



VIRGINIA DEPARTMENT OF HISTORIC RESOURCES

Historic Preservation Easement Program

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 its historic character should be protected, the Virginia Board of Historic Resources (“Board”) and the Virginia Department of Historic Resources (“DHR”) recognize 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 or rehabilitation projects as well as new construction. In addition, there are instances where maintenance and other work are necessary to maintain the property.

It should be noted that each easement is drafted with specific reserved rights and restrictions, and that some easements may allow or prohibit certain alterations. This policy is meant to outline the review and approval process and to provide general guidance as to which types of work require prior written approval. This guidance may not be universally applicable to all deeds, projects, or properties. In all cases, the easement is the governing document and will dictate whether prior written approval is required and how that review and approval will be conducted.

REVIEW AND APPROVAL PROCESS

DHR’s Easement Program staff administers the easements held by the Board. Any work requiring the Board’s (as Grantee) approval will be reviewed by the Easement Program staff according to the terms of the applicable easement and by applying the relevant *Secretary of the Interior’s Standards*, as set forth below. Decisions regarding a request for review and approval made by easement program staff will be provided to the property owner or their designated representative in writing, either by regular U.S. Mail, electronic mail or both. **The property owner may appeal any decision or determination made by Easement Program staff in accordance with the process outlined below. Decisions of the Board are final administrative agency decisions and may only be appealed to a court having jurisdiction within the Commonwealth of Virginia.**

All written letters or correspondence approving proposed work 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 request re-approval of the work or seek new approvals if the project has changed in any way from the previously approved proposal. Prior written approval of work is not transferable to a new property owner.

If a property owner wishes to designate a person or entity, such as their attorney or a consultant, to serve as their agent or representative with respect to a project review request or any appeal thereof, they must provide proof of such authorization in writing to DHR's Easement Program. DHR's Easement Program cannot accept project review requests submitted by anyone other than the property owner without such written authorization. Furthermore, all communications regarding such project review request will be directed to the property owner at the address on file with DHR or as listed in the tax assessor's records for the relevant city or county where the property is located. The property owner is responsible for ensuring that DHR's Easement Program has the property owner's accurate contact information. Upon receipt of written authorization, a designated agent or representative may also receive a copy of all communications.

Property owners should be reminded that with limited exceptions, all materials and communications regarding their easement and their property are subject to the Virginia Freedom of Information Act (FOIA). DHR is legally required to provide copies of all documents in its possession in response to a request under FOIA made by the property owner or any third party, whether public or private.

Language within the easements held by the Board has evolved over the years. Language in an easement recorded in 1973 will differ markedly from the language of an easement recorded in 2003. These changes are driven by a number of factors including changes in state law, the requirements of the Internal Revenue Service, and recommended best practices within the field of conservation easements. DHR's Easement Program strives to keep its easement templates current and to provide recommended updates to Board policies. Board policies are intended to provide guidance; however, the specific language contained in a recorded deed of easement is always the primary legal authority. Please contact Easement Program staff with any questions regarding how to interpret or apply the specific language contained in an easement.

Easements Recorded After September 2014

The Board voted to approve new easement language regarding review and approval by DHR's Easement Program staff for all activities and projects where prior approval is required by the easement and to approve corresponding changes to this policy in December 2014. The new approvals language in the easement template reads as follows, with minor variations to satisfy grant funding requirements:

APPROVALS:

- (a) Whenever a written request for Grantee's approval is submitted pursuant to the requirements imposed by this Easement and Grantee fails to respond in writing within thirty (30) business days of receipt of such request, then Grantee shall be deemed to

have approved the request, and Grantor may proceed with the action for which approval was requested.

(b) Nothing herein shall be construed, however, to require Grantee to issue a final decision on such request within such thirty (30) business day period, provided that such final decisions are issued as timely as is practicable under the circumstances. Such circumstances may include, but are not limited to, the complexity of the request or proposed project, the adequacy of the information submitted with the request, the degree to which the request or project complies with the Easement, whether the request or project is consistent with the Secretary's Standards as set forth in Section II, Paragraph 2.7 (Standards for Review) above, the need for archaeological investigation pursuant to Section II, Paragraph 2.11 (Archaeology) above, and the need for on-site inspections or consultations.

