



VIRGINIA DEPARTMENT OF HISTORIC RESOURCES

Historic Preservation Easement Program

POLICY #1

Mission, Purpose, and Legal Authority of Easement Program

The mission of the Easement Program is to ensure the preservation—in perpetuity—of the historic landmarks that immeasurably enhance the quality of our lives and the character of our Commonwealth

The easement program is the Commonwealth of Virginia's most effective tool for the protection of diverse historic landmarks at minimal cost to the taxpayers. The Commonwealth's long-standing policy is to confirm the importance of historic resources and to support their private stewardship. The easement program identifies important landmarks and encourages their voluntary preservation in private ownership. It enables owners to ensure the permanent preservation of significant historic, architectural, archaeological, or cultural properties.

In addition to this support of private stewardship of historic properties, the easement program protects the Commonwealth's investment in historic properties that receive state grants or other public funding. By requiring that easements be placed on properties that receive a certain threshold level of public funding, the Commonwealth ensures that the public's investment in historic resources will not be compromised.

The legal authority for the Department of Historic Resources' Historic Preservation Easement Program is derived from the following sources:

CONSTITUTIONAL AUTHORITY:

CONSTITUTION OF VIRGINIA, Article XI:

Section 1. Natural resources and historical sites of the Commonwealth.

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

Section 2. Conservation and development of natural resources and historical sites.

In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations. Notwithstanding the time limitations of the provisions of Article X, Section 7, of this Constitution, the Commonwealth may participate for any period of years in the cost of projects which shall be the subject of a joint undertaking between the Commonwealth and any agency of the United States or of other states.

LEGISLATIVE AUTHORITY

Va. Code §10.1-2204: Duties of the Board of Historic Resources include “Acquire by purchase or gift designated landmarks and sites, or easements or interests therein.”

Va Code §10.1-1701, Open Space Land Act: “To carry out the purposes of this chapter, any public body may (i) acquire by purchase, gift, devise, bequest, grant or otherwise title to or any interests or rights of not less than five years' duration in real property that will provide a means for the preservation or provision of open-space land and (ii) designate any real property in which it has an interest of not less than five years' duration to be retained and used for the preservation and provision of open-space land. Any such interest may also be perpetual.”

Va Code §10.1-1700: “Open-space land” means any land which is provided or preserved for (i) park or recreational purposes, (ii) conservation of land or other natural resources, (iii) historic or scenic purposes, (iv) assisting in the shaping of the character, direction, and timing of community development, or (v) wetlands as defined in § [28.2-1300](#).



VIRGINIA DEPARTMENT OF HISTORIC RESOURCES

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POLICY #2

Acceptance of Easements

By placing a property under easement the Commonwealth has determined that the historic character and the public benefit added by protecting the property warrant its protection—in roughly its current form and condition—in perpetuity. Holding an easement is a costly and time-consuming venture.

While many properties are historically significant, an easement places permanent restrictions on property, and should therefore be used to protect only those resources which are of enduring significance. An easement imposes on the Commonwealth the responsibility to monitor and enforce the terms of the easement, and creates a permanent relationship between the Commonwealth and a property's current and future owners. It is the policy of the Board and the Department to accept only easements of perpetual duration.

It is the policy of the Board and the Department not to accept easements which conflict with other known interests of the Commonwealth, including public works projects, except under very unusual circumstances which would otherwise result in loss of the resource or degradation of the characteristics for which the property is listed in the Virginia Landmarks Register (VLR), such that it would be removed from the VLR.

Offer of an easement is first considered by the staff of the Department. In formulating its recommendation to the Board, the staff will evaluate a number of factors including:

1. The level of historic and cultural significance of the property, including its status in the VLR.
2. The degree to which the public has access to the resources that are protected by the easement. To some extent, photos of the property and access provided for research can constitute public access.
3. The ability of the Department to monitor the features of the property that contribute to the public benefit of the citizens of the Commonwealth. The policy of the Department is to consider the range of public interests in the property

(historic, open space, ecological) and work with other state agencies to develop a plan that best serves that interest.

