

APPROVED MINUTES

SPECIAL MEETING of the BOARD of HISTORIC RESOURCES

**1:30 p.m. April 26th, 2016**

Department of Historic Resources, 2801 Kensington Avenue, Richmond, Virginia 23221

**Board of Historic Resources Members Present**

H. Edward “Chip” Mann, Chair

Clyde Paul Smith, Vice-Chair

Ashley Atkins-Spivey

Drew Gruber

Terri Hauser

Margaret T. Peters

**Board of Historic Resources Member Participating Remotely**

Eleanor Weston Brown

Participating from the offices of Patton, Wornom, Hatten & Diamonstein, 12350 Jefferson Avenue, Suite 300, Newport News, Virginia 23602

**Department of Historic Resources Staff Present**

Julie Langan, Director

Stephanie Williams, Deputy Director

Gillian Bearn

Wendy Musumeci

Jen Pullen

Elizabeth Tune

**Office of the Attorney General Staff Present**

Catherine Shankles

Katheryn Surface Burks

**Guests present:** Layne Cook; Peter Stephenson, Town Manager, Town of Smithfield; T. Carter Williams, Mayor, Town of Smithfield; Kathleen Kilpatrick

Chair H. Edward “Chip” Mann called the special meeting of the Board of Historic Resources (Board) to order at 1:35 p.m. and stated the purpose of the special meeting, to consider the proposal to amend and restate the easement on the Windsor Castle property in Isle of Wight County and assign the easement on the Werowocomoco property in Gloucester County to the National Park Service.

Chair Mann called the roll of the Board and noted that a quorum of the members was present.

Chair Mann asked for a motion to adopt the agenda as presented, which was made by Margaret Peters. Vice-Chair Smith seconded the motion. Chair Mann asked whether the Board had any questions, and hearing none, the Board voted unanimously to approve the agenda.

Catherine Shankles, with the Office of the Attorney General, asked that the vote be taken again by roll call to note Ms. Brown’s remote participation. Ms. Peters again made the motion to approve the agenda, which was seconded by Ms. Hauser. Chair Mann asked whether the Board had any questions, and hearing none, called for a voice vote. Board members Gruber, Atkins-Spivey, Hauser, Peters, Vice-Chair Smith, Brown, and Chair Mann voted in the affirmative and the motion passed unanimously.

Deputy Director Williams presented a resolution to amend the Bylaws of the Board of Historic Resources.

“RESOLVED, that Article VI, Section G of the Bylaws of the Board of Historic Resources is hereby amended by inserting the following language:

“Participation by a member of the Board from a remote location shall be approved unless such participation would violate this Article VI, Section G, or the provisions of FOIA. If a member's participation from a remote location is challenged, then the Board shall vote whether to allow such participation. If the Board votes to disapprove of the member's participation because such participation would violate this Article VI, Section G, such disapproval will be recorded in the minutes with specificity.”

FURTHER RESOLVED, that all other provisions of the Bylaws of the Board of Historic Resources as adopted shall remain in full force and effect, and the foregoing amendment shall be incorporated into the standing Bylaws of the Board of Historic Resources.

FURTHER RESOLVED, that any actions taken by a member of the Board prior to the approval of these resolutions that are within the authority conferred thereby are hereby ratified, confirmed, and approved.”

Chair Mann requested a motion to adopt the resolution as presented. The motion was made by Vice-chair Smith and seconded by Ms. Atkins-Spivey. Deputy Williams read the resolution again in its entirety, and hearing no questions, Chair Mann requested a voice vote. Board members Gruber, Atkin-Spivey, Vice-chair Smith, Hauser, Peters, Brown, and Chair Mann voted in the affirmative and the motion passed unanimously.

