



NYC Department of Buildings  
280 Broadway, New York, NY 10007  
Patricia Lancaster, AIA, Commissioner  
(212) 566-5000, TTY: (212) 566-4769

**Phyllis Arnold, Esq.**  
General Counsel  
Phone: (212) 566-3291/3295  
Fax: (212) 566-3843  
E-mail: phyllisa@buildings.nyc.gov

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LEGAL  
POLICY AND PROCEDURE NOTICE # 1/04

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**TO:** Distribution

**FROM:** Phyllis Arnold, General Counsel

**DATE:** February 5, 2004

**SUBJECT:** Easement agreements and restrictive declarations; filing, review, approval and documentation

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**PURPOSE:** To set forth procedures and requirements for the filing, review, approval and documentation of proposed easement agreements and restrictive declarations

**SUPERSEDES:** LPPN #2/87, dated November 13, 1987, LPPN #1/92, dated January 15, 1992 and Paragraph 7 of TPPN #10/87, dated December 11, 1987

**EFFECTIVE:** Immediately

**BACKGROUND:**

In order to allow the development of parcels where such development would otherwise be foreclosed by various statutory restrictions or requirements, the Department of Buildings may, at its option, pursuant to Sections 643 and 645 of the Charter of the City of New York, accept easement agreements or restrictive declarations that provide for alternate means of compliance with code requirements. In addition, compliance with certain provisions of zoning may require the execution of restrictive declarations.

**SUPERSEDED**

**SPECIFICS:**

**I. APPROVED FORMS**

The following eight easement agreements or restrictive declarations have been approved as to legal form and are annexed hereto:

1. Caretaker's Apartment Restrictive Declaration;
2. Driveway Easement Agreement;
3. Egress Easement Agreement;
4. Flood Zone Restrictive Declaration;
5. Lotline Window Restrictive Declaration;
6. Off Site Parking Restrictive Declaration;
7. Party Wall Easement Agreement; and
8. Light and Air Easement Agreement.

**II. REQUIRED LANGUAGE**

In order to be acceptable as to form, all proposed easements agreements and restrictive declarations must contain the following:

1. A “run with the land” clause. The agreement or declaration must be binding upon and inure to the benefit of the parties (both grantor and grantee) and their respective heirs, legal representatives, successors and assigns;
2. A metes and bounds description of all affected tax lots;
3. A clause stating that the agreement or declaration “shall not be modified, amended or terminated without the prior written consent of the New York City Department of Buildings;”
4. The specific statutory provision or other requirement being satisfied by the agreement or declaration;

5. The application number for which the agreement or declaration is required;
6. Where necessary to clarify the exact location of the benefited or burdened area, diagram(s) attached as an exhibit in the form of a plot plan with a cross-hatched portion indicating the area of easement, the egress route, etc.; and
7. A clause stating that a “Failure to comply with the terms of this restrictive declaration or easement agreement may result in the revocation of a building permit or certificate of occupancy” for the subject premises.

### **III. SIGNATORY**

All signatures must be notarized using the individual, partnership or corporate acknowledgment form.

#### **A. SINGLE OWNER OR MULTIPLE OWNERS**

Where one party owns all parcels affected by a proposed agreement, the agreement is to be in the form of a restrictive declaration, with the fee owner identified as “Declarant.” It shall not be considered a substantive departure from the annexed approved forms to change the agreement from an easement to a restrictive declaration, in the event the properties are owned by the same owner(s).

#### **B. LONG TERM TENANTS**

Long term tenants may not bind the owners of the parcels, and therefore may not sign the agreement or declaration on behalf of the owner.

### **IV. PROCEDURE**

#### **A. APPLICATIONS SUBJECT TO PLAN EXAMINATION**

1. All proposed easement agreements and restrictive declarations submitted in connection with applications undergoing plan examination must be submitted to the Borough Office for review and approval before it is recorded and before approval of the application.

- a. Review for substantive satisfaction of objection/compliance with statutory requirement

The assigned plan examiner will perform a technical review of the agreement or declaration and its attached exhibits to determine whether such an agreement or declaration, if approved as to form, satisfies the applicable objection or statutory requirement. This review may include confirmation of metes and bounds, and/or determination that an egress route, driveway, number of parking spaces, etc., meet statutory requirements.

If the agreement or declaration does not satisfy the applicable objection or statutory requirement, the plan examiner shall not remove the objection. Review of the agreement or declaration for compliance with an approved form need not proceed until the document satisfies substantive requirements.

b. Review for conformance with approved form

Once the plan examiner determines that the proposed easement agreement or restrictive declaration substantively satisfies the objection or statutory requirement, the plan examiner shall review the agreement or declaration for conformance with an approved form.

