



VIRGINIA DEPARTMENT OF HISTORIC RESOURCES

Historic Preservation Easement Program

POLICY #2

Criteria for Acceptance of Easements

The Virginia Board of Historic Resources (the “Board”) and the Virginia Department of Historic Resources (“DHR”) recognize the unique responsibility incurred when accepting an easement. All easements held by the Board are administered by the Easement Program at DHR, which serves as staff to the Board. By accepting an offer to place a property under easement, the Board of Historic Resources has determined that the historic character and the public benefit contributed by easing the property warrant its protection—in its approximate current form and condition—in perpetuity. While many properties are historically significant, an easement places permanent restrictions on real property, and should therefore be used to protect only those resources which are of enduring significance. An easement imposes on the Commonwealth the obligation 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 DHR to accept only easements of perpetual duration. Limited circumstances may arise in which the Board may consider, in its sole discretion, whether to accept an easement of more than five years duration, as required by the Open-Space Land Act, but less than perpetual. Such circumstances may include proposed transfer of the title to such property to an appropriate state or federal agency where a perpetual easement would inhibit or prevent such transfer.

When it is the intent of the property owner granting the easement to seek federal and/or state tax incentives for the donation or conveyance of an easement, it is the practice of the Board and DHR to ensure that the easement complies with state and federal laws governing conservation easements. The United States Internal Revenue Service Code and the U.S. Treasury Regulations have established standards for conservation easements affecting the terms of easements, the duration of easements, the process for the acceptance of easements, the stewardship of easement properties, and the overall management of easement programs. Currently, the Virginia tax code requires that these same standards be met when seeking a state tax credit for land preservation. Failure to operate in a manner consistent with these legal requirements would jeopardize the standing of the program and its ability to meet stewardship commitments made by the Board and DHR to property owners throughout Virginia.

Additionally, it is the policy of the Board and DHR 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”), or the listing of battlefield properties identified in the Civil War Sites Advisory Commission’s *Report on the Nation’s Civil War Battlefields* (1993, as amended) (“*CWSAC Report*”) or the American Battlefield Protection Program’s *Report to Congress on the Historic Preservation of Revolutionary War and War of 1812 Sites in the United States* (2007, as amended) (“*ABPP Report*”). Section 10.1-1701 of the Code of Virginia (1950, as amended) requires that the conservation easement be consistent with the official comprehensive plan for the locality in which the property is located.

An offer of easement by a property owner is first considered by DHR’s Easement Program staff to ensure that the property meets the Board’s legal requirements and that the application includes the information necessary for formal review. A detailed application form is available on DHR’s Easement Program webpage and is provided to every prospective grantor with the Easement Information Packet. A complete application must be received by DHR at least thirty (30) calendar days prior to the next scheduled meeting of the Easement Acceptance Committee. Easement Program staff will notify the property owner or their designated agent by electronic mail if the application is incomplete. A complete application received by the deadline is then reviewed by the Easement Acceptance Committee (“EAC”), comprised of senior staff of different professional disciplines from various divisions within DHR. The EAC makes recommendations to the Board regarding the acceptance of an offer of easement. The EAC may take one or more of the following actions: (i) recommend approval of the easement offer as proposed; (ii) recommend that any approval be conditioned on specific requirements or actions; (iii) not recommend acceptance of the easement offer as proposed; or (iii) defer making a recommendation where insufficient information has been provided by the property owner or his/her designated agent, or where conditions affecting the property may require prior resolution. In formulating its recommendation to the Board, the EAC will assess criteria and evaluate various factors including:

1. Whether the property being offered for easement is listed either individually or as a contributing resource to an historic district listed on the VLR, or is within or includes a portion of a battlefield listed in the *CWSAC Report* or the *ABPP Report*.
2. The level of historic and cultural significance of the property, including its status in the VLR or, for battlefield properties, its priority rating in the *CWSAC Report* or the *ABPP Report*, as administered through the American Battlefield Protection Program of the National Park Service. Properties that are not individually listed or listed as contributing to a historic district listed in the VLR or that do not fall within the boundaries of a battlefield identified in the *CWSAC Report* or the *ABPP Report* are not eligible for acceptance by the Board into the Easement Program.
3. The degree to which the public has or will have physical and/or visual access to the resources that are protected by the easement.

