

# Title Reports and Title Insurance

Prepared by:  
Duane H. Wunsch  
*Fidelity National Title Group, Inc.*



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## ALIGNMENT OF TITLE REPORTS AND LAND SURVEYS

Duane H. Wunsch  
Fidelity National Title Group  
[duane.wunsch@fnf.com](mailto:duane.wunsch@fnf.com)

### TITLE REPORTS AND TITLE INSURANCE

#### A. Alternative Forms of Title Reports and Indemnification

Real estate purchase contracts typically include as a condition the delivery by sellers of a marketable title. State law controls the definition of marketable title. The approach followed in most states is that the title is not marketable if it is doubtful, clouded or open to dispute. J. Bushnell Nielsen, Title & Escrow Claims Guide, §9.7.7, at 236 (1996).

Although title implies a universal quality, the sources of public land records from which a real estate title is determined, the mechanics and methods of searching, and the customs and practices in the locales where the land is located are anything but universal. Several different methods of searching and examining the title to real estate are followed in the United States and based upon the recording acts in effect in the state. In New England, the Southeast and in some Midwestern states, a search of the public land records is made by the attorney or someone under their direction and an abstract made of notes thereof, followed by an opinion of title. In other areas, a search is made by an abstractor who compiles an abstract showing all recorded instruments affecting the land and certified that it is accurate and complete. Finally, in many states and in most metropolitan areas, a search of the records is made by the staff of title insurers or of title agencies, and a commitment for title insurance is issued. Paul E. Bayse, Clearing Land Titles §3, at 13-14 (2d ed. 1970 & Supp. 2004). Regardless the prevailing method of searching the public land records in the locality, investors are certain to locate a title insurance company or law firm office offering title insurance.

In assessing which form of title information or indemnification best suits its needs, the purchaser will evaluate what remedy or recourse exists in the event that, contrary to the title guaranty document, the title should prove impaired or unmarketable. Liability of the abstractor is governed by applicable state law, and limitations may preclude recovery. Thus, in one state it was held that an abstractor is not liable to persons who may suffer losses by reason of the abstractor's negligence unless privity of contract exists between them. Peterson v. Gales, 191 Wis. 137, 210 N.W. 407 (1926). In states that limit liability to instances where privity exists, the purchaser should require that the abstract contain a statement certifying that it is furnished for the use and benefit of all owners and their successors in title, and mortgagees. In order to assure that recovery is realized, the purchaser should also establish that a policy of abstractor's errors and omissions insurance is in force. Notwithstanding a qualifying abstractor's certificate and policy of errors and omissions insurance, gaps in coverage will nonetheless occur where the abstractor ceases its operations and no tail coverage is in force.

#### B. Title Insurance

The American Land Title Association (ALTA), a national association of commercial title insurers, title insurance agencies and abstractors has promulgated title insurance policy forms since 1946. The ALTA owner's policies and loan policies are widely regarded as standard forms. The California Land Title Association (CLTA) has also promulgated policy forms, but is better known outside California for a multitude of policy endorsement forms. Finally, individual title insurers have

developed and promoted the use of their own non-ALTA policy forms in certain states. Distinctly separate forms of policies of title insurance continue to be designed and promulgated by the ALTA to insure the interests of the owner and lender, respectively. It has been held that only the insured and those who succeed to the insured's interest by operation of law can enforce the policy against the title insurer. Hawkins v. Oakland Title Ins. & Guar. Co., 165 Ca. App. 116, 531 P.2d 742 (1958). Thus, a loan policy that was issued insuring the lien of a mortgage does not provide or impart coverage to the mortgagor that owns the real estate encumbered by the insured mortgage. See, e.g. Mayo v. Title Ins. Co., 423 So.2d 1357 (Ala. 1982); Gaines v. American Title Ins. Co., 136 Ga. App. 162, 220 S.E.2d 469 (1975).

### C. Owners Policy and Loan Policy

#### 1. Owner's Policy

The American Land Title Association (ALTA) 2006 Owner's Policy is a policy form adapted for use to insure properties of all types and uses, whether residential, commercial or industrial containing improvements, or vacant land. The 2006 ALTA Owner's Policy is the latest broad spectrum owner's policy form to have been promulgated by the ALTA, and is available in most states. The ALTA decertified older policy forms that the 2006 Owner's Policy was designed to replace, yet the decision whether to issue older policy forms rests not with the ALTA but with individual insurers. A clear consensus has developed that the 2006 Owner's Policy has significant advantages over the predecessor 1992 ALTA Owner's Policy for the insured.