4. The complexity of conservation issues. The Department will take into consideration features that are vulnerable to deterioration or will otherwise require a high level of monitoring by DHR staff.
5. The Department will consider the likelihood of the property being able to remain economically viable if placed under easement.
6. The degree to which other state goals and the mission of the Department are met.
7. The Department will consider whether proposed easement properties are adjacent to other protected properties.
8. The degree to which property is an intact set of features or a complex of inter-related features.
9. The Department will also consider negative factors, such as any work that appears necessary to stabilize or rehabilitate the property.

The Easement Acceptance Committee may use worksheets or other guidance forms. Although these worksheets or guidance forms may assign numerical designations to various factors, these ratings do not represent an official eligibility score. They merely assist staff in evaluating diverse factors when formulating recommendations for the Board's consideration. All of the relevant facts and circumstances will determine whether an easement offer is accepted or rejected, regardless of the numerical "score" reflected on the worksheet. Easement Staff will present the Board with the recommendation of the Easement Acceptance Committee to accept or reject an offer of easement.

Easement staff will apprise the property owner of the Board's decision in writing.



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POLICY #3

Monitoring and Inspections of Easement Properties

Once an easement has been acquired, the Department must maintain regular contact with the property owner and inspect the property on a regular basis to ensure that the features of the property that are subject to the easement are maintained and that the conservation value of the property is preserved.

The Department monitors each easement property to ensure compliance with the terms of the easement. Monitoring is conducted through official correspondence, general owner contact, inspections, and other means necessary. In general, the Department's goal is to maintain regular contact with property owners and conduct a full physical inspection at once a year or more often if necessary.

The Department also provides technical assistance and information to property owners, to assist in the appropriate treatment of historic resources and in an effort to foster an ongoing partnership. This contact may be in the form of newsletters, site visits, or other forms and questionnaires to facilitate the sharing of information between the Department and the property owner.

Property owners will be notified in writing by staff of a proposed inspection time and date, and will be encouraged to be present. Staff will work to arrange an inspection time and date that is convenient for the property owner.

The full inspection will cover all areas subject to the easement, and will be fully documented on the inspection form. Photographs (digital or film) will be taken to record the property at the time of inspection, and to illustrate any conditions that may require follow-up by easement staff. A report of the inspection will be incorporated into the easement file.

Property owners will be informed in writing by easement staff of the results of the inspection, and will be provided with a copy of the inspection form and any relevant photographs.

Solid baseline documentation in compliance with Treas. Reg. Section 1.170A-14(g)(5)(i) will be the basis for all inspections following recordation of an easement. Every future

change should be measured against the baseline documentation. See also Policy #4, *Documentation of Easement Properties*.

For easements accepted after December 31, 2008, an inspection worksheet that is tailored to the specific property will be developed at the same time that the baseline documentation is being developed. This form will be used for all subsequent inspections and will facilitate inspections by different staff members not as familiar with the property. The form will include the following:

- The features to be inspected should be consistent with those identified in the baseline documentation. Character-defining features and structural elements that require cautious treatment or are vulnerable to deterioration should be noted.
- The approximate age or life-expectancy of features that may require updating. For example, if non-historic gutters are known to have been installed 15 years ago, it will be helpful to know that within the next 5 to 10 years they may require replacement.
- Features of the property that are known to be non-historic will be noted.
- Areas that must be photo-documented during an inspection will be identified. At a minimum, each elevation of a structure should be photographed in addition to any areas of concern.
- Public access will be noted on the form. The staff member performing the inspection will record information collected from the property owner regarding any access that the public has had since the previous site visit.
- The effect of minor changes to the property will be noted. This includes, but is not limited to, vegetation that may need attention soon but not immediately, encroachment of adjacent development, or erosion.

In the case of easements accepted before December 31, 2008, revised inspection forms will be developed at the time of the next scheduled inspection. In cases where the baseline documentation in the easement file is limited, the staff member conducting the inspection will prepare a "Present Condition Report" to be used from that point forward.

An effort will also be made to update the records maintained by the department with regard to potential archaeological resources on easement properties.

