

Mortgage Subordination Fact Sheet – RIM Easement Programs

Accepting a conservation easement on a property that is subject to a pre-existing mortgage is a special problem. If the lender were to later foreclose on the mortgage and take title to the property, the easement may be extinguished. Because of this, the State requires lenders to subordinate their mortgage interest in the property to the rights of the easement holder. This means that in the event of a foreclosure, the easement will not be extinguished. The State is not able to accept an easement on mortgaged property unless the holder of the mortgage agrees to sign a mortgage subordination agreement or, alternatively, release their mortgage interest over the conservation easement area.

What is a mortgage subordination?

When a mortgage holder subordinates a mortgage to a conservation easement, they agree to allow the easement to be first in the chain of title, so that in the event of a foreclosure, the easement survives intact. In determining interests in a parcel of land, the general rule is “first in time, first in right.” When a lender records a mortgage prior to the conservation easement, then the mortgage has priority over the easement in the event of a foreclosure, unless subordinated. Otherwise, the easement will be extinguished, and the lender will take title to the land free and clear of the conservation easement.

The lender’s “first in time” priority interest may be altered by a priority agreement called a mortgage subordination agreement. In this agreement, the lender subordinates its mortgage to the conservation easement, even though the mortgage was recorded prior to the conservation easement in the public land records. Then if foreclosed, the lender would take title subject to the easement, thereby giving the easement holder the continued legal right to monitor, enforce and defend its conservation easement. Although the actual form of the mortgage subordination may vary, BWSR has a defined mortgage subordination agreement that has been approved by the State Attorney General’s office and must be used to subordinate mortgages to the State’s conservation easements (see example [here](#)). The mortgage subordination agreement simply provides that the lender “hereby subordinate the lien” of its mortgage to the conservation easement and that the easement survives any foreclosure.

Why can obtaining a mortgage subordination be a challenge?

The lending institution generally has no legal or financial incentive to yield its position and allow the easement to take priority over the mortgage. Most lenders are conservative and believe that the safest position is to safeguard their existing priority in the title and to take the property free and clear of all other encumbrances in the event of foreclosure. Because it is not always in the interest of the lender to comply, obtaining a subordination can be an arduous task that often requires education regarding conservation easements:

- Demonstrate to the lender that the easement-restricted property continues to have a value in excess of its outstanding mortgage and/or that the permitted uses of the property will not unduly limit marketability of the property should the lender have to foreclose.
- Explain the purpose of the easement to the lender and describe how it benefits the community at large.
- It may be beneficial to work with your local branch, rather than an out of state office or branch, whom may be more familiar with your property/situation, etc. This may help with the ability to obtain a mortgage subordination and may speed up processing times for the subordination to be completed.
- Landowners can choose to add the bank as a co-payee on their easement check. This sometimes helps lenders feel more confident in subordinating their interest to the conservation easement because they know they may be receiving a loan payoff in the very near future. This can only be done with the landowner's written permission, via a letter sent to the BWSR State office.

Potential Alternatives to Mortgage Subordination

If the lender is unwilling to sign a mortgage subordination agreement, the below options may also be considered to meet BWSR's requirements. Please note that BWSR cannot move forward with the conservation easement until after the required documents have been signed by the lender and provided to BWSR for review and approval.

1. **Partial Mortgage Release:** The lender may be willing to release the portion of the property being put under a conservation easement, while still maintaining their mortgage over the remainder of the property (if any). In order to do this, the lender typically requires the property owner to submit a request for consideration with a non-refundable fee. The lender could also require a survey, an appraisal, and/or a parcel subdivision. Any fees required by the lender for this purpose must be paid by the property owner.
2. **Mortgage Satisfaction:** BWSR's requirements can also be met if the property owner has the ability to pay off the balance of the mortgage and subsequently record a "mortgage satisfaction" with the county recorder's office.
3. **Mortgage Refinance:** If none of the above options are viable, the property owner could pursue refinancing their mortgage with a lender who *will* agree to sign a mortgage subordination agreement. The new/refinanced mortgage would need to be fully processed and recorded on the title of the property, then the new lender would be required to sign the standard mortgage subordination, prior to moving forward with the easement.