



Mortgage Subordination

RIM Handbook

Accepting an easement on a property subject to a pre-existing mortgage is a special problem. If the lender ever forecloses on the mortgage and takes title to the property, the easement may be extinguished. The only solution is to have the lender subordinate its rights in the property to the rights of the easement holder. That means that in the event of a foreclosure, the easement will not be extinguished. The State will not accept an easement on mortgaged property unless the holder of the mortgage agrees to subordinate via completion of a mortgage consent.

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. 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, the MN BWSR has a defined mortgage consent that has been approved by the State’s Attorney General and is to be used to subordinate mortgages to the State’s conservation easements. The mortgage consent 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 in the interest of the lender to comply, getting 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 consent and may speed up processing times for a mortgage consent 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 will 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.