



Endorsements - ALTA Owners' and Lenders' Policies

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ENDORSEMENTS

Endorsements issued by the title insurer or title agent are designed to delete, add to, or modify any number of provisions of the commitment for title insurance and policies of title insurance. Endorsements are not available as stand-alone documents, but invariably refer to an underlying commitment or policy that predated or was issued simultaneous with the endorsement. Although it is usually the case that endorsements enhance or expand upon coverage, in some instances endorsements will be issued to reduce or revoke coverage. Several basic features of or considerations relating to endorsements should be mentioned:

- Endorsements are of two types: Standardized and transaction specific.
- Endorsements where standardized will be promulgated by the ALTA, the CLTA or other state title association or board, or designed by individual insurers.
- Endorsements, where transaction-specific, will be issued to reflect or respond to requests (e.g. "Exception No. 14 is hereby deleted.").
- Endorsement availability will depend upon whether the endorsement form is, in the discretion of the title insurer, appropriate to owners, lenders or both.
- Endorsement availability will depend upon approval by the state regulator, if any.
- Endorsements will not be issued unless underwriting criteria imposed by the title insurer are met.
- Underwriting criteria imposed by the title insurer will vary between and among different states.
- Underwriting criteria imposed by the title insurer will vary between and among title insurers.
- Promulgation of an endorsement by ALTA does not necessarily mean that the endorsement will be available in every state.
- Endorsements will not be issued unless the applicable premium is paid.

A. Array of ALTA Endorsements

If the several ALTA policy forms were designed to satisfy a broad spectrum of prospective purchasers and lenders, the many more ALTA endorsement forms further advance the challenge of defining and insuring against disparate title risks that confront purchasers, lenders and investors. Each endorsement offers an expression of a risk and the applicable statement of coverage against loss. There are as of the

date of the publication of these materials one hundred three (102)
ALTA endorsements.

ALTA 1	Street Assessment
ALTA 3	Zoning – Unimproved Land
ALTA 3.1	Zoning – Completed Structure
ALTA 3.2	Zoning – Land Under Development
ALTA 4	Condominium
ALTA 4.1	Condominium
ALTA 5	Planned Unit Development
ALTA 5.1	Planned Unit Development
ALTA 6	Variable Rate Mortgage
ALTA 6.2	Variable Rate Mortgage/Negative Amortization
ALTA 7	Manufactured Housing Unit
ALTA 7.1	Manufactured Housing Unit – Conversion - Loan
ALTA 7.2	Manufactured Housing Unit – Conversion - Owner's
ALTA 8.1	Environmental Protection Lien
ALTA 8.2	Commercial Environmental Protection Lien
ALTA 9	Restrictions, Encroachments, Minerals - Loan
ALTA 9.1	Covenants, Conditions and Restrictions – Unimproved Land – Owner's
ALTA 9.2	Comprehensive – Improved Land – Owner's
ALTA 9.3	Covenants, Conditions and Restrictions - Loan
ALTA 9.6	Private Rights – Loan
ALTA 9.6.1	Private Rights - Current Assessments - Loan
ALTA 9.7	Restrictions, Encroachments, Minerals – Land Under Development – Loan
ALTA 9.8	Covenants, Conditions and Restrictions – Land Under Development – Owner's
ALTA 9.9	Private Rights – Owner's
ALTA 9.10	Restrictions, Encroachments, Minerals – Current Violations - Loan
ALTA 10	Assignment
ALTA 10.1	Assignment and Date Down
ALTA 11	Mortgage Modification
ALTA 11.1	Mortgage Modification With Subordination
ALTA 11.2	Mortgage Modification with Additional Amount of Insurance
ALTA 12	Aggregation – Loan
ALTA 12.1	Aggregation – State Limits - Loan
ALTA 13	Leasehold - Owner's
ALTA 13.1	Leasehold - Loan
ALTA 14	Future Advance - Priority
ALTA 14.1	Future Advance - Knowledge
ALTA 14.2	Future Advance - Letter of Credit