#### Loving v. Virginia Marker

Director Langan presented proposed revisions to the text for the highway marker that recognizes the *Loving v. Virginia* case. The revisions are prompted by the grandson of Mrs. Loving, who contacted the Department of Historic Resources (DHR) with his opposition, after reading the press release announcing that the marker would be erected in Caroline County. Although the grandson asked that the marker not be erected, DHR decided to continue with its manufacture and installation and to revise the text to accommodate his concerns. James Hare, Director, Division of Survey and Register, spoke with the grandson who stated that Mildred Loving was not of African American descent as stated in the marker text, but Native American. Director Langan explained that because of the 1924 Racial Integrity Act, the census did not record racial make-up beyond “white” or “colored,” and it is not possible to determine whether Mrs. Loving had African American and/or Native American heritage. Consequently, DHR could not satisfy the grandson’s concerns, but will revise the marker text so not to identify any specific racial make-up. DHR will proceed with the marker because it represents an important aspect of history.

Ms. Peters stated that the revision is correct and defensible, and discusses the decision by the U.S. Supreme Court in *Loving v. Virginia* which is an historical fact. The marker does not make any judgement on race, but addresses the Racial Integrity Act which was a significant action in 1920’s state government. She stated that the proposed revision of the text is an excellent accommodation of the grandson’s concerns. Director Langan responded that the grandson is not satisfied with DHR’s revision and intent to install the marker.

Ms. Atkins-Spivey asked whether Mr. Hare had spoken with the Chief of the Rappahannock Tribe, and if so what was her response. Director Langan responded that Mr. Hare had spoken with Chief Richardson,

who said that Mrs. Loving was not known to have any affiliation with the Rappahannock tribe. Ms. Atkins-Spivey stated for the record that based on oral history, Mrs. Loving was recognized as part Native American. Ms. Atkins-Spivey conveyed her respect for Chief Richardson's opinion, but said that it was not the only opinion that matters.

Chair Mann said that because the options provided by the Board of Vital Statistics for racial identification were limited to "white" or "colored," it strengthens the position of DHR that this information cannot be obtained and Mrs. Loving's racial make-up confirmed. Peters underscored this point by stating that there was no provision for more specific racial identification.

Director Langan made clear to the Board that the grandson, speaking on behalf of the family, did ask that the marker not be pursued. Langan recognized that this is a difficult topic, but that it is important to highlight its importance to Virginia's history.

Ms. Hauser asked where the marker would be placed, and Director Langan responded that a final location has not been determined but the hope is to place it at the county courthouse. Mr. Gruber voiced his support for this location.

Chair Mann asked for a motion to approve the proposed revised text for the Loving v. Virginia marker, which motion was made by Ms. Peters and seconded by Mr. Smith. Board members Gruber, Atkins-Spivey, Hauser, Peters, Vice-Chair Smith, Brown, and Chair Mann voted in the affirmative, and the motion passed unanimously.

Ms. Hauser addressed the chair to ask whether there is a process to communicate with family members associated with the subject of a highway marker. Director Langan said that there is such a process, but that DHR did not know of any relatives of Mrs. Loving. It was not until DHR was contacted by the grandson, that the department became aware of any relatives. Although DHR has only had contact with the grandson, he has indicated that he speaks for a group of family members. Furthermore, he was not supportive of DHR's response that the marker would address limited information on race collected by the census. Director Langan stated that there is not a way to accommodate the grandson's concerns short of not erecting the marker, and said that this is an unusual case.

