



ALTA/ACSM Land Title Survey corner

by Gary Kent

Q • I have been told by my client's lender that I must sign the following certificate.
• What do you think—are there any problems with this?

The following is the actual lender's certificate:

"We hereby certify to the [Lender's name]; [Borrower]; [Title Company]; and their respective successors, nominees and assigns that: (a) the within Survey was prepared in accordance with the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys jointly established and adopted by the American Land Title Association, the American Congress on Surveying and Mapping, and the National Society of Professional Surveyors, in 2005, including Table A items 2, 3, 4, 5, 6, 7c, 8, 9, 10, 11, 13, and 16 thereof and complies with all applicable state laws; (b) [surveyor to insert appropriate accuracy standard pursuant to 2005 standards]; (c) the Survey represented herein is an accurate Survey of all the real property legally described herein; (d) the within Survey properly and accurately indicates the size, type and location of all improvements on such real property as of the date of the Survey and that all such improvements are within the boundary lines and applicable set back lines of the Project; (e) the within Survey was prepared under the direct supervision and control of the undersigned from an actual field transit Survey made of the real property legally described herein; (f) there are no encroachments either across property lines or zoning restriction lines in effect as of the date of the Survey; (g) the within Survey properly designates and locates all visible or recorded easements as of the date of the Survey; (h) ingress and egress to the subject real property is provided by [insert appropriate street(s)], upon which the real property abuts, the same being a paved and dedicated right-of-way maintained by [name of governmental authority]; (i) the subject real property [is/is not] located in an area designated as a "flood prone area" as defined pursuant to the Flood Disaster Protection Act of 1973, as amended; (j) the subject Project does not service any adjoining property for drainage, utilities, ingress, egress or any other purposes; (k) the subject Project described in this Survey is the same land described in the Title Insurance Commitment No. _____ dated _____ issued by [Title Company]; (l) all utility services required for the operation of the subject Project either enter the subject Project through adjoining public streets, or this Survey shows the point

of entry and location of any utilities that pass through or are located on the adjoining premises; (m) any discharge into streams, rivers or other conveyance systems is shown on this Survey; (n) if the Project consists of two or more parcels having common boundaries, those parcels are contiguous along the common boundaries; (o) no portion of the Project lies within a delineated wetlands area under federal, state or local law or policy; and (p) the record description of the Project forms a mathematically closed figure. The undersigned has received and examined a copy of Title Insurance Commitment No. _____ dated _____ issued by [Title Company] for the Project as well as each instrument listed therein, and the location of any matter shown thereon, to the extent it can be located, has been shown on this Survey."

A • This certificate is so rife with unnecessary redundancies, express guarantees and warranties and other problems that I scarcely know where to start, so let's just start at the top, with the clause ... "respective successors, nominees and assigns." As a surveyor, I would never certify to the buyer's "successors, nominees and assigns." If I do, I have just extended my liability to all future owners of the property. The only appropriate party to certify to is probably the lender, and I would gage the additional liability associated even with that.

Mention of 2005 ALTA/ACSM standards—ACSM did not adopt the 2005 standards, only ALTA and NSPS did so.

Item (a): Someone told this lender that there was a new set of 2005 standards, so they changed the referenced date, but they have apparently not actually read the ALTA/ACSM Standards since 1997. Table A, Item 11 was bifurcated into 11a and 11b in 1999; to call for simply "Item 11" makes no sense in the 1999 and 2005 standards.

Item (b): Apparently they don't have any idea how to deal with the accuracy standards, so they've just thrown them to the wind.

Item (c): Surveyors do not need to certify to an "accurate survey;" they do, however, need to conduct a survey in accordance with the appropriate standard.

The introductory paragraph of the standards itself states “It is ... recognized that title insurance companies are entitled to rely on the survey furnished to them to be of an appropriate professional quality, both as to completeness and as to accuracy.”

Item (d)—(“...the within Survey properly and accurately indicates the size, type and location of all improvements...”): If the surveyor certifies that they he/she has shown “all improvements,” they have certified to improvements (and their size, type and location) that are underground and not even visible to the eye! This clause is covered by Table A, item 8 and perhaps Table A, item 11a or 11b, depending on how the lender responds when asked.

Item (e): Every state law requires that surveyors either perform the work or properly supervise the employees working under their direction. Oh, yes! When was the last time you conducted a “field transit” survey?

Item (f): The surveyor’s obligation is to essentially identify and show potential encroachments. Whether or not something is, in fact, truly an encroachment is a matter of law, not a matter of survey. Potential violations of zoning setbacks are even more problematic. Is the condition a non-conforming use? What requirements actually apply to the real estate? Is there a variance? At least in most large cities, the jurisdiction *itself* will not even answer these questions! Paragraph 5(i) of the standards addresses this issue.

Item (g): The surveyor who certifies to this has just certified that he or she has conducted a complete and accurate title search. Even if a title commitment was provided, if the title company happened to miss an easement, the surveyor just took the hit for it. Paragraph 5(h) of the standards properly addresses this issue.

Item (h): Many, many roads and streets were never dedicated. In any case, the issue of access is addressed by virtue of paragraphs 5(c), 5(h) and 5(j) and Table A, Item 9 of the ALTA/ACSM standards.

Item (i): What is a “flood prone area” as defined pursuant to the Flood Disaster Protection Act of 1973, as amended? Table A, item 3 properly addresses this issue to the extent that the surveyor can certify.

Item (j): As the surveyor, do you know where all of the utility lines are? Does any storm water run across the boundary lines of the tract? Paragraph 5(h) (and Table A Item 11(b) if the lender wishes) addresses this issue.

Item (k): Between the last sentence of the first introductory paragraph, the second introductory paragraph and paragraph 1 of the standards, this issue is covered. It is also appropriate that there be a note on the survey specifying the date and number of the title commitment provided. If a new description was prepared based on the survey, the relationship between its lines and corners, and the lines and corners of the record description, should be explained.

Item (l): What in the world are the utilities required for operation of the premises?? Is this (now or in the

future) a nuclear plant? A farm? An office building? The surveyor should never certify to such wording. This item is indicative of the lender’s need for Table A, Item 11(b), but even so, the surveyor should carefully qualify what that information is based on.

Item (m): If the lender wants to pay for a topographic survey, the surveyor might consider this. Otherwise, paragraphs 5(h), 5(l) and 7 should be sufficient.

Item (n): This is addressed by paragraph 5(d).

Item (o): Unless qualified as a wetlands biologist, the surveyor can only certify that all delineated wetlands were located. Otherwise, the appropriate response to this item is to put a note on the survey that “The subject real estate does [or does not, if appropriate] lie within a wetlands area as identified on the U.S. Fish and Wildlife’s Wetlands Inventory map, dated ____.

Item (p): The issue of misclosure is addressed by paragraph 5(b).

Title commitment clause—This issue is covered by the introductory paragraphs, paragraph 1 and paragraph 5(d) and 5(h). It is, however, a good idea to place a note on the survey identifying the title commitment (by number and date) as the source of the easements.

This information should be communicated with confidence to the lender, with a goal of convincing the attorney that the standard certification is appropriate and addresses virtually everything they are concerned about. ■

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