- ALTA 14.3 Future Advance – Reverse Mortgage
- ALTA 15 Non-imputation - Full Equity Transfer
- ALTA 15.1 Non-imputation - Additional Insured
- ALTA 15.2 Non-imputation - Partial Equity Transfer
- ALTA 16 Mezzanine Financing
- ALTA 17 Access and Entry
 - ALTA 17.1 Indirect Access and Entry
 - ALTA 17.2 Utility Access
- ALTA 18 Single Tax Parcel
 - ALTA 18.1 Multiple Tax Parcel
- ALTA 19 Contiguity - Multiple Parcels
 - ALTA 19.1 Contiguity - Single Parcel
 - ALTA 19.2 Contiguity - Specified Parcels
- ALTA 20 First Loss – Multiple Parcel Transactions
- ALTA 22 Location
 - ALTA 22.1 Location and Map
- ALTA 23 Coinsurance – Single Policy
- ALTA 24 Doing Business
- ALTA 25 Same as Survey
 - ALTA 25.1 Same as Portion of Survey
- ALTA 26 Subdivision
- ALTA 27 Usury
- ALTA 28 Easement- Damage or Enforced Removal
 - ALTA 28.1 Encroachments – Boundaries and Easements
 - ALTA 28.2 Encroachments – Boundaries and Easements – Described Improvements
 - ALTA 28.3 Encroachments - Boundaries and Easements - Described Improvements and Land Under Development
- ALTA 29 Interest Rate Swap Endorsement - Direct Obligation
 - ALTA 29.1 Interest Rate Swap Endorsement - Additional Interest
 - ALTA 29.2 Interest Rate Swap Endorsement – Direct Obligation
 - ALTA 29.3 Interest Rate Swap Endorsement – Additional Interest – Defined Amount
- ALTA 30 Shared Appreciation Mortgage
 - ALTA 30.1 Commercial Participation Interest
- ALTA 31 Severable improvements
- ALTA 32 Construction Loan Pending Disbursement
 - ALTA 32.1 Construction Loan – Loss of Priority – Direct Payment
 - ALTA 32.2 Construction Loan –Loss of Priority – Insured’s Direct Payment
- ALTA 33 Disbursement Endorsement
- ALTA 34 Identified Risk Coverage
- ALTA 35 Minerals and Other Subsurface Substances – Buildings
 - ALTA 35.1 Minerals and Other Subsurface Substances –Improvements

ALTA 35.2	Minerals and Other Subsurface Substances – Described Improvements
ALTA 35.3	Minerals and Other Subsurface Substances – Land Under Development
ALTA 36	Energy Project – Leasehold/Easement – Owner’s
ALTA 36.1	Energy Project – Leasehold/Easement – Loan
ALTA 36.2	Energy Project – Leasehold – Owner’s
ALTA 36.3	Energy Project – Leasehold - Loan
ALTA 36.4	Energy Project – Covenants, Conditions and Restrictions – Land Under Development – Owner’s
ALTA 36.5	Energy Project – Covenants, Conditions and Restrictions – Land Under Development - Loan
ALTA 36.6	Energy Project – Encroachments
ALTA 36.7	Energy Project – Fee Estate – Owner’s Policy
ALTA 36.8	Energy Project – Fee Estate – Loan Policy
ALTA 37	Assignment of Rents or Leases
ALTA 38	Mortgage Tax
ALTA 39	Policy Authentication
ALTA 40	Tax Credit - Owner's Policy
ALTA 40.1	Tax Credit - Defined Amount - Owner’s Policy
ALTA 41	Water – Buildings
ALTA 41.1	Water – Improvements
ALTA 41.2	Water – Described Improvements
ALTA 41.3	Water – Land Under Development
ALTA 42	Commercial Lender Group
ALTA 43	Anti-Taint
ALTA 44	Insured Mortgage Recording
ALTA 45	Pari Passu Mortgage – Loan Policy
ALTA 46	Option

In June 2006 the ALTA updated all endorsements so that the endorsements conform to the 2006 policies to which they refer. As a result, there are now two parallel series of ALTA endorsement, distinguishable by “-06” denoting use with the 2006 policy form. The ALTA endorsements designed for use with the 2006 policy forms display “06” at the end of the endorsement; those endorsements designed for use with the 1992 policy forms do not. Thus, ALTA Endorsement 3.1 is to be used with the 1992 policy, but ALTA Endorsement 3.1-06 is to be used with the 2006 policy. In the discussion of endorsements that follows, the ending “-06” will be omitted unless otherwise noted.

