on low-income residents, and reversal of the trend of flight from urban areas. In New York, residential historic preservation is incentivized through the "Historic Homeownership Rehabilitation Tax Credit," under which qualified homeowners can receive a tax credit for certified rehabilitation work on their homes. However, it does not appear as though the tax credit has been widely used by homeowners in Buffalo's historic districts, and as a result, valuable opportunities which could be used to make cities safer and more populous, have gone unused. A breakdown on New York's tax credit program, along with a survey of historic preservation incentives offered by other states reveals that New York should make the tax credit more accessible to low-income homeowners, and increase its financial incentives. These changes, along with increased public education on the availability of the tax credit and assistance throughout the certification and construction process, will put New York's urban centers, struggling with environmental injustice and sprawl, back on the road to prosperity.

I. Historic Preservation: A Brief History

American historic preservation efforts first arose shortly after the birth of the United States. Following the conclusion of the American Revolution, patriotic citizens banded together to save buildings associated with George Washington.[1] Historic preservation then evolved into a recognizable movement following the American Civil War, when preservationists again banded

[1] David B. Fein, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64, 71-72 (1985).

together to preserve several significant battlefields.[2] New York state has a long history of historic preservation, being one of the first state governments to employ governmental power for preservation purposes, when it acquired General George Washington's headquarters in Newburgh, New York in 1889.[3]

In 1916, the federal government set the stage for a great deal of future preservation activity, creating the National Park Service was within the Department of the Interior.[4] Soon after, several states increased their preservation activity, and the earliest historic district in the United States was established in 1931, as "The Old and Historic District of Charleston" in South Carolina.[5] The idea behind historic districts was not to preserve these areas for exhibition or education, "but for practical use as places to live in and work in."[6] Financial incentives for preservation first appeared in Europe in 1961, when the Netherlands became the first government to adopt a law allowing the owner of property to obtain a subsidy for maintenance of buildings listed in historic registers.[7] American preservationists would soon take notice of the beneficial economic impacts of preservation, as by 1966, studies showed that restoration of single-family households could increase a property's assessed value by more than 200% over just five years and could also present a vast array of benefits to the community. In "With Heritage so Rich," a 1966 landmark documentation of the benefits of historic preservation, the Special Committee on Historic Preservation of the United States Conference of Mayors recommended that states should

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[2] David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289, 291 (2004).
[3] Nathaniel C. Guest, *Putting History on a Stone Foundation: Toward Legal Rights for Historic Property*, 18 TEMP. POL. & CIV. RTS. L. REV. 699, 743 (2009).
[4] Albert Rains & Laurance G. Henderson, With Heritage So Rich: A Report of a Special Committee on Historic Preservation 48 (1st ed. 1966).
[5] *Id.* at 46.
[6] *Id.* at 54.
[7] *Id.* at 155-56.

enact legislation enabling local governments to establish historic preservation districts and "provid[e] special property tax treatment for historic structures and preservation and restoration expenditures."[8]

The Special Committee's work in 1966 was instrumental in leading up to the United States' adoption of the National Historic Preservation Act in the same year. In 1978, the United States Supreme Court upheld historic preservation as a valid public purpose under the Constitution, finding New York City's historic preservation ordinance an "appropriate means" to securing an "entirely permissible governmental goal."[9] New York would follow the lead of the federal government, establishing the State Historic Preservation Office ("SHPO"), through the State Historic Preservation Act of 1980, which recognizes that the historical, architectural and cultural heritage of the state is among the most important environmental assets of the state, and as such, it should be preserved.[10] The act defines "historic property" as "any building, structure, district, area, site or object…that is of significance in the history, architecture…or culture of the state, its communities or the nation."[11] The act also recognizes that "New York's cultural heritage is one of the state's most important 'environmental assets' and that the forces of change threaten 'irreplaceable properties' which should be preserved."[12] One of SHPO's responsibilities is to administer the Historic Homeownership Rehabilitation Tax Credit program. Today, historic preservation has become somewhat of a grassroots cause, with "ordinary" homeowners now

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[8] *Id.* at 210.
[9] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129 (1978).
[10] N.Y. PARKS REC. & HIST. PRESERV. LAW § 14.01 (McKinney 1984).
[11] *Id.* § 14.01(5).
[12] J. Langdon Marsh & Judith Green Simon, *The Protection of Historic Resources in New York State: An Overview of Federal, State and Local Laws*, 10 FORDHAM URB. L. J. 411 (1981).

entering the debate, and working to rehabilitate their homes to achieve the many various goals of historic preservation.[13]

