

Reserved and Permitted Rights and Approvals

The following guidance describes both *minimum* and *recommended* contents for title work due diligence. Minimum contents are indicated by “must”; recommended contents are indicated by “should” or “may” statements.

Items recommended by the Center of Excellence to be checked off and completed have a box - .

Minimum contents for title work due diligence are described in the following Treasury Regulations, Land Trust Alliance (LTA) Standards and Practices and Colorado Open Space Alliance (COSA) Best Practices. The conservation organization must meet these minimum standards for each transaction.

Treas. Reg. 170(A)-14(g)(5)(ii). The Regulations require the easement provide a right of the donee to enforce the conservation restrictions by appropriate legal proceedings including, but not limited to, the right to require the restoration of the property to its condition at the time of the donation.

LTA S&P 11F. Reserved and Permitted Rights and Approvals. The land trust has an established procedure for responding to Landowner required notices or requests for approvals in a timely and consistent manner, and has a system to track notices, approvals and the exercise of any significant reserved or permitted rights.

COSA 5.3. Easement Violations. A conservation easement often requires the Landowner to notify the local government if he or she proposes some action that is listed as a reserved or permitted right. The agency should have a procedure in place for responding to Landowner notices or requests for approvals in a timely and consistent manner, as well as a system to track notices, approvals and the exercise of any significant reserved or permitted rights...

Note: The flexible nature of conservation easements results in a suite of unique provisions related to the reserved rights and the permitted rights. Permitted rights are those rights that may not be specifically called out in the conservation easement deed, but which the landowner retains by virtue of the conservation easement allowing additional uses and acts that are consistent with the protection of the conservation values. Reserved rights are any rights specifically reserved to the landowner in the easement deed and should not substantially diminish or impact the conservation values. The conservation organization needs a consistent way to track what has been reserved and exercised and what has been specifically permitted to occur on a property through some pre-determined method of approval with the conservation organization, which will further the conservation organization’s landowner relationships and ability to enforce their conservation easements.

When reviewing reserved and permitted rights requests, government conservation organizations may find themselves in two roles that may conflict, or at least not align with one another. Government entities have a role as a regulating authority and another as a holder of conservation easements. The process a government conservation organization follows to evaluate requests for compliance with conservation easements should focus on compliance and be distinctly separate from the land use review/approval process, even though the processes may dovetail along some lines (such as when documentation required for land use review aids the conservation review). In other words, land use approval should not constitute conservation approval. The government conservation organization should be careful to distinguish which role is active when decisions are made, as well as the limitations of those decisions and how they do or do not impact the government entity’s other role.

Recommended contents set forth in this guidance were developed based on input from conservation organizations (also referred to as “donees,” “grantees,” “land trusts,” or “local governments” throughout this website) and conservation professionals with experience on these topics. Because each project is unique, a conservation organization may tailor recommended contents, as appropriate, to suit an individual property or project.

1. Reserved and permitted rights policy and/or procedures.

- The conservation organization has a written policy or procedure for responding to, documenting and approving landowner requests in a timely and consistent manner. Suggested components include:
 - Establishment of a timeline for communications and approvals. The conservation organization should respond promptly to landowner requests to exercise reserved rights.
 - Identification of authorized staff, senior staff, board, legal counsel, etc. who may approve, review, and interpret easement language.
 - Consider whether there are other parties or stakeholders, including funders that should be consulted or provided copies of the request and approval documents.
 - Establish a procedure to document how approval was justified and analyzed.
 - Have a process for systematically documenting the request and conservation organization's response, whether it is an approval or denial.
 - Identify a process for reviewing the reserved and permitted rights policy with landowners.
 - Have a plan for allocating the time and money required to meet this additional monitoring responsibility over time as conservation organization's portfolios increase.

- 2. **Receipt of reserved and permitted rights request.**
 - Requests from landowners are preferably received in writing.
 - Requests should provide sufficient information to allow the conservation organization to assess whether the request is consistent with the reserved right(s). The description should include location, size, scope, design, nature of proposed act or use and other details that may be required or needed to sufficiently assess the proposal.
 - In addition to a written description of the request, the following supplemental documents may be important to request from the landowner: maps, survey, construction plans, and photos relating to the proposed exercise of rights.

- 3. **Review of reserved and permitted rights request.** The conservation organization conducts analysis to determine if the request is consistent with the permitted and reserved rights.
 - Compare the request and supporting documents to the terms of the conservation easement.
 - Review the Baseline Documentation Report as needed.
 - Request additional information, perform a site visit or consult with a third party or board, as needed.
 - If the conservation organization is having difficulty establishing whether the request is consistent with the language in the easement, consider reviewing correspondence relating to the original transaction to establish Grantor's intent.
 - Review available organizational or industry precedents.

- 4. **Approval or denial of request.** The following outcomes may occur (check one):
 - Request requires no formal approval.
 - The conservation organization should communicate conclusion with landowner, written response is preferred.
 - Request requires approval, as stated in the conservation easement.
 - The conservation organization should communicate conclusion with landowner consistent with organization's approval policy and the requirements for approval laid out in the easement. A written response is required.
 - Easement language is unclear as to whether the reserved or permitted right exists.

- Analyze how the proposed act or use would impact the conservation values. A letter may be written by the conservation organization to the landowner approving or denying the request based on if the proposed act or use appears to be consistent with the protection of the conservation values.
 - The conservation organization may consider amending the conservation easement to clarify unclear language.
- Request is not consistent with the easement terms; however, the act or use has no impact on the conservation values.
- A letter may be written to the landowner approving or denying the request based on conservation organization's interpretation of easement language.
 - The conservation organization may consider amending the conservation easement to clarify unclear language.
 - See Section 2 – 4. Amendments for more information.
- Request is not consistent with the easement terms and cannot be approved.
- The conservation organization should provide a written letter to the landowner, clearly stating and documenting why the request is being denied.
- 5. Document Process.**
- A consistent system is maintained for tracking reserved and permitted rights, the exercise of reserved rights, and approvals granted by the conservation organization (this could be a database or via summary documents or other enduring systematic record). Without such a record, the conservation organization may have difficulty determining what rights were exercised in the past and what rights exist for the future.
- Complete information about the exercise of reserved rights is readily available for each easement.
- The conservation organization may consider on a case by case basis whether requiring notice and recordation is appropriate or required.
- For example, if a reserved right is executed that is a one-time right - such as the right to build a house or subdivide the property – the conservation organization may consider recording a notice or affidavit of the execution of that right in the office of the recorder of deeds, registrar or registry of deeds where the property is located.
- If an easement places a limitation on the scope of a particular reserved right, the conservation organization must document when the rights have been partially exercised.
- Retain paper trail consistent with the conservation organization's records retention policy.
- Follow-up with the landowner to verify that the exercise of reserved or permitted rights was consistent with the approval.