In October, 2008 the ALTA approved additional endorsements as follows:

ALTA 8.2	Commercial Environmental Protection Lien
ALTA 17.2	Utility Access
ALTA 24	Doing Business
ALTA 25	Same as Survey
ALTA 25.1	Same as Portion of Survey
ALTA 26	Subdivision
ALTA 27	Usury
ALTA 28	Easement- Damage or Enforced Removal

As of February 3, 2010, the ALTA decertified ALTA Endorsement 21 (Creditors Rights), and approved two additional endorsements as follows:

ALTA 29	Interest Rate Swap Endorsement - Direct Obligation
ALTA 29.1	Interest Rate Swap Endorsement - Additional Interest

As of July 26, 2010, the ALTA promulgated ALTA 30 – Shared Appreciation Mortgage.

As of February 3, 2011, the ALTA promulgated additional endorsements as follows:

ALTA 31	Severable improvements
ALTA 32	Construction Loan Pending Disbursement
ALTA 32.1	Construction Loan Pending Disbursement
ALTA 33	Disbursement

As of August 1, 2011, the ALTA promulgated additional endorsements as follows:

ALTA 29.2	Interest Rate Swap – Direct Obligation – Defined Amount.
ALTA 29.3	Interest Rate Swap Endorsement – Additional interest – Defined Amount
ALTA 34	Identified Risk Coverage

As of April 2, 2012, the ALTA promulgated sixteen new ALTA endorsements, revised five endorsements, and withdrew two endorsements (ALTA 9.4 and ALTA 9.5).

The endorsements are:

- ALTA 3.2 Zoning – Land Under Development
- ALTA 9.6 Private Rights – Loan
- ALTA 9.7 Restrictions, Encroachments, Minerals – Land Under Development – Loan
- ALTA 9.8 Covenants, Conditions and Restrictions – Land Under Development – Owners
- ALTA 28.1 Encroachments – Boundaries and Easements
- ALTA 35 Minerals and Other Subsurface Substances – Buildings
- ALTA 35.1 Minerals and Other Subsurface substances –Described Improvements
- ALTA 35.2 Minerals and Other Subsurface Substances – Improvements
- ALTA 35.3 Minerals and Other Subsurface Substances – Land Under Development
- ALTA 36 Energy Project – Leasehold/Easement – Owners
- ALTA 36.1 Energy Project – Leasehold/Easement – Loan
- ALTA 36.2 Energy Project – Leasehold – Owners
- ALTA 36.3 Energy Project – Leasehold – Loan
- ALTA 36.4 Energy Project – Covenants, Conditions and Restrictions – Land Under Development – Owners
- ALTA 36.5 Energy Project – Covenants, Conditions and Restrictions – Land Under Development – Loan
- ALTA 36.6 Energy Project – Encroachments

As of August 3, 2012, the ALTA promulgated two additional endorsements:

- ALTA 30.1 Commercial Participation Interest
- ALTA 32.2 Construction Loan Disbursement

As of December 3, 2012, the ALTA promulgated two additional endorsements:

- ALTA 37 Assignment of Rents or Leases
- ALTA 38 Mortgage Tax

As of April 2, 2013, the ALTA promulgated seven additional endorsements:

- ALTA 9.9 Private Right – Owner’s Policy
- ALTA 9.10 Restrictions, Encroachments, Minerals – Current Violations – Loan Policy

ALTA 12.1 Aggregation – State Limits – Loan Policy
ALTA 28.2 Encroachments – Boundaries and Easements – Described Improvements
ALTA 32.1 Construction Loan Pending Disbursement
ALTA 32.2 Construction Loan – Loss of Priority – Insured's Direct Payment
ALTA 39 Policy Authentication

As of December 2, 2013, the ALTA promulgated eight additional endorsements:

ALTA 11.2 Mortgage Modification with Additional Amount of Insurance
ALTA 41 Water – Buildings
ALTA 41.1 Water – Improvements
ALTA 41.2 Water – Described Improvements
ALTA 41.3 Water – Land Under Development
ALTA 42 Commercial Lender Group
ALTA 43 Anti-Taint
ALTA 44 Insured Mortgage Recording