II. Buffalo's Unique Position to Benefit from Policy Changes

New York is a state that should take particular interest in the effects of historic preservation tax credits, since 249 of 2,400 National Landmarks, and 4,400 of the nation's 77,000 National Historic Register listings are within New York.[14] Further, Buffalo is in a unique position to take advantage of historic preservation programs since there are over 270 National Historic Register structures in Western New York, many of which are districts with several qualifying residential structures.[15] Buffalo is home to an uncharacteristically high number of national architectural treasures by famous architects such as Frank Lloyd Wright, Louis Sullivan, H.H. Richardson, Stanford White, Richard Upjohn, Daniel Burnham, and Eliel and Ero Saarinen. Buffalo is also well known for both a wide range of preservation-supporting not-for-profit groups, as well as vibrant neighborhoods preserved as historic districts.[16]

Also, Buffalo has some of the oldest housing stock in the country, and much of it is vacant, considering that the city's population has declined from a high around 600,000 in the mid-twentieth century to well under 300,000 today.[17] Buffalo is home to ten historic districts, including the 2011 addition of the University Park Historic District to the National Register of Historic Places, adding 494 homes that qualify for the homeowners tax credit program. Also in

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[13] Ted Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 YALE L. J. 768, 772 (2007).
[14] Jane Humphreys, *Tax Incentives for Historic Rehabilitation in Western New York*, v (June 2004), www.ny.frb.org/regional/rehab1b.pdf.
[15] *Id*. at viii.
[16] Elizabeth B. Waters, *Buffalo Historic Preservation Issues and Opportunities Assessment*, 2 (Feb. 1, 2008), www.preservationbuffaloniagara.org%2Ffiles%2Fdocuments%2FWaters-Final-Report.pdf.
[17] *Id.* at 4.

2011, the Allentown Historic District was expanded, now containing 1,232 homes that qualify for the tax credit.[18]

III. Historic Preservation as Sound Environmental Practice

The preservation of historic residential structures has several beneficial impacts to communities, including environmental, economic, and social benefits. Western New York analysts have praised historic preservation and its potential for "providing affordable and centrally-located housing, building municipal tax revenue, strengthening heritage tourism, providing jobs, and promoting denser growth patterns over sprawl."[19] Those who have studied various preservation movements have noticed a change in those rallying under the cry of historic preservation in the second half of the twentieth century, as:

> [h]istoric preservation, the erstwhile preserve of patriotic organizations and academic architecture buffs, now attracts the interest of local governments seeking to stave off suburban flight, neighborhood organizations hoping to save their streets from various governmental and developmental bulldozers, businessmen in quest of a combination of tax advantages and public relations, and environmentalists buying time against dams and highways. In short, there seems to be something for everyone in historic preservation.[20]

Accordingly, state funding for the rehabilitation of historic structures can provide immediate benefits to struggling communities, both economically and environmentally. Buffalo is particularly situated to benefit from the impacts of historic preservation, taking into account its recent economic difficulties, in the backdrop of a rich architectural downtown and housing stock. Local government also has a great deal to gain from increased historic rehabilitation work, both

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[18] *Preservation Works in New York State: Western New York Project Portfolio*, New York State Office of Parks, Recreation and Historic Preservation (2011), www.nysparks.com/shpo/preservation-works/documents/WesternNewYorkProject.pdf.
[19] Humphreys, *supra* note 14, at vii.
[20] Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 477 (1981).

due to savings of funds which would be expended on new infrastructure and an increase in revenue resulting from higher property values and taxes paid.

a. Preservation of Aesthetic and Civic Assets

Some preservationists have likened historic buildings to natural resources, in that both are finite and essential to the "livability" of our built environment. As "historic resources," historic structures and districts present a great deal of psychological and aesthetic comfort to the community and are essential to any geographic area's sense of place.[21] When historic preservation arose in the nineteenth century, the dominant motivation for preservation was seeking to inspire observers with a sense of patriotism.[22] Stemming from this objective, early preservation efforts focused on structures associated with famous individuals or historic events, with the efforts to preserve Mount Vernon as perhaps the most prominent example.[23] The United States Supreme Court recognized the importance of the pursuit to preserve historic buildings in *United States v. Gettysburg Electric Railway Co.*, when Justice Rufus Wheeler Peckham wrote in support of preserving the Gettysburg battlefields as a valid public use:

> Upon the question whether the proposed use of this land is a public one, we think there can be no well founded doubt…The battle of Gettysburg was one of the great battles of the world…Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country…[The soldiers'] successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States…appreciates and endeavors to perpetuate it by this most suitable recognition.[24]

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[21] Guest, *supra* note 3, at 702-03.
[22] Rose, *supra* note 20, at 480.
[23] *Id.* at 480-81.
[24] 160 U.S. 668, 660-82 (1896).