### **Easement Amendment for Consideration**

#### 1. Windsor Castle, Town of Smithfield, Isle of Wight County *Proposed Amended and Restated Deed of Easement*

Ms. Bearns summarized the historic significance of the Windsor Castle property, and the protection of a portion of the property by a 2007 easement and two amendments. A 42.09-acre portion of the property, containing the historic house and outbuildings, was protected by the property owner in 2007 through an easement held by the Board. The easement addressed most of the pre-20<sup>th</sup> Century buildings, but allowed for the existing tenant house to be relocated within the easement property. A 2008 amendment to the easement protected an additional 4 acres of the larger property, and included an allowance for construction of an approximately 2500 square foot barn with fences and appurtenant structures to be constructed within the 4 acres that were the subject of the amendment. The amendment also included a non-standard provision for review of the new construction, stating that exterior details would not subject to review. Then, the easement was amended in 2010 after purchase of the entire property by the Town of Smithfield for use as a public park. The park includes walking trails that provide connectivity with other parts of Smithfield. The 2010 amendment includes provisions for new construction of amenities associated with interpretive and park use; requires that all buildings be maintained, both those existing at the time of the amendment and future new construction; restricts the use and prohibits industrial and

commercial uses; enhances the public access requirement to one day per year as the responsibility of the property owner; and includes standard administrative provisions such as the requirement for insurance.

Ms. Bearn explained that the town now has a greater understanding of its long-term use and care of the property, and has found that the 2010 amendment impedes the town's plans to use the property for public and private events, such as weddings, reunions, antique shows, festivals, and ultimately bed-and-breakfast use of the house. The commercial use provision, as the result of the 2010 amendment, precludes the use of the property for these events. The Town also has a capital improvement project, which is intended to generate revenue for rehabilitation of the main house and construction of new buildings and facilities to support the events, as well as revenue for long-term care and maintenance. The easement language does not allow for installation of temporary structures such as tents, however DHR believes that such structures can accommodate a range of uses without needing permanent buildings that have greater impact upon the property. So too, staff believes construction of the 2500 square foot barn on the 4-acre portion of the property that was the subject of the 2009 amendment is not the appropriate location, as new construction would be more visible and is not within the agricultural building context.

Conceptual plans developed by Frazier & Associates call for new construction integrated into the historic landscape; there has been no design review conducted by DHR staff for the project. Ms. Bearn reviewed a site plan which illustrates the proposed development of the property, including the location of existing and proposed new buildings, site and infrastructure improvements, and the location of tents. The 20<sup>th</sup>-Century equipment shed would be adapted as an enclosed facility to support event use. The Town also requested continuance of parking on the easement property for events occurring on the larger property.

In working with the Town through the amendment and restatement process, DHR staff was made aware of the Windsor Castle Water Company, founded in 1927 for use of a private water well on the Windsor Castle easement property to serve private inholdings within the easement property. Shares of the company are held by the property owners of the inholding parcels and use of the well is ongoing and the owners wish to maintain their rights. DHR will work with the Town to determine the relationship between the water rights and well to the easement property and confirm whether a deed was recorded for the water company, although it is likely that there was not a recorded deed evidenced by the fact that the Town was unaware of the well at the time of its purchase of the property. If no deed or lease exists, the Town will have to contact and work with the owners to have their rights recognized and protected prior to proceeding with the amended and restated easement. The conservation easement will have to state clearly that it doesn't protect water quality in order to indemnify the Board from any environmental issues related to the well.

Ms. Bearn summarized the terms and conditions of the proposed amended and restated easement:

- A. Amend commercial use restriction to exempt activities occurring within existing and permitted new buildings and structures.
- B. Amend to allow for temporary structures such as tents subject to standard easement template language.
- C. Amend to allow 2,500 sq. ft. barn to permit construction outside of 4 acre area.
- D. Eliminate reserved right to relocate the Tenant House.
- E. Require rehabilitation of the Tenant House subject to a written plan.
- F. Require capital improvement and rehabilitation projects to occur pursuant to a written plan.
- G. Subject all new construction to the standard review requirements of siting, massing, height, design and materials.
- H. Limit impervious surface coverage for all existing and permitted new buildings and structures and impervious roads, trails and parking facilities.
- I. Require full restatement to implement current easement template.