As of April 2, 2014, the ALTA promulgated two additional endorsements:

ALTA Endorsement 40-06 Tax Credit - Owner's Policy
ALTA Endorsement 40.1-06 Tax Credit - Defined Amount - Owner's Policy

As of December 1, 2014, the ALTA promulgated three additional endorsements:

ALTA Endorsement 36.7 Energy Project – Fee Estate – Owner's Policy
ALTA Endorsement 36.8 Energy Project – Fee Estate – Loan Policy
ALTA Endorsement 45 Pari Passu Mortgage – Loan Policy

As of April 2, 2015, the ALTA promulgated three additional endorsements:

ALTA Endorsement 9.6.1 Private Rights - Current Assessments - Loan Policy
ALTA Endorsement 19.2 Contiguity - Specified Parcels
ALTA Endorsement 28.3 Encroachments - Boundaries and Easements - Described Improvements and Land Under Development

As of August 1, 2015, the ALTA promulgated ALTA Endorsement 46 Option.

Finally, as of December 1, 2015, the ALTA decertified ALTA Endorsement 2 (Truth in Lending).

B. Recent Changes to ALTA Endorsements: Endorsement Series

Of special interest are the creation and expansion of new and existing series of endorsements beginning in 2011. In 2011, the ALTA promulgated a series of endorsements relating to a subject regarding which state laws diverge, construction mortgage priority, the ALTA 32 Series. In 2012, the ALTA promulgated sixteen (16) new endorsements, revised five (5) endorsements, and withdrew two (2) endorsements. Among the endorsements that experienced significant changes were those that comprise the ALTA 9 Series discussed below. ALTA 13-06 was revised to include a revision of the definition of Personal Property, and to add a new section 4, recognizing that the endorsement does not insure as to remediation resulting from environmental damage or contamination. ALTA 28.1-06 Encroachments – Boundaries and Easements, provides coverage for encroachments onto adjoining land or onto an easement. ALTA Endorsement 28.3-06 Encroachments - Boundaries and Easements - Described Improvements and Land Under Development, provides coverage for encroachments onto adjoining land or onto an easement where the land is under development. In 2012, the ALTA 35 Series was promulgated to provide coverage relating to minerals and subsurface substances. Also in 2012, the ALTA 36 Series, designed to provide coverage for energy projects, including those for wind and solar energy, was added. In 2013, the ALTA expanded the ALTA Series further and promulgated the ALTA 41 Series, regarding water rights.

C. How to Match the Transaction and Parties With the Proper ALTA Endorsement

Although newly promulgated ALTA endorsements will not instantaneously displace other forms of coverage in all state and local real estate markets, it should be expected that over time a gradual replacement of older endorsement forms containing coverage the same or similar to that found in the newer ALTA endorsements will occur. Thus, once the endorsements are approved by the state regulator, and provided that appropriate underwriting criteria for the endorsement were supplied to the title insurer and the applicable

premium paid, title insurance offices and agents will likely begin issuing or offering to issue the new ALTA endorsement after having received a request for an older non-ALTA endorsement or predecessor ALTA endorsement that provided the same or similar coverage. In some instances, the coverage of the new ALTA endorsement will be different from that of the older endorsement. For example, to obtain the same coverage as was contained in one of the former ALTA 9 Series endorsements will require the insured to obtain several different endorsements which together comprise the coverage contained in the former ALTA 9 Series endorsement. The increase in the number of endorsements requires the party seeking coverage to determine, as among the various ALTA endorsement forms now ninety-seven in number, which endorsement best affords the coverage suited to the transaction. Several examples illustrate the challenge of requesting coverage by choosing the proper ALTA form number:

<u>Form of coverage requested</u> <u>Endorsement Equivalent</u>	<u>ALTA</u>
Comprehensive Endorsement	ALTA 9-06
Former ALTA 9-06	ALTA 9-06 and 9.6-06
Former ALTA 9.3-06	ALTA 9.3-06, 9.6-06, 28.1-06 and 35.3-06
Utility Facilities	ALTA 17.2-06
Mineral Endorsement	ALTA 35-06, 35.1-05, 35.2-06, or 35.3-06

D. ALTA 9 Series and Progeny

1. ALTA Endorsement 9

ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals) is a popular loan policy endorsement that provides coverage against several different risks. The endorsement in its current form is different from that promulgated at its inception. In April, 2012, the endorsement form's description of the risks changed in several important ways. In April 2013, there were further revisions and additions.