The second wave of historic preservation efforts arose at the turn of the century and focused on cultural, artistic, and architectural structures.[25] The spirit of this movement is ironically memorialized in the Supreme Court's opinion in *Berman v. Parker*, which happened to reject a preservation argument, when Justice William Douglas wrote "The concept of the public welfare is broad and inclusive…The values it represents are spiritual as well as physical, aesthetic as well as monetary…[T]he community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[26] Following preservation efforts to preserve cultural and architectural treasures came a third wave, which coincided with the environmental movement and focused on a concern for the psychological and environmental effects of historic preservation.[27]

b. Local Economic Development

Preservation has a striking impact on the economic development of the community in which it is undertaken. This is due to the fact that preservation of historic homes is twenty percent more labor intensive than new construction, which tends to be material intensive.[28] As a result, preservation demands a great deal of man-hours, which translates into well-paying jobs for skilled, as well as general laborers, most of whom lack advanced education.[29] The economic development advanced by historic preservation tax credits is not only the result of job creation, but also the increase in property value resulting from the rehabilitation work.[30] Not only does preservation work employ local laborers, it also serves to further stimulate the local economy, as

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[25] Rose, *supra* note 20, at 480.
[26] 348 U.S. 26, 33 (1954).
[27] Rose, *supra* note 20, at 480.
[28] Guest, *supra* note 3, at 716.
[29] *Id.*
[30] Ryan Howell, *Throw the "Bums" Out? A Discussion of the Effects on Historic Preservation Statutes on Low-Income Households Through the Process of Urban Gentrification in Old Neighborhoods*, 11 J. GENDER RACE & JUST. 541, 542 (2008).

studies have found that those workers most often spend their earnings in their own communities.[31] An economic benefits assessment conducted by the Preservation League of New York State concluded that New York's tax credit programs create a $12:1 return on state investment, accounting for significant job creation, increased local and state tax revenue returns, and community redevelopment benefits.[32] The long-term economic impacts that tax credits have on the community can be difficult to see in the short-term, but nevertheless, residential historic preservation has been found to be a viable means of local economic development, and New York should embrace this social benefit.

c. Means of Combatting Sprawl

The rehabilitation of historic residences is perhaps the most effective tool for combatting urban sprawl. Sprawl is defined as "low density, single use development, which inefficiently uses land."[33] Current land use planning strategies often encompass "smart growth" principles, which promotes the adaptive re-use of existing structures to foster denser development. As a result of increased urban residential development due to tax credit incentives, cities can more efficiently use public services, existing infrastructure, and under-utilized mass transit systems.[34] By limiting sprawl and drawing attention back to the inner city neighborhoods, historic preservation can also address several other issues and, as a result, make the community healthier and more closely knit. By living closer to neighbors and places of employment, the need for automobile use is decreased, resulting in air quality improvement. A more concentrated urban

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[31] *Id.*
[32] Preservation League of New York State, *Proposed Cuts Will Stall Upstate Revitalization* (Jun. 22, 2010), readme.readmedia.com/Proposed-Cuts-to-Tax-Credits-Will-Stall-Upstate-Revitalization/1495742.
[33] Roberta F. Mann, *Tax Incentives for Historic Preservation: An Antidote to Sprawl?*, 8 WIDENER L. SYMP. J. 207, 211 (2002).
[34] Humpreys, *supra* note 14, at 8.

center requires the laying of less pavement and the installation of less infrastructure outside the city, saving valuable wildlife habitat. Rehabilitation also decreases the need for new construction, and saves homes that might be slighted for demolition, both decreasing the amount of new materials produced and reducing the burden that construction and demolition debris place on landfills.[35] Finally, and perhaps most importantly, the rehabilitation tax credits allow low-income urban residents to abate toxic substances such as lead paint in their homes, at less expense. It should also be noted that preserved homes are preferred in older neighborhoods over newly-built homes, not only because it is less expensive, but also because preserved homes keep the historic character of the community and blend in where a new home may appear obtrusive.[36]

d. Provision of Affordable Housing

Residential historic preservation has been credited with producing more than 250,000 housing units.[37] This is especially important from environmental and social justice standpoints, because houses built before 1950 are disproportionately the residences of low-income homeowners. Historic preservation of these homes, and especially the tax credit's contribution by making the rehabilitation process more affordable, conserves this desperately needed housing stock, avoiding the unwanted displacement of those who cannot afford to move themselves or their families, while also retaining the community's diversity and rich culture.[38]

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[35] *See* Mann, *supra* note 32, at 211-219.
[36] Todd Schneider, *From Monuments to Urban Renewal: How Different Philosophies of Historic Preservation Impact the Poor*, 8 GEO. J. ON POVERTY L. & POL'Y 257, 266 (2001).
[37] Guest, *supra* note 3, at 713.
[38] *Id.*

IV. New York State's Historic Homeownership Rehabilitation Tax Credit

a. The Law

New York's Historic Homeownership Rehabilitation Tax Credit was first offered in 2007 and currently allows for a credit equal to "twenty percent of the *qualified rehabilitation* expenditures made by the taxpayer with respect to a *qualified historic home*…allowed in the taxable year in which the final certification step of the *certified rehabilitation* is completed."[39] To be eligible for the tax credit, the homeowner must satisfy all of these qualifications and must follow strict certification procedures.