#### 1. Loan Policy

The ALTA 2006 Loan Policy is the latest loan policy to have been promulgated by the ALTA. Like its parallel standard owner's version, the ALTA 2006 Loan Policy is adapted for use to insure properties of all types and uses.

#### 2. Commitment

The commitment for title insurance or, as it was formerly known, the binder or preliminary report, is prepared and issued for the purpose of advising the proposed purchaser or lender of the status of the title before the transaction is closed and committing the title insurer, upon whose agreement to indemnify the transaction ultimately hinges, to issuing a policy. The commitment for title insurance (Exhibit 9), though it entails insurance, has a strong land informational component, in that it constitutes a detailed composite or profile of the subject matter, the underlying real estate title: The name of the owner, property description, a listing of mortgages or deeds of trust, liens, taxes and matters ordinarily satisfied or released prior to a transfer of the title, and lastly, easements, restrictive covenants and other matters that usually survive the transfer of ownership. A proposed insured is well advised to timely obtain a commitment so that they know for a certainty what liens and encumbrances affect the title and without delay make arrangements or begin negotiations with the appropriate parties for their payment or release.

The ALTA, in addition to having promulgated policies, has promulgated commitment forms, the standard 2006 Commitment form and the ALTA Plain Language Commitment form. Effective August 1, 2016, the ALTA promulgated a new standard Commitment form ("2016 Commitment"). The ALTA decertified both the standard 2006 Commitment and the ALTA Plain Language Commitment effective December 31, 2017.

### C. Component Parts of Title Insurance Explained

The standard ALTA owners and loan policies contain the same basic components, though the specific provisions of the owner's policy version vary in important ways from the loan policy version.

1. Covered Risks: Insuring provisions that enumerate specifically the risks that the policy covers. The ALTA 2006 Owner's Policy contains ten Covered Risks; The ALTA 2006 Loan Policy contains fourteen Covered Risks. The first eight Covered Risks of both policies are identical. Covered Risks 9, 10, 11 and 12 of the Loan Policy provide coverage against lack of enforceability and priority of the insured mortgage and of any assignment (if shown in Schedule A) thereof.
2. Exclusions: Subject matter generally or broadly described that are not intended to be within the coverage of any title insurance policy.
3. Conditions: Definitions of the policy terms and provisions describing the rights and the obligations of the insured. The insured owner is covered for as long as the insured (or any of the successor individuals or entities identified in Condition 1(d), including heirs, devisees and successors by merger) retains an interest in the property. In contrast, under Condition 1(e) of the ALTA 2006 Loan Policy, coverage extends to both the named insured in Schedule A as well as the owner of the indebtedness secured by the insured mortgage.
4. Schedule A: A description of concrete title information derived from the public land records, including the identity of the owner, the legal description of the land, and (in loan policies) the insured mortgage. Also, the Policy Date, Policy Amount and name of Insured are included.
5. Schedule B: Exceptions from coverage, both standard exceptions and special exceptions, are stated. Exceptions are designed to take away or limit coverage concerning a specific instrument. Unlike the Owner's Policy, the Loan Policy contains two distinctly separate schedules for exceptions: Part I for matters against which no coverage is provided, and Part II for matters that the policy insures affects the title but are nonetheless subordinate to the lien of the insured mortgage.
6. Endorsements: Endorsements may or may not be attached to the policy, depending upon the insured's arrangements or negotiations with the title insurer prior to closing to obtain these endorsements. Endorsements either add or make more explicit coverage of the underlying policy, or amend Conditions. It is imperative for the insured to arrange in advance of closing for the requested endorsement, such that the insured will timely learn what criteria the title insurer may impose and premiums will be charged. Requesting endorsements from the title insurer on the eve of the closing is likely to result in a denial of certain endorsements for which there is insufficient preparation time to issue. There are currently 104 ALTA endorsements, and well in excess of one hundred CLTA endorsements.

