

Preservation and Community Management Strategies Technical Report

To: Fort Monroe Authority Board of Trustees

From: Leasehold Feasibility Working Group

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Re: Report on Preservation and Community Management Strategies at Fort Monroe

Date: November 17, 2011

Background

After the 2005 Defense Base Closure and Realignment (BRAC) Commission announced that Fort Monroe would be closed in September 2011, the City of Hampton started immediately planning for the reuse of Fort Monroe. The City of Hampton's Federal Area Development Authority (FADA) was created by the action of the Virginia General Assembly in 2005. The Hampton FADA was recognized by the Department of Defense (DOD) as the Local Reuse Authority (LRA) under the BRAC guidelines. As early planning efforts by the City evolved, citizens became concerned about future development at Fort Monroe. Citizen groups, while supporting financial sustainability, began to advocate that the property at Fort Monroe should be a park open to the citizens of the region, that the historic structures at Fort Monroe should be preserved and protected, that new construction at Fort Monroe should be minimized and that the property and structures at Fort Monroe should remain in public ownership to retain control for the property's future. These same concepts also informed the extensive public consultation process begun in 2005 pursuant to the National Historic Preservation Act and the resulting execution of a Programmatic Agreement to address the immediate and foreseeable impacts of closure on Fort Monroe in a manner consistent with sound stewardship practices.

The 2007 General Assembly passed enabling legislation (2007 HB3180) that created the Fort Monroe Federal Area Development Authority (FMFADA). The revised statute retained provisions for the seven commissioners from the Hampton FADA but added eleven commissioners appointed by the

Commonwealth. The FMFADA was subsequently recognized by the DOD as the LRA for reuse planning at Fort Monroe. The new legislation contemplated property conveyance at Fort Monroe to private parties provided it was consistent with the Reuse Plan:

“As to real property or interests therein owned or held in whole or in part by the Authority, whether acquired by reverter of title, purchase, gift, condemnation, or otherwise, no such real property or ownership interests in the former federal area known as Fort Monroe shall be subject to any land use, zoning, or subdivision ordinance of any city so long as such real property or interests therein are owned or held by the Authority. However, the conveyance of any interest in the real property from the Authority to a private party shall be consistent with Fort Monroe’s reuse plan and contingent upon the private party’s obtaining all necessary approvals under applicable land use law or ordinance.” [2007 § 15.2-6304.1(D)].

Citizen groups continued to call for maintaining public ownership. In 2008, a committee of citizens developed a petition calling for an amendment to the City of Hampton policy on Fort Monroe to specifically include a provision opposing any sale of Fort Monroe real estate to private entities. Over 7,000 Hampton residents signed the petition. One advocacy group, the Citizens for a Fort Monroe National Park (CFMNP), emerged as the most vocal proponent for continued public ownership, lobbying the FMFADA Board and the local General Assembly members. The CFMNP was successful in convincing the legislature to adopt a no land sale provision. This strategy was incorporated by the 2010 General Assembly in the Fort Monroe Authority Act by passage of HB1297 that states:

“It is the policy of the Commonwealth that property at Fort Monroe shall not be sold to private interests, but shall be maintained as Commonwealth-owned land that is leased, whether by short-term operating/revenue lease or long-term ground lease, to appropriate public, private, or joint venture entities. If the decision is ever made to sell property at Fort Monroe, it may only be sold with the consent of both the Governor and the General Assembly, and approval as to form of the documents by the Attorney General” [2010 § 15.2-7304(A)].

The new Fort Monroe Authority (FMA) Board of Trustees established by HB1297 began to revisit some of the decisions made by the FMFADA Board including the lease-only strategy. Several of the FMA Trustees openly expressed concern about the sustainability of the economic model and the decision to pursue prepaid leaseholds as a financing mechanism for implementing the capital improvement plan. Similar concerns have been expressed by representatives of the Hampton City Manager’s office and members of the U.S. Army Deputy Assistant Secretary of Installations and Housing office negotiating the Economic Development Conveyance with the FMA.

In late 2010 the Fort Monroe Authority and City of Hampton officials worked on amendments to the enabling legislation to reflect some changes requested by the new FMA Board. Representatives of the CFMNP also provided comment and input on the revised legislation. The 2011 session of the General Assembly passed SB1400 which amended the conveyance language to read:

“It is the policy of the Commonwealth that the historic, cultural, and natural resources of Fort Monroe be protected in any conveyance or alienation of real property interests by the Authority.

Real property in the Area of Operation at Fort Monroe may be maintained as Commonwealth-owned land that is leased, whether by short-term operating/revenue lease or long-term ground lease, to appropriate public, private, or joint venture entities, with such historic, cultural, and natural resources being protected in any such lease, to be approved as to form by the Attorney General of the Commonwealth of Virginia. If sold as provided in this article, real property interests in the Area of Operation at Fort Monroe may only be sold under covenants, historic conservation easements, or other appropriate legal restrictions approved as to form by the Attorney General that protect these historic and natural resources and only with the consent of both the Governor and the General Assembly, except that any transfer to the National Park Service shall require only the approval of the Governor.” [2011 § 2.2-2340(A)]

The 2011 amendment revised the previous policy established by the legislature by dropping the outright prohibition on private sales while retaining the strict procedural requirements for approval of sales. As detailed below, the current policy is consistent with the Programmatic Agreement executed on April 27, 2009, which allows for the transfer of property or its management or control subject to appropriate protections.

The FMA Board commissioned a study to investigate the feasibility of the prepaid leasing concept in the Hampton Roads market including the ability to obtain mortgage financing on prepaid leasehold interests and the marketability of leasehold interests to potential leaseholders in the area. The report was prepared by Bay Area Economics (BAE) and presented to the FMA Board of Trustees on March 24, 2011. The final version of the BAE Technical Memorandum dated April 13, 2011 contains the following conclusions:

- *A Prepaid Residential Leasehold program presents the FMA with a sub-optimal business proposition: lower sales revenues with higher costs both in terms of staff time and out-of-pocket expenses than would likely be the case with a fee-simple sales program.*
- *The FMA should consider adopting a fee simple sales program with property controls implemented through deed restrictions; Covenants, Conditions and Restrictions documents (CC&Rs); and historic preservation easements/covenants as set forth in the Programmatic Agreement – the degree of control would be virtually equivalent to that achieved under a leasehold structure since the Programmatic Agreement and its mandated controls apply to both forms of ownership.*

The Leasehold Feasibility Working Group (LFWG) was established to continue the evaluation of the prepaid leasehold financing strategy currently based on the BAE technical report on prepaid leasehold feasibility prepared by BAE Principal David Shiver. The FMA Board has requested a recommendation from the LFWG on the merits and feasibility of prepaid leasehold interests versus fee simple sales.

At its organizational meeting on April 26th, the members of the LFWG group were asked to state their principal objectives for the future of Fort Monroe. The vast majority of comments revolved around protection of the historic properties and creating a sustainable economic model. During discussions the LFWG members identified four possible revenue generating strategies for the properties at Fort Monroe:

1. Rental income from short-term operating leases,
2. Rental income from long-term leasehold interests with no prepayment,
3. Rental income from long-term leasehold interests with prepayment of rent, and
4. Fee simple sales to private individuals or investors.

The LFWG members also requested an evaluation of the protection mechanisms available to the FMA for historic assets and management of the property as a community based on the four conveyance strategies. This report presents the findings of these investigations and the recommendations of the LFWG for future strategies for preservation and sustainability at Fort Monroe.

Preservation and Community Management Tools

A sub-group was tasked with investigating whether the existing leasehold strategy would provide a higher level of protection for historic properties, new construction and the natural resources than fee simple sales with deed restrictions or historic easements. The sub-group met on May 24th to evaluate the protection mechanisms currently in place or foreseen that could be put in place to protect the historic properties and to manage the property in any of the four scenarios. During that meeting the Virginia Department of Historic Resources (DHR) reminded the group that the other side of this analysis is the economics. The DHR stated its belief that preservation and prosperity go hand and hand and recognize that what creates a sustainable economic picture also works best for the historic resources.

The following list identifies the range of tools already in place or foreseen in accordance with governing documents to address preservation and those identified as available for the management of the community at Fort Monroe, together with a description of each tool.

- Programmatic Agreement (PA) – This document provides a framework for future stewardship and protection of historic properties at Fort Monroe, including individual buildings and structures, archaeological sites, landscape features, and historic viewsheds, as well as the National Historic Landmark (NHL) district as a whole,

The PA is a legally enforceable document that binds the signatory parties to its terms, and defines roles and responsibilities. It provides a holistic approach to the long-term protection of culturally significant resources on the entire approximately 565-acre property at Fort Monroe while also recognizing that different areas or zones have their own distinctive character and quality. The stipulations and tools called for in the PA are interconnected in order to provide a system of checks and balances to ensure consistency with the document's preservation intent. Additionally, the PA provisions were written to anticipate a range of uses or change in property ownership, management or control, whether through subsequent delegation, lease, sale or other conveyance.

For instance, the stipulations require that parties not bound by the PA directly as signatories shall be bound through available legal and appropriate mechanisms. These might include, for example, management agreements with delegated parties, incorporation of the relevant terms of the PA into any lease, the use of perpetual easements in the case of the sale of property or timed covenants in

the case of long term conveyances. Moreover, the PA's overarching framework for stewardship can and should be complemented by other tools to address neighborhood issues normally managed through other governing documents such as CC&Rs or local zoning.

The PA focus is on the physical treatment of historic, architectural, archaeological, and landscape features. The treatments are grounded in accepted best preservation practices and are informed by the National Park Service (NPS) guidance found in *The Secretary of the Interior's Standards for the Treatment of Historic Properties* and other NPS reference materials as these may be amended in the future. Interconnected tools employed in the PA to ensure proper treatment of historic properties include a Management Zone concept and the use of a Historic Preservation Manual and Design Standards (Design Standards) at the operational level. (The Standards must be approved by NPS and DHR.) These requirements are further supported by the critical and defined role of a professionally qualified Fort Monroe Historic Preservation Officer and the continuing review of projects by the State Historic Preservation Officer.

The PA delineates seven areas called "Management Zones" based on their distinctive architectural character, land use, density and other factors. The PA also sets forth broad guidelines specific to each zone and its character, to include allowable new construction, limits to demolition and preservation treatments. The Design Standards take these guidelines and provide a detailed breakout of what is acceptable zone by zone. In this way, the Design Standards lay out specific guidelines for historic preservation treatments and design acceptable characteristics for new and infill construction and additions, including architectural style, massing, scale, materials, site placement, etc. The PA mandates that projects affecting historic buildings, structures and landscapes and any new development shall be reviewed and approved on the basis of consistency with the zone management treatment principles and the detailed Design Standards. Other projects may be considered only after all efforts are made to avoid or minimize adverse effects. Generally such projects must be fully justified by data that supports that there is no feasible or prudent alternative. More flexibility is provided in the Wherry area, while demolition in the more sensitive area, such as Zone E, the batteries and in the case of individually eligible properties, is only permitted to address immediate health and safety concerns or to prevent further property damage.

Requirements of the PA that bind signatories to protect historic properties

Below is a list of PA stipulations that bind signatory parties to the perpetual protection of historic properties at Fort Monroe regardless of ownership, lease arrangement or controlling interest in those properties:

- Stipulation I.F.3: This stipulation requires the Army, prior to the sale, transfer or lease of land that will not revert to the Commonwealth to develop in consultation with the other signatory parties "model historic preservation covenants, easements or other appropriate protections to be attached to the deed or lease agreements." The stipulation also requires that the Army, immediately prior to transfer, record the finalized covenants, easements or other appropriate protections with the City of Hampton conveyance records, or attach these protections to the lease which shall be similarly recorded. The Army is forbidden to "transfer property out of Federal ownership or control without adequate and legally enforceable

restrictions or conditions to ensure that the long-term preservation of the property’s historic significance.”

