

Alignment of Title Reports and Land Surveys: *Types of Surveys*

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I. TYPES OF SURVEYS

A. Potential Claims by Parties in Possession

1. Assertion of claims in real estate

In a perfect world, full disclosure and transparency concerning the spectrum of liens, defects, and encumbrances that affect the title would enable investors to arrive at the value from which to base their offer to the seller without having to concern themselves about hidden risks that impair the property's value. In fact, prospective purchasers and investors face the ever-present possibility that individuals or entities that are not parties to the purchase agreement and of which the purchaser is unaware at the time of closing may have claims to or rights in the real estate that will remain intact after the closing. Claims by third parties may be in the nature of fee simple title, life estates, leasehold interests, options to purchase, easements or licenses, and they may extend to part or all of the real estate. In the event that the claims are in the nature of fee simple title, the third party's claim will be attributable to either a conveyance, title by adverse possession, or similar non-record-based claims.

2. Discoverability of claims of parties in possession

Conveyances, particularly those involving arms-length transactions, are typically recorded, and thus, conveyances by which title to a portion or all of the land is claimed by the grantee of a conveyance would usually be discoverable from a search and examination of the public land records, and from a review of the standard commitment for title insurance. However, not all conveyances involve purchasers; some are based on transfers to family members, trusts or business associates, or affiliates. Furthermore, adverse possession is typically not discoverable from a search of the public land records. Thus, a painstaking search and examination of the public land records alone may not necessarily constitute a complete and accurate portrayal of the title.

The prospective purchaser of real estate after having entered into a contract will likely obtain prior to the closing or settlement a title insurance commitment, title opinion, abstract of title, or other title document that contains the legal description of the

property based upon a search and examination of the public land records that culminates with the last recorded deed that vested the seller with title. A title search will invariably reveal, as among its findings or revelations, a deed by which the seller acquired its title. After having examined the title document, the purchaser could conceivably prove right in assuming that the property description of the deed to which the seller attributes its title accurately portrays the boundaries of the land owned by the seller, but without an inspection or a survey of the boundaries, they could also prove wrong: An adjoining owner could be occupying a portion of the land. Buildings, structures, septic drain fields, signs, and fences could encroach on the boundaries. See Bump v. Dahl, 26 Wis.2d 607, 133 N.W.2d 295, 299 (Wis.1965) (adjoining owner in possession of a triangular-shaped area which had been landscaped, used, and incorporated into their yard as a part thereof and visibly was no part of the property the purchasers were purchasing).

Persons of uncertain identity and under a claim of right, rather than by permission, could be making use of part of the land for vehicular or pedestrian access or parking. The purchaser who forges ahead with closing a purchase, ignoring fences, tree lines, encroachments, landscaping, and other signs of possession or use under a claim of right, will not likely be treated favorably by the courts in the event of a boundary dispute or ownership contest with the party claiming the right to maintain such improvements and occupy the land they encompass.

What evidence in the field will impart notice of the rights of others? What possible outstanding evidence of use, occupation, and possession by parties other than the record titleholder should the survey reveal or show?

B. Factors That Determine the Type of Survey

Although the negotiation of real estate sale transactions at arms-length are driven by a price reflective of market valuation, from the perspective of counsel transactions will involve factors that are subjective to the parties and therefore require inquiry into the intended uses and objectives of the investor or purchaser. Is new construction anticipated? What type and location of vehicular access will be required? Do existing covenants, conditions, restrictions, and easements allow for uses contemplated by the investor without exposure to a risk of enforcement or the

enjoinment of uses or the razing of improvements? Do the topography or terrain include waterfront, steep hillsides, burial sites, hazardous waste, environmentally sensitive sites, or rare plant or protected animal species? Purchaser's counsel and the title insurer will rely upon a land surveyor to produce a contemporary profile of the site in the form of a map or plat of survey that portrays, depending upon the agreed-upon scope of the survey, the location, and dimensions of buildings, walls, and fences, abutting streets or roads, easements and utility installations, waterways and wetlands, subsurface and aerial improvements or installations, areas evidencing occupation of adjoining owners, and other facts and circumstances of interest to the purchaser, in relationship to the property description portrayed by the title insurance commitment. Among the purposes of the survey is to (1) delineate the property description and (2) identify the improvements, site conditions, and acts of occupation that are within, that straddle, or that lay outside of, the property description. From a comparison of the property description and site conditions, counsel for the purchaser and title insurer can assess the risk to the purchaser of a host of matters that may lead the purchaser to abort the transaction, to resolve uncertainty over the title, or lead the purchaser to make yet additional inquiries about the state of facts.