### D. Will the Title Policy Indemnify Against Loss as a Result of an Encroachment?

1. Covered Risk 2(c)

The American Land Title Association ("ALTA") 2006 Owner's Policy and Loan Policy insure against loss or damage sustained or incurred by the Insured by reason of:

Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

However, the coverage of the policies is subject to Exceptions from coverage, if any, that appear in Schedule B of the policies. It is almost always the case that unless the title insurer is provided with evidence the title insurer deems satisfactory that no encroachments encumbrances, violations, variations, or adverse circumstances affecting the Title exist, that a standard exception for such matters will be raised in Schedule B. The following exception is frequently the exception that will be raised if no survey is provided:

Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.

One can readily appreciate the importance of the reduction of the scope of coverage if the survey exception is raised in the policy: A loss that the Insured sustains as a result of an encroachment will not be covered. Similarly, the cost of defense as against suit brought by the party claiming a part of the insured Land that is encumbered by or subject to the encroachment will not be covered.

## 2. Title insurance policy definition of encroachments

In the event that the standard survey exception has been deleted from the policy, to what extent is the loss attributable to an encroachment covered by the policy?

Although the term "encroachment" itself is undefined, Covered Risk 2(b) of the 2006 ALTA Owners Policy and Loan Policy recognizes that encroachment as the term is used by the policy includes both improvements of the Insured and of the adjoining owners:

Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.

The ALTA policy that predated the 2006 ALTA Owner's Policy, the 1992 ALTA Owner's Policy, lacked the symmetrical encroachment language of Covered Risk 2(b). Both the 1992 and 2006 policies contained a definition of "land." The 1992 ALTA Owner's Policy provides:

The term "land" does not include any property *beyond the lines of the area described or referred to in Schedule (A)*, nor any right, title, interest, estate or easement in abutting streets, roads, avenues (emphasis added)...

The fact that the 1992 ALTA Policy defined "land" but not "encroachment" could, depending upon the facts and circumstances of the case, result in different outcomes over whether loss as a result of a structure occupied by the Insured Owner that encroached onto adjoining land was covered by the policy. Thus, in Wisconsin, it was held that deletion of the standard survey exception from the 1992 ALTA Owner's Policy resulted in coverage against loss sustained as a

result of the existence of a structure occupied by the Insured Owner. In the case, the ALTA 1992 Owner's Policy, which did not contain Covered Risk 2(b), was issued. The standard survey exception was deleted from the Owner's Policy and the policy did not raise any specific exception for an encroachment of a below ground parking area into the right of way of an abutting street. When the title was transferred, the municipality became aware of the encroachment into the street of the parking area, triggering an annual penalty by the municipality against the owner. The court found that the policy's definition of 'land' becomes ambiguous in light of circumstances indicating the purpose of the extended coverage policy is to insure against off-record defects, defects which may fall outside the legal description of land contained within the policy." Ambiguous terms in an insurance policy are construed against the drafter, the definition of "land" is not controlling on the scope of coverage, and, therefore, that the definition of "land" in Schedule A does not limit coverage, and the insurer was responsible for payment of the municipal penalties based on the underground encroachment. First Am. Title Ins. Co. v. Dahlmann, 2006 WI 65, 291 Wis.2d 156, 715 N.W.2d 609 (2006).

The court reached a dissimilar result where the insured owner purchased, rather than the ALTA 2006 Owner's Policy, an expanded coverage policy in which the covered risks of their policy included defending against situations where "Your title is unmarketable," and where "you are forced to remove your existing structure—other than a boundary wall or fence because: (a) it extends on to adjoining land or on to any easement." Although no suit to remove the encroachment was brought against the insured, the insured received a letter from the adjoining owner referring to the encroachment and then brought suit under the policy claiming a compensable loss. The court held that policy did not require title insurer to defend or indemnify homeowners to establish a right to maintain the septic system that encroached on the adjoining land, and that the circumstances were not within the covered title risks absent an action on neighbor's behalf to force removal of the septic system Trinder v. Conn. Attorneys Title Ins. Co., 2011 VT 46, 189 Vt. 492, 22 A.3d 493 (2011).

#### E. The Standard Survey Exception

All commitments for title insurance contain a standard exception from coverage for matters that would be disclosed by a complete and accurate survey. Although there are variations in the wording, the following is an example of the standard survey exception:

Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land.

In the event the title insurer agrees to remove or delete the survey exception, coverage unless excluded by the policy Exclusions, will not be denied for various matters that only a complete and accurate survey would reveal. The mechanics of removing the survey exception compels the insured or its counsel to inquire sufficiently far in advance of the time necessary for a survey to prepare the requisite site investigation and survey what the title insurer will require insofar as the contents of the survey.