It would be almost impossible for a homeowner to understand the application of the tax credit from a reading of section 606(pp)(1), quoted above, which confers the credit. Firstly, a homeowner must be aware of the definition of "qualified rehabilitation expenditure," to understand if the rehabilitation work he or she is considering would trigger the tax credit. The statute goes on the define "qualified rehabilitation expenditure" as "any amount properly chargeable to a capital account: (i) in connection with a *certified rehabilitation* of a qualified historic home, and (ii) for property for which depreciation would be allowable under section 168 of the internal revenue code if the qualified historic home were used in a trade or business."[40] The section further provides that such expenditure does not include any amounts expended for the purchase of a historic home, an enlargement of an existing home, or any rehabilitation work completed prior to the statute's enactment.[41] This definition is of little use to a homeowner unfamiliar with the statute or the internal revenue code, especially since the definition points to another undefined term, "certified rehabilitation."

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[39] N.Y. TAX LAW § 606(pp)(1) (McKinney 2006)(emphasis added).
[40] *Id.* § 606(pp)(3)(A)(emphasis added).
[41] *Id.*

The statute then moves to define "certified rehabilitation" as "any rehabilitation of a certified historic structure which has been approved and certified as being consistent with the standards established by the commissioner of parks, recreation and historic preservation for rehabilitation…, a local government certified pursuant to section 101(c)(1) of the national historic preservation act or a local landmark commission."[42] The law references the standards established by the Commissioner of the Office of Parks, Recreation and Historic Preservation, but does not point to the location of the standards, so that an interested homeowner might be able to designate whether planned designations will qualify for the credit.

The law then moves to summarize the rigorous three-step certification process put in place to ensure that the home and the rehabilitation work both qualify for the credit. A homeowner must first receive an initial certification that their home meets the definition of the term "certified historic structure."[43] Secondly, once a homeowner's home has been certified as a "certified historic structure," the homeowner must again contact SHPO for a second certification, to be issued prior to the commencement of any construction work, certifying that the work proposed in the homeowner's plans is consistent with the commissioner's standards, as mentioned above.[44] Finally, the homeowner must apply for a third certification, upon the completion of the construction, certifying that the rehabilitation work was completed as proposed and that the costs claimed are consistent with the work completed.[45] This process requires a homeowner to reach out to SHPO on three separate occasions, each of which requires the homeowner to meet specific qualifications.

For purposes of the initial certification, a "qualified historic home" is:

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[42] *Id.* § 606(pp)(4)(A).
[43] *Id.* § 606 (pp)(4)(B)(i).
[44] *Id.* § 606 (pp)(4)(B)(ii).
[45] *Id.* § 606 (pp)(4)(B)(iii).

> a *certified historic structure* located within New York State: (i) which has been *substantially rehabilitated*, (ii) which, or any portion of which, is owned, in whole or part, by the taxpayer, (iii) in which the taxpayer resides during the taxable year in which the taxpayer is allowed a credit, and (iv) which is in whole or in part a targeted area residence within the meaning of section 143(j) of the internal revenue code or is located within a census tract which is identified as being at or below one hundred percent of the state median family income in the most recent federal census.[46]

Accordingly, a home will not qualify unless it has been substantially rehabilitated, the applicant has an ownership interest in it, the homeowner resides in the home for at least the taxable year in which the credit is claimed, and it is located within a targeted residence area or census tract. The law provides little guidance on what qualifies an area as a qualified "targeted residence area" or "census tract," which will require further research on the part of the homeowner, and correspondence with SHPO. Further, to qualify as a "historic home" under this section, the home must undergo "substantial rehabilitation," which the law defines as "qualified rehabilitation expenditures in relation to such building total[ing] five thousand dollars or more."[47] Finally, if a homeowner wishes to identify whether or not his or her home is a "qualified historic home," he or she must determine whether or not it is a "certified historic structure." The law defines "certified historic structure" as "any building…which: (i) is listed in the state or national register of historic places, or (ii) is located in a state or national registered historic district and is certified as being of historic significance to the district."[48]

Also, the amount of credit allowed is not unlimited, as the credit for an individual home is capped at $50,000.[49] If the homeowner's gross income in the year rehabilitation is completed is less than $60,000, the amount of the credit that exceeds state tax liability is returned to the

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[46] *Id.* § 606 (pp)(5)(A)(emphasis added).
[47] *Id.* § 606 (pp)(5)(B).
[48] *Id.* § 606 (pp)(6).
[49] *Id.* § 606 (pp)(2)(A).