- Stipulation II.F: This stipulation commits the Commonwealth and the Fort Monroe Authority (as successor in interest my law to the Fort Monroe Federal Area Development Authority, to continuing enforcement of the terms of the PA related to matters of preserving and protecting the historic properties at Fort Monroe. As stated in the PA this is to be accomplished by the Commonwealth and FMA “in the event of transfer of any interest in the real estate or delegation of their interest in, or respective responsibilities for, Fort Monroe” by binding the transferee or the delegate “to the terms of this Agreement [i.e. the PA] as appropriate through available legally enforceable mechanisms.” Such “legally enforceable mechanisms” may include, but are not limited to, historic preservation easements or covenants held by DHR.
- Stipulation IV.C.6(i): According to this stipulation the Commonwealth must, in consultation with DHR, develop criteria that shall guide the decision-making process for the sale, transfer or lease of historic properties at Fort Monroe. The purpose of this requirement is to ensure that the implications to an historic property being removed from Commonwealth ownership or control are taken into consideration and carefully addressed. Among those items that must be included in this criteria are an economic analysis comparing retention of the historic property under Commonwealth ownership and control versus the sale, transfer or lease of the property to another entity, anticipated effects to the characteristics that make the historic property eligible for the National Register of Historic Places (NRHP) individually or as a contributing resource within the NHL historic district, the historic significance of the property, the physical condition of the property, and an evaluation of the feasibility and practicality of mothballing the historic property until the Commonwealth can identify a future use for the property.
- Stipulation IV.C.6(ii): As with the Army requirement found in Stipulation I.F.3, the Commonwealth, in consultation with DHR, must also develop “historic preservation covenants, easements or other appropriate protections to be attached to the deed or lease agreements” of historic properties leaving Commonwealth ownership or control. Additionally, such protections must be consistent with the established principles of the PA.
- Stipulation IV.C.6(vi): This stipulation states that the Commonwealth prior to transfer of property to a party not bound by the PA “shall take such necessary steps to ensure that the protections afforded by the PA are enforceable against such party by the Commonwealth, the FMA, the City of Hampton, or such entity as may have jurisdiction over the property at the time through local zoning and/or other appropriate tools.” The purpose of this stipulation is to ensure the continued protection of historic properties at Fort Monroe even in the event that such properties are acquired, through lease or sale, by an entity that is not subject to the terms of the PA.

Requirements of the PA for the treatment of historic properties

Below is a list of PA stipulations that address the treatment of historic properties at Fort Monroe by signatory parties or other controlling interests:

- Stipulation II.E: In the event that the NPS acquires some or all of Fort Monroe as a National Park, the federal agency is responsible for compliance with Section 106 and Section 110 of the National Historic Preservation Act.

- Stipulation III.A: The FMA shall develop a Historic Preservation Manual and Design Standards (Design Standards) for activities occurring on the reversionary and non-reversionary lands at Fort Monroe. The Design Standards shall be “consistent with sound and accepted preservation practices and standards” and shall be informed by NPS publications and guidance documents such as *The Secretary of the Interior’s Standards for the Treatment of Historic Properties*, its Preservation Briefs and Tech Notes, as well as other appropriate sources. The Design Standards will, at a minimum, include the array of treatment options (rehabilitation, restoration, reconstruction, and preservation), address routine maintenance and repair activities, establish parameters for appropriate design (e.g. massing, scale, materials, locations, etc.) within each zone of the NHL historic district, respect the identified historic landscapes and significant viewsheds, and assess the potential to affect archaeological sites. The Design Standards must be reviewed and approved by DHR and NPS and can only be amended upon approval by DHR.
- Stipulation IV.C: This stipulation establishes seven distinct Management Zones at Fort Monroe based on a number of factors including careful consideration of historic and existing architectural character, current and past land uses, construction periods, concentration of contributing resources, and resource types such as the Endicott Batteries and individually eligible properties. The Management Zones establish the parameters for demolition of historic buildings; mass, scale, and appropriateness of new construction; and the recommended treatment approach. The Design Standards are more specific guidance on how to operate within those parameters.
- Stipulation IV.D: With the Army presence ending at Fort Monroe, the undertakings occurring there by the Commonwealth or a designated third party will no longer fall under the jurisdiction of Section 106, which pertains strictly to federal projects. Therefore, to ensure consideration and protections in the absence of a federal agency, an entirely new state-level mechanism for evaluating projects occurring at Fort Monroe and their potential to affect historic properties was required. This stipulation establishes a review of undertakings initiated by the Commonwealth or other entity at Fort Monroe. Among the requirements found in this section of the PA are the creation and maintenance of a state position to act as the Fort Monroe Historic Preservation Officer (FMHPO) and to serve as the subject matter expert, guide project proponents to limit impacts to historic properties, and coordinate consultation with DHR and other stakeholders. Much like Section 106, undertakings occurring at Fort Monroe sponsored by the Commonwealth or another party must first be reviewed by the FMHPO and then by DHR. This two-tiered review process is intended to provide checks and balances to ensure appropriate treatment of significant cultural resources.

Implementation Scenarios
1. Short-term operating lease – The PA will be incorporated by reference in the lease agreement.
2. Long-term leaseholds – The PA will be incorporated by reference in the leasehold agreement.
3. Long-term leaseholds with prepayment – The PA will be incorporated by reference in the leasehold agreement.
4. Fee simple sales – The PA requires that the property be placed under easement, preservation covenant or other legal enforceable mechanism prior to leaving state ownership or control.

Historic Preservation Manual and Design Standards – The Fort Monroe Authority (as successor in interest by law to the Fort Monroe Federal Area Development Authority) has developed a draft Historic Preservation Manual and Design Standards (Design Standards) pursuant to Stipulation III.A of the Programmatic Agreement. (This document is pending submission for approval and adoption.) These Design Standards are consistent with the PA zone management requirements and its broad treatment directions. They are based upon and consistent with sound and accepted preservation practices and standards established and regularly reviewed in relevant National Park Service publications and guidance documents such as the Preservation Briefs and the Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for the Treatment of Cultural Landscapes. At a minimum the Design Standards will address all treatment options for historic properties (rehabilitation, restoration, reconstruction and preservation), routine maintenance and repair, appropriate design, massing, height, scale, materials, location, spatial relations, density, etc. for new construction and additions to existing buildings or structures within each Management Zone, significant historic viewsheds and cultural landscapes and the potential to affect archaeological sites resulting from proposed ground disturbing activities. The Design Standards will be reviewed and approved by both the National Park Service and the Virginia Department of Historic Resources. The Design Standards will be the guiding operational document for review of projects involving historic buildings and structures and those involving new construction or ground disturbing activities within the Fort Monroe National Historic Landmark District regardless of ownership, including projects within the proposed National Park Service Unit boundary. Further, these Design Standards will be applicable to projects proposed on the interior of historic buildings and structures where the historic interior remains intact. They are consistent with the *Secretary of the Interior’s Standards for Rehabilitation of Historic Properties*, which must be followed in order to qualify for the Federal and State Rehabilitation Tax Credit programs, and with the standards that apply to consultation involving federally owned properties.

Implementation Scenarios
1. Short-term operating lease – The Design Standards will be incorporated by reference in the lease agreement.
2. Long-term leaseholds – The Design Standards will be incorporated by reference in the leasehold agreement.
3. Long-term leaseholds with prepayment – The Design Standards will be incorporated by reference in the leasehold agreement.
4. Fee simple sales – The Design Standards will be recorded in the deed conveyance.

- Community Management Regulations – This is a strategy that was recommended by the Historic Preservation Advisory Group as necessary to complement existing mechanisms to address those community issues normally covered by municipal zoning. FMA’s adoption of community management regulations will take the place of zoning and/or city ordinances and a resident’s manual. Some examples of the types of regulations that will be addressed in the regulation document currently under development by FMA with the assistance of the OAG are landscaping

(lawn maintenance, shrub/planting beds, foundation planting, tree replacements, etc.), mailboxes, clotheslines, flags/flagpoles, signs, decorative ornaments, exterior lighting, fences, play equipment (swings, sliding boards, trampolines, basketball goals, etc.), accessory buildings, porches/decks and trash disposals. The regulation document will also address specific requirements for exterior changes not covered by the PA or Design Standards such as trim/details and windows/doors. The regulation will also contain recourse provisions in the event of singular or repeated violations of the regulations.

Implementation Scenarios
1. Short-term operating lease – The regulations will be incorporated as an exhibit to the lease agreement.
2. Long-term leaseholds – The regulations will be incorporated as an exhibit to the leasehold agreement.
3. Long-term leaseholds with prepayment – The regulations will be incorporated as an exhibit to the leasehold agreement.
4. Fee simple sales – The regulations will be a separate document signed at closing of the fee simple deed conveyance.

- Historic Easements – Historic preservation easements, a specialized form of conservation easements, are considered the most effective mechanism available for the perpetual preservation of historic resources. An easement is a legally binding and perpetual agreement between a property owner and the easement holding agency. Historic preservation easements are effective because they require that the property be maintained according to a documented condition or better; require that the property owner obtain the prior written approval of the easement holder before undertaking changes; and enable the easement holder to enforce compliance with the terms of the easement. Together, these restrictions promote and enforce appropriate stewardship of the historic property. The deed of easement is recorded at the jurisdictional courthouse and runs with the title to the property. An easement cannot be extinguished except through judicial proceeding, and only then because the easement no longer serves a public purpose, as the resource protected no longer exists.¹ Easements may be amended only in certain circumstances to enhance the protection of the historic (and perhaps other) resources present.

Easements and Interaction with Other Restrictions

Easements differ from covenants and other restrictive agreements, such as CC&Rs established by a homeowners’ association, or even a local historic preservation ordinance. Unlike a covenant, which can be placed on a property for a designated time period, an easement is perpetual in duration. An easement is established to protect defined, significant conservation values (e.g. historic resources) present at a property, and serves a public purpose in doing so. It is carefully

¹ In the 45-year history of DHR’s easement program, only one easement has been extinguished due to casualty loss of the historic building due to fire. In this case, the building was located on a small property that was not within the boundaries of a historic district listed in the Virginia Landmarks Register. In another case, DHR transferred its review authority to the Virginia Outdoors Foundation, who co-held the easement, due to the destruction of the historic house by fire. In this case, DHR retains its right to review ground disturbance for potential impact to archaeological resources.

crafted to provide appropriate and comprehensive protection for such resources. For example, a historic preservation easement protects the interior and exterior of a historically significant building by requiring that the property be maintained according to a documented standard, and that any changes be consistent with the historic character of the property. Failure on the part of the property owner to comply with such terms would result in a violation of the easement and an associated enforcement action by the easement holder.

However, unlike a CC&R, an easement does not generally address purely aesthetic issues (such as the color of painted surfaces or acceptable exterior furniture), nor does it address issues, such as noise, that are most often considered under local zoning or a neighborhood agreement. Instead, an easement focuses on preserving the historic integrity of a particular property. Easements and restrictions such as CC&Rs, as well as other control mechanisms, are not mutually exclusive, therefore, and together may provide both satisfactory stewardship of a property and reinforce overall neighborhood objectives.

Importantly, an easement cannot be removed or changed by the vote of a governing board or citizenry, nor can it be influenced by prevailing political or cultural forces. Easements are administered by the professional staff of a governmental agency or private organization whose mission it is to protect and steward the resources. Proposed alterations to an easement property are evaluated by the professional staff according to national standards, such as the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (Secretary's Standards), to provide a consistent interpretation and application across easement properties. Because of their serious nature, historic preservation and conservation easements, and the agencies that administer easement programs, are highly regulated at the state and federal levels.

Legal Framework

Virginia pioneered the use of easements as a statewide preservation tool. Established by the General Assembly in 1966, Virginia's program today is one of the largest in the country and is viewed as a model nationwide. The General Assembly recognized that the most cost-effective and best preservation of Virginia's historic resources is accomplished when property remains in private ownership, with the Commonwealth ensuring the appropriate protection and stewardship of the property in perpetuity.