#### 3. When no plat of survey is provided

The policy exception least likely to be removed from the policy is the standard survey exception. Historically, the survey exception was: Unrecorded easements, discrepancies or conflicts in boundary lines, shortage in area and encroachments which an accurate and complete survey would disclose. Although title insurers have authorized the deletion of the survey exception

from the ALTA loan policy when insuring mortgages involving residential property, they do not authorize the survey exception's deletion from the ALTA owner's policy unless a current land survey containing a satisfactory surveyor's certificate is provided for the title company's examination. Title offices, which lack the technical expertise of land surveyors of locating monuments in the field, typically refrain from conducting field inspections. Reluctance to remove the survey exception stems from the possibility that the title insurer could become obligated to pay for loss occasioned by the forced removal of the insured's buildings and improvements, if encroaching on a boundary line or easement.

4. When a plat of survey is provided

Once it has received the land survey and request for related coverage, the title insurance agent proceeds to examine the survey for encroachments of buildings, fences, retaining walls, and roof overhangs, for building setback violations, and for road right of way encroachments by loading docks, underground vaults, sidewalks and other obstructions (Exhibit 10). On occasion, zoning information, and wetland or floodplain designations are revealed by the survey and will be listed as exceptions by the policy as a result. Finally, the title insurance agent will usually compare the location of any building, structure or parking lot with the location of utility easements in order to ascertain whether these encroach upon the easements.

3 Importance of the surveyor's certificate

Title insurers regard the scope of the surveyor's certificate as important to their decision about whether the survey exception will be deleted. Survey certificate forms vary, and there is no single form deemed by the title insurance industry as a prerequisite to extending coverage over survey matters. However, at a minimum, the surveyor should certify that he has examined the property for encroachments, that the survey depicts all buildings, structures, fences and improvements, and that the description represents a complete and accurate description of the land. Because they do not contain certificates of this kind, various land division plats or maps are not acceptable to title insurers as a basis upon which to delete the standard survey exception from the ALTA owner's policy.

4 Affidavit of no change to improvements

Title insurers have indicated a willingness to delete the survey exception from the ALTA loan policy, when issued, to insure mortgages involving commercial property, without a current land survey, provided that a non-contemporaneous land survey of the same property is supplied for examination along with an affidavit by the landowner to the effect that nothing described in the non-contemporaneous land survey has changed (Exhibit 11).

5 What does the removal of the survey exception signify?

When the title insurer has in fact deleted the survey exception, it may not necessarily be clear what physical intrusions have been indemnified against as a result. Subsurface objects or intrusions of which the purchaser had no actual knowledge, such as septic drain fields, farm drain tile lines, gravesites, geological sites, building foundations or rock strata, when not occupied by any landowner under a claim of right, may nevertheless constitute physical features unequivocally detrimental to the interests of the insured owner. Abandoned wells, underground storage tanks or burial sites containing human remains may require the landowner to adhere to applicable federal and state laws and local ordinances regulating the site conditions and incur



loss in connection with site remediation. However, do these physical conditions constitute a lien, defect or encumbrance of the kind against which coverage is provided by the title insurance policy? In Kayfirst Corp. v. Washington Terminal Co., 813 F. Supp. 67 (D.D.C. 1993), it was held that the buried foundation of a building constituted an encumbrance on the title of the insured, rendering the title unmarketable. It was held that the removal of the standard survey exception afforded coverage against annual fees assessed post-policy by the city against the insured owner for an encroachment by the insured of an underground parking structure within the right of way of an abutting city street. First American Title Ins. Co. v. Dahlmann, 2006 WI 65, 291 Wis. 2d 156, 715 N.W.2d 609 (2006).

6 What does a modification of the survey exception signify?

In some instances, when a survey is provided to the title insurer, the survey exception may conceivably be revised rather than deleted in its entirety. When the title insurer, upon its receipt and review of a survey that ultimately proved erroneous by understating the amount of the land burdened by a flowage easement that prevented development of the land, revised the survey exception to state: “This policy does not insure against loss or damage ... that arise by reason of ... the following matters: ...2. *Shortages in area*... (the word “encroachments” was deleted from the survey exception)” the court adopted the insured’s interpretation that “encroachments” in the standard survey exception included the flowage easement. If “encroachments” included the flowage easement, then removing “encroachments” from the standard survey exception meant that the flowage easement was no longer excepted from coverage. Lawyers Title Ins. Corp. v. Doubletree Partners, L.P., 739 F.3d 848, 856 (5th Cir.2014).

