



ALTA Endorsements That Matter

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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.

A. 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 ensure 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 Meadow Brook Drive, Blue Bell Drive and Sun Flower Lane as shown on the plat of Meadow Brook South Subdivision," a question arose as to the intention of the insurer and the insured insofar as the meaning of the endorsement. After developer settled dispute with existing homeowners for \$75,000, developer brought suit against the title insurer that denied that the endorsement provided coverage against developer's loss. Applying the reasonable expectations doctrine, the court determined that a consumer with average intelligence but not trained in the law or insurance business would reasonably expect that the insurer was insuring that the three roads were open to public access, and not that the developer had access because of its ownership of land in Phases I and II of the subdivision. The loss arose from a risk covered in the title insurance policy—namely the risk of not having a right of legal access to the land by way of the three streets. Meadowbrook LLP v. First American Title Ins. Co., 329 P.3d 608 (Mont. 2014).

4. ALTA 9 Series endorsements

Endorsements that, depending upon the type of real estate insured and whether the insured is the owner, may require evaluation of detailed site information are the ALTA Endorsements 9, 9.1, 9.2 and 9.3. These endorsements provide potentially valuable affirmative coverage against several related matters. Although the loan policy endorsements (Endorsements 9 and 9.3) are routinely issued to lenders with minimal investigation in residential transactions, the same is not true of commercial transactions or of Endorsements 9.1 and 9.2, when issued with owner's policies. In commercial transactions, it is usually the case that the title company will require a current land survey before deciding whether to issue Endorsement Forms 9 or 9.3 to the lender. The title company may ultimately agree to issue Endorsement Forms 9 or 9.3 yet modify the coverage by raising specific exceptions from coverage, removing certain of the Endorsement's affirmative coverage provisions. For example, the title company could conceivably decide to retain an exception for loss as the result of a mineral reservation in the chain of title. Where the title insurer had issued ALTA Endorsement 9 but failed to express in addition to the exception for "Declaration of Restrictions in Deed Book FHS 1155, page 206", as

a *specific* exception in Schedule B Part I of the loan policy, the existence of a right of first refusal included within the Declaration, the title insurer was obligated to pay loss as a result of the right of first refusal holder's refusal to approve of a new buyer. Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 579 F.3d 304 (3rd Cir. 2009).

5. Mortgage modification endorsements

There are three mortgage modification endorsements: ALTA 11, ALTA 11.1, and ALTA 11.2. ALTA 11 insures that the modification of the insured mortgage evidenced by the modification agreement referred to within the endorsement does not impair the validity, enforceability, or priority of the insured mortgage as of the Date of Endorsement. In addition to the coverage of ALTA 11, ALTA 11.1 insures against loss based upon a specific matter not being subordinate to the lien of the insured mortgage. In addition to the coverage of ALTA 11, ALTA 11.2 increases the Amount of Insurance. The title insurer will require as a condition to issuing the endorsements that the modification agreement be recorded in the public land records.

6. Future advance endorsements

Future credit endorsements assure the lender that advances shall have the same priority as if made on date of policy, subject to certain exceptions. In most states, the mortgagee that makes future advances does not enjoy priority as against the lien of an intervening mortgage if the advances are optional rather than obligatory, and the lender has knowledge of an intervening mortgage. See, e.g., Colonial Bank v. Marine Bank, 152 2d 444, 448 N.W.2d 659 (1989). Therefore, among the endorsement's exceptions when the mortgage secures optional advances are liens of which the lender has actual knowledge. ALTA Endorsement 14 excepts coverage for intervening liens of which the insured has knowledge, but ALTA Endorsement 14.1 does not. Thus, the title insurer is unlikely to issue ALTA Endorsement 14.1 unless the law of the jurisdiction protects advances of which the advancing lender lacked actual knowledge, and where constructive notice attributable to the recordation or filing of intervening liens does not impair the priority of the advance.

7. Contiguity endorsements

Contiguity endorsements insure that the insured land is contiguous to other land, or that where the insured land consists of more than

one parcel the parcels are contiguous with one another. The contiguity endorsement can prove particularly useful when the prospective purchaser will acquire multiple parcels on which to operate a large-scale project, such as a theme park, shopping center, airport, or residential subdivision, where construction is contemplated, or when there is a risk that a portion of the site, a narrow strip of land that intervenes between the two insured parcels, may be owned, or claimed by another party. The ALTA has promulgated two contiguity endorsements, ALTA 19 when the land described in Schedule A consist of two or more parcels, and ALTA Endorsement 19.1 when the land described in Schedule A consists of a single parcel.