2. Background

Among the first of the standardized title insurance endorsements developed by the title industry, promulgated in 1969 by the California Land Title Association (CLTA), was the Comprehensive Endorsement (CLTA Form 100). In 1988, the American Land Title Association (ALTA) promulgated a similar form entitled ALTA Endorsement 9 ("Restrictions, Easements, Minerals"). At the time, ALTA Endorsement 9 was a loan policy-only endorsement for which there was no owner's policy equivalent. Former ALTA 9 contained coverage by which the insurer insured against loss or damage sustained by reason of:

- Violations of covenants
 - Violations of recorded building setback lines
 - Encroachments
 - Extraction or development of minerals
 - Covenants relating to environmental protection
- Private rights (lien for liquidated damages, private charge, option to purchase, right of first refusal or prior approval of a future purchaser)

In 1998, the ALTA introduced two owner's policy-only endorsements, ALTA 9.1 (Unimproved Land) and ALTA 9.2 (Improved Land) that were designed to provide coverage similar to ALTA 9 to owners. In 2006, the ALTA introduced three more endorsements: ALTA 9.3-06, ALTA 9.4-06 and ALTA 9.5-06. Thus, ALTA Endorsement 9, originally one endorsement, has evolved into the largest series of endorsements ("ALTA 9 Series").

3. ALTA 9 Series revised in 2012

Effective April 2, 2012, the ALTA revised the ALTA 9 Series in part as a result of Nationwide Life Insurance Company v. Commonwealth Land Title Insurance Company, 579 F.3d 304 (3d Cir. 2009). In Nationwide, the title insurer raised an exception for a recorded instrument that contained an option to repurchase, but the exception did not mention the words "option to repurchase" and referred only to an instrument within which the option right was contained. The court held that the general exception that was raised in Schedule B for covenants, conditions and restrictions was not sufficient to remove coverage for the option to repurchase that was contained as within the

covenant instrument. The ALTA revised the remaining ALTA 9 Series endorsements to make more specific what they did not cover, decertified ALTA 9.4 and 9.5, and added two new endorsements to the ALTA 9 Series. ALTA Endorsements 9.06, 9.1-06, 9.2-06, 9.6-06, 9.7-06 and 9.8-06 were revised by adding a preamble to reassert the applicability of the policy terms, and revising the insurance provisions to make the references to insured matters singular instead of plural. In addition, several other changes were made described below.

4. Changes to ALTA 9-06

ALTA 9-06 was revised to delete former section 1.b.(ii): “(The Company insures... against loss or damage sustained by reason of... the existence, at Date of Policy, of... Any instrument referred to in Schedule B as containing covenants, conditions or restrictions on the Land that, in addition, (A) establishes an easement on the Land; (B) provides a lien for liquidated damages; (C) provides for a private charge or assessment; (D) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant.” Former section 1 was the subject of the decision in Nationwide. To obtain coverage against the matters described in former paragraph 1.b.(ii), the insured mortgagee must now obtain an additional endorsement, ALTA 9.6-06 Private Rights – Loan Policy.

5. Changes to ALTA 9.1-06

ALTA 9.1-06 was revised to eliminate former section 1 coverage concerning encroachments and section 2 coverage concerning minerals. To obtain coverage for building encroachments, the insured owner must now obtain an additional endorsement, ALTA 28-06 Easement – Damage or Enforced Removal or ALTA 28.1-06 Encroachments – Boundaries and Easements. To obtain coverage for minerals, the insured owner must now obtain an additional endorsement from the ALTA 35 Series.

6. Changes to ALTA 9.2-06

ALTA 9.2-06 was revised to eliminate former section 1 coverage concerning encroachments and section 2 coverage concerning minerals. To obtain coverage for building encroachments, the

insured owner must now obtain an additional endorsement, ALTA 28-06 Easement – Damage or Enforced Removal or ALTA 28.1-06 Encroachments – Boundaries and Easements. To obtain coverage for minerals, the insured owner must now obtain an additional endorsement from the ALTA 35 Series.