7 Forced removal coverage

Some standard policy forms provide forced removal coverage. For example, Covered Risk 20 of the ALTA Homeowner’s Policy (Rev. 12-02-13) insures against loss that results if: “You are forced to remove Your existing structures because they encroach onto Your neighbor’s land.” Where the adjoining owner threatens the removal of encroaching structures, what is the effect of a forced removal coverage policy where the standard survey exception was not deleted from the policy?

After title insurer issued an Expanded Protection Owner’s Policy that contained coverage against certain risks (“12. You are forced to remove your existing structure-other than a boundary wall or fence-because: a. it extends on to adjoining land or on to any easement... (and) d. any portion of it was built without obtaining a building permit from the proper government office or agency.”), the insured owner received a letter from the adjoining owner, the United States Forest Service, notifying the insured owner that the westerly portion of the insured’s house, utility service box and propane tank encroached onto the U.S. Forest Service’s land, and stating:

We have previously provided you with a complete record of survey data and maps related to the area and the items in question. This letter serves as formal notice to remove all materials structures you have located on National Forest System land. Specifically, perform the following:

Remove from Federal property all improvements related to your home at 155 Norton Farm Road, Ripton, VT including a portion of your home, propane tank and any lines associated with such.

Consult with the Rochester District Ranger and staff regarding the necessary site restoration needed to restore the site to a natural state which may include the removal or addition of fill, spreading of loam, grading, and plating of native seed mix or plants. Please remove these items and complete restoration work by May 31, 2013. If you feel this timeframe is not adequate you may provide, for our review and approval, a detailed alternative schedule for the completion of this action. *If you have not completed this work by the above date we will proceed accordingly* (emphasis added).

The insured then brought suit against the title insurer claiming that the U.S. Forest Service letter triggered forced removal coverage under the policy. The court determined that the title insurer had no duty to defend or duty to indemnify under the policy until a forced removal was either imminent or has taken place, neither of which was the case. The insured did not remove the encroachments by the Forest Service's deadline or at any time thereafter, and the encroachments were neither been destroyed nor was their destruction imminent. To require courts, property owners, and insurance companies to parse every demand letter in order to discern whether a threatened removal is sufficiently serious to trigger coverage would invite coverage disputes where none exist, prompt property owners to file lawsuit when a forced removal may never actually take place, and embroil the courts in a virtually impossible task of separating serious and viable threats from mere posturing. The insured could have but did not negotiate the removal of the standard survey exception in the owner's policy. Johnston v. Connecticut Attorneys Title Ins. Co., No. 5:13-cv-229, U.S. Dist. 2014 WL 1494016 (D. Vt. April 16, 2014).

## 7 Easements or Claims of Easements standard exception

In some locales, although public utility lines or installations exist, utility easements were granted but never recorded and therefore utility easements for underground installations are not detectable from a search and examination of the title. Also, utility easements by prescriptive use exist which cannot be detected from a survey. There may be underground parking or subsurface easements that benefit private parties. Finally, vehicular and pedestrian easements for access are not uncommon. As a result, in addition to the standard survey exception, all title commitments contain a second related exception from coverage:

Easements or claims of easements not shown by the public land records.

Prospective insureds sometimes wrongly assume that the title insurer will automatically agree to delete the standard easements or claims of easements policy exception, when in fact the title insurer will decline to do so unless the title insurer receives evidence either in the form of a survey or from other information provided by utilities that no easement installations and no unrecorded easements, whether by express grant, implied, prescriptive or by necessity, exist on the land to be insured.

Since utility easements are often attributable to underground improvements, which are not visible at the site, title insurers may not authorize the deletion of the exception for easements or claims of easements unless they are first provided with a American Land Title Association – National Society of Professional Land Surveyors ALTA/NSPS Land Title Survey which specifically certifies that the surveyor has reported all easements, including observable evidence of drains, telephone, telegraph, or electric lines: water, sewer, oil or gas pipelines on or across the property, and specifically including underground easements. The surveyor certifies to this assurance by way of Item 11, Table A of the optional survey responsibilities and specifications.