8. Non-imputation endorsements

a. New equity holders

Real estate investment may not always entail a formal transfer of the title by deed. Thus, an investor may acquire the equity ownership of the title-holding entity in part or in full, without a contemporaneous conveyance. The risk to the investor who fails to obtain any title insurance is that the investor lacks protection against liens, defects or encumbrances outgoing investors or existing investors have knowledge: Exclusion 3(a) of the ALTA Owner's Policy excludes loss from liens, defects or encumbrances suffered, assumed, or agreed to by the Insured. In the event that one of the outgoing or existing investors had knowledge of a defect, the title insurer could deny coverage to the new investor on the basis that the knowledge of the defect is imputed to the new investor. To avoid that outcome, the incoming investor can obtain one of three endorsements:

b. ALTA Endorsement 15

ALTA Endorsement 15 provides to the incoming investor of a full equity transfer coverage against loss arising from liens, defects, or encumbrances of which the outgoing investors had knowledge.

c. ALTA Endorsement 15.1

ALTA Endorsement 15.1 provides to the incoming investor of a partial equity transfer against loss arising from liens, defects, or encumbrances of which the existing investors had knowledge as of the Date of Policy of the existing policy. If the incoming investor wants coverage against matters of which the existing

investors have knowledge after Date of Policy, then it must also obtain an endorsement that advances the Policy Date.

d. ALTA Endorsement 15.2

ALTA Endorsement 15.2 provides to the incoming investor of a partial equity transfer against loss arising from liens, defects, or encumbrances of which the existing investors had knowledge. However, in contrast to ALTA 15.1, which is issued in connection with an existing Owner's Policy that insured the title-holding entity, ALTA 15.2 is issued with a new Owner's Policy that insures the incoming investor.

e. Affidavit and indemnity

The title insurer will require as a condition to issuing the endorsement that all of the existing or outgoing equity investors execute an affidavit and indemnification that confirms that they have no knowledge of liens, defects, or encumbrances, and in the case of ALTA 15.1 that the existing entity sign the endorsement to assent to the addition of another insured to the policy. Depending upon the circumstances, the title insurer may also require a financial statement by the indemnitor.

B. Endorsements that Matter: Residential Transactions

1. Condominium endorsements

The ALTA condominium endorsements closely resemble ALTA 9. ALTA Endorsement 4 provides the mortgage with affirmative coverage against seven matters to facilitate the sale of mortgage loans in the secondary market. ALTA Endorsement 4.1 is available to both mortgagees and owners where insurer criteria are met. ALTA Endorsement 4 and 4.1 are nearly identical. ALTA 4 differs from ALTA 4.1 in that the former provides coverage against loss occasioned by lack of priority over future charges and assessments, but the latter provides coverage against loss occasioned by existence of charges or assessments at Date of Policy.

2. Manufactured housing endorsements

There are three manufactured housing endorsements: ALTA 7, 7.1 and 7.2. ALTA Endorsement 7 provides coverage to the effect that a manufactured housing unit located on the Land is covered by the

policy. ALTA 7 adds the manufactured housing unit to the definition of Land.

In addition to the coverage of ALTA 7, ALTA 7.1 provides coverage against loss or damage if the manufactured housing unit is not located on the subject premises, if security interests created under Article 9 of the Uniform Commercial Code were filed against the manufactured housing unit, and if the manufactured housing unit does not constitute real property under state law. ALTA 7.1 also insures against loss in the event that the insured mortgage is not enforceable against both the manufactured housing unit and the Land in a single mortgage foreclosure action.

In addition to the coverage of ALTA 7, ALTA 7.2 provides coverage against loss if the manufactured housing unit is not located on the subject premises, if security interests created under Article 9 of the Uniform Commercial Code were filed against the manufactured housing unit, and if the manufactured housing unit does not constitute real property under state law. ALTA 7.2 is the Owners' version of ALTA 7.1.

3. Location endorsements

There are two location endorsements, ALTA 22, and ALTA 22.1. The endorsement is popular with residential lenders. ALTA 22 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. In addition to the coverage of ALTA 22, ALTA 22.1 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.

4. Environmental endorsements

Like the location endorsements, environmental endorsements are popular with residential lenders. There are two environmental endorsements, ALTA 8.1, and ALTA 8.2. ALTA 8.1 provides affirmative insurance that the lien of the Insured Mortgage has priority over unrecorded or unfiled environmental protection liens. ALTA 8.2 provides coverage similar to ALTA 8.1 but is designed for commercial property. In contrast to ALTA 8.1, ALTA 8.2 can, where underwriting criteria are met, be issued with Owner's Policies.

C. Additional Coverage

A productive means of obtaining coverage may well be to explore the use of additional coverage where the particular lien, defect or encumbrance is, to the extent possible, known and determined to be of little or no risk to the purchaser or lender. Thus, in the event of a circumstance believed to impair the marketability of the title that the insurer will agree to address but not omit entirely, the insurer might conceivably agree to provide specific coverage. The following are examples:

1. Title of another whose claim appears in the chain of title

The Company hereby insures the named insured against loss or damage occasioned by the judgment of a court of competent jurisdiction of last resort that determines that the grantee of the instrument recorded in Volume _____ of Records, Page _____ is the vestee of an estate in fee simple title paramount to and exclusive of the interest of the named insured.

2. Easement, the description of which is broad and includes the insured land

The Company hereby insures the named insured against loss or damage occasioned by the disturbance of improvements on the land as the result of enforcement of Easement recorded in Volume _____ of Records, Page _____ by the grantee therein or parties claiming under it.

3. Judgment or statutory lien

The Company hereby insures the named insured against loss or damage occasioned by enforcement by foreclosure by the creditor of the judgment entered by the court on _____ against _____ in Case No. _____ in the amount of \$_____.

ALTA Endorsement 34 (Identified Risk Coverage) is designed to provide additional coverage by endorsement rather than engrafting coverage in the policy schedules.

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