The Board of Historic Resources holds easements according to Chapter 22, Title 10.1 and Chapter 17, Title 10.1 of the Code of Virginia which recognize that the preservation of open-space land, including land preserved for historic or scenic purposes, serves a public purpose by curbing urban sprawl and encouraging more desirable and economical development of Virginia's resources. The Department of Historic Resources (DHR) administers the easement program on behalf of the Board of Historic Resources.

Central to the drafting of easement restrictions and administration of easement programs is the body of Treasury regulations (26 CFR 1.170A-14) that addresses conservation easements. These regulations establish standards for what qualifies as a "perpetual conservation restriction" and "eligible donee," or easement-holding organization. The donee is required to have a commitment

to protect the property and the capacity to enforce the terms of the easement. The regulations also set requirements for what constitutes adequate protection of historic properties, including review of proposed changes to ensure compliance with appropriate standards, visual public access, and enforcement of the terms of the easement by the holder.

It is important to note that DHR abides by the requirements set out in Treasury regulations in the management of its program, regardless of whether tax benefits are sought for the donation. In consultation with the Office of the Attorney General (OAG) and national experts, DHR also engages in regular and thorough review of program policies and procedures and easement template documents, to ensure compliance with all governing state and national laws, and conservation best management practices.

Program Management and Operation

This legal background shapes all aspects of DHR's easement program, from the easement document to management of the program. Each deed of easement is developed from a template document and is tailored to the specific conditions and character of a property. Easement restrictions are crafted to allow a building and property to remain viable, while maintaining and preserving its historic character and the integrity of materials. Following recordation of the easement, all proposed changes are reviewed in a timely manner by DHR's professional staff according to the terms of the easement and in consultation with the Secretary's Standards and associated guidance. DHR's staff, which includes architectural historians, architects, conservationists, and archaeologists, provides guidance to property owners on the appropriate treatment of their historic resources, whether a historic building or structure, cultural landscape, or archaeology.

DHR conducts regular inspections of its easement properties to ensure compliance with the terms of the easement. These monitoring visits also provide an important opportunity to foster a positive relationship with the property owner and to provide technical assistance. Consistent with state and federal law, DHR's easements also require public access and include strong provisions for enforcement of the easement agreement, backed up by the legal authority and resources of the Commonwealth of Virginia, through the OAG.

Violations

If a violation is found to exist at an easement property, DHR assesses the scope and impact of the violation upon the historic character and integrity of the property, and determines the appropriate enforcement action in close consultation with the OAG. As outlined in Easement Program Policy #7, "Violations," DHR establishes a specified time frame for correction of the issue. If the violation is not adequately addressed within the specified timeframe, DHR, through the OAG, will seek all available legal remedies to correct the situation.

DHR works carefully with property owners to ensure the proper stewardship of their historic resources; consequently major easement violations have been rare during the history of the program. When such violations have occurred, DHR strives to achieve a positive resolution that preserves or restores the historic character and integrity of the property. If such resolution cannot

be achieved through a constructive relationship with the property owner, DHR seeks appropriate legal action to require that the violation be corrected in an acceptable manner. DHR has successfully brought legal action to require removal of unapproved and inappropriate work and restoration of a property to its historic appearance.

Easements at Fort Monroe

Simply put, easements are the best tool available to ensure the perpetual preservation of historic resources. While they may not be employed at every building (or historic landscape) at Fort Monroe, an easement held by DHR would guarantee the preservation of the resources thus protected. Easements will be placed on those historic properties that are transferred from state ownership in fee simple, including when a building is transferred in fee-simple with the Commonwealth retaining ownership of the underlying land. So too, for properties transferred out of state control through a long-term leasehold arrangement, a restrictive covenant will be placed on the property for the duration of the lease term, and would resemble an easement in the type of restrictions placed on the property and enforcement capacity.

Easements are an important and effective tool that can be employed for the benefit of the public and historic buildings at Fort Monroe. Importantly, easements can be utilized in conjunction with other restrictions to protect the important historic character of the property and uphold neighborhood objectives.

A sample historic preservation easement is attached to this report as Exhibit B.

Implementation Scenarios
1. Short-term operating lease – Not applicable.
2. Long-term leaseholds – A restrictive covenant would be required if any state property (i.e. building improvements) is conveyed out of state control.
3. Long-term leaseholds with prepayment – A restrictive covenant would be required if any state property (i.e. building improvements) is conveyed out of state control.
4. Fee simple sales – A deed of perpetual easement would be recorded to protect property transferred out of state control.

The members of the historic preservation sub-group feel that the FMA has a strong list of tools available to protect the historic properties in any scenario. The strongest protection is afforded through perpetual historic preservation easements, and by restrictive covenants for leaseholds, which provide substantially similar protection but only for the term of the leasehold. The sub-group supports the recommendation of the Historic Preservation Advisory Group to develop community management regulations to complement the existing historic mechanisms to address those community issues normally covered by municipal zoning or an association’s rules.

Economic Model Assumptions

Since its organizational meeting on April 26th, the majority of the discussion has centered on the prepaid leasehold versus sale scenario. The current version of the economic model reflects prepaid leasehold

financing on the 174 family housing units only. The prepaid leasehold strategy was projected to begin during FY2014 and continue through FY2019. Based on projected values in a recovering real estate market these prepaid lease transactions are projected to generate approximately \$37 million over the six-year period assuming a 10% discount for prepaid leasehold value versus fee simple sales. These proceeds are projected to be used to fund projects set out in the 20-year capital improvement plan developed by Kimley-Horn Associates. These projects are scheduled based on a number of economic and environmental factors. The projects will be completed as capital is available. If the prepaid leasehold strategy is not pursued by the FMA, alternative sources of capital funds must be identified and procured to fund the capital improvement plan.

The economic model projects that the commercial buildings will be leased to tenants through operating leases to provide operating funds for the FMA. The FMA has leased 13 commercial properties from the Army as part of its interim leasing program. Based on inspections completed at property turnover, the interior condition of the commercial buildings varies. Some buildings will require extensive repairs or restoration before they can be marketed for lease. In addition, many of the buildings have space configurations geared towards a training environment with large classrooms, some with raised floors. Based on recent negotiations with potential tenants it is clear that the \$15 per square foot (psf) for tenant improvements for new occupancy is too low. A recent prospective tenant requested nearly \$29 psf in tenant improvements to occupy a building that was deemed to be one of the better buildings.

The Wherry Apartments were expected to be operated by the FMA as short-term rental housing. The projected income in the financial model from the Wherry Apartments is \$299,000 per year. However, Hurricane Irene caused significant damage to many units that make the repairs economically infeasible. While insurance proceeds are available to fix the hurricane related damage there are no funds available to make the necessary repairs to the building exteriors to minimize future storm damage. The FMA Board recently endorsed the strategy to honor existing leases but to refrain from any new leases. It is now anticipated that the Wherry Apartments will be completely vacant by September 2012.

Property Financing

At the center of the discussion is the availability of financing for prepaid leasehold interests on residential units. After receiving an update on the progress of the LFWG, the FMA Board asked the LFWG to evaluate financing feasibility for both commercial and residential properties, either existing or future development.

- **Residential – Existing**

BAE did an extensive analysis of the feasibility for mortgage financing for prepaid residential leasehold. Based on a review of the BAE notes from interviews with local lenders and lenders in areas where leasehold interests have been financed the LFWG found the following key requirements:

- Lenders originate the mortgages but few hold the mortgages as portfolio investments. Most lenders sell the mortgages on the secondary market so lenders have a strong

preference that mortgage paper be marketable to Freddie Mac and Fannie Mae. Most lending institutions use Fannie Mae guidelines since they are stricter.

- The mortgage must be secured by the property improvements and the borrower's interest in the land². This would require that the property improvements be transferred to the lessee, which according to the OAG would require the approval of the General Assembly and the Governor.
- Generally, leasehold estates must be a common practice in the area². Based on research with commercial brokers in the market, prepaid leasehold estates are not common in the Hampton Roads area.
- The lease must provide that the leasehold can be assigned, transferred, mortgaged and sublet an unlimited number of times by the lessee either without restriction or on payment of a reasonable fee and delivery of reasonable documentation to the lessor². The lessor may not require a credit review or impose other qualifying criteria on any assignee, transferee, mortgagee or sublessee.
- The lease must not include any default provisions that could give rise to forfeiture or termination except for the nonpayment of the lease rents².
- The lease term must run for at least ten years beyond the mortgage maturity². This may require that the lease term be extended if the leasehold interest is sold, making the lease essentially perpetual.
- In the event of an uncured default the lender would have the right to cure the default or take over the borrower's rights under the lease².

There are two major barriers to the prepayment of leasehold rent. The first, that the loan must be secured by the property improvements, can be resolved by transferring title to the improvement to the leaseholder. This would require the approval of the General Assembly and the Governor. It would not be feasible to ask potential tenants to wait until the next General Assembly session for the property transfer to be approved since the General Assembly meets for only 45-60 days per year.

The second factor is one that is more difficult, if not impossible to overcome. The requirement that the use of leasehold estates be a prevailing practice in the market is problematic. Based on information provided by local residential brokers there are no records of leasehold estates being marketed recently in Hampton Roads. The closest product type was listings for cooperatives in Virginia Beach. With only 174 potential leaseholds it is unlikely that the FMA could create a scenario over the next few years to meet the prevailing practice requirement. Until this requirement can be met, leasehold mortgages that do not qualify for Fannie Mae or Freddie Mac

² Fannie Mae Selling Guide, Section B2-3-04, revised 10/25/11

purchase or securitization are unlikely to be approved by lending institutions.

- Commercial – Existing

The LFWG did a survey with several large local banks. These lenders were asked a standard set of questions about financing for acquisition of existing ground leases or prepayment of new leaseholds for commercial properties. Based on the interviews the LFWG found the following key requirements:

- Lenders originate the mortgages and most hold these loans as portfolio investments since there is not an established secondary market such as Fannie Mae and Freddie Mac for commercial loans.
- The mortgage must be secured by the property improvements and the borrower's interest in the land. This would require that the property improvements be transferred to the lessee, which according the OAG would require the approval of the General Assembly and the Governor.
- Loan for prepayment or acquisition of existing leasehold is generally capped based on the product type with leasehold loan amount to appraised value (LTV) rates, generally 5% less LTV than fee simple transactions due to the perceived additional risk for leasehold transactions. LTV ratios range from 75%-85% depending on the risk associated with the product type.
- Any lending for improvements to the property must still meet the LTV ratio for the product type which may limit borrower's ability to finance improvements to the property.
- Borrower for either owner-occupied or multi-tenant facility must meet cashflow coverage requirement depending on the credit rating of the tenant. Borrowers must maintain net operating income at certain multiples of the debt service payments. Debt service coverage ratios (DSC) generally range from 1.1 to 1.3 depending on the risk associate with the property type.
- The loan term for leasehold financing is generally seven years or less with amortization periods of up to twenty-five years.
- Lender will look for additional security interest such as a personal guarantee or other pledged capital that could be liquidated in the event of a default.
- In the event of an uncured default the lender would generally have the right to resell the leasehold interest, liquidate the property or be taken out by a secondary source such as the FMA.

Commercial lenders have more flexibility across product types but are looking for experienced

borrowers and highly collateralized transactions. The requirements for commercial lending are more dependent on the cashflow of the tenant business or investor. Commercial loans must meet the lender's requirement, not a third-party standard.

Pre-payment of ground rent, if considered as a funding alternative to residential pre-payment, may limit the amount of financing available to the lessee for building improvements necessary to make the leased property suitable for leaseholder occupancy or multi-tenant occupancy since the total of both rent prepayment and tenant improvements would be subject to the limitation on LTV.

The only significant issue is that the loan must be secured by the property improvements. This would have to be done at the time of lease execution by transferring title to the improvement to the leaseholder. This would require the approval of the General Assembly and the Governor. The General Assembly meets for only 45-60 days per year. It would be a major barrier for owner-occupied tenants or multi-tenant investors to wait until the next General Assembly session for the property transfer to be approved.

- Residential – New Construction

In general, the requirements for leasehold lending on owner-occupied facilities (single family detached, townhomes and condos) follow the same requirements listed above for existing residential. No lender could recall any single family homes being built on ground leases due to the issue that the improvements typically convey to the lessor at the end of the lease term. The ground lease would have to be essentially perpetual in order to eliminate the concern.