(c) In the event that Grantor proceeds with the action without having obtained the prior written approval of Grantee, Grantor shall remain obligated to protect and preserve the Preservation and Conservation Values and Grantee may undertake remedial action as set forth in Paragraph 3.1 (Right of Inspection) above and/or pursue any remedies set forth in Section III, Paragraph 3.3 (Enforcement) if such action is in violation of this Easement or diminishes or impairs the Preservation and Conservation Values.

(d) No approval required hereunder shall be unreasonably withheld or delayed by Grantee.

(e) *[if applicable]* Nothing herein shall be construed to affect the authority of the Secretary of the Interior under Section 6(f)(3) of the Land and Water Conservation Act.

(f) Grantee is not liable to Grantor or any third party for any damage, injury, liability or consequence arising out of or resulting from Grantor's failure to obtain Grantee's prior written approval as required under this Easement.

As a general rule, easements recorded after September 2014 would include this new approval language. For any easement containing the above referenced approvals language, the following project review process shall apply:

PROJECT REVIEW PROCESS – For Easements Recorded After September 2014

A. All requests for review and approval as required by the terms of the easement must be submitted in writing to DHR's Easement Program as follows:

- (i) Hard copy requests should be sent to:
- Easement Program
 - Department of Historic Resources
 - 2801 Kensington Avenue
 - Richmond, VA 23221

(ii) Electronic format requests should be sent to:

EasementProjectProposals@dhr.virginia.gov

- B. It is the responsibility of the requestor to confirm that the written request for review has been received by DHR's Easement Program.
- C. Easement Program staff shall respond to a written request for review within thirty (30) business days of receipt of such request, unless otherwise specified by the terms of the applicable easement.
- (i) Approval or denial is not required within that thirty (30) day period. Easement Program staff will endeavor to issue an approval or denial within that thirty (30) day period for a request that includes the necessary information and no other circumstances warrant an extension or delay of that review period.
 - (ii) The Easement Program staff shall notify the property owner or designated agent or representative of the need for an extension or delay in writing within the initial thirty (30) day review period.
 - (iii) Circumstances warranting an extension or delay of the review period include, but are not limited to, the following:
 - (a) Receipt of additional materials or information requested in writing by the Easement Program staff;
 - (b) Archaeological survey and/or investigation as determined by the Easement Program Archaeologist;
 - (c) A site visit as determined by Easement Program staff;
 - (d) A site visit by other staff within DHR as determined by the Easement Program staff;
 - (e) Consultation with the property owner and his/her representatives or consultants regarding the proposed project;
 - (f) Review of the existing historic or archaeological resources on the property by DHR's Architecture and/or Archaeology Evaluation Committees to determine historic significance applying the *National Register Criteria for Evaluation* (36 C.F.R. 60);
 - (g) Review of the request by DHR's Treatment Committee upon referral by the Easement Program staff;
 - (h) Complexity of the request;
 - (i) Extent to which the request is consistent with the terms of the easement;
 - (j) Extent to which the request is consistent with the applicable *Secretary of the Interior's Standards* as set forth below in Paragraph D.
- D. In reviewing a project request, the Easement Program staff person assigned to review that request shall determine whether the proposed project is consistent with the terms of the easement and the applicable *Secretary of the Interior's Standards* (the "Standards").
- (i) The *Secretary of the Interior's Standards* shall include:

- (a) *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* (National Park Service, as amended).
- (b) *Secretary of the Interior's Professional Qualifications Standards* (48 F.R. 44716 (Sept. 1983, as amended)).
- (c) *Secretary of the Interior's Standards for Rehabilitation* (36 C.F.R. 67, as amended).
- (d) *Secretary of the Interior's Standards for the Treatment of Historic Properties* (36 C.F.R. 68, as amended).
- (e) *Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings* (National Park Service, as amended).
- (f) *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).

E. Failure to submit additional materials or information requested by Easement Program staff within thirty (30) days of such written request may result in denial of the request for review submitted by the property owner or his/her agent or representative.

- (i) To help ensure that the necessary information is provided with the initial request, the requestor should complete the Project Review Request form available online at <http://www.dhr.virginia.gov/easement/easement.htm> or by request with their submission and include all supplemental materials referenced or requested in the Project Review Application.