The title insurer does not investigate through what sources the land surveyor obtain information from which to generate this certification, only that it is in fact generated.

F. Endorsements that Expand Survey Coverage

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.

The ALTA has promulgated a multitude of endorsements that if issued would provide coverage against loss occasioned by matters shown by a survey, including encroachments. Discussed below are those endorsements that may be available where the title insurer's criteria are met. The proposed insured should neither assume that coverage will be provided nor that endorsements will be issued without first securing the express commitment to do so from the title insurer or its agency in advance of closing. Coverage is fact-specific and requires that the title insurer and its agency have an opportunity to examine the survey, public land records and applicable facts and circumstances.

1. ALTA 9 Endorsement Series

a. What is ALTA Endorsement 9?

ALTA Endorsement 9-06 (Restrictions, Encroachments, Minerals) is a popular loan policy endorsement that provides coverage against several different risks. However, the endorsement has been revised several times since 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.

b. 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.

c. 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.

d. 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.

e. 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.

f. 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.

g. 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.

h. In 2013, the ALTA again revised and added endorsements in 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.

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

Today, the ALTA 9 Series consists of ten (10) endorsements. Only three of the endorsements, ALTA 9, 9.7 and 9.10, provide coverage involving encroachments.

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

## 2. The ALTA 28 Endorsement Series

### a. ALTA Endorsement 28

ALTA Endorsement 28 was developed to insure against loss caused by damage to an existing building or enforced removal or alteration of an existing building located on the land onto or over an easement shown as an exception in Schedule B, as disclosed by a survey or inspection of the land. The loss must be based on an exercise of the easement and is only for damage to an existing building or enforced removal or alteration. ALTA Endorsement 28 does not mention “encroachment.”

### b. ALTA Endorsements 28.1 and 28.2

ALTA Endorsements 28.1 and 28.2 were developed to provide coverage with respect to certain boundary and easement encroachments. This coverage was previously included in the former ALTA 9 series. It is no longer contained within those endorsements other than the revised ALTA 9-06 and the new ALTA 9.7 and 9.10 endorsements. ALTA 28.2 is used when the encroachment of a specific improvement is meant to be covered and is specifically described at item 2.

### c. ALTA Endorsement 28.3

ALTA 28.3 was developed to provide coverage with respect to land under development.

### d. Background of ALTA 28 Series



In October, 2008, the ALTA promulgated a then new endorsement, ALTA 28 (Easement – Damage or Enforced Removal), that afforded certain coverage as to damage to existing buildings and forced removal. However, the coverage was limited to damage and enforced removal sustained in the exercise of rights to use or maintain easements:

The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the easement(s) referred to in Exception(s) \_\_\_\_\_ of Schedule B results in: (1) damage to an existing building located on the Land, or (2) enforced removal or alteration of an existing building located on the Land.

When the ALTA revised ALTA 9.1 and 9.2 to remove encroachment coverage, it simultaneously promulgated a new endorsement, ALTA 28.1 (Encroachments – Boundaries and Easements), which provided encroachment coverage relating to both easements and boundaries. ALTA 28.1 format assumes that two or more encroachments exist, certain of which will warrant coverage and others that will not; hence, Paragraph 4 identifies those encroachments against which the title insurer will *not* provide coverage:

- (3.) The Company insures against loss or damage sustained by the Insured by reason of:
- a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;
  - b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
  - c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
  - d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.

(4.) This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the encroachments listed as Exceptions \_\_\_\_\_ of Schedule B.

Effective April 2, 2013, the ALTA promulgated another endorsement, ALTA 28.2 (Encroachments – Boundaries and Easements – Described improvements), which provides coverage against improvements provided they are specifically itemized in the endorsement.

- (3.) The Company insures against loss or damage sustained by the Insured by reason of:
- a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an exception in Schedule B of the policy identifies the encroachment;

- b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an exception in Schedule B of the policy identifies the encroachment;
- c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
- d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.

(4.) Sections 3.c. and 3.d. of this endorsement do not insure against loss or damage (and the Company will not pay costs, attorneys' fees, or expenses) resulting from the following Exceptions, if any, listed in Schedule B: \_\_\_\_\_

[The Company may list any Exceptions appearing in Schedule B for which it will not provide insurance pursuant to Section 3.c. or Section 3.d. The Company may insert "None" if it does not intend to limit the coverage.]