7. Changes to ALTA 9.3-06

ALTA 9.3-06 was revised to eliminate former sections 1, 3 and 5 coverage concerning encroachments and former section 4 coverage for minerals. To obtain coverage for building encroachments, the insured mortgagee must now obtain an additional endorsement, ALTA 28-06 Easement – Damage or Enforced Removal or ALTA 28.1-06 Encroachments – Boundaries and Easements. To obtain coverage for minerals, the insured mortgagee must now obtain an additional endorsement from the ALTA 35 Series. It should be noted that the ALTA 35 Series does not, in contrast to former ALTA 9.3-06 section 4, provide coverage for damage to lawn, shrubbery or trees. It should also be noted that the existing numbering of ALTA 9.3-06 was retained, notwithstanding that new ALTA 9.3-06 differs markedly from former ALTA 9.3-06, and that persons requesting coverage should not inadvertently assume that the coverage of these identically numbered endorsements is the same.

8. Former ALTA 9.4-06 and 9.5-06

Both ALTA 9.4 and 9.5 were decertified by ALTA effective April 2, 2012 and are no longer available. To obtain coverage contained in former ALTA 9.4-06, the insured must now obtain ALTA 9.1-06, ALTA 28.1-06 and ALTA 35.3-06. To obtain coverage contained in former ALTA 9.5-06, the insured must now obtain ALTA 9.2-06, ALTA 28.1-06 and ALTA 35.3-06.

9. In 2013, the ALTA again revised and added endorsements to ALTA 9 Series

Effective April 2, 2013, the ALTA revised ALTA 9.6 and promulgated two more new endorsements: ALTA 9.9-06 Private Right – Owner's Policy, and ALTA 9.10 Restrictions, Encroachments, Minerals – Current Violations – Loan Policy.

10. In 2015, the ALTA promulgated ALTA 9.6.1 Private Rights – Current Assessments – Loan Policy.

11. What are the names and numbers of the endorsements that currently make up the ALTA 9 Series?

Today, the ALTA 9 Series consists of ten (10) endorsements:

ALTA 9-06	Restrictions, Encroachments, Minerals – Loan Policy
ALTA 9.1-06	Covenants, Conditions and Restrictions – Unimproved Land – Owner’s Policy
ALTA 9.2-06	Comprehensive – Improved Land – Owner’s Policy
ALTA 9.3-06	Covenants, Conditions and Restrictions – Loan Policy
ALTA 9.6-06	Private Rights – Loan Policy
ALTA 9.6.1-06	Private Rights - Current Assessments - Loan Policy
ALTA 9.7-06	Restrictions, Encroachments, Minerals – Land Under Development – Loan Policy
ALTA 9.8-06	Covenants, Conditions and Restrictions – Land Under Development – Owner’s Policy
ALTA 9.9-06	Private Right – Owner’s Policy
ALTA 9.10-06	Restrictions, Encroachments, Minerals – Current Violations – Loan Policy.

E. Endorsements That Matter

The burden is on the insured to timely identify and secure the endorsement that affords coverage it finds to be purposeful based upon its analysis of the facts and circumstances surrounding the transaction and the title in question. Availability, cost and time to prepare the endorsement in question will depend upon various factors. The title insurer may require an investigation and review of information it regards as essential to issue the endorsement, and as a result, communications should be joined as early as possible rather than assume that endorsements will be issued as a matter of course or merely upon payment of a premium.

In evaluating which of the endorsements may be worthy of consideration, no significance should be attached to the numerical ordering by ALTA of the endorsements: ALTA Endorsement 1, notwithstanding its number, is not more important, more popular or more critical to achieving coverage of the kind appropriate to the

insured in all cases than is ALTA Endorsement 44. Furthermore, the fact that an endorsement has not been promulgated by ALTA does not mean the endorsement is of little or no significance under the facts and circumstances of the anticipated transaction.

Many of the endorsements available in the marketplace require the title insurer to review or examine information about the title or boundaries of the property. At times, such reviews are time-consuming, and require skilled staff or communications with outside parties, such as county or municipal offices. The insured should allow several days for endorsements to be completed, and should not delay requesting them until the day of or the day before the closing.