F. In the event of a written denial issued by the Easement Program staff, the property owner may appeal such denial to the **Treatment Committee**.

- (i) The Treatment Committee is comprised of staff representing different divisions within DHR appointed by the Director and it meets on as-needed basis. **The Treatment Committee is not a public body pursuant to Virginia Code § 2.2-3701 and its meetings are not open to the public.**
- (ii) **Such appeal must be filed with Easement Program staff within forty-five (45) business days of the date of such written denial.**
- (iii) The reviewer may refer the initial project request to the Treatment Committee for guidance. In the event of prior review by the Treatment Committee, the property owner may appeal such denial directly to the Board at its next regularly scheduled meeting.
- (iv) The property owner shall be notified in writing within fourteen (14) business days of the Treatment Committee's recommendation.

G. If the Treatment Committee concurs with the denial, the property owner may appeal such denial to the Board at its next regularly scheduled meeting.

- (i) **Notice of such appeal shall be filed with the Easement Program staff, the Easement Program Manager or the Director of DHR within forty-five (45)**

business days of the date of written notice of the Treatment Committee's recommendation.

- (ii) Appeals filed less than fourteen (14) business days in advance of the next regularly scheduled meeting of the Board will be delayed until the following regularly scheduled meeting.
- H. In the event of a tacit denial, the property owner may appeal such denial in writing to the Easement Program Manager or the Director of DHR.
- (i) Tacit denial is defined as an automatic denial resulting from the failure of the Easement Program staff to respond to a written project review request submitted by the property owner or his designated agent as specified above within the applicable timeframe.
 - (ii) Such appeal shall be filed within forty-five (45) business days of such denial.
- I. Within thirty (30) business days of receipt of a written appeal, the Easement Program Manager or designated staff person shall respond to the appeal in writing and shall approve or deny the review request consistent with the review process set forth in Paragraphs A-E above.
- J. If the Easement Program Manager or designated staff person fails to respond to the written appeal within thirty (30) business days, the property owner shall submit a written appeal to the Board and may appear personally or through a designated agent or representative before the Board at its next regularly scheduled meeting.
- (i) Appeals filed less than fourteen (14) business days in advance of the next regularly scheduled meeting of the Board will be delayed until the following regularly scheduled meeting.
 - (ii) The property owner will be notified in writing of the Board's decision within ten (10) business days following the Board meeting.

Easements Recorded Prior to September 2014

Prior to September 2014, the majority of easements held by the Board contained the following language, with some minor deviations:

APPROVALS:

Whenever a written request for Grantee's approval is submitted pursuant hereto and Grantee fails to respond in writing within thirty (30) days of receipt of such request, then Grantee shall be deemed to have approved the request, and Grantor may proceed with the action for which approval was requested. Nothing herein shall be construed, however, to require Grantee to issue a final decision on such request within such thirty (30) day period, provided that such final decisions are issued in as timely a fashion as is practicable under the circumstances. Such circumstances shall include, but are not limited to, the complexity of the request or proposed project, the amount of information submitted with the initial request, and the need for on-site inspections or consultations. No approval required hereunder shall be unreasonably withheld by Grantee.

For easements recorded prior to September 2014, which contain approvals language similar to that listed immediately above, the following project review process shall apply:

PROJECT REVIEW PROCESS - Prior to September 2014

A. All requests for review and approval as required by the terms of the easement must be submitted in writing to DHR's Easement Program as follows:

(i) Hard copy requests should be sent to: Easement Program
Department of Historic Resources
2801 Kensington Avenue
Richmond, VA 23221

(ii) Electronic format requests should be sent to:

EasementProjectProposals@dhr.virginia.gov

B. It is the responsibility of the requestor to confirm that the written request for review has been received by DHR's Easement Program.

C. Easement Program staff shall respond to a written request for review within thirty (30) business days of receipt of such request, unless otherwise specified by the terms of the applicable easement.

(i) Approval or denial is not required within that thirty (30) day period. Easement Program staff will endeavor to issue an approval or denial within that thirty (30) day period for a request that includes the necessary information and no other circumstances warrant an extension or delay of that review period.

