

A TIME-SAVING ALTERNATIVE TO COMPLICATED, LONG-WINDED SURVEY CERTIFICATES (WITH FORM)

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With survey certificates, shorter can definitely be better.

ALMOST EVERY REAL ESTATE acquisition, financing, or development transaction requires a surveyor to inspect and measure the real property, then draw a survey diagram and deliver a certificate to back it up. This package of information lets the parties and their counsel better understand the physical characteristics of

the real property and identify issues that might impair its value. To some degree, a survey gives the players a substitute for visiting and inspecting the site.

Perhaps out of instinct, real estate lawyers who close significant commercial transactions sometimes try to develop comprehensive and

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thorough certificates for any surveyor to sign. These certificates often consist of a single long paragraph that goes on for a page or more. This overwhelming block of type asks the surveyor to give as many factual assurances as possible about the real property.

Lawyers use long form survey certificates both to avoid leaving out something that others would have included and to try to include new improvements that others might not have imagined. Survey certificates of this type can, however, come as quite a burden to surveyors, many of whom operate relatively informal one-person shops. They have limited enthusiasm for huge blocks of single-spaced text whose length might better be measured with a ruler than by counting lines. The results: procrastination, negotiations, extra expense, and unnecessary excitement when the absence of a "satisfactory" survey certificate creates a last-minute emergency at closing.

USING INDUSTRY SURVEY STANDARDS

- Lawyers can prevent this time-consuming process. The title insurance industry and the surveying profession have prescribed through reasonable standards exactly what a survey should show and exactly what assurances a surveyor should give his or her client. By relying on those standards as much as possible, a real estate lawyer can substantially trim back and simplify the required form of "surveyor certificate," yet obtain comfort entirely appropriate for the typical real estate loan or other transaction. The real estate lawyer can achieve all this with very little verbiage at all.

The industry-wide survey standards have been updated several times, most recently in 1999, as the combined work of the American Land Title Association ("ALTA"), the American Congress on Surveying and Mapping ("ACSM") and the National Society of Professional Surveyors ("NSPS"). The latest edition is called the

Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys ("ALTA/ACSM Survey Standards"), and can be found online at www.acsm.net/99altawd97.doc.

Collectively, the authors of the ALTA/ACSM Survey Standards have identified and handled almost every issue that a typical lawyer's long-winded survey certificate would address. Moreover, the ALTA/ACSM Survey Standards add a level of precision otherwise absent from survey certificates, and also take into account the limitations, expectations, and practices of the surveying profession.

Use ALTA/ACSM Standards As Base

Using the ALTA/ACSM Survey Standards as a base, you can ask a surveyor to provide only an extremely minimal surveyor's certificate—sufficient merely to confirm that the surveyor complied with the applicable requirements of the ALTA/ACSM Standards and a few other matters. Such a certificate effectively incorporates by reference the ALTA/ACSM Standards, and hence as a practical matter forces the surveyor to show on the survey all matters that should typically concern a lawyer and his or her client.

You must then confirm that someone looks at and pays attention to the survey and thinks about the information that the survey shows—a step in the closing process that should already happen anyway, but may not receive the emphasis it should if the attorneys and paralegals are devoting their efforts to fighting over survey certificates. If the attorneys and paralegals use a simplified form of survey certificate, though, they may find that they receive the survey itself sooner in the closing process and can devote their efforts to reviewing it rather than being distracted by the need to negotiate a survey certificate that really shouldn't need to be negotiated at all. You will discover any survey issues

earlier in the process, and perhaps reduce delays and last-minute crises.

The ALTA/ACSM Standards define some optional items that a survey might or might not disclose, all listed in Table A of the Standards. In practice, any careful business person or real estate attorney will want the survey to cover almost all the Table A items. Appendix 3 at the end of this article indicates which Table A items you can usually omit, and why.

Appendix 1: Minimalist Surveyor's Certificate

Appendix 1 offers an example of a minimalist surveyor's certificate, which should do the job for any real estate transaction requiring a survey and survey certificate, absent special and unusual circumstances. The sample certificate in Appendix 1 requires the surveyor to state that the survey complies with the ALTA/ACSM Standards and includes most of the optional items listed in Table A of those standards. If you obtain a surveyor's certificate in this form, you have covered all the bases that usually need to be covered, except anything site-specific or deal-specific.