homeowner in the form of a tax refund. If the homeowner's gross income exceeds $60,000, and the amount of the credit exceeds tax owed, then the credit can be carried forward to alleviate the homeowner's state income tax burden in future years.[50] The work is also subject to the eligibility requirements that (1) the minimum investment to trigger eligibility for the tax credit must be at least $5,000, and (2) at least five percent of the total expenditure must be spent on rehabilitation of the exterior of the home.[51] Finally, the law only extends the program until January 1, 2015.[52]

b. Public Outreach

A reading of New York Tax Law section 606(pp), which details the qualifications and requirements of the Historic Homeownership Rehabilitation Tax Credit, reveals that the application procedure is quite extensive and will require a great deal of homeowner correspondence with SHPO. Aside from explanations of the application and certification processes on SHPO's website, which accompany the tax credit application forms, the only other attempt at public outreach seems to come from not-for-profit preservation groups. Buffalo-based "Preservation Buffalo Niagara" has hosted three workshops on the tax credit program, one in Fall 2010 and two additional workshops in Spring 2011.[53] It is unclear whether or not the group is planning on holding more workshops in the future, but these workshops are a great start to introducing the public to the availability of the tax credit and providing information on the application and certification process.

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[50] *Id.* § 606 (2)(A)-(B).
[51] *Id.* § 606 (pp)(5)(B), (3)(C).
[52] *Id.* § 606 (pp)(2)(A).
[53] *Preservation Tax Credit Program to Be Explained in Allentown*, Buffalo Rising (Sept. 17, 2010), www.buffalorising.com/2010/09/preservation-tax-credit-program-to-be-explained-in-allentown.hmtl; *Two Preservation Tax Credit Workshops Scheduled This Week*, Buffalo Rising (Apr. 18, 2011), www.buffalorising.com/2011/04/two-preservation-tax-workshops-scheduled this week.html.

c. Use of the Homeownership Rehabilitation Tax Credit in Buffalo

Despite Buffalo's unique position to take advantage of the tax credits, and the great quantity of qualifying homes in Buffalo's ten historic districts, Buffalo homeowners accounted for only 43 of 171 approved applications in 2010-2011. For those two years, the Office of Parks, Recreation and Historic Preservation received 532 applications for the tax credit, and awarded $12,636,289.57 in credits.[54]

V. Residential Historic Preservation in Neighboring States

New York should improve its Historic Homeownership Rehabilitation Tax Credit program to stimulate greater homeowner participation, and in doing so, ensure the satisfaction of the principles of environmental justice, through an analysis of the residential historic preservation programs of neighboring states. As of 2011, thirty states have adopted laws that allow credits against income taxes for historic rehabilitation.[55] An assessment of tax credit programs of other states and the degree to which these programs are beneficial for low-income homeowners, will offer policy recommendations for New York's program. The focus of this assessment should center on the strategies other states employ to make their tax credit programs both easy to understand and financially feasible, allowing low-income homeowners in urban centers to take advantage of the rehabilitation tax credits.

a. Delaware

Delaware has quite possibly the best residential rehabilitation incentive, in terms of its potential for curing the ills of environmental injustice. Delaware's "Historic Preservation Tax

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[54] Email with Sloane Bullough, Technical Assistant, NYS Rehabilitation Tax Credits, Office of Parks, Recreation and Historic Preservation to Robert Grimaldi, Law Student, State University of New York at Buffalo Law School (Nov. 28, 2011)(on file with author).

[55] Harry K. Schwartz, *State Tax Credits for Historic Preservation*, National Trust for Historic Preservation (May 20, 2011), www.preservationnation.org/issues/rehabilitation-tax-credits/additional-resources/state_tax_credits-chart-5-20-2011-2.pdf.

Credit Act" is introduced with the finding that "historic preservation tax credits have proven to be economic drivers that result in significant job creation and growth while successfully preserving historic buildings across the state."[56] This purpose places the economic and social impacts of historic preservation before the aesthetic motivations, reflecting the impact Delaware policies have on social justice issues. Delaware's tax credit for residential rehabilitation is among the highest in the nation, allowing a thirty percent credit for rehabilitation of owner-occupied structures.[57] Significantly, Delaware also provides an additional ten percent credit for rehabilitation of homes that are either rental or owner-occupied "low-income housing," leading to a forty percent credit for these homes.[58]

In the past, Delaware had not required a minimum investment to trigger the credit, but now requires an investment of at least $5,000 for owner-occupied historic properties.[59] When paired with the forty percent credit for low-income households, the $5,000 threshold becomes much more accessible to urban poor than New York's, which only credits twenty percent. Delaware's law is also much more comprehensible than New York's, as it lays out the definitions of key terms such as "certified historic property," "certified rehabilitation," and "qualified expenditure" in a definitions section.[60] Further, Delaware explicitly permits "any person…[to] transfer, sell, or assign any unused credits."[61] This is significant, because any credit allowed that exceeds a homeowner's state income tax liability can then be transfer or sold, providing an opportunity to receive instant payment upon completion of the project. This option