If the submission departs substantively from the annexed approved forms, the plan examiner must request further review by referring it to the Borough Commissioner. The plan examiner's referral must identify the objection or statutory provision to be satisfied by the agreement or declaration.

The Borough Commissioner shall forward the agreement or declaration with the plan examiner's referral request to the General Counsel's Office for review. The General Counsel's Office will advise the Borough Commissioner whether the agreement or declaration is satisfactory as to form to satisfy such objection or statutory requirement. An application may not be approved until there is submitted to the Borough Office proof of the recording of the easement agreement or restrictive declaration (see paragraph "C" below).

**B. APPLICATIONS FILED THROUGH THE PROFESSIONAL CERTIFICATION PROCESS**

1. Identification of statutory requirement; Professional's Statement

For professionally certified applications, the professional engineer (PE) or registered architect (RA) must state on the Department's "Additional Information Sheet," the statutory requirement being satisfied by the agreement or declaration (the "Professional's Statement").

2. Verification of conformance with approved form

Proposed easement agreements and restrictive declarations that substantively conform in all respects to one of the annexed approved forms need not be sent to the General Counsel's Office for review. A PE or RA may professionally certify that an agreement or declaration conforms with an approved form by following the procedure set forth under subsection "a," below. If the PE or RA has not professionally certified that the agreement or declaration conforms in all respects to one of the annexed approved forms, the applicant must submit a request for review to the General Counsel's Office by following the procedure set forth under subsection "b," below.

a. Professional certification of conformance with approved form

The PE or RA may professionally certify that the easement agreement or restrictive declaration conforms in all respects to one of the annexed approved forms, and that it satisfies the specific statutory requirement cited in the Professional's Statement. Once the PE or RA has professionally certified that the easement agreement or restrictive declaration conforms in all respects to a Department approved form, and that it satisfies the identified statutory requirement, the owner must follow the procedure set forth below for recording the agreement or declaration.

b. General Counsel review of form

If the PE or RA has not professionally certified that the agreement or declaration conforms in all respects to one of the annexed approved forms, the applicant must submit the agreement or declaration, together with the Professional's Statement, to the General Counsel's Office for review. General Counsel's Office will advise the attorney who has prepared the agreement whether it is acceptable as to form. Once it is determined to be acceptable as to form, the owner(s) must follow the procedure set forth below for recording the agreement or declaration. A copy of the General Counsel Office approval must accompany the easement agreement or restrictive declaration that is filed with the application.

C. RECORDING OF THE EASEMENT AGREEMENT OR RESTRICTIVE DECLARATION

1. Execution and recording

After an easement agreement or restrictive declaration has been approved as to form (or is professionally certified as conforming to a Department approved form), it must be signed by the fee owner(s) and recorded at the county's Office of the City Register, or if in Richmond County, in the Richmond County Clerk's Office, against all the burdened and benefited tax lots. An application will not be approved until proof has been submitted that an approved (or professionally certified) agreement has been recorded.

2. Proof of recording

Prior to the approval of the application, the applicant must submit to the Borough Office proof that the agreement or declaration has been recorded against each tax lot. Proof that an agreement or declaration was recorded is evidenced by City Register number stamp, or reel and page number, from the appropriate county office for each tax lot.

The Borough Office may also accept as proof of recording, a copy of the agreement or declaration, together with an affirmation of an attorney stating that such copy is a true and exact copy of an approved or professionally certified agreement or declaration that was submitted for

recording against each of the affected tax lots. The attorney affirmation must be signed and dated and must contain the following language:

I, \_\_\_\_\_ an attorney admitted to practice in the State of New York, hereby certify that I have compared the annexed copy of an approved or professionally certified \_\_\_\_\_ [specify title of easement agreement or restrictive declaration], with the original on file in \_\_\_\_\_ [specify county clerk's office] to be recorded against the following Tax Block(s) and Lot(s): Block \_\_\_\_\_ Lot \_\_\_\_\_ and have found that the \_\_\_\_\_ [specify title of easement agreement or restrictive declaration] is a true and complete copy thereof.

3. Retention in application folder

All documents pertaining to the approval or professional certification of the easement agreement or restrictive declaration and its recording are to be filed and retained within the Department of Buildings' application folder.

D. REFERENCE IN CERTIFICATE OF OCCUPANCY

Where an application will result in the issuance of a certificate of occupancy, the certificate of occupancy must include reference to the type of easement agreement or restrictive declaration, the city register numbers issued by the County Clerk's Office, or if in Richmond County, the reel and page numbers.