Appendix 2: Common But Unnecessary Language

To support that statement, Appendix 2 of this article includes sample language extracted from many survey certificates that have crossed the author's desk or that the author has perpetrated for transactions. In each case, the commonly seen language is unnecessary because the ALTA/ACSM Survey Standards (including the specified Table A items) already cover exactly the same requirements—often with greater precision and detail than the commonly seen language extracted in Appendix 2. For each sample of common language in survey certificates, Appendix 2 demonstrates why that language is unnecessary, by quoting the relevant

requirements of the ALTA/ACSM Standards. In each case, the ALTA/ACSM Standards fully cover the same ground as the the commonly seen language, often with greater detail and practical scope. Given this overlap, lawyers and their clients lose nothing by requiring only an extremely minimal form of surveyor's certificate, such as the one in Appendix 1.

Appendix 3: Non-Customary Assurances That Create Problems

The forms of surveyor certificate that lawyers create also often raise problems by asking the surveyor to provide assurances that are either irrelevant or outside the surveyor's expertise. Many of those are summarized in Appendix 3. A surveyor does not usually expect to be responsible for these issues. If you ask the surveyor to assume that responsibility, the surveyor will likely object, because the requirement is not standard for the market, at least as the surveyor understands the market. You can therefore streamline the survey process by not asking for these assurances. If you nevertheless intend to ask for them, you should do so early in the process and be ready for objections. If necessary, find someone else (such as local counsel, a title insurance company, or an engineer) to provide the desired comfort if you really need it.

CONCLUSION • By using a minimal survey certificate like the one in Appendix 1, and by limiting the surveyor's responsibilities to a set that is standard in the relevant market, you can assure that the survey certificate, a "routine" element of the closing process, stays routine and simple, and does not produce negotiations, delays, or surprises. At the same time, the use of such a certificate will give your client all the comfort typically obtained from a survey and surveyor's certificate, assuming the property raises no special issues or concerns.

APPENDIX 1
Minimal Survey Certificate

The undersigned (the “*Surveyor*”), a registered land surveyor in the state or commonwealth identified below Surveyor’s signature, has prepared Surveyor’s survey dated _____ (Job No. _____) (the “*Survey*”) referring to:

- (a) Real property known as _____ (the “*Property*”); and
 (b) _____ Title Insurance Company (“*Title Company*”) Commitment No. _____ dated _____ for the Property.

Surveyor certifies to _____ (“*Borrower*”), _____ (“*Lender*”), and Title Company that Surveyor has surveyed the Property and:

- *Compliance.* The Survey—
 - (a) Was made in accordance with “Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys,” adopted by ALTA, ACSM and NSPS in 1999;
 - (b) Includes Table A Items 2, 3, 4, 6, 7(a), 7(b)(1), 7(c), 8, 9, 10, 11(b), 12, 13, 14, 15, and 16 of such Minimum Standard Detail Requirements¹; and
 - (c) Is based upon measurements made in accordance with “Minimum Angle, Distance, and Closure Requirements for Survey Measurements Which Control Land Boundaries for ALTA/ACSM Land Title Surveys” and the Accuracy Standards adopted by ALTA, NSPS, and ACSM and in effect on the date of this Certificate; and
- *Acreage.* The Property contains ____ acres (i.e., ____ square feet).

Borrower, Lender, Title Company, and their successors and assigns (including any trust, trustee, servicer, or rating agency for any securitization that includes Lender’s loan or any interest in it) may rely on this Certificate.

Signature: _____

Name: _____

Date: _____

State or Commonwealth: _____

License Number: _____

Seal: _____

¹ See Appendix 3 for an explanation of why other Table A items can be omitted.

APPENDIX 2

Common But Unnecessary Language In Surveyors' Certificates

1. Common language: "I am a duly registered land surveyor of the state where the Premises are located. This Survey was actually made upon the ground on _____ (date). This Survey has been prepared based upon field work conducted on the property shown hereon, performed by me or under by direct supervision on _____, _____."

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- 2. The plat or map of such survey shall bear the name, address, telephone number, and signature of the professional land surveyor who made the survey, his or her official seal and registration number, the date the survey was completed and the dates of all revisions, and the caption "ALTA/ACSM Land Title Survey" with the certification set forth in paragraph 8.
- 5. The survey shall be performed on the ground[.]