C. ALTA/NSPS Survey

1. The ALTA/ACSM Survey

The American Land Title Association (ALTA) and the American Congress on Surveying and Mapping (ACSM) first joined together to promulgate survey standards (ALTA/ACSM Standards) in 1962. Since then, the two organizations together revised ALTA/ACSM Standards in 1986, 1988, 1992, 1997, 1999, 2005, 2011, 2016, and most recently, on February 23, 2021. The ALTA/NSPS Land Title Survey consists of (1) eight numbered sections that make up the "Minimum Standard Detail Requirements (Exhibit 1, Pages 1-8)," and (2) Table A, the "Optional Survey Responsibilities and Specifications (Exhibit 1, Pages 9-10)." The ALTA/NSPS survey provides a means of certifying to a wide range of items that are pertinent to the title of the landowner. Table A contains a list of items that are negotiable as between the land surveyor and client.

2. Changes introduced by the 2021 ALTA/NSPS Land Title Survey

Effective February 23, 2021, several additional changes to the ALTA/ACSM Survey were made, including:

- a. Throughout the 2016 Standards the word “shall” was used. For example: “The surveyor shall. . . .” The 2021 ALTA/NSPS Survey replaced “shall” with “must” in many places to place additional emphasis on the importance of adhering to the standards.
- b. Paragraph 5.E. adds in addition to other items regarding easements “Utility locate markings (including the source of the markings, with a note if unknown.” The following is added to the end of Section 5.E.iv.: “And all utility poles on or within ten feet of the surveyed property. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the extent of all encroaching utility pole cross members or overhangs.”
- c. Paragraph 6 regarding Easements, Servitudes, Rights of Way, Access, and Documents has added viii. “If in the process of preparing the survey the surveyor becomes aware of a recorded easement not otherwise listed in the title evidence provided, the surveyor must advise the insurer prior to delivery of the plat or map and, unless the insurer provides evidence of a release of that easement, show it on the face of the plat or map, with a note that the insurer has been advised.”
- d. There are now only nineteen (19) Table A items. Former Table A item 18, which related to wetlands, was deleted.
- e. The NOTE at the beginning of Table A was revised. The 2016 Standards NOTE stated:

NOTE: The twenty (20) items of Table A may be negotiated between the surveyor and client. Any additional items negotiated between the surveyor and client shall be identified as 21(a), 21(b), etc., and explained pursuant to Section 6.D.ii.(g). Notwithstanding Table A Items 5 and 11, if an engineering design survey is desired as part of an ALTA/NSPS Land Title Survey, such services should be negotiated under Table A, Item 21.

The 2021 Standards NOTE now states:

NOTE: Whether any of the nineteen (19) items of Table A are to be selected, and the exact wording of and fee for any selected item, may be negotiated between the surveyor and client. Any additional items negotiated between the surveyor and client must be identified as 20(a), 20(b), etc. Any additional items negotiated between the surveyor and client, and any negotiated changes to the wording of a Table A item, must be explained pursuant to Section 6.D.ii.(g). Notwithstanding Table A Items 5 and 11, if an engineering design survey is desired as part of an ALTA/NSPS Land Title Survey, such services should be negotiated under Table A, Item 20.

- f. Item 6 of Table A has been revised to make it clearer that the surveyor can only add zoning information if the surveyor is furnished that information. Note that either the client or the client's representation can now furnish the surveyor that information.
- g. Item 11 of Table A has been changed. The 2016 Standards were problematic because Item 5.E. required the surveyor to show evidence of easements observed in the process of conducting the fieldwork.

See Item 5.E.iv. of the 2016 Standards:

2016 Standards, 5.E.iv.: Evidence on or above the surface of the surveyed property observed in the process of conducting the fieldwork, which evidence may indicate utilities located on, over, or beneath the surveyed property. Examples of such evidence include pipeline markers, manholes, valves, meters, transformers, pedestals, clean-outs, utility poles, overhead lines, and guide wires.

But Item 11 of Table A of the 2016 Standards referred to the surveyor showing:

“Location of utilities existing on or serving the surveyed property as determined by: observed evidence *collected pursuant to Section 5.E.iv. . . .*”

Therefore, if Item 11 of Table A was not checked, it was unclear under the 2016 Standards whether the survey necessarily showed observed evidence of utilities. Uncertainty whether the surveyor is obligated to who observed evidence has now been made clearer by virtue of a change to item 11 of Table A, which now states:

Evidence of underground utilities existing on or serving the surveyed property (in addition to the observed evidence of utilities required pursuant to Section 5.E.iv.) as determined by: (a) plans provided by client (with reference as to the sources of information) (b) markings coordinated by the surveyor pursuant to a private utility locate.

Note to the client, insurer, and lender: With regard to Table A, item 11, information from the sources checked above will be combined with observed evidence of utilities pursuant to Section 5.E.iv. to develop a view of the underground utilities. However, lacking excavation, the exact location of underground features cannot be accurately, completely, and reliably depicted. In addition, in some jurisdictions, 811 or other similar utility locate requests from surveyors may be ignored or result in an incomplete response, in which case the surveyor shall note on the plat or map how this affected the surveyor’s assessment of the location of the utilities. Where additional or more detailed information is required, the client is advised that excavation may be necessary.