Effective April 2, 2015, the ALTA promulgated another endorsement, ALTA 28.3 (Encroachments – Boundaries and Easements – Described improvements and Land Under Development), which provides coverage against improvements provided they are specifically itemized in the endorsement as shown by plans provided to the title insurer.

In effect, on April 2, 2012 and April 2, 2013, the ALTA broke apart ALTA 9.1 and 9.2 by separating the coverage formerly contained in the two endorsements into three new separate endorsements: ALTA 9.1/9.2, ALTA 28.1, and ALTA 35-35.3. Thus, in order to obtain the same coverage as was contained, prior to April 2, 2012, in ALTA 9.1 and 9.2, the insured owner should obtain ALTA 9.1/9.2; ALTA 28.1 or ALTA 28.2; and ALTA 35, 35.1, 35.2 or 35.3.

### 3. ALTA 9 and ALTA 28 compared

- a. ALTA 9 provides broader encroachment coverage than ALTA 28, 28.1, 28.2 and 28.3
- b. ALTA 9, Paragraph 4, provides:

The Company insures against loss or damage sustained by reason of:

An encroachment of: i. an Improvement located on the Land, at Date of Policy, onto adjoining land or onto that portion of the Land subject to an easement; or ii. an Improvement located on adjoining land onto the Land at Date of Policy unless an exception in Schedule B of the policy identifies the encroachment otherwise insured against in Sections 4.a.i. or 4.a.ii.;

A final court order or judgment requiring the removal from any land adjoining the Land of an encroachment identified in Schedule B; or

Damage to an Improvement located on the Land, at Date of Policy: i. that is located on or encroaches onto that portion of the Land subject to an easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; or ii. resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the Land or excepted in Schedule B.

a. ALTA 28 and 28.1 define “improvement” as:

For purposes of this endorsement only, “Improvement” means an *existing building*, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property (emphasis added).

b. ALTA 28.2 defines “improvement” as:

For purposes of this endorsement only, “Improvement” means *each improvement* on the Land or adjoining land at Date of Policy, *itemized below* (emphasis added):...

In contrast, ALTA 9 defines “improvement” as:

“Improvement” means an improvement, including any lawn, shrubbery, or trees, affixed to either the Land or adjoining land at Date of Policy that by law constitutes real property.

Thus, ALTA 28 and 28.1 do not provide coverage involving encroachments other than building encroachments. However, ALTA 28.2, provided the encroachments are itemized, can be used to provide encroachment coverage involving both building and non-building encroachments.

ALTA 9 is, where the title insurer’s criteria have been met, available only with loan policies; ALTA 28, 28.1, 28.2 and 28.3 are, where the title insurer’s criteria have been met, available with both loan policies and owner’s policies.

## B. Title Insurer Criteria for Obtaining Endorsements

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.

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. When the title insurer requires that it be provided with a survey, the parties to the transaction should never assume that any survey, regardless the scope of the survey certificate or survey content and date, will be

satisfactory to the title insurer as a basis for removing the standard survey exception or easements or claims of easements exception or issuing any endorsement.

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.

### C. Additional Forms of Survey Coverage

The extent to which deletion of the standard survey exception will be possible to expand title insurance coverage was discussed in Section III.D of this material. In addition to securing the deletion of the standard survey exception, several endorsements that are related to surveys and survey coverage may conceivably be available and suitable to the circumstances, provided that the title insurer's criteria are met. The availability, type of property and purpose of endorsements, including the ALTA 9 and ALTA 28 Series discussed in Section III.F, related to surveys are briefly summarized as follows.

#### 1 ALTA 9 Restrictions, Encroachments, Minerals – Loan Policy

- Policy: Loan Policy only
- Property: Commercial and Residential
- Purpose: Provides coverage against loss arising from violations of covenants, encroachments, violations of setback lines, encroachments, and damage to existing improvements as the result of development of minerals. It is an example of a loan policy endorsement covering several distinctly different types of risks. ALTA 9 bears the closest resemblance to a CLTA endorsement originally known as the "Comprehensive Endorsement."

#### 2 ALTA 18 Single Tax Parcel

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Provides coverage against loss if the tax number shown does not include all the Land described in the policy or includes land not described in the policy.

