



## VIRGINIA BOARD OF HISTORIC RESOURCES

### Historic Preservation Easement Program

#### POLICY #13

##### Conversion/Diversion of Easement Properties

The Virginia Open-Space Land Act<sup>1</sup> (“**OSLA**”), enacted by the General Assembly in 1966, authorizes any public body, defined, in part, as state and local governments having authority to acquire land for public use, to acquire “title to or any interests or rights of not less than five years’ duration in real property” for the perpetual preservation of open-space land. As a public body, the Virginia Board of Historic Resources (“**Board**”) holds historic preservation and open-space easements on historically significant properties pursuant to the OSLA.<sup>2</sup> These easements are administered by the Virginia Department of Historic Resources (“**DHR**”).

Easements held by the Board under the OSLA (“**OSLA Easements**”) are interests in real property owned by the Commonwealth of Virginia.

Section 10.1-1704 of the Code of Virginia, a part of the OSLA, provides, in part, that “[n]o open-space land, the title to or interest or right in which has been acquired under [the OSLA] and which has been designated as open-space land under the authority of [the OSLA], shall be converted or diverted from open-space land use unless” a series of rigorous statutory conditions are satisfied.

*Conversion* generally refers to a change in the use of property subject to an OSLA Easement and designated as open space land under the OSLA (“**Easement Property**”), either whole or in part, that is different from, and incompatible with, its dedicated open-space uses.

*Diversion* implies that the proposed project or activity is so incompatible with the conservation purposes of the OSLA Easement that the restrictions imposed by the OSLA Easement must be

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<sup>1</sup> Va. Code §§ 10.1-1700, *et seq.* (1950, as amended).

<sup>2</sup> The Board also holds easements pursuant to Section 10.1-2204(A)(4) of the Code of Virginia (“**2204 Easements**”). If a 2204 Easement either (i) contains a term incorporating the conversion or diversion provisions of the OSLA into such easement or (ii) otherwise contains conversion or diversion provisions therein, then this policy will govern the evaluation of any requests for conversion or diversion of property subject to such 2204 Easement. For purposes of evaluating conversion and diversion requests of property subject to such 2204 Easements under this policy, such 2204 Easements will be treated the same as OSLA Easements under this policy, unless the terms of such 2204 Easement provide otherwise.

removed, either in whole or in part, and that appropriate substitute land will be placed under an OSLA Easement to replace the land being diverted.

If an Easement Property owner or third party (either, a “**Project Proponent**”) desires to commence a project, activity, or other undertaking on an Easement Property that that may result in the conversion or diversion of any portion of such Easement Property to a use not compatible with the OSLA Easement’s protections (a “**Project**”), then such Project Proponent must submit a project review form to DHR prior to commencing the Project. .

Section 10.1-1704 sets a rigorous standard that must be met for a Project to be eligible for conversion or diversion and also requires that specific conditions be met to the satisfaction of the Board. The OSLA provides very limited flexibility for Projects to impact an Easement Property, while ensuring land of comparable conservation quality and quantity is preserved in perpetuity.

### **Easements subject to Open-Space Land Act**

The OSLA outlines a process by which Easement Property may be converted or diverted from its use as open-space land, provided the requirements of Section 10.1-1704 are met. Section 10.1-1704(A) states that:

- A. *No open-space land, the title to or interest or right in which has been acquired under this chapter and which has been designated as open-space land under the authority of this chapter, shall be converted or diverted from open-space land use unless: (i) the conversion or diversion is determined by the public body to be (a) essential to the orderly development and growth of the locality and (b) in accordance with the official comprehensive plan for the locality in effect at the time of conversion or diversion and (ii) there is substituted other real property which is (a) of at least equal fair market value, (b) of greater value as permanent open-space land than the land converted or diverted and (c) of as nearly as feasible equivalent usefulness and location for use as permanent open-space land as is the land converted or diverted. The public body shall assure that the property substituted will be subject to the provisions of this chapter.*

The process, as set forth above, requires three steps:

1. The Board must determine whether the Project is essential to the orderly development and growth of the locality and conforms to the official comprehensive plan for the applicable locality.
2. The Board must evaluate the substitute land offered, as to whether it is:
  - of at least equal fair market value;

- of greater conservation value as permanent open-space land than the Easement Property affected; and
  - of reasonably equivalent usefulness and location.
3. The Board must ensure that the substituted land is placed under an open-space easement and made subject to the provisions of Section 10.1-1704.

Any Project affecting an OSLA Easement that may constitute conversion or diversion must be reviewed by the Board. The Board retains the exclusive authority in making determinations regarding conversion or diversion.