D. Other Survey Certificates

The scope of the surveyor’s certificate is negotiable as between the surveyor and the surveyor’s client requesting the survey. The scope of the survey and the size and complexity of the site will

affect the survey's cost to the client. In some transactions, several parties may ultimately influence and determine the scope of the survey: The prospective purchaser, prospective lender, prospective title insurer, and the municipality. Efficiency compels the client to find out from all parties what these parties require before requesting the surveyor's price and time requirements.

Title insurance requirements alone can prove variable in that the title insurer's insured may not as yet have determined the scope of coverage that will determine the survey details that the title insurer will require as a condition to providing title insurance coverage. Will title insurers require that the survey be an ALTA/NSPS survey in order to delete the standard survey exception from the title policy? The answer will vary with local law and regulations and market conditions. There are many different types of survey certificates in use (Exhibit 3). In some locales, the title insurer will not necessarily require that the survey be an ALTA/NSPS survey, so long as the survey contains a certificate containing at a minimum the following:

I have surveyed the above-described property and the above map is a true representation thereof and shows the size and location of the property, its exterior boundaries, the location and dimensions of all structures thereon, fences, apparent easements and roadways, and visible encroachments if any.

However, there will be instances in which the title insurer, as a direct result of the insured's request for specific coverage, will require an ALTA/NSPS Survey. A multitude of title insurance endorsements are available, provided a survey that meets the title insurer's criteria is prepared. For example, the title insurer may conceivably require an ALTA/NSPS Survey as a result of the insured's request to:

- Delete from the policy the standard exception for Easements or claims of easements not shown by the public records.
- Delete an exception that was raised for a recorded "blanket" easement, the legal description for which is vague or described an entire quarter-quarter section, but which may not necessarily affect the land to be insured.
- Issue ALTA Endorsement 3 or 3.1 (Zoning)

- Issue ALTA Endorsements 17 (Access) or 17.1 (Indirect Access)
- Issue ALTA Endorsement 19 (Contiguity)

E. Mortgage Inspections

In certain locales, maps, inspection reports, and drawings may conceivably be produced by professional land surveyors or others that are designed to portray boundaries and the location of improvements that do not meet the minimal standards of the ALTA/NSPS Survey.

The mortgage inspection (Exhibit 4) is typically used by the title insurer to provide survey coverage, but the survey is used to provide coverage to the lender, not the owner, and the owner likely would not even be given a copy of the mortgage inspection survey. Thus, where the adjoining owner sued the purchaser for trespass on the basis of the existence of an encroaching underground septic system located on a two-acre area titled in the adjoining owner, the mortgage inspection report showed the encroachment area but the purchaser testified they never saw the mortgage inspection and were therefore unaware of the encroachment. Wagoner v. Obert, 180 Ohio App.3d 387, 401–402, 2008–Ohio–7041, 905 N.E.2d 694 (5th Dist.).

F. Geographic Information Systems ("GIS")

A geographic information system (GIS) refers to a system designed to capture, store, manipulate, analyze, manage, and present types of geographical data, including maps that display property parcel boundaries, topography, buildings, structures, and other physical features. The context in which GIS maps are used in this discussion is a GIS created or maintained by local government and accessible to public users (Exhibit 5). Local government units charged with assessment of real property for taxation purposes are among the administrative offices that regard themselves as having a degree of influence or control over property boundaries, if not to the extent of determining boundary location then at a minimum calling the record user's attention to uncertainty over and discrepancies between boundaries by means of comments and notations that raise doubt over boundary location in the mind of the records user. GIS, in those locales where it is available to public users, may result in questions that investors and purchasers may ask themselves prior to closing:

1. To what extent is GIS authoritative in delineating property boundaries?

GIS vendors that sold their products to local governments will have placed emphasis on varying GIS advantages. In light of the variation in local government records and political circumstances, is unlikely that there is or ever will be a consensus among local government administrators over the proper scope of GIS in implementing local tax and regulatory policies. GIS is designed to capture the computation of the size of surface area of land that is subject to taxation rather than positioned to resolve, as would a court of general jurisdiction over the parties, overt discrepancies between the boundaries of adjoining owners. As regards real estate title examination made in anticipation of a sale of real estate, GIS maps if sufficiently detailed can prove useful in detecting possible boundary discrepancies, gaps, and overlaps. As far as title examiners and title attorneys who pre-closing prepare title commitments and opinions are concerned, GIS is typically the starting point, not the end, of an investigation by the title examiner into whether boundaries overlap: When consulting GIS and finding an indication of a boundary discrepancy, the title examiner may decide to examine the public land records of the county recorder more closely for further information concerning a boundary discrepancy, and ultimately decide based upon all the information available to her that the discrepancy does or does not exist. GIS is prepared without the benefit of a contemporaneous onsite investigation, and as a result, field monuments ("...thence Westerly 56 feet to a stone wall...") and field measurements are not always available to the GIS user.

