

From: [Rebecca Messinger](#)
To: [Jeffrey Delapena](#)
Subject: FW: Mortgage subordination question illegal conservation covenants
Date: Monday, February 24, 2025 8:50:12 AM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)

Jeff -

Please see the below comments from CCCU, for the record.

Thank you,
Rebecca



Rebecca Messinger
Clerk to the Council
COUNTY MANAGER'S OFFICE

564-397-4305



From: Kathleen Otto <Kathleen.Otto@clark.wa.gov>
Sent: Monday, February 24, 2025 8:18 AM
To: Rebecca Messinger <Rebecca.Messinger@clark.wa.gov>
Subject: FW: Mortgage subordination question illegal conservation covenants



Kathleen Otto
County Manager

564.397.2458



From: Clark County Citizens United, Inc. <cccuinc@yahoo.com>

Sent: Monday, February 24, 2025 1:15 AM

To: Michelle Belkot <Michelle.Belkot@clark.wa.gov>; Glen Yung <Glen.Yung@clark.wa.gov>; Matt Little <Matt.Little@clark.wa.gov>; Wil Fuentes <Wil.Fuentes@clark.wa.gov>; Sue Marshall <Sue.Marshall@clark.wa.gov>; Kathleen Otto <Kathleen.Otto@clark.wa.gov>; Oliver Orjiako <Oliver.Orjiako@clark.wa.gov>; Jose Alvarez <Jose.Alvarez@clark.wa.gov>; CommDev OA Land Use <CommDevOALandUse@clark.wa.gov>

Subject: Fw: Mortgage subordination question illegal conservation covenants

EXTERNAL: This email originated from outside of Clark County. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Clark County Council
2025
P.O. Box 5000
Vancouver, Washington 98666

February 24,

FOR THE PUBLIC RECORD

Re: Mortgage subordination question illegal conservation covenants

Dear Councilors,

Clark County Citizens United, Inc. has been researching the affect permanent conservation covenants have on mortgage contracts. Accepting a permanent conservation covenant on private property that is subject to a pre-existing mortgage contract create problems. Do regulators require lenders to subordinate their mortgage interest in the property to the rights of the easement holder? What happens when a lender records a mortgage *prior to the recording of a conservation covenant* on the deed to the mortgaged property?

The lending institutions are conservative and will take the safest position to safeguard their existing priority in the title and to assume the property is *free and clear of all encumbrances*.

This is one reason why the covenants are parachuted in towards the end of a lengthy and exhausting permitting process.

- But what happens when a permanent covenant is recorded on the deed *after* contracts have been signed, and funding approved that is *based on certain things to hold true*? This process is not in the lender's best interest.
- Covenant restricted properties will have a hard time demonstrating to lenders that the properties continue to have a value in excess of its outstanding mortgage. Permanent

covenants highly restrict the land and thereby the value of the land.

- Newly-restricted permitted uses of the property and conservation covenants, will limit marketability of the property.

- Recorded covenants will result in lost property values and diminished property rights.

The county must also look at all conflicts between their own policies concerning land for food production, pasturing cattle and horse, and ensuring adequate and affordable housing issues.

It appears the lenders are taking on a heightened risk for all their loans secured by the land. This would discourage investments made for the purpose of future development. It creates a cloud of uncertainty about the uses of the property, land owner rights and the future value of the property. One would think this would also impact the taxes levied against the property. In most cases, 5 acre parcels will be consumed by mitigation for wetlands or habitat and there is additional *RISK* that needs analysis. When Clark County has a vested interest in the property, the lending institutions must weigh in on the issue. The permanent covenants, for several reasons, are not aligned with affordability and create additional costs and precious time to any project. All the while, the landowners or developers are paying for their loans subordinated by the land.

To gain an understanding of the critical impact the illegal covenants place on lands, the councilors must review what Fanny Mae has to say over easements. The covenants are no different than an easement dedicated to the county and must be treated the same. These covenants are coerced from the landowner with a threat of withholding a permanent occupancy permit, if they do not comply. Such a demand is arbitrary and not in the best interest of the landowner or the loaning institute.