Financing for townhomes and condo projects face the same challenge on ground leases unless the lease can be automatically renewed or extended. The term of the underlying ground lease would have to be ten years longer than the latest maturing mortgage. Financing would be contingent on up to 75% of the units pre-sold prior to loan closing. The requirement for transferring ownership of the improvements would not be a barrier since the property would be ground leased to the borrower and the improvements would be built after the ground lease is completed. The issue of prevailing practice in the market would still be a barrier for conforming loans.

Lending for multi-family residential on long-term ground leases is available in the market. The demand for apartment units has increased based on the number of homeowners now moving to rental units as a result of foreclosure or short sells. This demand is expected to continue for the foreseeable future. The loan approval is contingent on the amount of pre-leasing. Lenders are looking for up to 75% pre-leasing prior to loan approval. Since new construction would occur after the ground lease was executed, the property improvements would be available as collateral for the loan.

- Commercial – New Construction

Lenders are willing to be flexible on new commercial construction. There is a preference for

owner-occupied headquarter facilities since these are more critical to the success of the business. The business must meet cashflow coverage requirements (NOI greater than 1.25 times the annual loan payments) and use the improvements as collateral for the loan. Personal guarantees are also required. Multi-tenant buildings, both office and retail, must be significantly pre-leased (up to 75%) prior to closing of the loan. Loan amounts are limited to 75% of the anticipated post-construction appraised value. Secondary collateral is usually required.

Economic Considerations

The following list identifies a list of economic factors that must be considered in evaluating how the four scenarios impact the revenue and expenses of the FMA, in particular the funding of capital improvement projects required or needed to upgrade the buildings, infrastructure and utility systems. As mentioned above, the need to provide economic sustainability is critical to the protection of the historic assets. Without an adequate source of operating capital the FMA will not be able to provide for adequate maintenance of the historic assets still under FMA maintenance responsibility. Any differences between commercial and residential properties are described in the relevant sections below.

- **Revenue Impact** – The FMA will have ongoing costs to operate and maintain those properties still under FMA maintenance responsibility. The FMA will need ongoing revenue as well as capital to address the approximately \$35 million in utility and infrastructure upgrades identified during the condition assessment study performed by the civil engineering consultant and scheduled in the 20-year capital improvement plan (CIP). The current economic model reflects that the commercial properties will be leased to tenants on operating leases. The residential properties (other than the Wherry Apartments) are expected to be leased with operating leases for the first 2-3 years and then converted to long-term prepaid leaseholds over a 6-year period. Maintenance responsibility for these leasehold properties would then become the responsibility of the lessee.

Implementation Scenarios
1. Short-term operating lease – Residential operating leases usually have a fixed amount of rental income per month with an annual increase in rent tied to either a fixed percentage or based on some type of consumer price index.
2. Long-term leaseholds – Long-term leasehold agreements usually have a fixed amount of rental income paid quarterly or annually with a periodic increase in rent tied to either a fixed percentage or based on some type of consumer price index.
3. Long-term leaseholds with prepayment – The aggregate amount of rent under the leasehold term would be discounted for the time value of money to determine a net present value (NPV) of the lease. The leaseholder would either pay cash or obtain mortgage financing for the NPV. The FMA would receive the NPV less any marketing/closing costs at the closing of the mortgage. This would result in a one-time revenue contribution from the leasehold with the possible exception of a small transfer fee if the leasehold is transferred to a new owner.
4. Fee simple sales – The FMA and buyer would agree to a sales price for the housing unit. The buyer would either pay cash or obtain mortgage financing for the purchase price. The FMA would receive the proceeds of the sale less any marketing/closing costs.

This would result in a one-time revenue contribution from the sale.

- **Financing** – The pre-payment of the leasehold rent and the closing of a non-cash sale will require the lessee or buyer to obtain financing for the transaction. The flood plain status may also impact the availability of the lessee/buyer to obtain property insurance through traditional underwriters. Specialty insurance companies do provide property insurance for properties within 100-year flood plains but at a higher premium.

Implementation Scenarios
1. Short-term operating leases – Not applicable.
2. Long-term leaseholds – Not applicable.
3. Long-term leaseholds with prepayment – Based on the BAE report on prepaid leasehold financing and interviews with local commercial lenders, the availability of conforming loans for prepaid leasehold transactions is, at best, extremely limited and requires making the prepaid leaseholds “prevailing practice” in the local market.
4. Fee simple sales – Residential mortgage products should be available for buyers of housing units at Fort Monroe based on their individual credit.

- **Impact on Capital Improvement Plan funding** – The current economic model reflects \$37.3 million of one-time revenue from the prepayment of long-term leaseholds. Of this amount \$35.5 million is projected to go towards site-wide infrastructure and utility upgrades reflected in the capital improvement program. The balance of the proceeds are expected to fund operating deficits during the redevelopment of the property including improvements necessary to reposition the commercial space for reuse by new tenants.

Implementation Scenarios
1. Short-term operating leases – Utilizing operating leases on the residential units may help to defray some of the operating deficits but it will not provide a capital source to upgrade the existing infrastructure. Bond underwriters will not generally recognize short-term operating lease revenue as adequate security for a revenue bond issuance.
2. Long-term leaseholds – Long-term leasehold revenue will provide a stable revenue stream for the term of the lease. This revenue stream may be sufficient to underwrite a revenue bond issuance to provide funding for capital improvement projects. Bond proceeds would be eligible to be used for capital improvement projects but may not be used for operating expenses.
3. Long-term leaseholds with prepayment – This is the strategy currently reflected in the economic model. It is anticipated, based on current market conditions and estimates of property values, that the prepaid leasehold program would generate approximately \$37 million. This revenue would be unrestricted and could fund either capital improvement projects or operating expenses.
4. Fee simple sales – If fee simple sales were authorized, the FMA may realize higher revenues than currently reflected in economic model. The current economic model discounts leasehold sales values by 10 percent versus fee simple values, so the FMA may potentially realize \$3.7 million in higher revenues under a fee simple program

and could possibly realize these revenues sooner than under a leasehold program since it would avoid having to establish sources of financing for leasehold sales. Revenue from fee simple sales would be unrestricted and could be used for capital improvement projects or operating expenses.

- Maintenance and Repair** – The 174 family housing units at Fort Monroe are largely in good condition. Based on the initial inspections of a limited number of commercial properties, some commercial properties will require a significant amount of repair to make them marketable. The cost to maintain historic buildings to the Secretary of the Interior Standards for the Treatment of Historic Properties is higher than the maintenance costs for new housing units. Based on statistics collected from industry sources such as the Building Owners and Management Association (BOMA), it is estimated to cost approximately \$3,000 annually per residential unit for maintenance and repair. This represents approximately \$522,000 in annual costs to the FMA if all the residential units are leased on short-term operating leases. Repair and maintenance costs for the commercial properties are projected between a baseline of \$138,000 for maintenance of vacant buildings and \$1.38 million when the facilities are fully occupied. Long-term leaseholds and fee simple sales transfer the maintenance costs to the tenant or owner. In any scenario, all maintenance and repair activities for historic properties will be subject to the provisions of the Secretary’s Standards and other governing documents.

Implementation Scenarios
1. Short-term operating leases – The cost for maintenance and repair would be the responsibility of the FMA. These costs would be an operating expense that offset the rental revenue for the housing units.
2. Long-term leaseholds – The cost of maintenance and repair would be transferred to the leaseholder under the provisions of the leasehold agreement.
3. Long-term leaseholds with prepayment – The cost of maintenance and repair would be transferred to the leaseholder under the provisions of the leasehold agreement.
4. Fee simple sales – The cost of maintenance and repair would be the responsibility of the property owner.

- Property Insurance** – One of the key economic aspects of protecting historic property at Fort Monroe is to ensure that it is adequately insured. All of the property at Fort Monroe lies in the 100-year flood plain. If property remains under the ownership of the Commonwealth then the property would be insured through the Virginia Department of Risk Management (DRM). While the state program is self-insured for losses below \$5 million, the state has created a program for properties at Fort Monroe with a traditional deductible at \$5,000 per occurrence. If building improvements are transferred to the leaseholder or buyer as part of the leasehold or sales agreement then the burden of obtaining property insurance would fall on the leaseholder. While the BAE feasibility report indicated that property insurance may be hard to obtain from traditional homeowner insurance companies, there are specialty insurance companies who will issue insurance on property within the 100-year flood plain, although at higher premiums. If operated on short-term leases or if the building improvements are not transferred to the leaseholder, the estimated cost of insurance for the 174 residential units through the state risk management

program is \$60,000. The projected cost to insure the commercial properties through the same program is \$162,000.

Implementation Strategies
1. Short-term operating leases – The cost for property insurance would be the responsibility of the FMA. These costs would be an operating expense that offset the rental revenue for the housing units.
2. Long-term leaseholds – If the building improvements remain as Commonwealth property then the property would be insured under the Virginia DRM but the cost of the premium would be billed to the leaseholder. If the building improvements are transferred to the leaseholder as part of the leasehold agreement then the burden to obtain property insurance would be the responsibility of the leaseholder under the provisions of the leasehold agreement.
3. Long-term leaseholds with prepayment – If the building improvement remain as Commonwealth property then the property would be insured under the Virginia DRM but the cost of the premium would be billed to the leaseholder. If the building improvements are transferred to the leaseholder as part of the leasehold agreement then the burden to obtain property insurance would be the responsibility of the leaseholder under the provisions of the leasehold agreement.
4. Fee simple sales – The cost of property insurance would be the responsibility of the property owner.

- Payment in Lieu of Taxes (PILOT)** – The 2011 Fort Monroe Authority Act (2011 SB1400) sets out a mechanism for the FMA to make semi-annual payments to the City of Hampton in exchange for the City’s provision of municipal services typically available to private property owners in the City. These services include police, fire, emergency response, public education, parks and recreation, social services, libraries, animal control, voter precincts, court and other services. The PILOT is the equivalent of the real estate tax based on City assessment of property at Fort Monroe at current real estate tax rate for private property owners in the City. Based on the current City assessment for the entire property, the annual PILOT payment to the City of Hampton would be approximately \$2.4 million. The transfer of property to long-term leaseholders or fee simple owners would transfer responsibility for the real estate taxes to the leaseholder and the FMA would receive a credit against the PILOT fee for any real estate taxes collected. Any property transferred to the National Park Service would be exempt from the PILOT fee.

Implementation Scenarios
1. Short-term operating leases – The value of the parcel would be included in the FMA’s assessed value for calculating the PILOT fee to the City of Hampton.
2. Long-term leaseholds – The leaseholder would be responsible for paying real estate taxes to the City based on the assessed value of the property at the City’s current millage rate. The assessed value is decreased once the remaining term of the leasehold is less than 50 years, eventually stabilizing at 15% of the assessed value if the term is less than 20 years. [See VA Code § 58.1-3203]

<p>3. Long-term leaseholds with prepayment – The leaseholder would be responsible for paying real estate taxes to the City based on the assessed value of the property at the City’s current millage rate. The assessed value is decreased once the remaining term of the leasehold is less than 50 years, eventually stabilizing at 15% of the assessed value if the term is less than 20 years. [See VA Code § 58.1-3203]</p>
<p>4. Fee simple sales – The property owner would pay real estate tax based on the assessment of the property at the City’s current millage rate.</p>

- Marketability** – One of the items evaluated by David Shiver in the BAE leasehold feasibility report was the marketability of residential long-term leaseholds in the Hampton Roads market. Based on interviews with residential brokers on the Peninsula and Southside, Mr. Shiver learned that there are no residential single-family leasehold properties in the market. The brokers also asserted that leaseholds would need to be essentially perpetual to be an attractive alternative for homeowners used to fee simple sales. If this holds to be true in the market, this may limit the restrictions that could be placed in the leasehold agreement. The marketability for leaseholds on commercial property is not restricted by the need for a perpetual lease, just that the lease term must be at least 5-10 years longer than the loan term. However, based on recent interviews with market lenders, the market awareness of commercial ground leases, especially prepaid ground rent, is low and it may result in difficulty attracting potential owner-occupied tenants and multi-tenant investors.