#### 3 ALTA 18.1 Multiple Tax Parcel

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Designed for use when the insured land consists of multiple parcels and multiple tax parcel numbers. ALTA 18.1 insures that any easement included as an insured parcel in Schedule A or C will not be extinguished by the foreclosure of property taxes assessed against the servient estate. However, this endorsement does not provide coverage if the easement itself is separately assessed and the Insured fails to pay such taxes.

#### 1. ALTA 18.2 Multiple Tax Parcel

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential

- Purpose: Like ALTA 18.1, it is designed for use when the insured land consists of multiple parcels and multiple tax parcel numbers. However, ALTA 18.1 is appropriate if the land described in Schedule A includes easements. If no easements are described in Schedule A, Paragraph 2 of ALTA 18.1 is not necessary, and ALTA 18.2 is appropriate because it does not refer to any easements.

## 2. ALTA 19 Contiguity – Multiple Parcels

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Designed to provide insurance that each parcel, in a policy which insures multiple parcels, is contiguous to at least one other parcel insured by the policy, or in the event that some parcels are not contiguous to at least one other parcel, that certain parcels are contiguous to certain other parcels.

## 3. ALTA 19.1 Contiguity – Single Parcel

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Provides coverage that the Land in the policy is contiguous to some other specific parcel not insured in the policy.

## 4. ALTA 19.2 Contiguity – Specified Parcels

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Designed to provide insurance that parcels that are listed by the endorsement are contiguous with one another but only as specified.

## 5. ALTA 22 Location

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Provides coverage against loss or damage if an improvement of the type identified in the endorsement having the address set forth in the endorsement is not located on the Land. It has been particularly popular among residential lenders.

## 6. ALTA 22.1 Location and Map

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: In addition to the coverage of ALTA 22, provides coverage to the effect that a copy of a recorded plat or map that may be attached as an exhibit to the endorsement accurately reflects the location and dimensions of the Land as shown in the public records

## 7. ALTA 25 Same as Survey



- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Provides coverage by specifying that the description on Schedule A is in effect identical to a description contained in a survey which incorporates differing language. Thus, the endorsement insures that the Land as described in Schedule A is identical with the land as described in the survey identified in the endorsement, despite the fact that there is different language in each of the descriptions.

#### 8. ALTA 25.1 Same as Portion of Survey

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Provides coverage to the effect that a portion of the land as described in a survey is the same as the Land described in Schedule A.

#### 9. ALTA 26 Subdivision

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Provides coverage against loss based upon the Land described in Schedule A not constituting a legally created parcel pursuant to applicable state statutes or local governmental regulations. Circumstances under which the insurer agrees to issue this endorsement with an Owner's Policy may prove limited.

#### 10. ALTA 28 Easement – Damage or Enforced Removal

- Policy: Owner's Policy and Loan Policy
- Property: Commercial and Residential
- Purpose: Designed to insure lenders against loss caused by the encroachment of a building located on the Land onto or over an easement shown as an exception in Schedule B.

#### 11. ALTA 28.1 - Encroachments – Boundaries and Easements

- Policy: Loan Policy only
- Property: Commercial and Residential
- Purpose: Provides coverage similar to that included in the pre-April 2, 2012 ALTA 9 series, which except for the revised ALTA 9 and new ALTA 9.7, has been deleted therefrom. Coverage includes: Loss occasioned by the existence of an encroachment by an improvement onto an adjoining property or an easement area within the insured Land, other than as disclosed by exceptions; the existence of an encroachment by an adjoining improvement onto the insured Land; and enforced removal of an insured Improvement based upon the encroachment into the easement area or onto adjoining property.

#### 12. ALTA 28.2 - Encroachments – Boundaries and Easements – Described Improvements

- Policy: Loan Policy only
- Property: Commercial and Residential

- Purpose: Provides coverage similar to that included in ALTA 28.1 by providing a space to itemize the specific improvements against which coverage against loss is provided.

13. ALTA 28.3 - Encroachments – Boundaries and Easements – Described  
Improvements and Land Under Development

- Policy: Loan Policy only
- Property: Commercial and Residential
- Purpose: Provides coverage similar to that included in ALTA 28.1 and 28.2 where the improvements exist at Date of Policy as well as future improvements shown by plans and specifications and that are itemized in the space provided.

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