And subject to the following conditions:

1. Negotiation and execution of written management plan for rehabilitation and capital improvement projects by Town of Smithfield and DHR, on behalf of Board, to be incorporated by reference into the Amended & Restated Deed of Easement.
2. Commitment to phased rehabilitation and capital improvements as follows:
  - a. Archaeological survey prior to any and all ground disturbance or new construction.
  - b. Installation of utility services including public water and sewer and undergrounding of electrical service lines to serve existing and permitted buildings.
  - c. Stabilization and rehabilitation of historic outbuildings including smokehouse, kitchen, log corncrib, farm office and granaries.
  - d. Exterior rehabilitation of Tenant House to include new roof, repair of foundation, and repair/replacement, as necessary, of windows, siding, porches.
  - e. Repairs and rehabilitation of Main House according to prioritized conditions assessment by DHR staff to be incorporated into written management plan.
  - f. Construction of two (2) new permitted farm buildings to support permitted uses of the property including maintenance subject to prior review and approval.
3. Completion of the rehabilitation and capital improvements described in Condition #2 above prior to construction of the 2,500 sq. ft. barn and associated new outbuildings.
4. Submission of all outstanding archaeological survey/investigation reports.
5. Agreement to supplement existing archaeology reports from prior survey and investigation if necessary for project review.
6. Archaeological survey of locations of temporary structures and inclusion of restrictions limiting temporary structures to those surveyed locations.
7. Amendment shall be through full restatement to implement current easement template.
8. Restriction that no construction of new buildings or structures may begin until Amended and Restated Deed of Easement is recorded.
9. Prohibition on use of the Property to support the uneased public park portion, including language limiting restroom facilities based on maximum capacity of the building in which they are located consistent with building code and certificate of occupancy requirements and language prohibiting use of Easement Property as parking lot.
10. Subordination of existing agricultural lease, including possible amendment to resolve potential conflicts in that lease; and of any other leaseholds on the Easement Property.
11. Submission of title work by the Town of Smithfield.
12. Resolution of relationship of Windsor Castle Water Company to the Easement Property, e.g. easement, lease, recorded in land records.
13. Inclusion of disclaimer and indemnification language to protect the Board and DHR regarding the Windsor Castle Water Company's well on Easement Property.

Ms. Bearns stated that the Easement Acceptance Committee recommended approval of the proposed amendment and restatement, as it is a good opportunity to create an easement that will work for the Town. The proposal pushes the rehabilitation of the historic buildings to the forefront and one comprehensive easement document would be a great improvement for all parties that must operate under the restrictions.

Chair Mann complimented Ms. Bearns for a remarkable and thorough job to summarize the proposal. He asked the Board for questions, and hearing none, asked Mayor Williams about any issues that the Town may have. Mayor Williams stated that Ms. Bearns did an excellent job and that the Town did not have any questions or information to add.

Chair Mann asked whether there was any further discussion, and hearing none, called for a motion. Vice-chair Smith made a motion to approve the proposed amendment and restatement of the easement, with the

conditions outlined and presented by Ms. Bearns. The motion was seconded by Drew Gruber. Board members Gruber, Atkins-Spivey, Hauser, Peters, Vice-Chair Smith, Brown, and Chair Mann voted in the affirmative, and the motion passed unanimously.

Chair Mann called a recess of the meeting at 2:30 p.m.

### **Easement Assignment for Consideration**

#### **1. Werowocomoco, Gloucester County**

##### *Proposed Deed of Easement Assignment*

The meeting was re-convened at 2:34 p.m. by Chair Mann. Chair Mann stated that Ms. Atkins-Spivey would recuse herself from voting as she is a member of the Pamunkey Indian Tribe, and would be absent prior to the motion and during the voting. As a personal observation, Chair Mann thanked Director Langan and the staff of the Office of the Attorney General for their work on this very important and complicated issue, and noted that due to their efforts he felt well prepared for the discussion. He further reminded the Board that this decision is theirs alone, and while he expects no surprises, each member must be comfortable with decision that is made.