Implementation Scenarios
<p>1. Short-term operating leases – The FMA is currently marketing short-term leases for residential properties. For smaller properties, a short-term lease would be attractive; for some of the large homes at Fort Monroe, tenants will likely seek longer-terms arrangements.</p>
<p>2. Long-term leaseholds – Marketing long-term residential leaseholds with annual payments would present potential marketing challenges. Rent would have to be set to be competitive with homeownership for a property of comparable value (e.g., 4 to 5 percent of the value of land and improvements per year). The long-term leaseholder would not have the same equity build-up potential as would be possible under the prepaid leasehold option, since under this option there likely would be periodic adjustments to rent to reflect changes in property value or CPI. The FMA would have to educate local brokers and potential leaseholders about this leasehold product. The depth of market for high-end residential rentals in the Hampton Roads market may be limited to support this type of leasehold program, at least in the near term before more of Fort Monroe’s potential as a highly unique and appealing community intimately connected with well-managed NPS historic and natural areas is realized. [Note: The FMA’s rate of return would be constrained by then current mortgage market. If the average conforming rate is 4.5%, that will limit the amount the FMA may be able to charge as base rent as a percent of total property value. Otherwise leaseholds at Fort Monroe would be more expensive than buying similar properties elsewhere.]</p>
<p>3. Long-term leaseholds with prepayment – Based upon the findings of the BAE Report, successful marketing long-term leaseholds with prepayment would be contingent upon</p>

establishing a financing program that is acceptable to lenders and the secondary market. In addition, the FMA would have to educate local residential brokers and prospective buyers about this leasehold product. Overall, long-term leaseholds with prepayment may have to be structured to resemble as closely as possible a fee-simple sale to reduce the number of marketing objections from prospective buyers (although if market appeal increases as a highly unique and appealing community intimately connected with well-managed NPS historic and natural areas is realized, this may change). For example, a key attribute cited by residential brokers would be to make the lease “perpetual.”

4. Fee simple sales – A fee simple would be familiar to brokers and prospective buyers and would face the standard types of issues associated with marketing residential real estate (e.g., property conditions, local schools, and level of taxation). The FMA would have to educate local brokers about historic preservation easements and other requirements that would be considered unique in the Hampton Roads region.

The following chart summarizes the applicability of the various protection tools and the impact on each strategy on the economic operation of Fort Monroe.

	Operating Lease	Leasehold	Prepaid Leasehold	Fee Simple Sale
Preservation and Community Strategies				
Programmatic Agreement	Terms of PA would be incorporated by reference in the lease agreement	Terms of PA would be incorporated by reference in the leasehold agreement	Terms of PA would be incorporated by reference in the leasehold agreement	PA requires that property be placed under perpetual easement, protective covenant, or other legally enforceable mechanism prior to property leaving state ownership or control
Historic Preservation Manual and Design Standards	Design Standards will be incorporated by reference in the lease agreement	Design Standards will be incorporated by reference in the leasehold agreement	Design Standards will be incorporated by reference in the leasehold agreement	Design Standards will be recorded in the deed conveyance
Community Management Regulations	Regulations will be incorporated by reference in the lease agreement	Regulations will be incorporated by reference in the leasehold agreement	Regulations will be incorporated by reference in the leasehold agreement	Regulation restrictive agreement document would be signed at closing
Historic Easements	Not Applicable	Not Applicable unless improvements are conveyed to leaseholder then a restrictive covenant for the term of lease would be recorded for any property conveyed out of state control	Not Applicable unless improvements are conveyed to leaseholder then a restrictive covenant for the term of lease would be recorded for any property conveyed out of state control	Deed of perpetual easement recorded to protect property transferred out of state ownership

	Operating Lease	Leasehold	Prepaid Leasehold	Fee Simple Sale
Economic Considerations				
Revenue Impact	FMA would receive rental income on a monthly basis. Leases usually include an annual increase.	FMA would receive rental income, typically on a quarterly or annual basis. Leases usually include an annual increase.	FMA would receive a lump-sum payment at closing either in cash or from mortgage financing. FMA may be able to collect a small transfer fee if leasehold is transferred to new leaseholder.	FMA would receive a lump-sum payment at closing either in cash or from mortgage financing.
Financing	Not Applicable	Not Applicable	Unlikely. Termination of lease may be limited to instances of monetary default to meet secondary market lending requirements.	Available based on buyer's credit.
Impact on Capital Improvement Plan	Short-term operating leases would not provide a long-term revenue stream that could be used to underwrite a revenue bond issuance.	Long-term aspect of rental payments may provide adequate security for a revenue bond issuance. Bond proceeds are typically limited to capital projects and may not fund non-capital expenses.	Discount to fee simple value is estimated to be 10%-20% depending on restrictions in leasehold. Payments received would not be restricted as with bond proceeds.	Proceeds from sale of property would be used to fund capital improvement projects. Payments received would not be restricted as with bond proceeds.
Maintenance and Repair (M&R) Costs	Gross leases obligate the FMA to pay maintenance and repair costs.	Maintenance and repair costs would be the responsibility of the leaseholder.	Maintenance and repair costs would be the responsibility of the leaseholder.	Maintenance and repair costs would be the responsibility of the owner.

	Operating Lease	Leasehold	Prepaid Leasehold	Fee Simple Sale
Economic Considerations				
Insurance	Properties would remain state-owned property covered by VA Department of Risk Management insurance program. FMA would be responsible for insurance premiums.	Depending on decision about transferring improvements, properties may remain state-owned property covered by VA Department of Risk Management insurance program. Leaseholder would be responsible for insurance premiums.	Depending on decision about transferring improvements, properties may remain state-owned property covered by VA Department of Risk Management insurance program. Leaseholder would be responsible for insurance premiums.	Property insurance would be the responsibility of the property owner.
Payment in Lieu of Taxes (PILOT)	Assessed value of property would be included in the calculation of the PILOT fee payable to the City of Hampton.	Leaseholder would be responsible for paying real estate tax directly to City of Hampton. VA Code limits taxation of leaseholds with remaining terms below 50 years.	Leaseholder would be responsible for paying real estate tax directly to City of Hampton. VA Code limits taxation of leaseholds with remaining terms below 50 years.	Owner would be responsible for paying real estate tax directly to City of Hampton.
Marketability	Short-term operating leases would likely be accepted by tenants for the smaller homes. Tenants interested in the larger homes would likely request longer-term operating leases.	Brokerage community focus groups indicated leasehold must be effectively perpetual, but increased market appeal of limited housing opportunities at Fort Monroe could allow more flexibility in future years.	Brokerage community focus groups indicated leasehold must be effectively perpetual, but increased market appeal of limited housing opportunities at Fort Monroe could allow more flexibility in future years.	Fee simple sales are understood and accepted in the local market.

Conclusions

Protection Mechanisms – The members of the LFWG feel that the FMA has a strong list of tools available to protect the historic properties in any scenario. The strongest protection is afforded through perpetual historic preservation easements, and by restrictive covenants for leaseholds, which provide substantially similar protection but only for the term of the leasehold. The LFWG supports the recommendation of the Historic Preservation Advisory Group to develop community management regulations to complement the existing historic mechanisms to address those community issues normally covered by municipal zoning.

Financing (Residential) – Local lending institutions resell mortgage loans for residential property. The vast majority of loans are resold to Fannie Mae or Freddie Mac, but most banks use the Fannie Mae guidelines to ensure that loans conform to both federal mortgage loan purchasers because Fannie Mae has the more restrictive requirements. Fannie Mae requires that the loan must be secured by the property improvements. This will require that the property improvements be transferred to the leaseholder and out of state ownership. The land ownership could be retained on a ground lease. According to the OAG this would require the approval of the General Assembly and the Governor under the current statute. In addition, the time delay involved for the General Assembly to approve property improvement transfers would be a significant barrier to attracting new leasehold tenants. A prospective lessee that requests a long-term leasehold in April would have to wait until at least January to have the General Assembly approve the property transfer if the tenant was going to try for conforming financing.

Fannie Mae also requires that leasehold estates be a prevailing practice in the local market to ensure that leaseholds could be resold in the event of a default. The LFWG could not locate any recent record of leasehold estates being sold in the local market. Therefore prepaid financing for residential leaseholds would not conform to federal lending standards and are not likely to be approved by local lending institutions.

Financing (Commercial) – Commercial loans are generally held as portfolio loans, although some are resold to investors. The property improvements would have to be available as collateral for the loan. This would require approval of the General Assembly. In general, financing for prepaid leaseholds for commercial properties is more likely to be available since it is principally based on the appraised value of the property and the cashflow of the tenant, not on federal lending requirements.

Recommendations

The FMA should finalize the Design Standards. This will provide an important supplement to the perpetual historic preservation easements and by restrictive covenants for leaseholds. The FMA should also work to develop some form of community management regulations to govern the use of the property beyond those protections in the other governing documents.

The FMA should move to amend the FMA statute to remove the General Assembly approval for property

transfer since the time delay involved makes either property improvement transfer for leasehold or fee simple transfer infeasible in a market where prospective tenants or buyers have many other choices that don't require the approval of a body that meets only 45-60 days per year.

The FMA should work with the Governor's office to establish a protocol for timely approval for the transfer of property improvements to be used as security for leaseholder financing or deed conveyance if fee simple transfers are approved.

The FMA should also consider adding fee simple sales as a possible conveyance strategy in addition to long-term leaseholds and short-term operating leases. The availability of fee simple transfer as a conveyance option would increase the flexibility of the FMA to structure transactions for future development such as single family housing units. This alternative will inform the master planning process for the future of Fort Monroe.

These recommendations were approved by a majority vote of the LFWG members at its November 1, 2001 meeting. The representative from the CFMNP voted against the recommendations. The CFMNP position is attached as Exhibit A.

DIFFERENT CONCLUSIONS from Citizens for a Fort Monroe National Park

By Mark Perreault and Louis Guy

- (1) For the last 400 years, Old Point Comfort has been publicly owned. Common sense tells us that, in the future centuries, public ownership should be the fundamental control and protection for the unique asset that is Fort Monroe. Court decisions in Virginia have shown that private property rights become very powerful when they conflict with public interests. Private ownership of any Fort Monroe lands makes future growth of the National Monument or any other changed priorities for the use of Fort Monroe lands extremely difficult if not impossible. Historic preservation easements and imposition of the programmatic agreement on purchasers are valuable protections, but fall well short of the future control that continued public ownership provides.
- (2) The financing issues of long term leases for the existing 174 historic residences (and any new construction ultimately approved) at Fort Monroe are substantial but not insurmountable. In this region the "prevailing" financing system will work for commercial and multi-family projects, and for new improvements on leased vacant land. Current Virginia law severely restricting any sale at Fort Monroe is not intended as a bureaucratic delay but rather a means of assuring public "control" of all of Fort Monroe for future generations. The struggle to obtain financing for 174 leaseholds and any new construction should not be used to repeal this important control and protection of all Fort Monroe, especially since there has been no serious effort to find creative lenders who will appreciate these unique properties (indeed, few or no outreach efforts to find solutions to the challenges to pre-paid residential leaseholds cited by BAE were pursued by the Leasehold Feasibility Working Group).
- (3) Fort Monroe needs to be self-sustaining for the long term. That is clearly a difficult goal to reach and it will take several years. But the extraordinary value of Fort Monroe justifies ingenuity and other than standard mechanisms to pursue that goal. The Fort Monroe Authority (FMA) must not fall into the trap of expedient actions aimed only at the short term. And this is especially so when the future market appeal of Fort Monroe may be greatly underestimated by the combined effect of the worst real estate downturn in memory, the vacant look of much of the property following the Army's recent departure and the reality that it will be awhile before the National Park Service's arrival is seen with changes on the ground.
- (4) White House designation of the Fort Monroe National Monument proves the importance of this national asset and its context within the 565 acre peninsula including FMA property. The new National Park Service (NPS) Superintendent arrived on the ground only a few days ago. In the next year or two, the FMA will develop a vital partnership with NPS on how best to manage this peninsula. The National Monument boundaries are subject to change in the future. Upon the Army's relinquishment of ownership, FMA and NPS will be the only property owners. It is outrageously premature at this time to change the law and facilitate sales of any Fort Monroe property to a private owner.
- (5) It must be noted that the remarkable and unexpected (and indeed historic) achievement of gaining a 325 acre National Monument within 45 days of the disestablishment of the Army garrison was achieved by a marvelous consensus formed among all the constituencies interested in Fort Monroe, local, regional and national. It is ironic and disappointing that we may see the long view and consensus so quickly put aside in favor of expediency and conflict. Citizens in the region overwhelmingly oppose fee sales of Fort Monroe lands, including in the City of Hampton where over 7,000 citizens signed initiative petitions opposing any private sales of Fort Monroe lands. Pursuit of this statutory change may also put at risk the hope for consensus and broad public confidence in the FMA's planned master planning process.