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[56] DEL. CODE ANN. TIT. 30 § 1811(a) (West 2004).
[57] *Id.* § 1813(a)(2).
[58] *Id.* § 1813(f).
[59] Harry K. Schwartz, *State Tax Credits for Historic Preservation*, SM056 A.L.I.-A.B.A. 1035 (2007); DEL. CODE ANN. TIT. 30 § 1812(16)(b) (West 2004).
[60] *Id.* § 1812.
[61] *Id.* § 1814(a).

is not available in New York, if the homeowner's gross income for the year in which the credit is taken exceeds $60,000.[62] Finally, it should be noted that Delaware's program is subject to an overall cap of $5,000,000, which limits all awards state-wide under the program.[63]

b. Rhode Island

In its declaration of purpose, the Rhode Island "Historic Homeownership Assistance Act" states that "preservation of Rhode Island's historic residences enhances an understanding of the state's heritage, improves property values, fosters civic beauty, and promotes public education, pleasure, and welfare."[64] Rhode Island provides a twenty percent credit for "certified maintenance or rehabilitation costs."[65] Under regulations promulgated by the Rhode Island Historical Preservation & Heritage Commission, the tax credit is triggered by a minimum maintenance and rehabilitation expenditure of $2,000.[66] In June 2010, Rhode Island's General Assembly suspended the Historic Homeownership Assistance Act after two decades of operation.[67] The Commission stated that since the program's inception in 1989, 1,409 projects had been approved to preserve historic homes, representing private investment of $24.8 million.[68] Studies have found that each dollar of state funds that Rhode Island dedicated to historic preservation leveraged $5.47 in private investment, while at the same time, revitalizing neighborhoods, expanding the state's tax base, and creating new jobs and urban vitality.[69] Despite the program's suspension resulting from state economic issues, Rhode Island's Historic

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[62] N.Y. TAX LAW § 606(pp)(2)(A)-(B)(McKinney 2006).
[63] DEL. CODE ANN. TIT. 30 § 1816(a) (West 2004).
[64] R. I. GEN. LAWS ANN. § 44-33.1-1 (West 2000).
[65] *Id.* § 44-33.1-3.
[66] R.I. CODE R. § 34-1-1:IV (West 2001).
[67] *Tax Credits & Loans*, State of Rhode Island Historical Preservation & Heritage Commission (2011), www.rihphc.state.ri.us/credits/homeowner.php.
[68] *Id.*
[69] Howell, *supra* note 30, at 553-54.

Homeownership Assistance Act still stands as a model for a successful rehabilitation tax credit, offering a substantial credit, with a low expenditure threshold.

c. Michigan

Michigan offered a tax credit very similar to New York's, but with the allowance of a twenty-five percent tax credit, offering a greater financial incentive for homeowners to rehabilitate their homes.[70] Michigan's program also differed from New York's in that the minimum required investment was ten percent of the property's assessed value, not a flat expenditure threshold of $5,000.[71] This allowed for easier utilization of the program by urban residents whose homes had an assessed value under $50,000, as the threshold was proportionately lowered to more closely correlate to the value of the home.[72] Michigan underwent a severe budget crisis in 2011, which resulted in the suspension of all state tax credit programs, including the Owner-Occupied Historic Rehabilitation Tax Credit on May 25, 2011.[73] A Michigan Historic Preservation Network Study in 2006 found that between 2001 and 2005, private investment resulting from the tax credit increased economic activity in Michigan by over $902 million, creating more than 22,000 jobs.[74] In light of this impressive impact on Michigan's economy, its Owner-Occupied Historic Rehabilitation Tax Credit stands as a model for other states in a position to use historic tax credits as a catalyst for economic development.

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[70] MICH. COMP. LAWS ANN. § 206-266(2) (West 2003).

[71] Michigan uses the qualification and certification procedures put in place for the federal rehabilitation tax credit, which allows a twenty percent credit, but only for income-producing properties, not owner-occupied residential structures. *See* 26 U.S.C. § 47(a)(2) (2006).

[72] *See* Scott M. Grammer, *Navigating Michigan's Historic Preservation Rehabilitation Tax Credits*, 89 MICH. B.J. 44 (2010).

[73] Melissa Milton-Pung, *Requiem for Michigan's Historic Tax Credits*, PreservationNation: National Trust for Historic Preservation (Jun. 9, 2011), blog.preservationnation.org/2011/06/09/requiem-for-michigan's-historic-tax-credits.

