

The Attorney's Guide to the ALTA/ACSM Land Title Survey

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Introduction

The ALTA/ACSM land title survey is often a part of the commercial real estate transaction. Just what is this survey? When is it required? How is it different from a "regular" survey? This article will attempt to answer these and other similar questions.

The ALTA/ACSM land title survey, usually called an "ALTA survey," is a survey performed to standards jointly adopted by the American Land Title Association (ALTA) and the American Congress on Surveying and Mapping (ACSM). The most current version of these standards is the 2005 set of requirements; earlier versions are dated 1962, 1986, 1988, 1992, 1997, and 1999. These standards can be found on-line at either www.alta.org or www.acsm.net.

There is also another set of land title survey standards. In 1962 an Illinois version was promulgated by a joint committee of the Illinois State Bar Association, the Chicago Bar Association, and the Illinois Professional Land Surveyors Association. These standards are rarely, if ever, used today.

When is a land title survey required?

Every owner's title policy contains five standard exceptions, also called general exceptions. These are:

1. Rights or claims of parties in possession not shown by the public records.
2. Encroachments, overlaps, boundary line disputes, or other matters that would be disclosed by an accurate survey and inspection of the premises.
3. Easements, or claims of easements, not shown by the public record.
4. Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the public records.
5. Taxes or special assessments that are not shown as existing liens by the public records.

If the title company is furnished the necessary documentation, and this documentation reveals no additional matters or adverse interests, it can waive, or delete, these five standard exceptions from the owner's title policy. This is called giving "extended coverage" to the owner's title policy. Once the title company is furnished a survey of the property in question, it can waive standard exceptions "2" and "3." Of course, any adverse matters disclosed by the survey will have to be shown as special exceptions to any title policy issued.

Sometimes these general exceptions overlap onto each other. For example, assume that a neighbor's driveway encroaches on the land being sold. This could impact general exception "1" (claim of someone in possession), general exception "2" (an encroachment), and general exception 3 (possible prescriptive easement).

Nonetheless, general exceptions "1," "4," and "5" are usually waived upon the seller's execution of a title insurance company affidavit in which the seller makes certain statements relative to possible mechanics liens, unrecorded leases, and other matters. Title companies have different names for this affidavit; one of them is an "ALTA Statement."

When a title company is asked to furnish extended coverage to 1-4 residential property, it will usually ask that it be furnished an Illinois "boundary survey" of the land. Illinois boundary survey standards are found at 68 Ill. Administrative Code, Sec. 1270.56.

But when insuring large and expensive commercial, industrial, and even vacant and multi-family properties, title companies will usually require a land title survey when asked to issue extended coverage. The reason for this is that the ALTA/ACSM land title survey standards are much more detailed and specific than the Illinois boundary survey standards.

For example, the surveyor's field procedures for boundary surveys are outlined in Section 1270.56(b)(7); the standards advise the surveyor in vague terms to perform all field work "with accepted methods of surveying theory, practice and procedures." Section 1270.56(b)(6)(N) of these standards indicates that the boundary survey must disclose "visible evidence of improvements, rights of way, easements, or use," but only *when requested by the client*. The optional nature of this provision is probably a throwback to an earlier time, when a boundary survey was merely a perimeter drawing of the land that showed no improvements at all. Regardless of this section's provenance, it is clear that a survey that may or may not disclose all evidence of occupation, improvements, and use is of little benefit to the title insurer.

On the other hand, Section 5 of the ALTA/ACSM land title survey standards itemizes twelve different categories of information that should be disclosed on the land title survey. Section 5 addresses such issues as unrecorded easements,

possessory evidence, and encroachments--matters that go to the heart of extended coverage. The standards not only meet the concerns of the title insurer; they also guide the surveyor in the preparation of the land title survey, leaving virtually no issues of interpretation unaddressed. This is why title companies require a land title survey as a condition to issuing extended coverage to title policies of large commercial, industrial, vacant, and multi-family properties.

What is Table A of these standards?

Several years ago a "Table A" of "Optional Survey Responsibilities and Specifications" was added to the land title survey standards. The Table A appended to the 2005 ALTA/ACSM land title survey standards contains eighteen items that include such matters as a location map of the property and the square footage of the exterior "footprint" of all buildings on the land. As the title suggests, these items can be added to the survey, but they are not a requirement of the survey standards.

The 2005 version of Table A has a new item that was not listed in earlier versions of Table A. A surveyor can now use photogrammetric mapping in the location of certain features (excluding boundaries) of the land.