Although many of the endorsements will be available in both residential and commercial transactions, certain of the endorsements tend by their nature to be of particular interest to residential purchasers or lenders and others of interest to commercial investors or lenders.

F. Endorsements that Matter: Commercial Transactions

1. Gap endorsement

a. What is "the gap?"

Among endorsements that have proven particularly attractive to insureds in locales where it is available is an endorsement not promulgated by the ALTA but that is nonetheless commonplace in many states, and that affords coverage against liens, defects, encumbrances or other matters, if any, not known by the prospective purchaser or lender to exist at the Effective Date of the commitment, the Gap Endorsement (Exhibit 19). The Gap Endorsement was among the first instances of title insurance coverage designed to insure against a future, rather than past, event. Ominously named, as a form of coverage, the Gap Endorsement approaches a necessary rather than an optional form of title insurance, in localities where the "gap," that is, the time between the retrieval date of the public land records and the time of closing, is an unduly long period of time. A Gap Endorsement is likely to prove appealing to purchasers in those localities where the public land records indexes are known to be out of date. For example, if it should transpire that a mortgage that was recorded on August 5, 2014 will not have become discoverable from a painstaking title search of the public tract

index or alphabetical index until September 8, 2014 or later, this means that for a period of more than a month, the title of the purchaser remains of an indeterminate, and therefore potentially impaired status, and the lien status of the mortgage lender seeking to finance the property's purchase similarly remains uncertain. Knowing that a prospective purchaser and the lender financing the purchase can be exposed to loss, by reason of liens or judgments that are docketed against the seller prior to the date of closing, and which cannot possibly be detected by an examination of the title, counsel have advised their clients to obtain a Gap Endorsement and thus shift the risk of loss to the title insurer.

b. Liens filed during the gap: A county/town/parish-specific risk

It is important to remember that the question of whether there exists any gap, and therefore any risk of loss to a prospective purchaser, is a uniquely local phenomenon. Only a local title company representative or other perennial courthouse visitor would know based upon firsthand experience what the gap period in that courthouse is, measured in days. In many less populous counties where county administrative staffing needs are adequate there is no gap, and the public land record indexes are up-to-date within days or hours of recording. Though a real estate investor may not necessarily know this fact, the purchase of a Gap Endorsement for land in a small rural county where no gap exists could prove to be a poor value. The risks of adverse consequences of a gap occur largely in largely urban and suburban counties, which have experienced the greatest population growth, and even within these counties, the length of the gap continues to change depending upon recording volume and local government staffing needs.

c. Circumstances under which the title agency may resist issuing the Gap endorsement

The fact that the purchaser agreement requires the seller to procure for the purchaser a Gap endorsement does not necessarily mean that a title agency can be found that is willing to issue the Gap endorsement. The Gap endorsement unlike other endorsements is a pure casualty form of coverage: Neither insurer nor insured knows whether liens, defects or encumbrances filed during the time period leading up to the

closing date exist. From the vantage of the title insurer, some sellers, particularly those owning distressed real estate, are bad risks. The title agency is not authorized to issue the Gap Endorsement unless it follows the title insurance underwriter's requirements, and among these is the requirement that a search of the records be made on the day of closing to make sure that no additional liens or encumbrances have become filed. The need for an additional search requires an additional cost to the agency or office. In the event that the title insurer learns from its search of the title that liens have already been filed against the seller with the likelihood of more to come, the title insurer is likely to refuse to issue the Gap Endorsement. Thus, the title agency is less likely if not unlikely to issue the Gap endorsement when insuring the proposed grantee of:

- i. Deeds in lieu of foreclosure
- ii. Deeds by a party to pending or threatened litigation or bankruptcy
- iii. Deeds by a party lacking in credibility
- iv. Deeds that lack warranties of title

2. Zoning endorsements

The most consistent source, among endorsements, of a time-consuming investigation and research required on the part of the title insurer and title agent is ALTA Endorsement 3.1 (Zoning), particularly when it is issued with the ALTA Owners Policy. Zoning information is occasionally problematic for two unrelated reasons.