Director Langan led the presentation by thanking Catherine Shankles and Katheryn Surface Burks of the Office of the Attorney General for their help in working through the complicated issues surrounding the assignment of the easement on the Werowocomoco property to the National Park Service (NPS). Ms. Langan stated that it is the reason for the special meeting of the Board, and thanked the Board members for making themselves available for the meeting.

Director Langan explained that the when the property was protected by the easement, it was never anticipated to be federally-acquired. Several years ago, NPS began to quietly explore the possibility of acquisition, and President Obama included money two years in a row in the federal budget to support that effort. The reason for this special meeting is that negotiations between the owner of the Werowocomoco property and NPS have been fruitful, and may lead to NPS acquiring the property. It has always been known that the existing easement would be an obstacle in the eyes of the federal government. Although there is a process for federal agencies to obtain a waiver that would allow acquisition of encumbered property, Director Langan, Ms. Shankles, and NPS staff realized that a waiver was not likely to be granted by the Department of Justice (DOJ). Therefore, they had to think more creatively of how to realize this very desirable objective of getting the property into the hands of an owner who would increase public access, interpretation, and study of the property, and bring to bear their professional staff and expertise.

Ms. Shankles described the process for assigning the easement to NPS. Ms. Shankles began by summarizing the history of the easement on the property, which was recorded in 2012 between the Ripleys and the Board. The property contains approximately 58 acres, where supposedly Powhatan's house was located. DHR, in conjunction with the property owners, conducted archaeology on the property. DHR paid \$600,000 for the easement, which included \$500,000 from the Sandra Speiden Fund, \$80,000 from the Virginia Land Conservation Foundation, and \$20,000 from DHR's agency budget.

Ms. Shankles highlighted certain provisions of the easement, including a developable 5-acre build area where the property owners' house and other structures are located; a developable 2-acre build area where a single-family residence, outbuildings, drain field, and pier may be constructed; as well as a reservation for a family cemetery. NPS is on good terms with property owners for purchase of 58 acres and an additional 200 acres outside of the easement area, totaling approximately 260 acres to be purchased from the Ripleys with a life estate to be reserved by the Ripleys over a portion of the eased area, as negotiated

between NPS and the Ripleys. Once NPS and Ripleys had a basic agreement, DHR became involved in the discussion about the easement and its amendment. As written the easement is between private parties and the Board, and the provisions must be amended because they address private use of the property, which are different concerns than if NPS owned the property with the experience and knowledge to “not do certain things.” Discussions between DHR and NPS could not overcome requirements that federal government couldn’t commit to be bound by state laws, and DHR couldn’t agree to give up rights dedicated to Commonwealth under the easement. NPS stated that if couldn’t obtain necessary amendments to the easement, DOJ wouldn’t approve the waiver and NPS would not be able to purchase the property.

At this time, OAG and DHR began to discuss assignment of the easement to NPS. Assignment means that the Board will assign its interest in the easement to NPS, with no amendment of the easement by the Board. NPS, however, will amend the terms of the easement once they are holder. Ms. Shankles explained that the assignment would not change the terms of the easement, only the parties to the easement. The easement assignment would be placed in escrow until transfer of the property takes place.

Vice-chair Smith asked for clarification that the assignment of the easement would be placed in escrow, pending certain contingencies being fulfilled. Ms. Shankles confirmed that understanding, and stated that NPS has to close on the purchase of the property, which depends on finalizing the conditions of the purchase agreement. NPS has told DHR and OAG about general changes they intend to make through amendment of the easement, and their intent to enter into a Memorandum of Understanding (MOU) with DHR to address issues outside the easement for partnership and stewardship of the property. The primary contingency at this time is NPS’s acquisition of the property. The assignment would not be delivered to NPS until the property is due to close. Ms. Surface Burks noted that the deed of assignment would be returned to the OAG if the purchase of the property by NPS was not closed.