A report on the inspection will be provided to the property owner within 30 days of the inspection. Anything identified during the inspection that is considered to be a violation of the terms of the easement will generally be addressed by staff within seven (7) business days (see also Policy #7, Violations). This timeframe may vary depending on the nature of the information available to staff. In cases where remedial work is needed,

staff will set timeframes for the owner to complete such work. Timeframes for additional inspections will be established as necessary.



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POLICY #4

Documentation of Easement Properties

The baseline documentation for each property is evidence of the condition of the features and conservation values that are the subject of the easement. That is, the features that make the property worthy of protection in perpetuity must be recorded as part of the permanent file for the property so that its condition can be monitored over time.

As new easements are negotiated, staff will compile information on the history and significance of the property from various sources including the National Register of Historic Places, the archives of the Department, and the property owner.

In addition to the existing materials, other information will be collected as part of the easement process. Plat maps, topographic maps, and other information available will be collected, and detailed photographic documentation will be undertaken. Floor plans, insofar as they are available, will be included. If these are not available, staff will prepare sketches of floor plans, identifying significant features and to assist with the identification of features in photographs (photo point maps). Photographs (head-on) of each elevation and each feature identified as character-defining in nomination, and important non-historic features will be taken. The location from which the photos were taken will be noted on a plan. Natural features, to the extent that they contribute to the overall character and feel of the property should be photographed as well. All features of the property that are particularly vulnerable to deterioration will be documented.

The baseline documentation will be collected following the Board of Historic Resources meeting where the property is considered and as close as possible to the date that the easement is expected to be recorded so that the condition of the property at the time the easement is recorded is reflected in the baseline documentation. Even in cases where the existing property file located at DHR is relatively complete, photographs documenting the condition at the time of donation will be taken.

The property owner must acknowledge the accuracy and completeness of the baseline documentation by signing the cover sheet and returning it to DHR.

For all existing easements, the staff will examine the files prior to conducting a regularly scheduled easement inspection to determine the adequacy of the baseline documentation.

In cases where the baseline documentation is found to be deficient, a Present Condition Report will be prepared during the site visit. This report will be provided to and signed by the property owner and serve as baseline documentation from that point forward.



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POLICY #5

Review of Applications for Work on Easement Properties

While the placement of an historic property under easement is generally with the understanding that the historic character should not be altered, the DHR recognizes that there is a need for balance between maintaining historic preservation values and the continued use of an historic property. This dynamic balance requires careful consideration of any proposal to alter a property—including the review of restoration work. In addition, there are instances where maintenance and other work is necessary to maintain the existing condition of the property.

It should be noted that each easement is drafted with specific reserved rights and restrictions, and that some easements may allow or disallow certain alterations. In some cases, work described herein as minor may require review and approval. This policy is meant to provide general guidance and does not apply across all easement documents, projects, or properties.

In order to guide a property owner in understanding the type of work that can and cannot be conducted without prior approval, the Department has developed a list of examples of major and minor work (attached), unless otherwise specified in the easement. Work defined as minor can be conducted without prior approval by the Department. In cases where work defined as major is to be performed, the request for approval, as required by the terms of the easement, shall be submitted to the Department for consideration by staff.

The Department shall strive to respond to requests for approval within 30 days of receipt of a complete application, unless otherwise specified in the easement. A complete application should include: a letter from the property owner, architect, architectural historian, or other expert summarizing the work that is proposed and why it is necessary; plans, schematic drawings, and other design documents developed for the project; photographs of the property, specifically existing conditions that are to be addressed and historic fabric that would be affected by the proposed work; and any other information necessary to understand the proposal.

Easement staff may contact the owner, architect, architectural historian, etc. to schedule a site visit or to request additional information required by the Department in making its decision. Internal procedures for regional office involvement will be followed in the processing of requests for approval.

Requests for approval shall be considered by the staff or the Treatment Committee of the Department, depending on complexity, and will be evaluated for consistency with the terms of the easement and according to the Secretary of the Interior's Standards for the Treatment of Historic Properties and other guidance documents and historic preservation principles and values. Upon the recommendation of the Treatment Committee, the request for approval may be heard by the Board of Historic Resources before a final response is issued. Requests for approval shall not be unreasonably withheld, unless the request is not consistent with the terms of the easement.