Sincerely,

Susan Rasmussen, President

Clark County Citizens United, Inc.
P.O. Box 2188
Battle Ground, Washington 98604

Fanny May Mortgage Loan Requirements

"The Borrower must obtain Lender consent before granting an easement over the Property.

An easement may be approved only if permitted by the Loan Documents and this Form. The easement must satisfy all terms and conditions of the Loan Documents. If the Loan Documents provide no specific guidance on approving an easement, then the provisions of this Form apply.

Except as provided below regarding some routine easements, the Servicer may not consent to subordinating the Lien of the Security Instrument to a non-routine easement without Fannie Mae's prior written consent. The Servicer is delegated the authority to approve an easement only to the extent delegated in this Form. The key points for the Servicer to consider in reviewing a request for an easement are set forth below.

Multifamily Selling and Servicing Guide Reference Part V: Servicing and Asset Management,

Chapter 4 Delegation

Criteria

The Servicer is delegated the authority to approve an easement provided the Servicer completes all the Sections of this Form and answers "No" to all the questions in Part III. The Servicer may attach its own form narrative or memo in place of Section II, provided the memo contains the information requested in Section II and the Servicer completes the remaining sections of this Form.

Fannie Mae approval of the easement is required if one or more questions in Section III is answered "Yes". Real Estate Considerations The Servicer must evaluate any proposed easement to determine the likely impact on the Property. An easement having any material adverse effect on the value, desirability, or marketability of the Property, or on the health or safety of the tenants, should not be approved. Items to consider include:

- What is the purpose of the easement?*
- What is the impact to the Property (i.e., marketability, parking, access, amenities, operations, health/safety of residents, etc.)?*
- Will the easements create a nuisance or negative feature that will impact the Property?*
- Will the easement allow residents or the owner of another property to have access to, or use any of, the amenities of the Property? If so, the easement must be:
 - o subordinate to the Lien of the Security Instrument; and*
 - o subject to a reciprocal easement agreement in favor of Fannie Mae, that allows Fannie Mae to terminate the easement following an Event of Default by the Borrower under the Loan Documents.**
- Does the easement include provisions normally found in a commercial lease or license*

(i.e., a specified term with ongoing payments to/from the Borrower, landlord/tenant provisions, or terminations penalties)? If so, Form 4636.CL must also be submitted.

- Is the easement permanent or temporary (e.g., a construction easement)?*
- Would the easement impose any financial obligations on Fannie Mae as the successor owner of the Property after foreclosure?*

Routine easements for utilities (natural gas, propane, water, sewer, electricity, etc.) or communication services (cable television, internet, broadband network, or telephone) are acceptable to Fannie Mae, provided that the easement:

- is properly reflected on the title insurance policy (either as appurtenant to the Property or as an exception to title) or a mortgagee title insurance endorsement showing no change in lien priority, other than the subordination of the Security Instrument to the new easement, as permitted below; and*
- would be reflected on a revised survey, although the Servicer is delegated the authority to decide whether a revised survey is required.*

While Fannie Mae prefers that any routine easement remain subordinate to the Mortgage Loan, the Servicer is delegated the authority to subordinate the Mortgage Loan to this type of routine easement, and document the easement and such subordination provided that: © 2021 Fannie Mae. Trademarks of Fannie Mae. 4636.E - November 2021

Page 2 of 8

- the easement provides no ongoing payments or compensation to or from the Borrower, other than an initial payment to the Borrower, if any, for granting the easement;*
- the recorded easement document does not include a commercial lease or similar agreement;*
- the recorded easement document would not impose financial obligations on Fannie Mae or its assignee or nominee after foreclosure, other than to recognize the easement; and*
- the subordination of the Mortgage Loan is documented via a simple Lienholder or Mortgagee consent or similar subordination language. What to Submit For both delegated and non-delegated easement requests, the Servicer must complete the relevant parts of this Form, and submit:*
 - a signed copy of this Form, including Servicer narrative or memo, if any;*
 - copy of the Borrower Request; · copy of the easement agreement and subordination, if applicable; · any other supporting documentation.*

How to Submit All delegated and non-delegated easement requests must be submitted as a Borrower Request through the Multifamily Asset Management Portal (MAMP).