2. Common language: "The Survey correctly shows all exceptions in title commitment no. _____ issued, by _____ Title Insurance Company on _____, with location and recording information, to the extent that such exceptions can be located on the Survey. The Survey accurately shows all easements affecting the Property."

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- 5.(d) The identifying titles of all recorded plats, filed maps, right of [way] maps, or similar documents which the survey represents, wholly or in part, shall be shown with their appropriate recording data, filing dates and map numbers, and the lot, block, and section numbers or letters of the surveyed premises. For non-platted adjoining land, names and recording data identifying adjoining owners as they appear of record shall be shown. For platted adjoining land, the recording data of the subdivision plat shall be shown. The survey shall indicate platted setback or building restriction lines which have been recorded in subdivision plats or which appear in a Record Document which has been delivered to the surveyor. Contiguity, gores, and overlaps along the exterior boundaries of the surveyed premises, where ascertainable from field evidence or Record Documents, or interior to those exterior boundaries, shall be clearly indicated or noted. Where only a part of a recorded lot or parcel is included in the survey, the balance of the lot or parcel shall be indicated.
- 5.(h) All easements evidenced by a Record Document which have been delivered to the surveyor shall be shown, both those burdening and those benefiting the property surveyed, indicating recording information. If such an easement cannot be located, a note to this effect shall be included. Observable evidence of easements and/or servitudes of all kinds, such as those created by roads; rights-of-way; water courses; drains; telephone, telegraph, or electric lines; water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property, shall be located and noted. If the surveyor has knowledge of any such easements and/or servitudes, not observable at the time the present survey is made, such lack of observable ev-

idence shall be noted. Surface indications, if any, of underground easements and/or servitudes shall also be shown.

3. Common Language: "The Survey shows all roads, streets, and highways abutting the Property."

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- 5.(c) Measured and record distances from corners of parcels surveyed to the nearest right-of-way lines of streets in urban or suburban areas, together with recovered lot corners and evidence of lot corners, shall be noted. The distances to the nearest intersecting street shall be indicated and verified. Names and widths of streets and highways abutting the property surveyed and widths of rights of way shall be given. Any use contrary to the above shall be noted. Observable evidence of access (or lack thereof) to such abutting streets or highways shall be indicated. Observable evidence of private roads shall be so indicated. Streets abutting the premises, which have been described in Record Documents, but not physically opened, shall be shown and so noted.

- [Table A] Item 10. Indication of access to a public way such as curb cuts and driveways.

4. Common Language: "The Survey shows all evidence of possession of the Property, including any squatters or presumptive easements."

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- 5.(f) The character of any and all evidence of possession shall be stated and the location of such evidence carefully given in relation to both the measured boundary lines and those established by the record. An absence of notation on the survey shall be presumptive of no observable evidence of possession.

5. Common language: "Except as the Survey shows: (a) no improvements on the Property encroach onto adjoining real property or any easement of which Surveyor has knowledge (or the Commitment discloses) burdening the Property; (b) no improvements on other real property encroach onto the Property."

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- 5.(i) The character and location of all walls, buildings, fences, and other visible improvements within five feet of each side of the boundary lines shall be noted. Without expressing a legal opinion, physical evidence of all encroaching structural appurtenances and projections, such as fire escapes, bay windows, windows and doors that open out, flue pipes, stoops, eaves, cornices, areaways, steps, trim, etc., by or on adjoining property or on abutting streets, on any easement or over setback lines shown by Record Documents shall be indicated with the extent of such encroachment or projection. If the client wishes to have additional information with regard to appurtenances such as whether or

not such appurtenances are independent, division, or party walls and are plumb, the client will assume the responsibility of obtaining such permissions as are necessary for the surveyor to enter upon the properties to make such determinations.

- 5.(j) Driveways and alleys on or crossing the property must be shown. Where there is evidence of use by other than the occupants of the property, the surveyor must so indicate on the plat or map. Where driveways or alleys on adjoining properties encroach, in whole or in part, on the property being surveyed, the surveyor must so indicate on the plat or map with appropriate measurements.

6. Common Language: “The Survey correctly shows the locations and dimensions of all boundaries of the property, and all visible buildings, structures and other improvements, building setback lines, party walls, ditches, flood plains, waterways, bodies of water, fences, easements as listed in said title commitment, rights-of-way, utilities serving said property, streets, alleys, roadways, curbs, gutters, driveways, curb cuts, parking stalls, loading docks, traveled ways, and other significant visible items located on, adjacent to, appurtenant to or which affects the subject property, and are discoverable upon visual inspection, or otherwise known to me....The Property forms a mathematically closed figure.”