Exhibit A

Even recognizing the real financial problems facing Fort Monroe Authority, there is no justification for hasty action in 2012 regarding fee simple land sales at Fort Monroe. The national spotlight on Fort Monroe, with the National Park Service arriving this month, has created a new environment offering unusual opportunities to obtain financial help. Therefore, any consideration by FMA of changes in Virginia law should be postponed for at least a year.

Exhibit B – Sample Historic Preservation Easement Template

HISTORIC PRESERVATION EASEMENT TEMPLATE

This sample deed is provided to assist landowners and their attorneys in preparing deeds of Easement to be conveyed to the Virginia Board of Historic Resources (VBHR). As each property contains unique conservation values, staff may recommend provisions appropriate to individual properties. Landowners should discuss present and future land management practices with staff before preparation of the deed of Easement. VBHR does not provide legal or tax advice or warrant that this sample will meet all IRS or Virginia Department of Taxation requirements or the Virginia Land Conservation Foundation's Conservation Value Review Criteria for Easements valued over one million dollars. An Easement will permanently change how the property may be used and its market value. Because this change can have major estate planning and tax consequences, landowners should consult legal counsel prior to submission of their proposed Easement to the Virginia Board of Historic Resources for its consideration.
-November 2010

[THIS TEMPLATE IS CURRENTLY UNDER REVISION]

This document was prepared by:
Department of Historic Resources
2801 Kensington Avenue
Richmond, VA 23221

The preparer is unaware of any Title Insurance issued on the property herein conveyed.

TAX MAP NO. OR PIN:

Exempted from recordation taxes
under the Code of Virginia (1950), as amended,
sections 58.1-811(A)(3) and 58.1-811(D)
and from Circuit Court Clerk's Fees under section 17.1-266

DEED OF GIFT OF EASEMENT

[PROPERTY NAME]

[COUNTY]

VBHR FILE NO.

Exhibit B – Sample Historic Preservation Easement Template

THIS DEED OF GIFT OF EASEMENT made this *[DATE]* day of *[MONTH]*, *[YEAR]*, by *[NAME OF GRANTOR]*, and his/her/their heirs, successors and assigns, (“Grantor”), whose address is: *[GRANTOR ADDRESS]*, and the **COMMONWEALTH of VIRGINIA, BOARD OF HISTORIC RESOURCES (“VBHR”)**, whose address is: Department of Historic Resources, 2801 Kensington Avenue, Richmond, Virginia, 23221, (“Grantee”),

WITNESSETH:

WHEREAS, Grantor is the owner in fee simple of certain real property known as *[PROPERTY NAME]* consisting of a tract of land containing *[NO.]* acres, more or less, as more particularly described below *[or on “Schedule A”, attached hereto and incorporated herein]* (the “Property”), which Property includes the following buildings and structures (hereinafter “the Buildings”):

the principal residence or manor house constructed of *[brief description]* dating from *[year]* (hereinafter the “Residence”); and additional ancillary structures *[describe]* (hereinafter the “Ancillary Structures”); and

WHEREAS, the Property also includes a formal landscaped garden *[describe]*, designed by noted landscape architect *[name]* (hereinafter “the Garden”); and

WHEREAS, the Property has significant undeveloped open space, including fields, forests, and *[describe other conservation values]*, that contribute(s) to the setting, context, and the public’s view of the Buildings; and

WHEREAS, Grantee is a "qualified organization" and “eligible donee” as defined in Section 170(h)(3) of the Internal Revenue Code (references to the Internal Revenue Code in this Easement shall be to the United States Internal Revenue Code of 1986, as amended) (the “IRC”), and Grantee is a qualified public body under the Open-Space Land Act, and as an agency of the Commonwealth of Virginia authorized under Chapter 22, Title 10.1 of the Code of Virginia of 1950, as amended, to receive properties and easements in gross or other interests in properties for the purpose of, among other things, the preservation and protection of such designated historic landmarks; and Grantee, as an agency of the Commonwealth of Virginia, has the resources to enforce the restrictions in this easement; and

WHEREAS, Chapter 22, Title 10.1 of the Code of Virginia of 1950, as amended, entitled “Historic Resources,” was enacted to support the preservation and protection of the Commonwealth of Virginia's significant historic, architectural, archaeological, and cultural resources, and charges the Board of Historic Resources to designate as historic landmarks to be listed in the Virginia Landmarks Register such buildings, structures, districts, and sites which it determines to have local, statewide, or national significance, and to receive properties and Easements in gross or other interests in properties for the purpose of, among other things, the preservation and protection of such designated landmarks; and

WHEREAS, the Virginia Department of Historic Resources, an agency of the Commonwealth of Virginia, under the leadership of its Director, administers such easements on behalf of Grantee; and

Exhibit B – Sample Historic Preservation Easement Template

WHEREAS, the Open-Space Land Act of 1966, Chapter 461 of the 1966 Acts of the Assembly, (Chapter 17, Title 10.1, §§10.1-1700 through 10.1-1705 of the Code of Virginia, as amended) declares that the preservation of open-space land, including land preserved for historic or scenic purposes, serves a public purpose by promoting the health and welfare of the citizens of the Commonwealth by curbing urban sprawl and encouraging more desirable and economical development of natural resources, and authorizes any public body to receive Easements in gross or other interests in properties for the purpose of preserving the character of such historic or scenic open-space lands; and

WHEREAS, Article XI of the 1971 Constitution of the Commonwealth of Virginia declares the preservation of historic properties and sites to be a goal and obligation of state government and, Section 1, “Natural resources and historical sites of the Commonwealth,” provides that “[I]t shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historic sites and buildings. Further, it shall be the Commonwealth’s policy to protect its atmosphere, lands, and water from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth”; and

WHEREAS, the Property stands as a significant example of *[style]* architecture in Virginia, illustrates aesthetics of design and setting, and possesses integrity of materials and workmanship; and

WHEREAS, because of its architectural, historic, archaeological, and cultural significance the Property was listed in the National Register of Historic Places on [date] [or certified by the National Park Service on [date] as a contributing building in the [name] National Register Historic District]; and

WHEREAS, as required under Section 10.1-1701 of the Open-Space Land Act, the use of the Property for open-space land conforms to the County of _____ Comprehensive Plan adopted on _____, and is designated as _____ on the county’s future land use map; and

WHEREAS, this Easement is intended to constitute (i) a “qualified conservation contribution” as that term is defined in §170(h)(1) of the IRC, and (ii) a qualifying “interest in land” under the Virginia Land Conservation Incentives Act of 1999 (§58.1-510 *et seq.* of the Code of Virginia (1950), as amended), as more particularly explained below; and

WHEREAS, this easement is granted “exclusively for conservation purposes” under IRC §170(h)(1)(C) because it effects “the preservation of a certified historic structure” under IRC 170(h)(4)(A)(iv); and

WHEREAS, this easement is granted “exclusively for conservation purposes” under IRC §170(h)(1)(C) because it effects “the preservation of open space (including farmland and forest land)” under IRC 170(h)(4)(A)(iii). Specifically, the preservation of open space on this Property is pursuant to clearly delineated state and local governmental conservation policies and will yield a significant public benefit; and

Exhibit B – Sample Historic Preservation Easement Template

WHEREAS, this Easement is intended to constitute “a restriction (granted in perpetuity) on the use which may be made of real property”, which is “a qualified real property interest” under IRC § 170(h)(2)(c); and

WHEREAS, this historic preservation and open-space Easement in gross constitutes a restriction granted in perpetuity on the use which may be made of the Property, and is in furtherance of and pursuant to the clearly delineated governmental conservation policies set forth below (*Cite federal, state or local governmental policies that will be advanced by the preservation of the Property, and the public benefit of such preservation*):

(i) Land conservation policies of the Commonwealth of Virginia as set forth in:

- a. Chapter 22, of title 10.1, §§10.1-2200 through 10.1-2213 of the Code of Virginia cited above; and
- b. The Open-Space Land Act cited above; and
- c. Section 1 of Article XI of the Constitution of Virginia cited above; and
- d. Grantee’s formal practices in reviewing and accepting this Easement. Grantee has engaged in a rigorous review, considered and evaluated the benefits provided by this Easement to the general public as set forth in these recitals, and concluded that the protection afforded the historic and open-space character of the Property by this Easement will yield a significant public benefit and further the conservation objectives of Grantee and the Commonwealth of Virginia. Grantor believes that such review and acceptance of this Easement by Grantee tends to establish a clearly delineated governmental conservation policy as required under IRC Section 170(h)(4)(A)(iii);
- e. *[Optional]* The 2002-2003 Biennial Report of the Virginia Land Conservation Foundation, dated January 2004, states that meeting Virginia’s land preservation goals under the Chesapeake 2000 Agreement “requires the conservation of 432,535 acres by 2010 or 61,791 acres per year.” ; and

f., g., h., etc. (any other applicable state policies); and

(ii) Land use policies of the County of _____ as delineated in:

a. its comprehensive plan adopted on _____ to which plan the restrictions set forth in this deed conform and which contains the following (*enumerate applicable goals, objectives, strategies, visions, or policies, etc.*) _____; and

b. (*Applicable if locality has land use value assessment and Property has been given such designation*) Section _____ of the _____ County Code that provides for land-use value assessment of the Property to encourage the preservation of the Property as real estate devoted to agricultural, forestal, horticultural or open-space uses, which ordinance was enacted pursuant to Virginia Code Section 58.1-3231; and

Exhibit B – Sample Historic Preservation Easement Template

c. *(Applicable if Property is in an agricultural, forestal or agricultural and forestal district)* Section ____ of the _____ County that provides certain tax benefits and other protections for agricultural and forest use of land to landowners who voluntarily limit development of their property under the terms of the applicable district which ordinance was enacted pursuant to the Virginia Agricultural and Forestal Districts Act: the Property is located within the _____ Agricultural and Forestal District, and, as such, has been identified by _____ County as worthy of protection for conservation purposes; and

d. Section ____ of the _____ County Code that subjects the Property to review by the local Board of Architectural review due to its location within the boundaries of the local historic district; and

e., f., g. etc. *(any other applicable local policies)*; and

WHEREAS, *(Cite here any other studies or plans that will be advanced by the Property's preservation, conservation awards or other recognition that the Property has received.)*; and

WHEREAS, *(List here the particular conservation attributes of the Property and the public benefit they yield)*; and

WHEREAS, this Easement will yield significant public benefit to the citizens of the Commonwealth as set forth in the preceding recitals and as set forth below; and

WHEREAS, Grantor and Grantee recognize the architectural, historic, and cultural values (hereinafter “conservation and preservation values”) and significance of the Property, and have the common purpose of conserving and preserving in perpetuity the aforesaid conservation values; and

WHEREAS, Grantee has determined that the restrictions hereinafter set forth (the “Restrictions”) will preserve and protect in perpetuity the preservation and conservation values [historic preservation, archaeological, open-space, and scenic values of the Property], which values are reflected herein and in Grantee’s evaluation of the Property, and the documentation of the condition of the Property is contained in Grantee’s files and records; and

WHEREAS, Grantee has determined that the Restrictions will limit the uses of the Property to those uses consistent with, and not adversely affecting, the historic preservation and conservation values of the Property and the governmental conservation policies furthered by this easement; and

WHEREAS, the conservation purpose of this Easement is to preserve and protect in perpetuity the preservation and conservation values [historic, archaeological, open-space and scenic values] of the Property; and

NOW, THEREFORE, in consideration of the foregoing recitals incorporated herein and made a part hereof and in consideration of the mutual covenants herein and their acceptance by Grantee, Grantor

Exhibit B – Sample Historic Preservation Easement Template

does hereby give, grant and convey to Grantee a historic preservation and open-space Easement in gross (Easement) over, and the right in perpetuity to restrict the use of, the Property, which is described below (or in SCHEDULE "A" attached hereto and made a part hereof), and consists of _____ acres located in _____ County, Virginia, near _____, fronting on State Route _____ (or road name) to-wit:

(insert legal description)

The Property is shown as Tax Map No. (or PIN) _____ among the land records of the County of _____, Virginia. Even if the Property consists of more than one parcel for real estate tax or any other purpose, it shall be considered one parcel for purposes of this Easement, and the restrictions and covenants of this Easement shall apply to the Property as a whole.