2. Will GIS suffice in lieu of a land survey in providing boundary information?

Surveyors have a duty to exercise the skill, care, and diligence of their profession for which they have professional liability to their clients. In contrast, GIS when maintained by local government in furtherance of a government administrative service whether or not accompanied by website disclaimers of liability for is governed by statute concerning governmental immunity from suit and therefore unlikely to result in liability for errors and omissions.

3. To what extent do boundary discrepancies, overlaps notations, and comments displayed by local GIS impart constructive notice of the rights of third parties in real estate?

Electronic records have enabled public and private sectors to realize an expansion in access to real estate title information, including maps. Although public GIS may prove a useful and convenient source of information, the recording acts of states do not require prospective purchasers of real estate to search and examine GIS to the same extent, if at all, as they are required to search and examine the records of the county recorder or register of deeds for liens, defects, and encumbrances. Although the question whether the rights of third parties attributable to government GIS maps, notwithstanding the rights are not detectable from the public land records, impart constructive notices has not as yet been addressed, the question of administrative indexes not accorded statutory recognition sufficient to impart constructive notice concerning conveyances has. Where after having conveyed the title to a relative by a deed that, lacking an accurate legal description, was not indexed in the public tract index the , mortgagor granted a mortgage to Associates Financial, and after a default the relative claimed that the mortgage was invalid because Associates Financial could have, through "reasonable inquiry," discovered the relative's ownership interest in the property by using a computer system at the Register of Deeds' office, the court rejected the relative's argument. Sec. 706.09(2)(b), Wis. Stats., which describes notices that impart constructive notice to purchasers, does not require purchasers for value to see if there is some way, in the absence of a proper recording, that an interest could possibly be discovered. Indeed, such a requirement would be contrary to the very purpose of the recording statutes—to ensure a clear and certain system of property conveyance. Associates Fin. Servs. Co. of Wisconsin, Inc. v. Brown, 258 Wis.2d 915, 656 N.W.2d 56, 61 (Wis.Ct.App.2002). The decision of the county auditor in noting a boundary overlap who concluded "the computerization of the county tax maps dictated that ambiguous legal descriptions be resolved" was admitted into evidence in an action to quiet the title. Kiesel v. Hovis, 2013-Ohio-3469, 2013 WL 4041578 (Ohio Ct. App. 6th Dist. Sandusky County 2013).

4. What effect, if any, will GIS have upon the marketability and insurability of the title?

Title insurers are aware of the ever-present possibility of claims of third parties, including adjoining owners that may result in title insurance claims, particularly under circumstances where the title insurer has deleted the standard exceptions from the policy. The author has encountered instances in which local GIS records contained errors or mischaracterizations. Thus, to embrace GIS as though its conclusions or depictions are invariably infallible is no more plausible than assuming that the county recorder's indexes are invariably infallible. GIS errors or no, in those locales where the county recorder will refuse to accept for recordation a deed on the basis of what the recorder asserts is a boundary discrepancy, and where the auditor or treasurer have the practical capacity to impair the appearance of title by commentary or criticism of the private owner's title in GIS and ancillary administrative records, depending upon the specific facts and circumstances, title insurers will be hesitant to disregard discrepancies attributable, regardless whether they agree with GIS's conclusions, to GIS.

G. Survey Symbols

The survey typically consists of a detailed map or plat, the property description in narrative form, a surveyor's certificate, and a legend that displays symbols for a variety of physical features. The number and variety of symbols found in the survey map will depend upon the size and complexity of the site and the scope of the survey certificate. Thus, the survey of a shopping center will reveal a plethora of symbols that the survey of a remote arid desert tract will not. Symbols that have significance insofar as rights in the land include:

- Fences
- Foundations
- Signage
- Walls
- Roads
- Paths
- Pavement
- Manholes

- Storm sewer
- Gas valves
- Gas meters
- Water valves
- Hydrants
- Well heads
- Light poles
- Utility poles
- Guy poles
- Guy wires
- Electric pedestals
- Electric meters
- Traffic lights
- Water surface
- Wetlands
- Flagpoles
- Parking meters
- Mailboxes
- Trees
- Shrubs
- Landscaping
- Underground electric lines
- Underground gas lines
- Underground telephone lines
- Overhead power lines

Structures that reveal or raise any inference of the existence of rights of utilities, adjoining owners, users, or occupants should be noted. The title insurer will usually raise exceptions for such matters unless it is established to the title insurer's satisfaction that the structures are there by permission of the owner.



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