Example: A surveying firm is hired to survey an abandoned naval station. The site is over one thousand acres in size. Any buildings and improvements on the land will be torn down or otherwise removed, as the land has been sold to a developer. In this instance there is no reason for a title company to be concerned with the location of any interior roads or buildings. To save time and money, the surveying firm could hire an aerial photography firm to fly over the land and take a picture of the site; this photograph could then be super-imposed onto the land title survey.

Note that because this Table A item excludes boundary issues, the surveyor will still have to utilize, at least in part, traditional "on the ground" surveying methods in the preparation of the survey.

When the attorney is ordering a land title survey from a surveyor, the surveyor may ask the attorney what Table A items, if any, should be shown on the survey. Naturally, the answer to this question will depend on the terms of the contract. But note that title companies will usually not require that *any* Table A requirements be shown in order to issue its extended coverage over matters of survey. This is an important consideration, as it is possible that the surveyor may charge an additional fee for complying with these optional Table A requirements. If the purchaser would like some Table A optional items to be shown on the survey, but the contract between the buyer and seller provides only that the seller is to pay for a survey and for a title policy with extended coverage over matters of survey and the other general exceptions, then perhaps the attorneys can

negotiate. The seller can pay for the basic land title survey in order for the purchaser to obtain extended coverage, but the buyer must pay for any additional Table A matters.

I know that item 7 of Table A includes the exterior dimensions of buildings, the square footage of the exterior footprint of buildings, the gross floor area of buildings, and “other areas to be defined by the client.” I know that item 9 refers to the number of parking spaces on the land. My client sometimes wants an ALTA 3.1 zoning endorsement added to this title insurance policy. Does this mean that I should require that Table A items 7 and 9 be checked off on all surveys of properties my client purchases?

The ALTA 3.1 zoning endorsement insures against loss or damage arising from a final court order that prohibits the use of the land with any structure presently located on the land. It also insures against loss or damage arising from a final court order that requires the removal or alteration of the structure on the basis that the zoning ordinance has been violated with respect to any of the following matters: area, width, or depth of the land as a building site for the structure; floor space area of the structure; setback of the structure from the property lines of the land; height of the structure; and number of parking spaces.

In order to determine if the “floor space area of the structure” violates a zoning ordinance, the title company will have to compute the “floor area ratio,” or “FAR.” Floor area ratio is the floor area of all structures on a zoning lot divided by the land area of that zoning lot.

Example: A municipal zoning ordinance allows for a floor area ratio of 2:1 in a commercial zoning district. A zoning lot in this district has an area of 20,000 square feet. There is one building on this lot. The building has four stories, and the “footprint,” or the area of the land the building occupies, is 10,000 square feet. Does the building comply with this floor area ratio?

FAR = the floor area of the structure divided by the land area of the zoning lot, or

10,000 x 4 divided by 20,000, or

40,000 divided by 20,000

In this example, the building on the zoning lot complies with the 2:1 floor area ratio requirement of the zoning code.

Admittedly, the information contained in item 7 of Table A is helpful to the title company in determining whether or it can issue this zoning endorsement. Most of the time, though, it is not absolutely necessary. The surveyor will usually disclose the nature of the building on the survey. (For example, “four-story brick

office building.”) Using a triangular engineer’s scale and a calculator, the title examiner can compute all areas to within an acceptable margin of error.

Identifying the number of parking spaces may be a different issue, however. But if necessary, the title examiner could accept an affidavit from either the owner or the property manager that sets forth the number of spaces.

I know about Table A. But is there anything else I should tell the surveyor when I order a land title survey? And who orders the survey, anyway, the attorney for the purchaser or the attorney for the seller?

The real estate contract between buyer and seller generally requires that the seller furnish the buyer a current survey at closing, and so normally it is the seller’s attorney who orders the survey. A “current” survey is usually defined as a survey that is six months old or less.

Before ordering the survey, the attorney must first review the real estate contract. The attorney must make sure that the survey she is requesting meets the requirements of the contract. The attorney may even want to give the surveyor a copy of the “survey” provisions of the contract to ensure that the resultant plat of survey meets the requirements of the contract.

The attorney should never “customize” his survey request. For example: “I want an ALTA/ACSM land title survey, but I don’t want you to. . . .” Many times what the attorney sees as a customization is actually more in the nature of an evisceration. (For example, “I don’t want you to show any evidence of unrecorded easements.”) If the surveyor complies with such a request, he will be forced to amend his survey certification accordingly. When the title company sees a survey certification that disclaims, for example, all evidence of unrecorded easements, it may refuse to give extended coverage over one or more of the general exceptions.

