

ANATOMY OF A REAL ESTATE ACQUISITION

David A. Weissmann, Esq.
WEISSMANN ZUCKER EUSTER P.C.
One Securities Centre
3490 Piedmont Road, Suite 650
Atlanta, Georgia 30305

- I. Tying up the Land: Letters of Intent and Purchase Contracts
 - A. Letters of Intent – Purposes:
 1. Gives comfort to parties seeking to make a deal
 2. Sets forth basic business terms from which a formal agreement can be drafted
 - B. Letters of Intent – Customary Inclusions:
 1. Identify property, purchaser and seller
 2. Specify purchase price, payment terms and earnest money
 3. Specify time periods for closing and for inspection period, if any
 4. Identify brokers and payment of commission
 1. Regardless of contract language, the real party paying the commission is the purchaser because the commission is factored into the purchase price
 5. Set forth the costs for which each party is responsible. Georgia practice is to have the seller pay for the Georgia Real Estate Transfer Tax (\$1.00 per \$1,000 of consideration), costs of satisfying any title exceptions required to be cured pursuant to the contract, and other costs incurred by the seller. Purchaser generally pays title, survey and other costs incurred by the

purchaser.

C. Letters of Intent – Other Possible Inclusions:

1. Impose a responsibility of cooperation on the seller to deliver all due diligence materials such as title, survey, development plans, environmental reports and other tests and analyses. May include prior years operating statements.
2. Include other desirable contingencies, such as development permit contingency or annexation into adjoining municipality contingency
3. Require the seller not to market the property or take any back-up offers during contract period.
4. Confidentiality provisions which require that the purchaser and seller not reveal information discovered regarding the property during due diligence.
 - a. If there is detrimental information, the purchaser could poison the market by revealing the information to other potential purchasers, thereby limiting the number of available and willing purchasers and thereby causing a reduction in the market price of the property.
5. Any particular contract terms that might be relevant, such as requiring that the sale be “as is” or requiring certain specific representations, such as the presence of utilities at the property.

D. Letters of Intent: Mandatory Inclusion:

1. Need a statement that the letter of intent is “non-binding” or could

be result in an incomplete agreement that is binding and enforceable.

a. The statute of frauds requires that all real estate contracts be in writing, and a letter of intent, even though incomplete, is a written agreement that could be enforced.

2. The form and substance of these “non-binding” sections can vary but should contain at least as follows:

“It is understood that this letter is merely a description of certain basic terms of a proposed transaction and not a legally binding agreement, and is subject to Purchaser and Seller negotiating and executing a formal Agreement. From and after the date of execution of this letter of intent, Purchaser and Seller shall use their best efforts to enter into a mutually acceptable formal Agreement and shall direct their attorneys to prepare the Agreement, provided that until such Agreement is signed by both Purchaser and Seller, either Purchaser or Seller may withdraw from negotiations by written notice to either other without any liability.”

3. Might also include language prior negotiations are incorporated and merged in the letter of intent, and that any reliance, estoppel, commitment, or other legal argument is justified or enforceable. Also possible to include a “merger” clause stating that the entire understanding of the parties regarding the subject matter is contained within the letter of intent which supersedes all prior and contemporaneous agreements and understandings related thereto.

4. The parties may nonetheless require that certain covenants in the letter of intent be binding, such as confidentiality provisions, which protect the proprietary nature of material that the seller may furnish regarding the property and its business operations.

II. Purchase Contract – Completing the Acquisition Requirements:

A. Purchase Contract Essentials Not covered by the Letter of Intent

1. Establishing escrow for earnest money and absolving escrow agent from liability
2. Describing the property with specificity together with any necessary appurtenances
3. Title and survey section setting forth time periods for objections and defining the seller's obligation to cure title objections
4. Describe the closing process, including documents to be executed and delivered, prorations, and other deliveries at closing
5. Establishing an inspection right, and containing an indemnity by the purchaser for damages arising from the inspection of the property
6. Additional covenants of the seller regarding on-going property operations, such as leasing rights or leasing criteria, compliance with existing loan documents, maintaining the property and property insurance, and restricting further encumbrances
7. Casualty and condemnation provisions
8. Default provisions
9. Assignment rights, if any
10. Representations and warranties or "as is" limitations
11. Service contract provisions – which ones will be assumed and which ones will be terminated
12. Completion of any offsite or onsite infrastructure
13. Brokerage disclosures and indemnities
14. 1031 like-kind exchange provisions
15. Miscellaneous but crucial provisions:
 - a. Time is of the essence
 - b. Severability clause
 - c. Merger clause
 - d. No amendment or modification clause
 - e. Georgia law provision
 - f. Multiple counterparts
 - g. Establishing "effective date" or other key dates

B. Details on essential provisions

1. Earnest money and escrows: Some contracts require relatively little earnest money on execution and a more substantial amount upon expiration of the inspection period. Since earnest money is generally refundable until the expiration of the inspection period,

initially the purpose of earnest money is limited to demonstrating the ability and sincerity of the purchaser rather than establishing an incentive to prevent default. After the inspection period, the earnest money should be sufficient enough to motivate the purchaser not to default.