(ii) The Easement Program staff shall notify the property owner or designated agent or representative of the need for an extension or delay in writing within the initial thirty (30) day review period.

(iii) Circumstances warranting an extension or delay of the review period include, but are not limited to, the following:

(a) Receipt of additional materials or information requested in writing by the Easement Program staff;

(b) Archaeological survey and/or investigation as determined by the Easement Program Archaeologist;

(c) A site visit as determined by Easement Program staff;

(d) A site visit by other staff within DHR as determined by the Easement Program staff;

(e) Consultation with the property owner and his/her representatives or consultants regarding the proposed project;

(f) Review of the existing historic or archaeological resources on the property by DHR's Architecture and/or Archaeology Evaluation Committees to determine historic significance applying the *National Register Criteria for Evaluation* (36 C.F.R. 60);

- (g) Review of the request by DHR's Treatment Committee upon referral by the Easement Program staff;
 - (h) Complexity of the request;
 - (i) Extent to which the request is consistent with the terms of the easement;
 - (j) Extent to which the request is consistent with the applicable *Secretary of the Interior's Standards* as set forth below in Paragraph D.
- D. In reviewing a project request, the Easement Program staff person assigned to review that request shall determine whether the proposed project is consistent with the terms of the easement and the applicable *Secretary of the Interior's Standards* (the "Standards").
- (i) The *Secretary of the Interior's Standards* shall include:
 - (a) *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* (National Park Service, as amended).
 - (b) *Secretary of the Interior's Professional Qualifications Standards* (48 F.R. 44716 (Sept. 1983, as amended)).
 - (c) *Secretary of the Interior's Standards for Rehabilitation* (36 C.F.R. 67, as amended).
 - (d) *Secretary of the Interior's Standards for the Treatment of Historic Properties* (36 C.F.R. 68, as amended).
 - (e) *Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings* (National Park Service, as amended).
 - (f) *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).
- E. Failure to submit additional materials or information requested by Easement Program staff within thirty (30) days of such written request may result in denial of the request for review submitted by the property owner or his/her agent or representative.
- (i) To help ensure that the necessary information is provided with the initial request, the requestor should complete the Project Review Request form available online at <http://www.dhr.virginia.gov/easement/easement.htm> or by request with their submission and include all supplemental materials referenced or requested in the Project Review Application.
- F. In the event of a written denial issued by the Easement Program staff, the property owner may appeal such denial to the Treatment Committee.
- (i) The Treatment Committee is comprised of staff representing different divisions within DHR appointed by the Director and it meets on as-needed basis. The Treatment Committee is not a public body pursuant to Virginia Code § 2.2-3701 and its meetings are not open to the public.

- (ii) Such appeal must be filed with Easement Program staff within forty-five (45) business days of the date of such written denial.
 - (iii) The reviewer may refer the initial project request to the Treatment Committee for guidance. In the event of prior review by the Treatment Committee, the property owner may appeal such denial directly to the Board at its next regularly scheduled meeting.
 - (iv) The property owner shall be notified in writing within fourteen (14) business days of the Treatment Committee's recommendation.
- G. If the Treatment Committee concurs with the denial, the property owner may appeal such denial to the Board at its next regularly scheduled meeting.
- (i) Notice of such appeal shall be filed with the Easement Program staff, the Easement Program Manager or the Director of DHR within forty-five (45) business days of the date of written notice of the Treatment Committee's recommendation.
 - (ii) Appeals filed less than fourteen (14) business days in advance of the next regularly scheduled meeting of the Board will be delayed until the following regularly scheduled meeting.

Please contact DHR's Easement Program staff with any questions regarding the applicable project review process. Contact information for Easement Program staff is located within the Division of Preservation Incentives at:

http://www.dhr.virginia.gov/homepage_features/staff3.htm

GUIDANCE FOR DETERMINING WHEN PRIOR WRITTEN APPROVAL IS REQUIRED

In order to guide a property owner in understanding the type of work that can and cannot be conducted without prior written approval pursuant to the easement, the Easement Program has developed a list of examples of major and minor work, which is provided below. Except as otherwise provided for in the relevant deed of easement, work defined as minor may be conducted without prior written approval by Easement Program staff. Work defined as major requires review and written approval by Easement Program staff before any work may be undertaken.