First, zoning ordinances and building regulations are typically not, at least not in their entirety, found in the public offices with which most title companies are familiar, but with the municipality or the county zoning administrator. Procuring the current ordinance and official map may require a digressing personal visit to the zoning office, not necessarily in or near the county courthouse, and a reading of the applicable provisions of the ordinance is necessary before any decision to issue the ALTA Zoning Endorsement can be reached. Although the national sales and closing offices of many title insurer organizations negotiate title insurance business from national customers, these same closing offices when remote from the property site are not always capable of obtaining the zoning information essential for the zoning endorsements without the intercession of local counsel or county title agency personnel, and

coordination of information requires good relations between national and local representatives. Current zoning information of the kind to resolve ambiguity in the ordinance's meaning sometimes requires communication with the department head or a knowledgeable zoning staff member, and their absence can prove problematic. Title insurers may require the opinion of legal counsel before proceeding to issue the zoning endorsement. Finally, circumstances exist in which title agencies are not authorized to issue the zoning endorsement without first obtaining the title underwriter's approval. Regardless of whose participation the title company must involve in the process, the time required to issue a zoning endorsement is usually lengthier than the time required to issue a commitment for title insurance, and the parties should plan accordingly.

One consideration concerning the ALTA 3.1 Endorsement is a need on the part of the title insurer to obtain contemporaneous site information to compare with the applicable ordinance. Title companies do not, with rare exception, make on-site inspections of the site. Yet, without up-to-date site information, it will not be possible to know whether the buildings located on the site comply with the latest building setback lines, height limitations, and with restrictions applicable to property use and parking. Therefore, a current land survey will almost always be necessary in order for the title company to evaluate whether the improvements and uses comply with zoning ordinances. It should not be assumed that any land survey regardless its quality will suffice in this regard, since the title company will examine the survey and the survey certificate to assure itself that the land surveyor has included the distance of the building from the street right-of-way, the building height, building uses and number of parking spaces. It is best to deliver the land survey to the title company well in advance of the closing, so that any additional information required by the title company can be added in the event it has been omitted from the survey.

When property proves to be a non-conforming use or include a non-conforming structure, the title company will also need information concerning the history of the property, so that it can document that the building was constructed in conformity with the then ordinance. For example, the title company may require building permits, letter correspondence, or other historical information before issuing a modified endorsement assuring that notwithstanding the noncompliance with the current ordinance, the building constitutes a legal non-conforming use.

3. Access endorsements

ALTA Endorsement 17 (Access and Entry) provides an important advancement in coverage beyond the insuring provision of the policy by assuring that the land abuts a public road, the abutting road is improved and suitable for vehicular access, and that curb cuts or drives that the insured has a right to use exist. In the absence of the Access Endorsement, the ALTA policies do not insure that access upon an abutting road, though public, is passable by vehicle. Thus, it was held that the title insurer was not obligated to pay loss where the sole means of access was by a "goat path" through a rocky hill. Gates v. Chicago Title Ins. Co. 813 S.W.2d 10 (Mo. App. 1991). Schedule A of the policy can reduce the coverage of the insuring provisions of the policy. Thus, where the title policy's description of the land included reference to a temporary easement and stated that the easement was to expire after Date of Policy, after the easement expired thereby depriving the insured of access, the policy did not provide coverage against lack of access notwithstanding the policy's insuring provision that provided coverage against lack of access. Community Credit Union v. Amerititle & Abstract, Inc., 822 N.W.2d 737 (Wis. Ct. App. 2012) (unpublished).

ALTA Endorsement 17.1 insures that the access is by abutting easement rather than public road. The access endorsement may require an investigation into the site or a current land survey. Unless the land is located within a recorded subdivision plat, it may not be possible for the title agent to assure that the land is contiguous with the lateral right of way of any public road or highway. Even if the land is contiguous, it may not be possible for the title company to know, until the applicable zoning ordinances concerning driveways are reviewed, whether the landowner will enjoy a legal right of ingress to and egress from the site.

That an access endorsement is issued may not necessarily resolve under the particular facts of the matter whether coverage was afforded. Where after developer's counsel brought to the attention of the title insurer the existence of an access dispute between developer and owners of existing home sites over whether a future phase of the development would enjoy access to the land, the title insurer then issued to developer an endorsement "insur[ing] against loss or damage sustained by the Insured by reason of the failure of the Land to abut a physically open street known as