Ms. Shankles continued by explaining that the deed assignment must be completed by May 15, as required by the terms of the purchase contract, at which time it will be placed in escrow. Once NPS has closed on purchase of the property, the deed of assignment will be recorded, followed closely by recordation of an amendment of the easement by NPS, and then the recordation of the deed in the name of NPS.

Ms. Shankles outlined certain conditions that NPS has agreed to for assignment of the easement: language in the assignment that would require NPS to maintain easement area as open-space land; language that would require the easement to revert to the Board if NPS were to convey its fee-simple interest, and provision that there would be no “merger of interest.” Ms. Shankles explained the legal concepts of property rights and merger of interest, which is important to preserve the Board’s interest in the property should it be transferred out of NPS ownership. Ms. Shankles next discussed the findings of the OAG in researching the proposed assignment, and the requirement that the transaction be approved by the Governor, Department of General Services, and the OAG as stated in VAC 2.2-1150 as it is a real estate interest held by the Commonwealth.

Once NPS receives the assignment, it intends to amend the easement to recognize the reserved life estate interest of the Ripleys in the 5-acre residential area; extinguish the 2-acre residential area and allowances for new construction therein; remove allowances for new construction by the Ripleys and move the 5-acre residential area that is subject to the life estate to a location closer to the water and away from the identified archaeological sites. Vice-chair Smith asked whether the existing home site is within the 5-acre residential area, which Ms. Shankles and Director Langan both confirmed. Mr. Smith followed up by asking whether they were shifting the boundaries of the 5-acre area, which Ms. Shankles confirmed and said that the house would still be within the revised boundaries of the 5-acre area. Further, under the amendment the Ripleys would not be able to use the existing pier or have the right to maintain the existing

kennels, and NPS would have the right to construct structures and amenities appropriate for use of the property as a park. NPS may repurpose the existing buildings and residence after termination of the life estate.

Ms. Peters asked whether new construction by NPS would be subject to review according to the Secretary of the Interior's Standards. Ms. Shankles answered that NPS has to comply with the Secretary's Standards, and acknowledged that this was an area of disagreement between DHR and NPS because DHR would have the authority to review and approve work on behalf of the Board. NPS could not agree to that provision, would have to comply with all federal laws. Director Langan stated that the Board and DHR will have not authority under the easement to review work at the property, but that NPS would still be subject to review according to Section 106 of the National Historic Preservation Act. Kathleen Kilpatrick voiced her agreement that DHR, as the State Historic Preservation Office, would have an opportunity to comment on any proposed work that would have an adverse effect, which Ms. Peters said was an important consideration. Director Langan further clarified that the partnership agreement will give DHR knowledge of NPS planning for projects before they would be submitted for review under Section 106.

Vice-chair Smith asked whether there have been any burials on the property. Ms. Shankles confirmed that the Ripleys did not exercise those rights and the rights are to be relinquished.

Ms. Shankles continue to describe the easement restrictions, originally drafted for private ownership, that will be relaxed to allow for hiking trails and use of the property as a public park. Because NPS cannot agree to follow state law, the easement language will be changed to federal laws, and Ms. Shankles cited the example that NPS cannot follow the Chesapeake Bay Act but will comply with the Executive Order on Chesapeake Bay Preservation and the Clean Water Act, and other applicable federal laws and policies for management of the park. The easement provisions requiring review and approval for ground disturbance will be revised to require NPS to follow federal laws for curatorial standards and maintenance of the property, but no further changes will be made to the easement language as it pertains to treatment of the archaeological artifacts as a collection. Furthermore, NPS is bound by the Anti-Deficiency Act, which means that NPS cannot commit to spending money because they will not know whether there will be sufficient funds.

Vice-chair Smith asked whether the Commonwealth would be re-paid the \$600,000 paid for purchase of the easement on the property. Ms. Shankles confirmed the amount of the Commonwealth's investment and said that it would not be repaid.