4. The ability of DHR, on behalf of the Board, to monitor the conservation values of the property that will be protected through the easement and that contribute to the public benefits associated with the easement. It is DHR's practice to consider the range of public interests in the property (e.g. historic, open space, ecological) and work with other state agencies to develop a deed of conservation easement that best serves those interests. However, if the property has significant resources that DHR does not have the technical expertise to steward or if there are pre-existing rights or land uses that would inhibit the protection that would be provided by the proposed easement, DHR may recommend that the property owner consider another public body as the easement holder.
5. The complexity of the property's conservation issues, including current and proposed land uses, proposed or recent new construction, the level of maintenance of the existing historic buildings, structures, sites, landscapes, or features, whether such resources are vulnerable to deterioration or will otherwise require a high level of monitoring by staff, the need for significant capital investment to maintain or preserve the existing historic resource(s), easements or other legal encumbrances, as set forth in more detail below, that may affect the proposed purposes of the easement, the ability to steward and enforce such easement, and/or the integrity of the Easement Program.
6. Whether reserved rights requested by the property owner, such as the number of subdivisions, allowable new construction, etc. are consistent with the protection of the conservation values of the property.
7. The likelihood of the property remaining economically viable if placed under easement.
8. The degree to which other state goals and the Board's mission are met.
9. Whether the property is adjacent to other protected or eased properties.
10. The degree to which the historic and cultural resources present on the property retain integrity, or the ability of the property to convey its historic significance, in the opinion of DHR staff applying the *National Register Criteria for Evaluation* (36 C.F.R. 60.3 and 60.4, as amended; *see also* 36 C.F.R. Part 63, as amended) and/or the *Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes* (National Park Service, as amended).
11. The degree to which the historic integrity of the property has been or will be compromised by prior land uses that likely irreversibly damaged the historic resources sought to be protected by the easement or that irreversibly altered the historic landscape or new construction, incompatible uses, previously conveyed rights held by third parties, topographic changes, etc.
12. Whether the easement will be consistent with the comprehensive plan for the locality in which the property is located, as required by Section 10.1-1701 (Open-Space Land Act) of the Code of Virginia.

13. Current conditions including evidence that the extant historic resources require substantial work and/or significant capital expenditures to stabilize or rehabilitate the resources, existing damage or disturbance to the resource, evidence of relic hunting, looting, unauthorized salvage, or other deleterious actions, etc.
14. Current legal conditions on the property that prevent, inhibit or unreasonably delay the conveyance of the proposed easement or that interfere or conflict with the terms and purposes of the easement. These include, but are not limited to, the following conditions or circumstances: clouds on title; previously conveyed rights, such as mineral rights or covenants; current plats of subdivision of the property including recorded encumbrances or dedications for such subdivision; easements and/or installed infrastructure or improvements for a past, present or future land use that are incompatible with the easement such as roads dedicated to the local government.
15. Title and other legal considerations including the timely provision of a title search and all associated deeds and instruments and a property survey and/or accurate legal description; copies of all current leases, licenses or other rights held by third parties to access or use the property being offered for easement, and information regarding environmental conditions, including an environmental assessment if requested by the EAC.

Easement Program staff will apprise the property owner of the EAC's recommendation in writing, via letter or email communication. If the EAC defers making a recommendation until a subsequent meeting, staff will apprise the property owner of why and whether the EAC has requested additional information. If the EAC does not recommend acceptance of the offer, staff will provide an explanation of the factors considered. The property owner may choose to withdraw the offer or amend the offer for reconsideration by the EAC, or may request that the offer be presented to the Board irrespective of the negative recommendation by EAC.

Easement offers will be considered by the Board at a regularly scheduled public meeting, which are held quarterly, or at a special public meeting. In order for an easement offer to be presented to the Board, any supplemental documentation and information requested by Easement Program staff and/or the EAC must be received by Easement Program staff at least ten (10) business days prior to the date of the Board meeting. If the easement offer has been submitted by a third party and/or a third party is representing the property owner, Easement Program staff must have had direct contact with the property owner via telephone, electronic mail or an in-person meeting at least ten (10) business days prior to presenting the offer to the Board to ensure that the property owner understands and accepts the Board policies and the standard terms of a deed of easement held by the Board. Any third party representing or acting on behalf of a property owner must submit the written authorization of the property owner.