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- 5.(a) [The Survey shall include all] data necessary to indicate the mathematical dimensions and relationships of the boundary represented, with angles given directly or by bearings, and with the length and radius of each curve, together with elements necessary to mathematically define each curve. The point of beginning of the surveyor’s description shall be shown as well as the remote point of beginning if different. A bearing base shall refer to some well-fixed bearing line, so that the bearings may be easily re-established. All bearings around the boundary shall read in a clockwise direction wherever possible. The North arrow shall be referenced to its bearing base and should that bearing base differ from record title, that difference shall be noted.
- 5.(b) When record bearings or angles or distances differ from measured bearings, angles of distances, both the record and measured bearings, angles, and distances shall be clearly indicated. If the record description fails to form a mathematically closed figure, the surveyor shall so indicate.
- 5.(d) The identifying titles of all recorded plats, filed maps, right of way maps, or similar documents which the survey represents, wholly or in part, shall be shown with their appropriate recording data, filing dates and map numbers, and the lot, block, and section numbers or letters of the surveyed premises. For non-platted adjoining land, names and recording data identifying adjoining owners as they appear of record shall be shown. For platted adjoining land, the recording data of the subdivision plat shall be shown. The survey shall indicate platted setback or building restriction lines which have been recorded in subdivision plats or which appear in a Record Document which has been delivered to the surveyor. Contiguity, gores, and overlaps along the exterior boundaries of the surveyed premises, where ascertainable from field evidence or Record Documents, or interior to those exterior boundaries, shall be clearly indicated or noted. Where only a part of a recorded lot or parcel is included in the survey, the balance of the lot or parcel shall be indicated.

- 5.(g) The location of all buildings upon the plot or parcel shall be shown and their locations defined by measurements perpendicular to the boundaries. If there are no buildings erected on the property being surveyed, the plat or map shall bear the statement, "No buildings." Proper street numbers shall be shown where available.
 - [Table A] Item 7.
 - (a) Exterior dimensions of all buildings at ground level.
 - (b) Square footage of:
 - (1) exterior footprint of all buildings at ground level;
 - (2) gross floor area of all buildings; or
 - (3) other areas to be defined by the client
 - (c) Measured height of all buildings above grade at a defined location. If no defined location is provided, the point of measurement shall be shown.
 - [Table A] Item 8. Substantial, visible improvements (in addition to buildings) such as signs, parking areas or structures, swimming pools, etc.
- See also 5(c) and 5(h) (above).*

7. Common Language: "The Survey correctly shows the location of all utility services for the Property."

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- Item 11. Location of utilities (representative examples of which are shown below) existing on or serving the surveyed property as determined by:
 - (b) Observed evidence together with plans and markings provided by client, utility companies, and other appropriate sources (with reference as to the source of information)
 - Railroad tracks and sidings;
 - Manholes, catch basins, valve vaults or other surface indications of subterranean uses;
 - Wires and cables (including their function) crossing the surveyed premises, all poles on or within ten feet of the surveyed premises, and the dimensions of all crosswires or overhangs affecting the surveyed premises; and
 - Utility company installations on the surveyed premises.

8. Common Language: "No part of the Premises lies within any special flood hazard area (any area subject to special flood hazards as designated by the Federal Emergency Management Agency)."

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- [Table A] Item 3. Flood zone designation (with proper annotation based on Federal Flood Insurance Rate Maps or the state or local equivalent, by scaled map location and graphic plotting

only.) If the property resides in two or more zones, then the survey shall clearly display the limits of each zone by graphically transposing each zone line from the F.I.R.M. to the survey.

9. Common language: “The Survey correctly depicts the elevations and any pending or recent construction on the Property; and any visible evidence that the Property has been used as a solid waste dump, sump, or sanitary landfill.”

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- [Table A] Item 5. _____ Contours and the datum of the elevations.
- [Table A] Item 14. _____ Observable evidence of earth moving work, building construction or building additions within recent months.
- [Table A] Item 16. _____ Observable evidence of site use as a solid waste dump, sump or sanitary landfill.