Ms. Peters asked whether there has been any official reaction from the Pamunkey Tribe, and that it is important for the Board to have that information. Ms. Atkins-Spivey, speaking as a member of the Pamunkey Tribe, said that the Pamunkey have been involved in conversations with NPS and DHR about the proposal and that the Tribe does not have an official position on the easement assignment. From the perspective of the Tribe, it is in favor of NPS acquisition of the entire property as the integrity of the site will be conserved. Mr. Smith asked whether the 260 acres constitute the entirety of the archaeological site, and Ms. Atkins-Spivey responded that only a small amount of the property has been excavated, which identified the core of the village with the monumental architecture, ditch features, and long house. She said that native people are known to have been buried at the property, and that there could be more. The fact that NPS acquisition will mean the 200 acres surrounding the core will be positive and will maintain the integrity of the site.

Chair Mann asked about the involvement of the individual tribes, particularly the Pamunkey Tribe due to its federal recognition. Ms. Atkins-Spivey stated that Werowocomoco is a Pamunkey site, and that Powhatan was a Pamunkey man who inherited the site. But, the property is significant not only because of Powhatan; the monumental architecture and ditches revealed in the archaeological investigation were

constructed 300 years prior to Powhatan's birth, and that he moved to the site because of its importance. Chuck Hunt with the National Park Service said that NPS will consult with the other Powhatan-descendent communities, who have been involved with the site for over 10 years. However, the Pamunkey expect to develop a MOU specific to their relationship with NPS. Director Langan clarified that the Pamunkey is the only tribe the NPS has met with, and Ms. Shankles confirmed that NPS has exhibited sensitivity to all of the tribes with an interest in the property.

Ms. Shankles outlined the legal basis for the assignment, stating that OAG came to the decision that the assignment of the easement can go through and that NPS can hold the easement, subject to the requirements and conditions established by the Board, and that this decision by the Board is made specific to the facts of this transaction. OAG determined that NPS can hold the easement; although NPS is not a public body as defined under the Open Space Land Act (OSLA), but that it is legally acceptable because the OSLA was created as a mechanism for agencies of the Commonwealth to hold easements. The OSLA does not say that the agencies defined under the act are the only agencies able to hold an easement, and the federal government has its own laws and regulations to authorize their holding easements; NPS would hold the easement under their federal authority to do so. The Board may assign the easement to NPS as the OSLA talks about conveying land that has been acquired. Under Section 1704 of the OSLA, it includes conversion/diversion language pertaining to the Commonwealth's interest in land, however this transaction does not constitute conversion/diversion under the act because NPS would be holding the easement as open space land and will be using the property for educational and natural resource purposes, which are identified by OSLA. So too, if NPS were to convey the property, the new owner would have to maintain the land as open space. The easement does not prohibit assignment, and because it is the mission of the Board to preserve and promote historic resources the assignment is consistent with the mission of the Board. Ms. Shankles read the provision of the easement states that the grantee cannot transfer or convey the easement unless the restrictions of the easement are continued in perpetuity and that the holder is a qualified donee. She confirmed that NPS is a qualified holder under IRC 170(h), and that because NPS will maintain the land as open space, this assignment and amendment will not harm the overall conservation purposes of the easement and that the restrictions will be continued in perpetuity. Coupled with the MOU between DHR and NPS, the protections for the property will remain in place. Section 2.2-1150 of the Code of Virginia requires approval of the transfer of the interest out of Commonwealth ownership requires approval by the Governor and the Department of General Services. Thus, there is good authority of the Board to assign the easement.

The OAG found that conveying the Commonwealth's interest in the property to NPS does not violate the state's Tenth Amendment rights. There is no legislation that allows the Commonwealth to convey this interest to the federal government, but there is no prohibition to doing so. Because the Commonwealth, through the Board, is agreeing to assign the easement to the federal government, there is not an impingement on the rights of the Commonwealth.