To assist the Board with its assessment, DHR Easement Program staff will perform a preliminary review to determine whether a proposed Project may constitute conversion or diversion and require review by the Board. DHR Easement Program staff work with the Project Proponent and compile detailed information about the Project, to determine whether the Project is consistent with the terms of the OSLA Easement, to provide guidance as to the nature and extent of appropriate land substitution, and to set out how the proposed conversion or diversion may or may not meet the requirements of Section 10.1-1704. Staff may develop recommendations to avoid conversion or diversion of Easement Property. After the information gathering process is complete, Easement Program staff will present the Project to DHR's Easement Acceptance Committee ("**EAC**") for review. The EAC will consider the request and provide a recommendation to the Board. Easement Program staff does not make a final determination regarding whether a given Project constitutes conversion or diversion, or the appropriateness of substitute land, but will present all relevant material to the Board for its consideration.

The following factors, among other, may be applicable in DHR Easement Program staff's threshold determination of whether the Project should be reviewed by the Board as a possible conversion or diversion:

- Permanent change to the use of the Easement Property or portion thereof that is inconsistent with the purposes and stated conservation values of the OSLA Easement or is otherwise prohibited by the OSLA Easement.
- Prolonged or permanent use or activity that is inconsistent or incompatible with the preservation purpose and/or conservation values protected by the OSLA Easement.
- Installation of a structure or facility that is not otherwise permitted by the OSLA Easement.
- Permanent conveyance of a portion of the Easement Property in fee simple to a third party where the conveyance is not a permitted division of the Easement Property under the OSLA Easement and where the purpose of that conveyance is not consistent with the purposes of the OSLA Easement.

**A proposed Project reviewed by DHR and the Board pursuant to Section 10.1-1704 may take a year or more to complete, as several Board meetings may be necessary to review a proposed Project in its entirety.**

The burden to satisfy Section 10.1-1704 rests entirely with the Project Proponent. The Project Proponent must document that the Project is essential to the orderly development and growth of the locality and conforms to the local comprehensive plan. If the Board determines that the Project constitutes conversion or diversion and that it meets the essentiality and comprehensive plan conformity requirements outlined in step one of the review process above, the Project Proponent must work with DHR Easement Program staff to identify appropriate substitute parcels of land. Due to the unique characteristics of every historic property, identifying potential appropriate and compatible substitute parcels will require diligence and careful research. In order for the Board to compare the fair market value of the substitute property to the Easement Property, the Project Proponent must obtain appraisals of both properties. The value of the substitute property and the Easement Property must be substantiated by an appraisal that conforms to the Universal Standards of Professional Appraisal Practice (“**USPAP**”) and is prepared by a certified general real property appraiser licensed in Virginia who meets the Appraiser Qualifications Board’s professional accreditation standards.

The Board may impose conditions to mitigate the impact of any Project that results in conversion or diversion and may require evaluation of alternative substitute property. Failure to obtain the Board’s approval for any Project constituting conversion or diversion means the Project shall not proceed. If the Board determines that the Project does not constitute conversion or diversion, Easement Program staff will review the proposed Project according to Easement Program *Policy #5: Project Review*.

Review by the Board of Historic Resources or DHR’s Easement Program staff of any Project affecting an Easement Property is entirely separate from and does not satisfy compliance review under state law, the National Historic Preservation Act, as amended, or any other federal, state, or local regulation. Project Proponents should contact the Director of DHR’s Review and Compliance Division to coordinate any necessary and appropriate environmental regulatory review.

Examples of Projects requiring Board review for a determination of conversion or diversion may include, but are not limited to:

- Installation of a new gas line with a corresponding permanent easement for benefit of the gas company where the purpose of the line is gas transmission, and the line does not serve the Easement Property.
- Widening of an existing overhead electrical transmission line with a corresponding permanent easement for the benefit of the utility company and where the purpose of the line is to provide electrical service to properties other than the Easement Property.

- Installation of an underground sewer pipeline with a corresponding permanent easement for benefit of the local government where the purpose of the sewer line is to serve adjacent properties and the line does not serve the Easement Property.
- Conveyance in fee simple of the Easement Property or a portion thereof to a utility company or state or local government agency for construction or installation of public utilities or facilities such as a road, sewer or water lines, school, airport, etc.

### **Battlefield Easements acquired with Federal Grant Funding**

All OSLA Easement whereby the Easement Property or the OSLA Easement were acquired using a Battlefield Land Acquisition Grant (“**BLAG**”) awarded through the American Battlefield Protection Program (“**ABPP**”) of National Park Service are subject to 54 U.S.C. § 200305(f)(3) of the Land & Water Conservation Fund (commonly known and hereinafter referred to as “**Section 6(f)(3)**”). Section 6(f)(3) imposes requirements regarding conversion and diversion and the American Battlefield Protection Program Authorization of 2009 (54 U.S.C. § 308103) assigns responsibility for such determinations to the ABPP.