The attorney may want to ask the surveyor if he certifies his land title survey to the 2005 ALTA/ACSM survey standards. It is possible that the surveyor may perform his survey work in accordance with the specifications of an earlier standard. This should not be a problem, as most title companies will accept a current land title survey that is completed pursuant to a pre-2005 standard. The attorney should confirm this, though, and the attorney should also confirm that the purchaser and any lender involved in the transaction also approve of the use of this earlier standard.

When the attorney orders the survey, she is making a contract with the surveyor. If the transaction fails to close, the surveyor will still expect to be paid for providing the survey, and the surveyor will be sending the bill to the attorney and not to the attorney’s client.

Therefore, the attorney should first talk to the client and make sure that the attorney has the authority to order the survey. The attorney should advise the client that she is ordering the survey on the client's behalf and that the bill must be paid, regardless of whether or not the transaction closes.

I heard that there are different land title survey standards for different types of property. Is this true?

Some of the previous versions of the ALTA/ACSM land title survey standards set forth different surveying requirements for four different types of properties: urban, suburban, mountain/marshland, and rural. These separate requirements have been omitted from the 2005 standards.

My client's lender wants the surveyor to sign a "long form" survey certification. Will this be a problem?

The 2005 ALTA/ACSM land title survey standards contain the following survey certification:

"This is to certify that this map or plat and the survey on which it is based were made in accordance with the 'Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys,' jointly established and adopted by ALTA and NSPS in 2005, and includes Items _____ of Table A thereof." Pursuant to the Accuracy Standards as adopted by ALTA and NSPS and in effect on the date of this certification, undersigned further certifies that in my professional opinion, as a land surveyor registered in the State of _____, the Relative Positional Accuracy of this survey does not exceed that which is specified therein."

However, attorneys for owners and lenders will sometimes ask surveyors to sign "long form" land title survey certifications. These certifications are often quite lengthy and usually impose increased liability on the surveyor. Consequently, most surveyors are unwilling to certify their survey to anything but the standard ALTA/ACSM land title survey certification.

For example, consider this sentence from a typical long form survey certification:

"Except as shown on the survey, there are no (1) encroachments upon the subject property by improvements on adjacent property; (2) encroachments on easements or on adjacent property, streets, or alleys by any improvements on the subject property."

This certification is overly broad; it should be limited to *visible evidence* of encroachments. How can the surveyor certify to those matters of which he has no knowledge? See, in this regard, *Kayfirst Corp. v. Washington Terminal Co.*, 813 F.Supp. 67 (D.D.C. 1993), in which the court determined that a step footing

that was buried four feet underground but extended seven feet inside the property line was an encroachment.

Compare this sentence from a long form survey certification to the corresponding 2005 ALTA/ACSM land title survey standards requirements. Paragraphs 5(h) and 5(l) of these standards refer to "*observable* evidence of easements" and "*physical evidence* of all encroaching structural appurtenances and projections."

There is no reason why this lender cannot rely on the standard form ALTA/ACSM land title survey certification. However, if it is adamant in its request for a long form certification, perhaps the surveyor could rewrite the offending certification so that it is consistent with the ALTA/ACSM land title survey standards.

The title company is telling me that unless the survey is specifically certified to [Name of] Title Company, it won't close the transaction. Is this a reasonable requirement?

Possibly not. Surveyors will often "certify" their land title surveys to specifically named parties. These are usually the purchaser or owner, lender (if any), and the title insurance company. By including such a certification on his plat of survey, the surveyor acknowledges that these named parties have a right to rely on his survey. This reliance would form the basis of recovery against a surveyor in the event the survey is later determined to be defective.

But note that the necessity for this certification is greatly ameliorated by the holding of the landmark Illinois Supreme Court case, *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969), the leading Illinois case concerning the liability of surveyors to third parties. This case provides a basis (reasonable foreseeability) for parties who have not been identified in a survey certificate to nonetheless recover for damages stemming from a defective survey.

Despite the holding of the *Rozny* case, Illinois surveyors routinely certify their land title surveys. But sometimes the surveyor does not know the name of the title company that is insuring the transaction. Or perhaps the initial transaction fails to close, an updated title insurance commitment is ordered from a different title company, but the surveyor is not told to revise his certification. Because of the *Rozny* decision, title companies should not reject a land title survey solely because it is not certified to the title company.

Is there anything else?

One could write a book on the 2005 ALTA/ACSM land title survey standards and the various peripheral issues that confront title companies and surveyors. But this article should be more than sufficient for the real estate attorney.