[74] *Id.*

d. Ohio

Ohio's "Historic Building Rehabilitation Credit" offers a twenty-five percent tax credit on qualified rehabilitation expenditures, subject to approval by the Ohio Department of Development, which analyzes the proposed rehabilitation to ensure that the work will result in a net gain in state and local taxes.[75] Since the criteria for approval of the rehabilitation work is evidence that the rehabilitation will increase the home's value, this review process requires much less of a showing on the part of the homeowner and is much less burdensome than New York's.[76] Also, Ohio has put in place an aggregate cap of $120 million for all projects.[77]

VI. Recommendations for New York State's Program

a. Policy Changes

New York State's Historic Homeownership Tax Credit is an excellent tool to achieve extremely important environmental, economic, and social objectives, but it needs to be amended to better address the environmental injustices that plague Buffalo and urban centers throughout New York. Firstly, state government should consider adopting an alternative method to the tax credit system, such as a grant program that would subsidize the cost of rehabilitation up front. Secondly, New York should lower the minimum investment required to trigger the tax credit. Finally, the state should reconsider its procedure requiring three separate certifications for a project to qualify.

i. Shift from Tax Credit to Grant Program

A major hurdle that homeowners wishing to rehabilitate their homes must cross is the fact that they are forced to fund the rehabilitation costs up front and then wait for reimbursement

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[75] OHIO REV. CODE ANN. § 5733.47(B)(Uncodified).
[76] *See* Schwartz, *supra* note 60.
[77] *Id.*

either in the form of a tax return or tax credits carried forward over any amount of years in the future. If the state used a grant program to provide funds to the owner of a qualified home planning qualified rehabilitation, then it would be much more feasible for low-income homeowners short on cash-on-hand to be able to afford the material and labor costs associated with rehabilitation.

Another alternative is allowing qualified rehabilitation projects to be completed in phases over several tax years. Homeowners could then receive tax refunds each year and apply those funds to the ongoing rehabilitation project.[78] This practice would allow a greater number of poorer homeowners to complete long-running rehabilitation projects that might not be feasible if the refund was collected after the project's completion. Yet another alternative is the possibility of implementing a property assessment freeze or property tax exemption, to provide further financial relief.[79] For example, South Carolina provides advantageous property assessment for rehabilitated historic properties, and Oregon provides an assessment freeze for fifteen years following rehabilitation.[80]

ii. Lower Minimum Investment

One of the only negative impacts of historic preservation is the fear of gentrification of low-income urban communities. Some critics of preservation fear that the historic preservation movement, along with the tax incentives, will produce a "renaissance of new investment" by a middle class returning to depressed urban areas.[81] The middle class will be attracted to these

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[78] Kelly Merrifield, *The Potential Benefits of a Federal Historic Homeowners' Tax Credit,* 39 NO. 3 REAL ESTATE REVIEW JOURNAL ART 3 (2010).
[79] Julia H. Miller, *A Layperson's Guide to Historic Preservation Law: A Survey of Federal, State, and Local Laws Governing Historic Resource Protection*, SM056 A.L.I.-A.B.A. 1 (2007).
[80] S.C. CODE ANN. §§ 4-9-195, 5-21-140 (West 1976); OR. REV. STAT. § 358.475 (West 2009); 2 Rathkopf's The Law of Zoning and Planning § 19.52 (4th ed. 2011).
[81] Howell, *supra* note 30, at 558.

urban communities for convenient commutes to downtown areas, as well as the cultural and entertainment opportunities presented by thriving urban centers. A possible byproduct of this middle class population shift is removal of low-income residents from their traditional communities.[82]

This side effect can be controlled if residential historic preservation is made more affordable by allowing the Historic Homeownership Rehabilitation Tax Credit to be granted with a lower minimum investment. As mentioned earlier, New York requires that the homeowner invest a minimum of $5,000 in the rehabilitation project.[83] By amending the definition of "substantially rehabilitated" in the tax credit statute to encompass projects costing homeowners less than $5,000, the program will be opened up to poorer residents who only have the ability to invest smaller amounts into their historic homes. Rhode Island saw a great deal of success with its program that required a minimum investment of only $2,000.[84]

iii. Less Burdensome Certification Procedure

Under New York's current tax credit program, homeowners must apply for three separate certifications during the course of the planning and construction of their rehabilitation project.[85] While certification is important, to ensure both that the home qualifies for the tax credit and that the work is completed satisfactorily and without comprising the home's historic character, three separate certifications is extremely burdensome, especially on a homeowner with little financial resources. Also, an Office of Parks, Recreation, and Historic Preservation staff member located in Waterford, NY, hours away from Buffalo must approve all certification applications. The staff member has thirty days to review the plans for initial certification, and then the homeowner

[82] *Id.* at 558-59.
[83] N.Y. TAX LAW § 606(pp)(5)(B)(McKinney 2006).
[84] *See* R.I. CODE. R. § 34-1-1:IV (West 2001).
[85] Id. § 606(pp)(4)(B).