Section 6(f)(3) states that no real property or interest in real property (easement) acquired or developed with grant assistance shall be converted or diverted from its conservation or battlefield preservation uses, other than with the approval of the Secretary of the Interior acting through the ABPP, and only upon the substitution of other land of equal market value and of reasonably equivalent usefulness and location for conservation and battlefield preservation purposes, which land is to be perpetually protected for conservation and battlefield preservation purposes.

Under the specific terms of each OSLA Easement for such battlefield Easement Properties, DHR Easement Program staff are generally required to notify ABPP of any proposed conversion or diversion and provide a written opinion as to whether the activity proposed constitutes conversion or diversion and whether the proposed substitute land is adequate.

Any Project involving a battlefield OSLA Easement subject to the OSLA and Section 6(f)(3) will require independent consideration by both the Board of Historic Resources under Section 10.1-1704 of the OSLA and by the ABPP under Section 6(f)(3). The Project Proponent should contact DHR Easement Program staff to coordinate the review processes to the greatest extent possible.

### **Fees**

All applicable fees for review of potential conversion or diversion will be assessed consistent with Easement Program *Policy #12: Administrative Fees* and the published Easement Program Administrative Fees Billing Statement. If Easement Program staff determines that a Project review request requires a conversion or diversion determination by the Board, the Conversion/Diversion Review Fee is due prior to staff conducting its review. If the Project also involves review under Section 6(f)(3), that fee will also be due prior to staff conducting its review. The fees are assessed per each individual Easement Property impacted by the request. Easement Program staff will not

prepare or present a conversion or diversion Project to the Board until all fees are paid in full. Should the Board determine that the request constitutes Conversion/Diversion, the Conversion/Diversion Processing Fee will then be due. Should the request require Easement Program Staff time in excess of forty (40) hours, additional fees may be applicable.

## **Project Qualifications**

### **1. Essentiality**

DHR strongly encourages Project Proponents to avoid impacts to Easement Properties protected by OSLA Easements, including, but not limited to, public utility expansion, transportation, and infrastructure projects. In rare instances where avoidance is not possible, DHR will work to minimize any impacts to the Easement Properties, their conservation values and public interest.

Typical Project Proponents are localities, other state agencies, federal agencies, or utility companies. The Project Proponent bears the responsibility of demonstrating, to the Board's satisfaction, that the Project is essential to the orderly development and growth of the locality. The Project Proponent must provide examples of all alternatives considered and explanations as to why those alternatives were not implemented. Clear evidence illustrating the lack of feasible alternatives is required; *cost-effectiveness will not be considered a viable reason for a conversion or diversion.*

### **2. Compliance with Comprehensive Plan**

The Project Proponent must demonstrate to the Board that the proposed Project is consistent with the current comprehensive plan in effect at the time of the conversion or diversion for the appropriate locality in which the property is located. This should minimally include written confirmation from the locality containing specific references to goals, objectives, strategies, future land use maps and needs identified in the plan.

### **3. Substitute Property**

Pursuant to Section 10.1-1704 of the OSLA, substitute property is required whenever Easement Property is converted or diverted from its open-space use. DHR Easement Program staff may provide preliminary feedback regarding appropriate substitute property with the Project Proponent in advance of any formal purchase offer, however the final determination remains the responsibility of the Board. These options should be consistent with the Commonwealth's land protection priorities and reflect similar conservation values to those of the affected OSLA Easement. **Substitute land is required for both conversion and diversion Projects. Substitute lands are subject to all applicable Easement Program fees and application processes.**

**A. Fair Market Value**

The Project Proponent must demonstrate to the Board that the substitute land is of at least equal fair market value of the converted or diverted Easement Property. The appraisal must conform to USPAP and include fair market valuation of the converted or diverted Easement Property before and after the OSLA Easement was recorded, as well as the value of the proposed substitute land currently, and if encumbered.

**B. Conservation Value**

The Project Proponent shall include maps and photographs of the proposed substitute property and a complete description of the conservation values to be protected. A clear demonstration of conservation values comparable to the affected Easement Property is required.

**C. Usefulness/ Location**

The Project Proponent must provide information on the usefulness of the proposed substitute property as open space as well as the proximity of the proposed substitute land to the existing Easement Property.

**D. Easement Application**

The Project Proponent must submit a complete Easement Application Form, including required photographs, title commitment & insurance policy, maps, boundary survey, and Phase 1 Environmental Site Assessment (ESA), for the proposed substitute land.

**E. Site Visit**

DHR Easement Program staff will conduct a site visit to the proposed substitute land in advance of the staff presentation to the Board.

Due to the individuality of each OSLA Easement, DHR Easement Program staff may establish additional review requirements as necessary.

*[Adopted by the Virginia Board of Historic Resources on June 12, 2025.]*