Questions

For questions contact: General: Multifamily Asset Management; Structured Transactions (Credit Facilities and Bulk Deliveries): Multifamily Structured Asset Management; Seniors Housing Properties: Multifamily Seniors Housing Property Asset Management; Borrower Channel: Multifamily Borrower Channel; Fannie Mae In-House Counsel: Fannie Mae Multifamily Legal; or Fannie Mae Outside Counsel: Pillsbury Winthrop Shaw Pittman LLP.

Fees

The Borrower must pay the Servicer a \$2,500 review fee. The Servicer may increase or decrease its fee at its discretion. No Fannie Mae review fees are due. The Servicer may also seek reimbursement from the Borrower for all reasonable out-of-pocket costs, including reasonable legal fees incurred by Servicer's counsel.

If Fannie Mae outside counsel is engaged, the Borrower must pay its fee, estimated at \$3,000 for most easement requests. The actual legal fee may be higher or lower, depending on the ultimate scope of the request and the time necessary to resolve. The Servicer will receive a summary invoice directly from Fannie Mae outside counsel and must arrange for payment.

The Servicer will be apprised of any likely increases in the estimated review fee. The estimated legal fee must be collected from the Borrower before engaging Fannie Mae outside counsel. Legal Documentation If the request is delegated to the Servicer, the preparation of the legal documentation to effectuate the easement is also delegated to the Servicer.

The Servicer is responsible for the preparation or review of (i) the easement agreement, (ii) any required draft amendments to the Loan Documents, and (iii) draft date-down endorsement to Fannie Mae's title insurance policy that reflects the easement and confirms the priority of Fannie Mae's Lien.

If the request is not delegated and/or Fannie Mae legal review is needed or requested, Fannie Mae counsel must be provided with the following:

- copy of the proposed easement agreement;*
- if the easement amends an existing instrument, a summary of that instrument and the modifications being made.*

For an amendment and restatement, a comparison of the original and replacement instrument; © 2021 Fannie Mae. Trademarks of Fannie Mae. 4636.E - November 2021

- if the easement is for sharing amenities or access (a reciprocal use or shared use agreement), a memorandum reviewing the applicable terms of the Loan Documents in the context of the proposed transaction, including a statement as to whether:
 - o the proposed easement will affect the priority of Fannie Mae's Lien;
 - o the request is to subordinate the Lien of Fannie Mae's Security Instrument; and
 - o the easement may be terminated by Fannie Mae upon any Event of Default by the Borrower under the Loan Documents;
- copy of the Borrower request;
- completed Form 4636.E
- an ALTA survey, site plan, map, plat, or other drawing depicting the location of the easement on the Property;
- a draft date-down endorsement to Fannie Mae's title insurance policy that reflects the easement (either as appurtenant to the Property or as exception to title), and either confirms the priority of Fannie Mae's Lien or shows the easement as superior to Fannie Mae's Lien;
- if Borrower will receive any proceeds, a description of the source and use of funds;
- if Fannie Mae is asked to subordinate its lien to the easement, a copy of the subordination agreement or language; and
- for each question in Part III of this Form answered "Yes" by the Servicer, the information requested by the Comments section and any supporting documentation.

Notwithstanding the above, if a date-down endorsement to Fannie Mae's title policy is not available or if the title insurance company will only issue a new title policy, the Servicer may obtain a title search or other title work that reflects the easement (either as appurtenant to the Property or as exception to title), and either confirms the priority of Fannie Mae's Lien or (if Fannie Mae agreed to subordinate its Lien to the easement) shows the easement as superior to Fannie Mae's Lien. © 2021 Fannie Mae. Trademarks of Fannie Mae. 4636.E - November 2021

Document Execution and Follow-up For non-delegated requests, Fannie Mae will review the documents and advise the Servicer of any needed follow-up actions. If Fannie Mae approves the non-delegated request or the Servicer has approved the delegated request, the instructions below must be followed for executing any required documents. The Servicer may use its Limited Power of Attorney for documents

that Fannie Mae has reviewed and approved.