must send photographs of the completed construction, along with another completed application to receive final certification.[86] Even if the state views the three-step certification process as absolutely necessary to achieve the objectives of historic preservation and ensure that only qualified homes are only receiving qualified rehabilitation, then the Office of Parks, Recreation and Historic Preservation should still increase its public outreach to provide guidance and make this application process less intimidating for homeowners.[87]

b. Public Education

Perhaps equally as important as policy changes for increasing the use of the Historic Homeownership Tax Credit among poorer urban populations is increased public education on the program, its qualifications, and its benefits. As it stands, the tax credit applies to a very narrow range of rehabilitation activities, on a very narrow range of homes, all subject to three required certifications by professionals. If homeowners are even aware of the program, the definitions and exclusions, as well as the required certifications, can be very confusing.[88] Community workshops, informational sessions, and literature could be the sparks that get homeowners to

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[86] Email from Andrea Rebeck, Preservation Specialist, Preservation Buffalo Niagara to Robert Grimaldi, Law Student, State University of New York at Buffalo Law School (Nov. 23, 2011)(on file with author).

[87] Kelly Merrifield, *The Potential Benefits of a Federal Historic Homeowners' Tax Credit*, 39 REAL ESTATE REV. J. 3 (2010).

[88] In preparation for this project, I first approached a local environmental law attorney, who informed me that he had not assisted any clients with the homeowners' tax credit. He referenced me to a prominent Buffalo tax attorney, who specializes in New York state tax credits. When I reached out to this attorney, he was unable to answer any of my questions about the program, explaining to me that the homeownership tax credit was designed for use by homeowners without legal assistance. I also reached out to a local contractor, who has done a significant amount of historic preservation work, who described the New York state tax credits as "difficult to navigate" and "not worth the effort." I even contacted my landlord, since I live in the upper apartment of a home built in the 1920s in Hamlin Park, a designated historic district. When I asked my landlord if she used a historic rehabilitation tax credit in 2010 and 2011 when she replaced the roof and repainted the wood siding on the exterior of our home, she said she knew very little about the program and heard it was not worth the hassle.

save for and begin work on these projects. This is certainly a good first step, but more aggressive actions should be taken immediately to ensure that all residents of historic districts in Buffalo are aware of their eligibility for the tax credit and informed as to the procedure they must follow.

If SHPO worked alongside other state agencies or had more of a regional presence in areas such as Buffalo, for the purpose of directing citizens to professionals qualified to certify their work plans, the process would be much more accessible. Currently, the only way to receive information on the tax credit, outside of legal research, is through SHPO's website. While this is an effective method to reach a wide audience, it completely misses those homeowners who lack internet access, or the many more who are unfamiliar with SHPO and its programs. Community workshops and distribution of information will at least broach the topic, and provide all-important awareness to homeowners who may be able to take advantage of the tax credit. Once SHPO takes this step, local environmental, affordable-housing, and preservation groups can fill in the gaps left by the introductory materials, to further advise homeowners on the qualifications of the credit, and where they can get their plans certified.

Not-for-profit groups such as Preservation Buffalo Niagara have taken the lead to hold workshops, open to the public, to explain the tax credit program.[89] These workshops were held within targeted neighborhoods that are listed as historic districts, making surrounding homeowners eligible for the tax credit.[90] Considering Buffalo's ten historic districts, door-to-door canvassing is perhaps the most effective method for ensuring that all eligible homeowners

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[89] *Preservation Tax Credit Program to Be Explained in Allentown*, Buffalo Rising (Sept. 17, 2010), www.buffalorising.com/2010/09/preservation-tax-credit-program-to-be-explained-in-allentown.hmtl; *Two Preservation Tax Credit Workshops Scheduled This Week*, Buffalo Rising (Apr. 18, 2011), www.buffalorising.com/2011/04/two-preservation-tax-workshops-scheduled this week.html.

[90] *Id.*

are aware of the tax credit and are provided with information on the application and certification process. This step must be taken soon, as the process from planning the rehabilitation through completing construction and receipt of final certification is time-consuming and the tax credit program only currently operates through the end of 2014.

VII. Conclusion

Historic preservation is not only a means of increasing the aesthetic and cultural quality of a community, but also an essential tool for curing the impacts of environmental hazards on the poor and reversing the trend of flight from urban areas. New York's residential historic preservation is incentivized through the Historic Homeownership Rehabilitation Tax Credit, which has not been widely used by homeowners in Buffalo's historic districts. Neighboring states have seen wide success in their residential historic preservation programs through policy choices conferring greater financial returns to homeowners, making the process less burdensome and more accessible, and educating the public on the benefits available and the relative ease of the application and certification process. If these changes are integrated into New York's program, with a great deal of emphasis on increased public education on the availability of the tax credit and assistance throughout the process, New York's urban centers will have an effective weapon against the grave harms presented by economic ills and environmental injustice.