Requests for approval of work involving ground disturbing activities will further be considered by the Easement Program Archaeologist. Upon request by the Easement Program Archaeologist, the Archaeological Evaluation Team of the Department will also consider projects involving ground disturbance in order to recommend an appropriate course of action.

All letters approving work to be performed on an easement property will include a sunset clause, or a timeframe within which the work must be completed. If the work is not done within the specified timeframe, the property owner must seek new approvals from DHR. Prior approval of work shall not be transferable to any new property owner.

Upon completion of work on an easement property, the baseline documentation must be updated. The inspection form must also be updated and all updates should be provided to the property owner.

Examples of Major and Minor Alterations

Alterations of a minor nature generally do not require review by the Department of Historic Resources. Minor alterations are normally considered to be ordinary maintenance and repair.

This list is not intended to be comprehensive; it is only a sampling of some of the more common types of alterations which may be contemplated by property owners.

PAINT

Minor – Exterior or interior hand scraping and repainting of painted non-decorative and non-significant surfaces as part of periodic maintenance.

Major – Painting or fully stripping decorative surfaces or distinctive stylistic features including murals, stenciling, wallpaper, ornamental woodwork, stone, decorative or significant original plaster.

WINDOWS AND DOORS

Minor – Regular maintenance including caulking, painting, and necessary reglazing. Repair or in-kind replacement of existing individual decayed window parts.

Major – Wholesale replacement of units, change in fenestration or materials, alteration of profile or setback of windows. The addition of storm windows is also considered a major change, however with review is it generally acceptable.

EXTERIOR

Minor – Spot repair of existing cladding and roofing including in-kind replacement of clapboarding, shingles, slates, and in-kind replacement in-kind of porch elements.

Major – Large-scale repair or replacement of cladding or roofing. Change involving inappropriate removal or addition of materials or building elements (i.e. removal of chimneys or cornice detailing or installation of architectural detail which does not have a historical basis); altering or demolishing building additions, **spot repointing of masonry**. Structural stabilization of the property is also considered to be a major alteration.

LANDSCAPE/OUTBUILDINGS

Minor – Routine maintenance of outbuildings and landscape including lawn mowing, pruning, gardening, and repair.

Major – Moving or subdividing buildings or property, altering of property, altering or removing significant landscape features such as gardens, view sheds, walks, plantings, ground disturbance affecting archaeological resources.

HEATING/AIR CONDITIONING/ELECTRICAL/PLUMBING SYSTEMS

Minor – Repair of existing systems.

Major – Installing or upgrading systems which will result in major appearance changes (i.e. dropped ceilings, disfigured walls or floors, exposed wiring, ducts, and piping), the removal of substantial quantities of original plaster or other materials in the course of construction.

Changes classified as major alterations are not necessarily unacceptable. Under the terms of the easement such changes must be reviewed by the DHR and their impact on the historic integrity of the resource assessed.

It is the responsibility of the property owner to notify the DHR in writing when any major alterations are contemplated. Substantial alterations may necessitate review of plans and specifications.

DHR staff will work with property owners to provide technical assistance in the case of minor alterations and will use newsletters and site visits to inform property owners about minor and major alterations.

The intent of the easement is to enable the DHR to review proposed alterations and assess their impact on the integrity of the structure, not to preclude future change. DHR staff will attempt to work with property owners to develop mutually satisfactory solutions, which are in the best interests of the property.



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POLICY #6

Easement Amendments

It is the policy of the Board of Historic Resources that every easement be carefully and thoughtfully negotiated, and that the terms of each easement reflect the mutual expectations and desires of both the Grantor and the Grantee. Easement documents shall be drafted with the expectation that amendment will not be necessary. To that end, Department staff members are expected to work closely with property owners, appropriate counsel, and advisors to ensure that, to the greatest extent practicable, foreseeable future circumstances are considered at the time the easement document is drafted.