AND SUBJECT, HOWEVER, to the restriction that Grantee may not transfer or convey the Easement herein conveyed to Grantee unless Grantee conditions such transfer or conveyance on the requirement that (1) all restrictions, limitations, and conservation purposes set forth in the conveyance of the Property accomplished by this deed are to be continued in perpetuity, and (2) the transferee is an organization then qualifying as an eligible donee as defined by section 170(h)(3) of the IRC and the applicable Treasury Regulations promulgated there under.

1. The restrictions hereby imposed on the use of the Property are in accord with the policy of the Commonwealth of Virginia, as set forth in Chapters 22 and 17 of Title 10.1 of the Code of Virginia of 1950, as amended, to preserve the Commonwealth's designated historic landmarks, and to preserve historic and scenic open-space lands in the Commonwealth. The acts which Grantor covenants to do and not to do upon the Property, and the restrictions which Grantee is hereby entitled to enforce, shall be as follows:**BASELINE DOCUMENTATION REPORT.** The parties agree that the photographs of the Property taken by [INSERT NAME] of the Virginia Department of Historic Resources on [INSERT DATE] (Virginia Department of Historic Resources negative number [INSERT NUMBER]) accurately document the appearance and condition of the Property as of the date of this Easement. The negatives of the photographs shall be stored permanently in the archives of the Virginia Department of Historic Resources, which is located at 2801 Kensington Avenue, Richmond, Virginia, or its successors. Hereafter, the Property shall be maintained, preserved, and protected in this documented state as nearly as practicable, except for changes that are expressly permitted hereunder. Grantor warrants that it has made available to Grantee, prior to the time the donation is made, baseline documentation sufficient to establish the condition of the property at the time of the gift. The parties agree that the Baseline Documentation Report supplied and contained in the files of Grantee accurately describes the condition and character of the Property at the time of this Easement. The Baseline Documentation Report may be used to determine compliance with and enforcement of the terms of this Easement; however, the parties are not precluded from using other relevant evidence or information to assist in that determination.
2. **DIVISION.** The Property shall not be divided, subdivided, or conveyed in fee other than as a single tract. *[Limited subdivision that does not significantly affect the historic or scenic character of the property may be permitted subject to negotiation.]*

Exhibit B – Sample Historic Preservation Easement Template

Boundary line adjustments with adjoining parcels of land are permitted and shall not be considered separate conveyances of portions of the Property or divisions or subdivisions of the Property, provided that Grantee approves such adjustments and is made party to any deed creating a boundary line adjustment, and at least one of the following conditions is met:

- (i) The entire adjacent parcel is subject to a recorded historic preservation Easement owned by Grantee; or
- (ii) The proposed boundary line adjustment shall have been reviewed and approved in advance by Grantee.

3. GRANTOR'S COVENANT TO MAINTAIN:

- (i) Grantor agrees at all times to maintain the [*manor house or other historic resources*] in the same or better structural condition and state of repair as that existing on the effective date of this Easement and according to any changes or modifications that have been approved in writing by Grantee after the effective date of this Easement. Grantor's obligation to maintain shall require replacement, repair, and/or reconstruction by Grantor whenever necessary to preserve the [*manor house or other historic resources*] in substantially the same structural condition and state of repair as that existing on the date of this Easement according to any changes or modifications that have been approved in writing by Grantee after the effective date of this Easement.
- (ii) The repair, replacement, and/or reconstruction necessary to comply with subparagraph 3(i) above shall be done in a manner consistent with the *Secretary of the Interior's Standards for the Treatment of Historic Properties and Guidelines for the Treatment of Cultural Landscapes* (36 C.F.R. 68), as these may be amended from time to time (hereinafter the "Secretary's Standards").
- (iii) For the purposes of subparagraph 3(i) above, the obligation to maintain and repair shall mean the use by Grantor of like materials applied with workmanship comparable to that which was used in the construction or application of those materials being repaired or maintained, for the purpose of retaining in good condition the appearance and construction of [*manor house or other historic resources*]. In fulfilling their maintenance obligation under subparagraph (i) above, Grantor shall not make changes in appearance, materials, and workmanship from that existing prior to the maintenance and repair without the prior written approval of Grantee.
- (iv) The character-defining historic interior spaces and architectural elements of [*manor house or other historic resources*] including but not limited to mantels, windows, window frames, doors, door frames, stairs, staircases, baseboards, cornices, chair rails, wainscoting, trim, floorboards and hardware shall not be altered or removed from the Property without the prior written approval of Grantee.
- (v) Grantor reserves the right to continue all manner of existing residential and agricultural use and enjoyment of the Property's buildings, including but not limited to the maintenance, repair, and restoration of existing fences; the right to maintain existing driveways, roads, and paths with the use of same or similar surface materials; the right to maintain existing utility lines, gardening and building walkways, steps, and garden fences; the right to cut, remove, and clear grass or other vegetation and to perform routine maintenance, landscaping, horticultural activities, and upkeep, consistent with the purposes of this Easement.

4. PERMITTED BUILDINGS AND STRUCTURES. No building or structure shall be built or maintained on the Property other than:

- (i) the historic manor house, which exists on the date of this Easement; and

Exhibit B – Sample Historic Preservation Easement Template

- (ii) *description for permitted primary or secondary dwellings can be inserted in this clause with potential building envelope, location, and setback restrictions; and*
- (iii) the following existing [historic] outbuildings and structures, which exist on the date of this Easement: *[specify]*; and
- (iv) non-residential outbuildings and structures commonly and appropriately incidental to dwellings permitted in subsection (i) of this paragraph, and sized appropriately to serve as amenities to single-family residential use, (*Optional addition*): [provided that the aggregate footprint of such non-residential outbuildings and structures for each permitted dwelling shall not exceed XXX square feet in ground area unless prior written approval shall have been obtained from Grantee that a larger footprint is permitted considering the purpose of this Easement and the scale of the proposed outbuilding or structure in relation to the surrounding area] *and/or* [and located near such dwellings. For the purpose of this paragraph (ii), “near” means within 200 feet of such dwelling, unless prior written approval shall have been obtained from Grantee that a greater distance is permitted considering the purpose of this Easement and the scale of the proposed outbuilding or structure in relation to the surrounding area]; and
- (v) farm buildings and structures; for the purposes of this subparagraph, a farm building or structure shall mean a building or structure originally constructed and used for the activities specified in Paragraph 9(i); and
- (vi) reconstructions of historic outbuildings or structures which are documented through professional historical or archaeological investigation to have been located on the Property, which shall be consistent with and evaluated according to the Secretary’s Standards, specifically, the *Standards for Reconstruction*.

5. **ALTERATIONS AND NEW CONSTRUCTION.** The manor house *[add historic outbuildings]* shall not be demolished or removed from the Property, nor shall it be materially altered, restored, renovated, extended, or increased or decreased in height except in a way that would be in keeping with the historic character of the Property and consistent with the Secretary’s Standards and provided that the prior written approval of Grantee to such actions shall have been obtained. This provision shall apply to both the exterior and interior of the manor house. No other new or existing building or structure shall be constructed, altered, restored, renovated, extended, or demolished except in a way that would, in the opinion of Grantee, be in keeping with the historic, architectural, and scenic character of the Property, and provided that the prior written approval of Grantee to such actions shall have been obtained. The location, size, and design of any new building or structure is expressly made subject to the prior written approval of Grantee.
6. **MASONRY.** No cleaning, repointing, waterproofing, or painting of the exterior masonry of the manor house *[add historic outbuildings]* shall be undertaken unless the prior written approval of Grantee shall have been obtained. *[This provision will not be inserted if the manor house does not have noteworthy masonry.]*
7. **STANDARD FOR REVIEW.** In exercising any authority created by this Easement to inspect the Property or to review any construction, reconstruction, alteration, repair, or maintenance activity, Grantee shall apply the Secretary’s Standards.
8. **DESTRUCTION.** In the event that the manor house or any other building or structure named in Paragraph 4 above is destroyed or damaged by causes beyond Grantor’s reasonable control including fire, flood, storm, earth movement, or other acts of God, to such an extent that in the opinion of Grantee the building’s historic integrity is irremediably compromised, nothing herein

shall obligate Grantor to reconstruct the building or return it to its condition prior to such calamity.

- 9. INDUSTRIAL OR COMMERCIAL ACTIVITIES.** Industrial or commercial activities are prohibited with the exception of the following:
- (i) agriculture (including livestock production), equine activities and forestry; and
 - (ii) small-scale incidental commercial or industrial operations related to activities set forth in (i) above that Grantee approves in writing as being consistent with the conservation purpose of this Easement; and
 - (iii) processing and sale of products produced on the Property as long as no additional buildings are required; and
 - (iv) temporary or seasonal outdoor activities that do not permanently alter the physical appearance of the Property and that do not diminish the conservation values of the Property herein protected; and
 - (v) activities that can be and in fact are conducted within permitted buildings without material alteration to their external appearance.
- 10. ARCHAEOLOGY.** Ground disturbing activity or earth removal may require archaeological survey or investigation if, in the opinion of Grantee, such ground disturbing activity or earth removal may impact archeologically significant deposits, sites, or features on the Property. Archaeological survey or investigation may be undertaken on the Property only if a scope of work for such survey or investigation is reviewed and approved in writing in advance by Grantee and only if said survey or investigation is performed in accordance with the *Secretary of the Interior's Standards for Archeology and Historic Preservation* and under the supervision of a professionally qualified archaeologist meeting or exceeding the *Secretary of the Interior's Standards for Archeology and Historic Preservation*. Any such survey or investigation shall be designed to protect, preserve or recover archaeologically significant deposits, sites, or features in the area of the proposed ground disturbing activity. Artifacts and objects of antiquity professionally excavated from archaeological deposits, sites, or features on the Property shall be treated, curated, and preserved according to the Virginia Department of Historic Resources *State Collection Management Standards* (March 22, 2007). Grantor shall take all reasonable precautions to protect archaeological deposits, sites, or features on the Property from looting, vandalism, erosion, mutilation, or destruction from any cause.
- 11. TRASH.** Accumulation or dumping of trash, refuse, junk or toxic materials is not permitted on the Property. This restriction shall not prevent generally accepted agricultural or wildlife management practices, such as composting, or the storage of farm machinery, organic matter, agricultural products or agricultural byproducts on the Property.
- 12. TREES AND VEGETATION.** Management of trees and vegetation on the Property shall be consistent with established arboreal, horticultural, and/or forestry practices, and removal of fallen trees, branches, or dead trees that pose a hazard to the permitted buildings and structures on the Property shall be managed in such a way as to prevent damage to the buildings, outbuildings, structures, and which are consistent with the Conservation Values of the Property. Management, including removal of timber consistent with established forestry practices, may be undertaken on forested lands, as well as to clear fallen trees and branches or to fell dead trees that pose a hazard to the permitted buildings, structures. If portions of forested land require conversion to open field or if portions of open field require conversion to forested cover, such as in the event of a natural disaster or other necessity, Grantor must receive written approval from Grantee indicating that the proposed removal or planting of timber will not harm or destroy the Property's historic setting, nor any character defining landscape features, nor any

Exhibit B – Sample Historic Preservation Easement Template

archaeologically significant deposits, sites, or features within the area to be cleared. Prior to clearing portions of forested land or converting open-space land to forested cover, a pre-harvest or planting plan must be approved by Grantee. Best Management Practices, as defined by the Virginia Department of Forestry, shall be used to control erosion and protect water quality when any timber harvest or land-clearing activity is undertaken.