10. Common Language: “The Survey correctly depicts all parking areas and correctly indicates the number of parking spaces on the Property.”

This language is unnecessary because the ALTA/ACSM Standards already require the following:

- [Table A] Item 9. _____ Parking areas and, if striped, the striping and the type (e.g. handicapped, motorcycle, regular, etc.) and number of parking spaces.

APPENDIX 3

Unnecessary Or Inappropriate Assurances In Surveyors’ Certificates

Common Language

Inappropriate Or Unnecessary Because

Monuments. The Survey complies with Table A, Item “1.”

This would require the surveyor to install permanent “monuments” in the ground where they do not already exist. Such measures are unnecessary. In some states they may force the surveyor to prepare and record new plat maps.

Elevations. The Survey Complies with Table A, Item “5.”

This would require the surveyor to measure and draw the elevations and slopes of the property. Under typical circumstances, such information is unnecessary.

Gross Floor Area. The Survey complies with Table A, Item “7(b)(2).”

This would require the surveyor to measure the gross floor area of the building, as opposed to just the exterior dimensions. Although inte-

Common Language**Inappropriate Or Unnecessary Because**

Other Area Measurements. The Survey complies with Table A, Item "7(b)(3)."

rior measurements would create substantial additional work, they would typically not create substantial additional value to the surveyor's client.

Utilities, Evidence of. The Survey complies with Table A, Item "11(a)."

This would require the surveyor to provide other measures as the client requests. This requirement would apply only in certain site-specific circumstances.

Other Optional Items. The Survey complies with Table A, Item "17."

Item 11(b) requires the surveyor to report utilities based on "visible evidence" and on other sources of information. Item 11(a) would limit the surveyor's responsibilities to "visible evidence" only.

Separate Lots. The Premises consist of one or more separate tax lot(s) and separate subdivided tract(s). No such lot or tract contains any real property not part of the Premises.

Item 17 provides for any site-specific survey requirements and will otherwise not apply.

State Standards. The Survey complies with the State's standards, if any, for surveyors and surveys.

Surveyors often prefer to leave this issue to the Title Company to investigate.

Streets. All roads, streets, and highways shown on the Survey are completed and dedicated public streets and have been accepted for public maintenance.

Any registered surveyor must comply with applicable state standards.

Urban Standards. The survey was performed to the standards of an "urban" survey.

An "ALTA/ACSM LAND TITLE SURVEY" does not require the surveyor to confirm existence of a dedicated roadway. Instead, the parties should request an Access Endorsement from the Title Company and let the title company make the determination.

ALTA/ACSM Survey Standards no longer distinguish between "urban" and any other forms of survey. The distinction made sense when it was not always feasible to achieve a high level of accuracy in surveys. Today's surveying equipment allows high accuracy for all surveys.

Common Language

Utilities. All utilities for operation of the Premises are available at the lot lines, enter the Premises through adjoining public streets, unless shown on the Survey, and do not run through or under any improvements not located on the Premises.

Zoning. The Property complies with zoning.

Inappropriate Or Unnecessary Because

An “ALTA/ACSM Land Title Survey” does not require the surveyor to verify that all utilities servicing the property are operational. This confirmation should come from other sources.

Although surveyors sometimes are willing to perform that analysis, they more often regard it as the practice of law and refer the issue back to the lawyer or the Title Company.

PRACTICE CHECKLIST FOR**A Time-Saving Alternative To Complicated, Long-Winded Survey Certificates (With Form)**

Lawyers often want lengthy survey certificates that address a wide range of issues. Surveyors often balk at such certificates, creating problems that are entirely preventable.

- To avoid needless delay and controversy, consider simply following industry standards. The American Land Title Association (“ALTA”), the American Congress on Surveying and Mapping (“ACSM”) and the National Society of Professional Surveyors (“NSPS”) have defined such standards in *Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys*. These are known in the industry as the “ALTA/ACSM Survey Standards” and you can find them at www.acsm.net/99altawd97.doc.
- Consider using a short form of certificate that incorporates the ALTA/ACSM Survey Standards by reference. These standards typically require the surveyor to show on the survey all matters that should concern you and your client.
- The ALTA/ACSM Survey Standards define some optional items that a survey might or might not disclose. Consider including almost all these optional items.
- By following this approach, you can stick to a very limited and clean survey certificate, and keep the process simple and painless.

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