Historic Alexandria Foundation
218 North Lee Street, Suite 310 • Alexandria, Virginia 22314
(703) 549-5811 • FAX (703) 548-4399
Email: h.a.f@erols.com • Website: HistoricAlexandriaFoundation.org

August 11, 2016

Joanna Anderson, Esq.
Deputy City Attorney
Alexandria, Virginia

Dear Ms. Anderson,

I am writing on behalf of the Historic Alexandria Foundation (HAF) to express our concern and disagreement with recent staff statements and procedures followed in connection with applications to the Old and Historic District Board of Architectural Review that involve properties subject to preservation easements.

The most recent case that raised these concerns is BAR #2016-00160. The staff statement with which we disagree is found at page 4 of the Staff Report:

> **Staff notes that the Alexandria Historical Restoration and Preservation Commission (AHRPC) holds a scenic and exterior architectural easement on this property. All alterations to the buildings, new construction and changes to the landscape must separately be reviewed and approved by the AHRPC. However, an easement is a private contract between the property owner and the easement holder and these are not regulated by the City.**

In addition, at its meeting on July 6, 2016, the Chair of the BAR read a preliminary statement provided by staff that included similar language regarding the status of a preservation easement as a "private contract", and further stated that **"in the past the BAR has advised applicants that easement holders should approve any proposal to be reviewed by the BAR as a courtesy. However, the BAR is not able to legally require that."**

We believe these statements are incorrect, both as a matter of law and policy, for the reasons noted below. We urge the City to continue to require the consent of a preservation easement holder before an application is deemed complete and subject to review by the BAR. We request that you provide us with the legal reasoning that led to the statements quoted above and the proposed change in the existing procedure that requires evidence of the consent of an easement holder before presenting an application to the BAR. We would like to meet with you at your convenience to discuss these issues.

Legal Status of Conservation and Open Space Easements

Under Virginia law a conservation easement is a non-possessory interest in real property. VA. CODE ANN. § 10.1-1009. It is not simply a "contract between the property owner and the easement holder", as stated in the recent staff reports. Accordingly, the BAR should not take action that could impair the property interests of the easement holder without its consent. The BAR should continue to require evidence that an application has the consent of all parties holding an interest in the property under review, whether that interest is in the fee simple or the interest of an easement holder.

Moreover, historic preservation and open space easements are governed by the Virginia Conservation Easement Act (VCEA), VA. CODE ANN. §§ 10.1-1009 through 10.1-1016 and the Virginia Open Space Land Act (OSLA), VA. CODE ANN. §§ 10.1-1700 through 10.11705. These laws "were intended to encourage the acquisition by certain public bodies of fee simple title or 'easements in gross or such other interests in real estate' that are designed to maintain the preservation or provision of open-space land." United States v. Blackman, 270 Va. 68, 613 S.E.2d 442 (2005). The public policy in favor of land conservation and preservation of historic sites and buildings is also reflected in Article XI of the Constitution of Virginia.

These laws make clear that, in contrast with conventional private easements, conservation easements serve a public function and such easements are "held and administered by the easement holders not for themselves, but on behalf of the public and in furtherance of state policy". See 2012 Va. Op. Atty. Gen 31. Not only are conservation easements held on behalf of the public, but the owners of property subject to conservation easements are granted substantial benefits in the form of tax relief to reflect the value that preservation provides to the public interest. Accordingly, VCEA expressly provides standing to the local government to take action to enforce conservation and open space easements on real property within their jurisdictions. VA. CODE ANN. § 10.1-1013.

The recent statements in the BAR staff reports that conservation easements "are not regulated by the City" fail to take this Virginia Code provision into account. The City does, indeed, have standing to take action to enforce a conservation easement. It should not abrogate this responsibility by allowing, or requiring, the BAR to take action

without regard to the interests of the holder of a conservation easement or the public interest in favor of preservation easements. As a City body, the BAR should take these interests into account in its decisions. Failure to do so could result in a diminution of the value of the easement, lead to inconsistent requirements for the property owner, and limit the City's ability to ensure compliance with an easement as provided in the VCEA.

The BAR should continue the established policy to require evidence of the consent of the holder of a conservation easement before an application can be heard. We were puzzled by the statement read by the BAR Chair at the recent meeting, as quoted above, that "in the past the BAR has advised applicants that easement holders should approve any proposal to be reviewed by the BAR as a courtesy." In fact, the application procedures clearly state that documentation of an easement holder's consent to an application is **required**, not a "courtesy", before an application will be considered complete. Section 8 of the application instructions provides as follows:

> **REVIEW BY OTHER AGENCIES**: It is the policy of the Boards not to review applications which do not meet other applicable city regulations. This policy ensures that the project approved by the Board can, in fact, be undertaken. In cases where there is an historic preservation easement on the property or the property is under a homeowner's association, a copy of the letter approving the project must accompany the application at the time of submission. Applications without approval letters will not be accepted and will be deferred until the letter is received and the application is complete.

This practice and procedure should be continued as it is the only way to ensure that the easement holder's interest in the property will not be impaired by actions taken by the BAR without its consent. We do not know of any reason why the BAR Chair's statement claimed that "the BAR is not able to legally require that". Section 10-104 (B)(3) of the City Code allows the BAR to adopt administrative procedures, pursuant to which the BAR has set forth numerous requirements for documentation that must be submitted before an application will be considered complete. The existing BAR policy is a reasonable requirement, consistent with its authority under City law, and a best practice to ensure that the BAR time and resources are well spent. It should be continued.

We believe that the apparent change in the BAR procedure for handling applications for properties subject to conservation easements is unwise and not supported by law or policy. If there are other factors we have not considered that you think justify such a change we would be most interested in your thoughts on these issues.

Thank you for considering our views on this matter. We look forward to meeting with you at your earliest convenience to discuss these issues. I can be reached at elj831@gmail.com or 703-615-9529.

Sincerely,

Elaine Johnston
Co-Chair, Advocacy Committee

Cc: Al Cox
Lance Mallamo