Because all future events cannot be anticipated, easements may need to be amended in certain exigent circumstances. Therefore, it is the policy of the Board to allow for consideration of appropriate amendments as circumstances dictate.

An amendment should strengthen the protection afforded by the original easement to the resource(s) on the property. For example, a property owner may wish to include additional acreage or more restrictive provisions concerning new construction to the existing easement. An amendment should not compromise the historic, architectural, archaeological, open space, cultural, or other environmental resources which the easement was intended to protect.

When determined to be appropriate by the Board, an amendment may be accepted that does not affirmatively strengthen protection of the resource, but which maintains the original easement protections in place. Such an amendment is judged to be “preservation neutral” because it neither strengthens nor weakens the protections to the resource(s) established in the original easement agreement. Circumstances when a “preservation-neutral” amendment may be considered include but are not necessarily limited to:

- Boundary adjustments which result in a *de minimus* change in the protected acreage;

- Changes in the location, configuration, or size of permitted subdivision parcels which do not result in expanded development rights, new construction closer to the manor house or other primary resource(s) than would otherwise be permitted, or other significant diminution in the protection afforded by the original easement; and
- New subdivision rights which do not result in expanded development rights or new construction greater than that which would otherwise be permitted.

“Technical” amendments may be executed to address:

- Errors or omissions in the original easement, or to make other technical adjustments to the easement language;
- Changes which are understood by all parties, based on clear evidence, to be consistent with the original intent of the Grantor and the Grantee.
- Changes that have occurred by act of nature that affect the physical nature of the resource and the accuracy of the easement.

Under very unusual circumstances, the Board may consider an amendment which is not preservation-neutral. Any amendment which diminishes the protection afforded to the resource is not favored, and should be considered only as a last resort to prevent the resource itself from being compromised by neglect, deterioration, inappropriate changes or other circumstances.

Adopted by the Board of Historic Resources, September 2007



VIRGINIA DEPARTMENT OF HISTORIC RESOURCES

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POLICY #7

Violations

An easement represents a permanent commitment and partnership between the Grantor and the Grantee. The Board of Historic Resources takes seriously its obligation to uphold and enforce the terms of its easements and to ensure that the resources it has been entrusted to protect are not lost through deterioration, neglect, irresponsible management, or inappropriate changes.

A violation is defined as any action or event or lack of maintenance that has caused or has the potential to cause harm to the conservation values and features of the property that are protected by the easement.

A violation that results in irreversible damage to the features of the property that are protected by the easement is classified as a Major Violation. Minor Violations result from inappropriate work or lack of proper maintenance where no permanent damage to the historic fabric or feature have been noted, with the understanding that level of violation will be elevated if the issue is not resolved. A Technical Violation results when a property owner has made alterations that are consistent with the historic character of the property but did not follow the appropriate notification and approval procedure.

In cases of a potential or known violation of the terms of an easement, or where issues of maintenance and/or repair constitute an imminent or serious threat to the integrity of the resource, the DHR will implement the procedures summarized below. If the property is subject to a co-held easement, the DHR will consult with its fellow easement holders in investigating any potential violations and enforcing the terms of the easement, or otherwise as stipulated in the easement.

When notified of a potential violation by a third party, the easement staff will make every attempt to contact the property owner by telephone immediately to discuss the situation. Based on the owner contact and the nature of the potential violation, staff will arrange for a site visit, if needed, to assist in determining the action necessary to correct the violation. Easement staff or regional office staff shall make a site visit to the property within seven (7) business days if it has been determined that a major violation has occurred. The response to minor or technical violations will be determined on a case-by-case basis.

If the DHR learns of a violation during the course of a site visit or other form of visual inspection, the staff member will document the violation in a report. Reports on minor and technical violations will be directed to the Incentives Programs Manager and major violations will be reported to the Director of the Agency. When a violation has occurred, a letter outlining the nature of violation and recommendations to correct the violation will be sent to the property owner by certified mail (requesting return receipt).

The exact nature of the recommendation made by the Department will vary depending on the nature and severity of the violation, the willingness of the property owner to address the situation in an appropriate manner, and other factors.