If the Servicer Has Limited Power of Attorney If the Servicer has a Limited Power of Attorney permitting the execution of documents relating to the easement, an officer of the Servicer may sign as attorney-in-fact for Fannie Mae. The signature block must be signed “[Name of Servicer], as Attorney-in-Fact for Fannie Mae.”

If the Servicer Does Not Have Limited Power of Attorney If the Servicer does not have a Limited Power of Attorney, the documents must be sent for execution to: Fannie Mae Midtown Center 1100 15th Street, NW, Mailstop 8V-21 Washington, DC 20005 Attn: Multifamily Asset Management A copy of this Form must be included with the request for execution, with instructions on where to return the executed documents. If the request is time sensitive, electronic versions of the documents may be sent to the applicable Fannie Mae email box address listed in the “Questions” section of this Form.

*The Servicer must record all applicable documents and retain all required documentation, including this Form, in the Servicing File. Documentation may be kept in electronic form. The Servicer must attach an electronic copy of any newly executed Loan Documents to the existing request in the MAMP. Executed original copies of any new or amended Loan Documents should be sent to the following address:
Fannie Mae (Multifamily) Certification and Custody Document Delivery Facility (DDF)
21240 Ridgetop Circle Sterling, VA 20166*

Use of Funds

The Servicer or Borrower must use any funds received from the easement according to the requirements of the Loan Documents and Disclosure Documents. If neither address the use of funds, then funds received in connection with the easement must be used to:

- reimburse the Borrower, Servicer, and Fannie Mae for reasonable, direct costs (including reasonable attorneys' fees) incurred as a result of the easement;*
- restore any Property conditions impacted by the easement;*
- improve the marketability of the Property to lessen any negative impact resulting from the easement;*
- place the funds in a special, restricted escrow designated for Property improvements at a later time at the discretion and direction of the Servicer;*
- place the funds in the Replacement Reserve for future Property improvements not included in the most recent Property Condition Assessment (PCA); or*
- provided the Mortgage Loan is rated Pass or Pass Watch and no Event of Default has occurred and is continuing, the Servicer may release funds to the Borrower up to the greater of (i) \$25,000, or (ii) 10% of the current Unpaid Principal Balance of the Mortgage*

Loan. The Loan Documents generally prohibit any partial prepayment of the Mortgage Loan. However, if not expressly prohibited under the Loan Documents, in its sole discretion Fannie Mae may permit a partial prepayment in accordance with Accepted Servicing Practices.

Any partial prepayment will be subject to applicable Prepayment Premium and fees, as required by the Loan Documents. © 2021 Fannie Mae. Trademarks of Fannie Mae. 4636.E - November 2021

Page 5 of 8

Unauthorized Easement

If the Servicer becomes aware that the Borrower granted an easement on the Property without approval from the Servicer or Fannie Mae, do not follow the requirements of Part V, Chapter 7, Section 704.01B -

Notice to Fannie Mae of Performance Default and Section 704.01C –

Types of Performance Defaults.

In addition, a Non-monetary Default Borrower Request should not be sent through the MAMP. Instead, the Servicer must:

- promptly complete Form 4636.E, and follow the same process as if the easement had not yet occurred; and*
- immediately send to the Borrower a Reservation of Rights Letter (Form 4804); and*
- submit electronic copies of Forms 4636.E and 4804 through the MAMP.*

If the easement is acceptable to the Servicer, all the questions in Section III of Form 4636.E are answered “No,” the Servicer is delegated the authority to approve the easement. If the easement is not acceptable to the Servicer or if any question in Section III of Form 4636.E is answered “Yes,”; then the Servicer should submit a non-delegated Borrower Request through the MAMP with the information required by this Form.

Fannie Mae will decide whether to approve the easement or declare the Mortgage Loan in default. Notwithstanding the above, if the Servicer discovered that the Borrower granted an easement without approval while processing a Supplemental Mortgage Loan or the refinancing of a Fannie Mae Portfolio Mortgage Loan, the Servicer is delegated the authority to waive the requirement to send the Borrower Form 4804. The Servicer should document this waiver in the MAMP."