The term "in-kind" means the replacement of existing historic fabric with the same material of the same dimension, design and workmanship.

Examples of Major and Minor Alterations

Alterations of a minor nature generally do not require review by Easement Program staff. Minor alterations are 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.

PAIN

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

Major – Painting of previously unpainted surfaces or painting over, removing and/or stripping historic decorative surfaces or distinctive and historic stylistic features including murals, stenciling, wallpaper, ornamental woodwork, stone, decorative or historically significant original plaster

WINDOWS AND DOORS

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

Major – Replacement of windows or doors, including sashes, frames, thresholds, or trim, change in window sash configuration or fenestration patterns (relationship of existing door and window openings), or creation of new window or door openings. .

MECHANICAL, ELECTRICAL AND CONDITIONING SYSTEMS

Minor – Repair and/or replacement of existing systems and their components, which would have no effect on the historic fabric of the building or structure or would not alter the exterior appearance of nonhistoric buildings or structures. Such work includes the installation of new pumps, units such as a furnace, replacement of valves and pipes within existing chases, rewiring within existing chases, replacement of existing above-ground tanks or fuel storage containers.

Major – Installing new systems or upgrading existing systems which would affect the historic fabric of the building or structure; require significant ground disturbance for a new well, new piping, underground electrical conduit or a geothermal system; require new ducts or chases; result in major appearance changes (i.e. dropped ceilings, disfigured walls or floors, exposed wiring, ducts, and piping); or require the removal of existing fabric or material such as original plaster or floorboards or affect the exterior appearance of a nonhistoric building or structure.

EXTERIOR

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

Major – All work to masonry, whether exterior or interior. Extensive repair or replacement of building components such as cladding or roofing or architectural features such as decorative trim, shutters, cupolas or finials. Change involving the removal or addition of materials or building elements (i.e. removal of a porch or shutters or installation of architectural detail, such as moldings, carved porch supports or stained glass windows.); construction of a new addition, or altering or demolishing building additions. Structural stabilization of an historic building or structure is also considered a major alteration.

OUTBUILDINGS AND LANDSCAPE

Minor – Routine maintenance of outbuildings and landscape including lawn mowing, pruning, gardening, and routine repair of outbuildings or landscape features, such as walkways, terraces, patios, fountains, etc.

Major –Ground disturbance or grading other than routine gardening, installation of drainage or irrigation systems, , demolition of existing outbuildings, , altering, installing or removing significant landscape features such as gardens, changes to forested cover, view sheds, walks, or plantings that define the historic setting or create a landscape feature, and ground disturbance affecting archaeological resources.

NEW CONSTRUCTION

Minor – Installation of a new mailbox; replacement of an existing fence line with the same material; installation or erection of removable exterior furniture such as birdhouses, benches, swing sets, small above-ground pools etc. that are not attached to any historic building, structure or fabric or temporary or seasonal items such as political signs, netting for fruit trees or vines, holiday decorations, etc.

Major – Construction of any new buildings, structures, features or amenities including but not limited to farm buildings, residential outbuildings, garden sheds, pergolas or arbors, in-ground pools or fishponds, terraces, walkways, garden features such as fencing, fountains.

CHANGES TO LEGAL STATUS OF PROPERTY

Minor – Conveyance to a new owner; execution of a will bequeathing or gifting the property. Note that some easements specifically require that DHR be notified prior to any sale or conveyance.

Major – Subdivision of the property; boundary line adjustments; execution of any easement for any purpose, including access easements, utility easements or overlay easements in favor of any private person or entity or any public utility.

Changes classified as major alterations are not necessarily unacceptable. The intent of the easement is to enable DHR to review proposed alterations and assess their comprehensive impact on the integrity of the protected historic and archaeological resources, not to preclude future change. DHR Easement Program staff will work with property owners to provide technical assistance and to develop mutually satisfactory solutions that are consistent with the *Standards*, the terms of the easement and in the best interests of the property.

It is the responsibility of the property owner to notify the DHR in writing when any major alterations are contemplated.

[Adopted by the Virginia Board of Historic Resources on March 8, 2006; Revised December 18, 2008; Revised March 17, 2011; Revised December 11, 2014; Revised September 17, 2015]