A pre-harvest plan shall not be required for the following permitted commercial and non-commercial activities: (i) cutting of trees for firewood, either for sale or for other domestic uses of Grantor, (ii) removal of trees posing an imminent hazard to the health or safety of persons or livestock, or (iii) removal of invasive species. *[Cutting of timber on historically, scenically, or ecologically significant forested land may be restricted.]*

13. GRADING, BLASTING, AND MINING. Grading, blasting, and earth removal shall not alter the topographic aspect of the Property, except as required in the construction of permitted buildings, structures, or roads. Notwithstanding the foregoing, no grading, blasting, or earth removal is permitted on the Property without prior written determination and approval of Grantee that it will not diminish or impair the Conservation Values of the Property. Generally accepted agricultural activities shall not constitute a material alteration. Surface mining, subsurface mining, on or from the Property, or drilling for oil or gas on the Property is prohibited. *[Optional: The construction of ponds on the Property is permitted provided the prior written approval of the location and size of any such ponds shall have been obtained from Grantee.]*

14. ROADS AND UTILITY LINES. The location of any new roads or any new utility lines on the Property (except over existing rights of way) shall be subject to the prior written approval of Grantee. Public or private utilities that do not serve the Property shall not cross the Property unless Grantee determines that the construction and maintenance of such utilities will not impair the conservation values of the Property and gives its prior written approval for such construction and maintenance, which approval shall take into consideration the visibility and other impact of such utilities on the conservation values of the Property. Grantor reserves its separate right to approve such public or private utilities.

15. SIGNS. No sign, billboard, or outdoor advertising structure shall be displayed on the Property without the consent of Grantee, other than signs not exceeding nine square feet for any or all of the following purposes: (i) to state the name and address of the Property or property owners, (ii) to provide information necessary for the normal conduct of any permitted business or activity on the Property, (iii) to advertise the Property for sale or rental, and (iv) to provide notice necessary for the protection of the Property and for giving directions to visitors.

16. PUBLIC ACCESS. The parties hereby acknowledge that the Property is visible from a public right-of-way *[specify]* and that members of the general public may view the Property from said right-of-way. Grantor shall make the Property accessible to the public on a minimum of one (1) day per year. This requirement may be fulfilled through an open house, house tour, or similar event that is open to the general public. Grantor may have a representative present during such public access, and access may be subject to reasonable restrictions to ensure security of the Property and safety of the visitors. At other reasonable times, upon request of Grantee made with reasonable notice to Grantor, persons affiliated with educational organizations, professional architectural associations, and historical societies shall be admitted to study the property. In addition, Grantee may take photographs, drawings, or other representations documenting the significant historical, cultural, and architectural character and features of the

Exhibit B – Sample Historic Preservation Easement Template

Property and may use or publish them (or authorize others to do so) to fulfill its charitable or educational purposes.

Although this Easement will benefit the public as described above, nothing herein shall be construed to convey to the public a right of access to, or use of, the Property. Grantor retains the exclusive right to such access and use, subject to the terms hereof.

- 17. INSURANCE.** Grantor shall keep the Property insured by an insurance company licensed to issue policies in the Commonwealth of Virginia and rated “Secure” by A.M. Best Company or other qualified insurance rating company for the full replacement value against loss from the perils commonly insured under standard fire and extended coverage policies and comprehensive general liability insurance against claims for personal injury, death, and property damage.
- 18. EASEMENT MARKER.** Grantee, in its discretion, and upon reasonable notice to Grantor, may erect at a location acceptable to Grantor, a single marker or sign, not exceeding two feet by two feet, which states the name of Grantee and advises that Grantee owns the Easement granted herein.
- 19. RIGHT OF INSPECTION.** Grantee and its representatives may enter the Property from time to time, upon reasonable notice to Grantor, for the sole purpose of inspections (including photographic documentation of the Property) and enforcement of the terms of the Easement granted herein.
- 20. ENFORCEMENT.** Grantee has the right to bring an action at law or in equity to enforce the Restrictions contained herein. This right specifically includes the right to require restoration of the Property to a condition of compliance with the terms of this Easement as existed on the date of this Deed of Gift of Easement except to the extent such condition thereafter changed in a manner consistent with the restrictions and approved by Grantee; to recover any damages arising from non-compliance, and to enjoin non-compliance by ex parte temporary or permanent injunction. If the court determines that Grantor failed to comply with this Easement, Grantor shall reimburse Grantee any reasonable costs of enforcement, including costs of restoration, court costs and reasonable attorneys’ fees, in addition to any other payments ordered by such court. Grantee does not waive or forfeit the right to take action as may be necessary to insure compliance with this Easement by any prior failure to act and Grantor hereby waives any defenses of waiver, estoppel or laches with respect to any failure to act by Grantee.
- 21. DURATION.** This Easement shall be perpetual. It is an easement in gross that runs with the land as an incorporeal interest in the Property. The covenants, terms, conditions and restrictions contained in this Easement are binding upon, and inure to the benefit of, the parties hereto and their successors and assigns, and shall continue as a servitude running in perpetuity with the Property. Landowner’s rights and obligations under this Easement terminate upon proper transfer of Landowner’s interest in the Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.
- 22. TITLE.** Grantor covenants and warrants that Grantor has good title to the Property, that Grantor has all right and authority to grant and convey this Easement and that the Property is free and clear of all encumbrances (other than restrictions, covenants, conditions, and utility and access Easements of record) including, but not limited to, any mortgages not subordinated

to this Easement.

- 23. CONSTRUCTION.** Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the purposes of the Easement and the policy and purposes of Grantee. If any provision of this Easement is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid. Notwithstanding the foregoing, lawful acts or uses consistent with the purpose of and not expressly prohibited by this Easement are permitted on the Property. Grantor and Grantee intend that the grant of this Easement qualify in part as a “qualified conservation contribution” as that term is defined in Section 170(h)(1) of the Internal Revenue Code and Treasury Regulations §1.170A-14, and the restrictions and other provisions of this instrument shall be construed and applied in a manner that will not prevent this Easement from being in part a qualified conservation contribution.
- 24. GRANTEE’S PROPERTY RIGHT.** Grantor agrees that the donation of this Easement gives rise to a property right, immediately vested in Grantee, with a fair market value that is equal to the proportionate value that the perpetual conservation restriction at the time of the sale bears to the value of the Property as a whole at that time.
- 25. CONVERSION OR DIVERSION.** Grantor and Grantee intend that this Easement shall be perpetual and acknowledge that no part of the Property may be converted or diverted from its open-space use except in compliance with the provisions of Section 10.1-1704 of the Open-Space Land Act which does not permit extinguishment of open-space Easements or loss of open-space.
- 26. EXTINGUISHMENT.** Notwithstanding the provisions of Section 10.1-1704 of the Open-Space Land Act, should an attempt be made to extinguish this Easement, such extinguishment can be carried out only by judicial proceedings and only if in compliance with Section 10.1-1704 and IRC Section 170 (h) and applicable Treasury Regulations. In any sale or exchange of the Property subsequent to an extinguishment, Grantee shall be entitled to a portion of the proceeds at least equal to the proportionate value of this Easement computed as set forth in Paragraph 24 above, but not to be less than the proportion that the value of this Easement at the time of extinguishment bears to the then value of the Property as a whole. Grantee shall use all its share of the proceeds from the sale of the Property in a manner consistent with the conservation purposes of this Easement, of Virginia Code Section 10.1-2200 *et seq.*, and of the Open-Space Land Act.
- 27. AMENDMENT.** Grantee and Grantor may amend this Easement to enhance the Property’s conservation values or add to the restricted property, provided that no amendment shall (i) affect this Easement’s perpetual duration, (ii) conflict with or be contrary to or inconsistent with the conservation purpose of this Easement, (iii) reduce the protection of the conservation values, (iv) affect the qualification of this Easement as a “qualified conservation contribution” or “interest in land” or (v) affect the status of Grantee as a “qualified organization” or “eligible donee”. No amendment shall be effective unless documented in a notarized writing executed by Grantee and Grantor and recorded among the land records of the County of _____, Virginia.
- 28. SEVERABILITY.** The invalidity or unenforceability of any provision of this Easement shall not

Exhibit B – Sample Historic Preservation Easement Template

affect the validity or enforceability of any other provision of this Easement or any ancillary or supplementary agreement relating to the subject matter hereof.

- 29. APPROVALS.** Whenever a written request for Grantee's approval is submitted pursuant hereto and Grantee fails to respond in writing within 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 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 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.
- 30. TRANSFER OF TITLE.** Prior to any inter vivos transfer of title to the Property, excluding deeds of trust given for the purpose of securing loans, Grantor shall notify Grantee in writing.
- 31. SUBORDINATION.** _____ herein, the Bank, is the Noteholder under a certain Deed of Trust dated _____ and recorded in the Clerk's Office of the Circuit Court of _____ County, Virginia in Deed Book _____ at Page _____, or as instrument number _____, which subjects the Property to the Bank's lien. As evidenced by _____, the signature hereto of its authorized representative, the Bank hereby consents to the terms and intent of this Easement, and agrees that the lien represented by said Deed of Trust shall be held subject to this Deed of Gift of Easement.
- 32. APPRAISAL.** The parties hereto agree and understand that any value of this Easement claimed for tax purposes as a charitable gift must be fully and accurately substantiated by an appraisal from a qualified appraiser as defined in IRS regulations (see section 1.170A-13(c)(5)), and that the appraisal is subject to review, audit and challenge by all appropriate tax authorities. The Board of Historic Resources makes no express or implied warranties that any tax benefits will be available to Grantor from donation of this Easement, or that any such tax benefits might be transferable, or that there will be any market for any tax benefits that might be transferable. The parties hereto intend that the Easement conveyed herein shall be a qualified conservation contribution within the meaning of Section 170(h) of the Internal Revenue Code of 1986, as amended, and the restrictions and other provisions of this instrument shall be construed and applied in a manner that will not prevent this Easement from being a qualified conservation contribution. By its execution hereof, Grantee acknowledges and confirms receipt of the Easement and further acknowledges that Grantee has not provided any goods or services to Grantor in consideration of the grant of the Easement.
- 33. DEFINITIONS.** In this Deed of Gift of Easement the term "Grantor" shall include Grantor and its successors and assigns, and the term "Grantee" shall include Grantee and its successors and assigns.

Acceptance by the VBHR of this conveyance is authorized by sections 10.1-2204 and 10.1-1701 of the Code of Virginia of 1950, as amended.

[Signature pages to follow]

Exhibit B – Sample Historic Preservation Easement Template

Witness the following signatures and seal:

_____(SEAL)
Landowner/Grantor

COMMONWEALTH of VIRGINIA)
CITY/COUNTY of) , to-wit:

The foregoing instrument was acknowledged before me this ____ day of _____, 200 ,
by _____, Grantor therein.

Notary Public

My commission expires: _____

Certification Number: _____

Exhibit B – Sample Historic Preservation Easement Template

Consented to:
(BANK OR LENDING AGENT)

By: _____
Name

Title

Date: _____

COMMONWEALTH of VIRGINIA)
of _____), to-wit:

The foregoing instrument was acknowledged before me this ____ day of _____, 200 ,
by _____, the Bank therein.

Notary Public

My commission expires: _____

Certification Number: _____