When a minor violation has occurred, the staff will work with the property owner to remedy the situation. In the case of a technical violation, the staff will also work closely with the property owner to ensure that future work be done only after proper notification of the department.

If, after consultation, a violation is not corrected within a reasonable time frame specified by DHR or if no response is received from the property owner, the violation will be brought to the attention of the Chairman of the Board of Historic Resources and the Office of the Attorney General. Major violations will be reported to the Board and to the Office of the Attorney General immediately. DHR, through the Office of the Attorney General, will seek all available legal remedies to correct the situation, including, but not limited to liens on the property and legal remedies.



VIRGINIA DEPARTMENT OF HISTORIC RESOURCES

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POLICY #8

Easement Program Recordkeeping

The Department of Historic Resources takes seriously its role as an easement holding organization and strives to meet or exceed all recommendations and guidelines for such organizations. In doing so, the Easement Program staff will compile information in compliance with the 2006 revisions to the Internal Revenue Service tax code (as set forth in the Pension Protection Act of 2006) and will continue to monitor easement data to identify trends and areas where improvements can be made to the delivery of services.

1. number of easements held at beginning of year, acreage, and location
2. number of easements (and acreage) acquired (new easements)
3. number of easements modified, sold, transferred, released, or terminated (and acreage)
4. number of easements in following categories:
 - a. buildings and structures
 - b. easements that encumber a golf course or portions of a golf course
 - c. Easements within or adjacent to residential developments or housing subdivisions, including easements related to the development of property.
 - d. Easements that were acquired in a transaction described under "purchase of real property from charitable organizations" in IRS Notice 2004-41 (properties purchased and then transferred).
5. number of easements and acreage monitored by physical inspection or other means.
6. number of archaeological sites and resources identified on easement properties.
7. total staff hours and list of expenses incurred monitoring and enforcing
8. all easements on buildings and structures acquired after August 16, 2006, and show if each easement meets the requirements of section 170(h)(4)(B). These are properties that are listed in the National Register or are contributing features of a National Register property).
9. number and nature of violations (Technical, Minor, and Major)

The Department will also ensure the safety and security of the permanent files associated with easement properties. The permanent files include copies of the baseline documentation, a copy of the recorded deed of easement, and copies of correspondence, photos, and inspections reports from the property.



VIRGINIA DEPARTMENT OF HISTORIC RESOURCES

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POLICY #9

Easement Requirements

As an easement holding organization, the Department of Historic Resources will work with property owners and their legal counsel to develop easement language that serves to protect the property subject to the easement and provide helpful guidance.

The Department will continue to update the standard language to be included in all easements (template language) as necessary to reflect changes in federal and state law and preservation procedures and practices. It is the policy of the Department to develop language for each easement that will be both flexible and strong enough to remain in force in perpetuity.

In addition to stipulations already included in the templates used by DHR, easements accepted after December 31, 2008 will include the following stipulations, as appropriate.

- The Department will require that the donors of easements ensure that the property subject to the easement is adequately insured against loss from the perils commonly insured under standard fire and extended coverage policies and comprehensive general liability insurance.
- Each easement will include a stipulation regarding extinguishment.
- Consistent with the Internal Revenue Code requirements enacted with the Pension Protection Act of 2006, easements will stipulate that the height of easement properties may not be altered.
- Any restrictions on a property that are already in force (e.g. zoning, review by Architectural Review Board) will be identified in an easement property.
- The Department will require that easements clearly state that the staff of the Department will be granted access to properties under easement, upon reasonable notification, in order to conduct an inspection of the features of the property that are protected by the easement.

- Easements will require that an owner of an easement property must notify the Department when the property is for sale
- Easements will reference the Secretary of the Interior's Standards as the benchmark by which alterations to a property will be measured against.
- In order to derive the maximum public benefit from properties under easement, it is the policy of the Department to provide recommendations for public access in the easement document. The level of access and the type of access will be considered on a case-by-case basis.
- In cases where an easement is to be co-held by DHR and other organizations or in cases where the property is subject to other levels of review (e.g. Architectural Review Board), every attempt will be made to sub-ordinate and clearly define responsibilities in the easement.