At the public meeting, Easement Program staff will present the offer, describe the property's historic significance and the formal documentation of that significance (e.g. listing in the VLR or within boundaries of a battlefield), highlight any special features of the property, specify any reserved rights and address the EAC's recommendations, including any recommended conditions of approval. Easement Program staff will notify the property owner of the meeting date and location and will provide information regarding the agenda. A property owner whose offer will

be considered at the meeting may attend the meeting and may request permission to address the Board regarding the easement offer and/or the EAC's recommendation. Third parties who are not the property owner or the property owner's agent or designated representative may not address the Board regarding easement offers.

All letters, email communication, or other written correspondence documenting approval of an easement offer by the Board will include a sunset clause, or a timeframe within which the easement must be recorded. If the easement is not recorded within the specified timeframe, the property owner must seek new approvals from DHR and the Board. Standard approvals are valid for three (3) calendar years from the date of the Board meeting at which the offer was approved for acceptance. Any one of the following will require reconsideration by the EAC and the Board at its next regularly scheduled meeting:

1. Any significant changes to the terms of the easement offer made after approval by the Board but prior to recordation of the easement.
2. Any significant or major changes to the property that occur after Board approval but prior to recordation of the easement.

Any such changes should be brought to the attention of Easement Program staff as early in the drafting and easement negotiation process as possible. Board approval of an easement offer is not transferable to a new property owner.

The Board of Historic Resources has full discretion in deciding whether to accept an offer of easement and the applicable conditions for such acceptance. The Board may decline to accept an offer of easement for any reason. The Board may condition its acceptance as it deems appropriate to ensure the protection of the property's cultural resources, to maintain the integrity of the Easement Program and to fulfill its mission.

Special Considerations for Battlefield Resources:

The Board and DHR recognize the historic, archaeological, cultural, and landscape significance of battlefield properties and their unique characteristics. Often, battlefields are not listed on the National Register of Historic Places or the VLR. Therefore, DHR and the EAC utilize the priority rating system developed by the CWSAC and the ABPP as a basic requirement when evaluating easement offers for battlefields. Proposed easements on battlefield properties are evaluated for their overall historic significance and integrity, as well as for any historic buildings, structures, and archaeological or cultural sites located on the property regardless of whether those resources are associated with a battle. Many battlefield properties are working farms and the need to keep them viable for continued agricultural production is an important aspect of their preservation. For each easement offer on a battlefield property, the Board, DHR and the EAC will:

1. Evaluate the appropriate level of protection for the battlefield landscape, and for existing architectural and built resources (including dwellings, outbuildings, and structures) on a case by case basis. If necessary, DHR staff will present these resources to the DHR's Architectural and/or Archaeological Evaluation Team(s) for a determination of eligibility for listing on the VLR.

2. Consider whether the existing architectural or built resources merit protection in the easement in the form of required maintenance or protections for exterior and interior architectural features. DHR and the EAC will assess all existing buildings and structures on the property regardless of their association (or lack thereof) with a particular battle and may require maintenance of historic buildings and structures whether or not they existed at the time of the battle. The EAC will make recommendations regarding the protection of historic buildings and structures to the Board.

The Board, the EAC and Easement Program staff may consider documentation provided by the property owner or his/her designated agent, documentation of the property in DHR's Archives, including its cultural resources database, and documentation or information available through federal, state or local governments and nonprofit organizations about the property and its history. For example, Easement Program staff may utilize a historic battlefield map obtained from the Library of Congress to specifically identify the location of the property within the boundaries of a specific battle; or consult historic aerials available from the county where the property is located to better understand prior land use patterns or the location of non-extant buildings and structures. DHR Easement Program staff will provide the property owner or his/her designated agent with copies of or access to any documentation or information obtained from sources other than the easement application and DHR's Archives. DHR's Archives located in Richmond are open to the public during business hours Tuesday through Thursday and property owners are strongly encouraged to research their property prior to submission of an easement application.

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