Ms. Shankles discussed other concerns about the state funding used to acquire the easement. Ultimately, the decision to convey the easement to NPS is a policy issue, and the Governor and Secretary of Natural Resources are highly desirous of the transfer of the property to NPS. The fact that the property would go to NPS, and additional protection is afforded to the resources through the transfer. Chair Mann stated that the original funding by the state was an investment, and that the final cost will be much greater than the original investment. Director Langan stated that part of the reason that NPS is open to a partnership agreement is because of DHR's and the Commonwealth's initial investment and that the cost of their purchase is less because of it.

Ms. Peters asked about the sources of the \$600,000, and Director Langan explained that the funds came from the Speiden Fund and the Virginia Land Conservation Fund and confirmed that the grant sources

were dedicated to this goal. Ms. Peters followed up by asking whether there were any legal implications with the use of the funds, and Director Langan said that there are not any such restrictions.

Mr. Gruber asked about the reversion provision, and Ms. Shankles explained that it is the mechanism to ensure that the resource is protected in perpetuity. Should NPS sell the property, the easement would revert to the Board. The amendments to the easement envisioned by NPS will allow for more freedoms for the land owner because NPS is a federal conservation agency and has the expertise and experience to do things at the property that a private owner could not do. That is why OAG is comfortable with NPS as both the owner of the underlying fee of the property and as the holder of the easement. Director Langan added that if the easement were to revert to the Board, it would be more restrictive than as currently written.

Ms. Atkins-Spivey recused herself, and exited the room. As a summary, Ms. Shankles stated that the Real Estate and Land Use Section of the OAG advised DHR that it would be appropriate to recommend that the easement that is held by the Board be assigned to NPS, subject to the approvals required by Section 2.2-1150 of the Virginia Code and provided there is language in the assignment requiring NPS to maintain the easement area as open space, requiring the easement revert back to the Board upon NPS conveyance of the underlying fee, and preventing a merger of interest upon NPS acquisition of the fee. The advice provided by OAG is limited to the facts and circumstances surrounding this transaction.

Chair Mann asked for a motion to approve or disapprove the proposed assignment of the easement to NPS. Ms. Brown made the motion, which was seconded by Ms. Peters.

Ms. Hauser said that when she read Director Langan's memo to the Board, she understood that the Virginia taxpayers have a significant investment in the easement, which is being given to NPS. The question for her is what the taxpayers get in return, which is the preservation of an important piece of history. Under this assignment that piece of history is being protected with the cost of the burden shifted from the Virginia taxpayers to the federal government. With the reversionary clause, Ms. Hauser said that she can support the proposed assignment. Vice-chair Smith added that the public benefits through an additional 200 acres being preserved, which fulfills the mission of preserving these sites. Chair Mann asked about the process for approval of the final language of the assignment, and what else is needed from the Board. Ms. Shankles answered that nothing further will be asked of the Board unless the proposal radically changes. Chair Mann further inquired whether the decision about changes is up to OAG and DHR, and said that the Board assumes that the transaction will occur as discussed but that the Board should be consulted should changes be proposed.

Director Langan responded that changes would be brought back to the Board, as is done with other easement proposals, but that she does not anticipate any changes. Her sense from NPS is that one of their major obstacles is the decision by the Board to move forward with the assignment.

Mr. Gruber stated that in his evaluation of all strata of the project, he finds that it will do great things for the preservation in the Commonwealth and nation. Ms. Peters commended the work done by DHR and the OAG, and stated that it sets an important precedent for careful consideration by the Board in taking the decision seriously. Ms. Brown echoed her support for the proposed assignment.

Chair Mann called for a vote, noting Ms. Atkins-Spivey's recusal. Board members Gruber, Hauser, Peters, Vice-Chair Smith, Brown, and Chair Mann voted in the affirmative and the motion passed.

Chair Mann asked whether there was any other business, and Director Langan said there was not. Chair Mann adjourned the meeting at 3:40 p.m.