- a. The contract should provide that the failure of the purchaser to timely deliver any of the required earnest money is grounds for the seller to terminate. Case law has held that there is independent consideration for the purchase and sale agreement even if the earnest money is not deposited.
- b. Any additional deposits which are intended as earnest money should be defined as such, and the definition of earnest money should specifically encompass those other deposits, by reference to sections or paragraph numbers of the contract. Earnest money can also be in the form of letters of credit.
- c. The escrow agent should not be a stakeholder in the transaction. Brokers, title companies and attorneys typically serve as escrow agents. Their liability should be restricted to liability resulting from willful acts or gross negligence. Interpleader language should also be included (potentially with the right to deduct the costs of

interpleader from the escrowed funds).

2. The property description must be specific. Attachment of a survey or legal description is best practice. Other possible references include tax maps, street addresses, or other drawings. Case law holds that if there is no “key” from which to determine the property description, the contract will fail.
 - a. In the context of a property to be carved out of a larger tract, it is problematic, but common practice, to be unable to specify the exact legal description until the survey is complete. The seller may want to control the survey process in such a case, or at a minimum, have consent rights thereto.
 - b. Often legal descriptions drawn from surveys differ from the vesting legal description, but it is unfair to have the seller warrant a new survey legal. Common practice is to require a (limited) warranty deed to the vesting legal, and a quitclaim deed to the survey legal, thereby updating the public records.
3. Parties to the contract: The seller should be the party holding vested title, and the purchaser should be specific, without references to “its successor and assigns” although common practice is for real estate companies to have acquisition “arms” which assign the contract to a specifically created new entity at

closing.

4. Purchase price and payment terms: Describe the purchase price in words and numbers. Typically, payment is cash, cashier's check, or funds wired in the federal reserve electronic funds transmission system. Federally wired funds are the best practice because the funds are readily available upon receipt. Contrary to popular belief, bank checks and cashier's checks are not instantly available and need to clear, sometimes overnight and sometime over a longer period. The payment section should specify that the escrow agent shall release the earnest money to the seller and the purchase price will be credited in the amount thereof. The section also may provide that payment is subject to prorations and adjustments as provided in other parts of the purchase contract.
 - a. If payment is not "all cash" but includes a purchase money note and security deed, the form and content of the note and security deed need to be either attached, or language should be included that they will be on certain standard forms (such as a recognized bank form) or that the seller and purchaser will negotiate them during the inspection period. In either case, essential terms should be included, such as payment terms, notice and cure rights, release provisions and non-recourse provisions.
5. Title and survey sections: Defines parameters of valid objections

and the seller's cure obligations. Objections may be limited to those title exceptions which are not "insurable" at standard rates by a national title company. However, there are distinctions between title that is "insurable" and that is "good and marketable." Seller's often attach a list of those exceptions which are already known, and thereby exclude them as valid objections. The rationale is that the purchaser can review the pre-existing exceptions during the inspection period and terminate the agreement if needed.

- a. The time periods for objecting and for the seller to respond affirmatively or negatively thereto should be specified.

The purchaser's rights to cure, terminate or waive those objections should also be specified (by time period as well, from the seller's perspective).

- b. The seller should nonetheless be obligated to cure certain monetary liens. The extent of this obligation is negotiated. The seller may want to limit its obligation to those liens known to the seller, such as security deeds which it expressly executed, assumed or took subject to. The purchaser may want to include other monetary liens and judgments. A compromise may include a monetary limit on unknown liens. Prior years taxes should generally be a seller obligation. Taxes due as a result of a reassessment of prior years (or other "roll-back" taxes) should be a seller

obligation, but this may be negotiated.

- c. The purchaser should retain the right to use portions of the purchase price to pay-off those monetary liens that the seller is obligated to cure. Otherwise, the purchaser may be left with an action of specific performance, the timing of which can frustrate the transaction.
6. A place of closing should be specified, such as the office of the purchaser's attorney, at a set time and date. Escrow closings are becoming particularly in favor, with title companies acting as escrow agents not only for money but also with conveyance documents. This is sometimes referred to as a "New York style" closing. A contract without an outside closing date may be void or voidable.
- a. Deliveries at closing include the vesting deed (generally limited warranty deeds), bill of sale, assignment of leases and service contracts (with indemnities), assignment of general intangibles, title affidavit, evidence of authority, FIRPTA and Georgia residency affidavits and closing statement.
 - b. Prorated items should include taxes, items of income and expense, and rent (with credit or separate delivery for security and other deposits). If tenants of the property pay any of these items, extra care must be taken to cover any

items that may have been pre-paid by tenants, or which will be paid after closing. If there are delinquent tenants, the seller may want to retain the right to collect rent arrearages. The purchaser often will agree to give the seller any rent it receives in excess of currently due amounts and allow the seller to attempt to obtain payment from the tenant, short, however, of any legal action.

7. The inspection right includes the right of access to the property, with the purchaser indemnifying the seller against loss and damage that may result therefrom. The indemnity should specifically survive the expiration or termination of the purchase contract. Sometimes the seller requires that it be named in the purchaser's general liability insurance policy. The seller may also request prior notice of any entry onto the property, and restrict invasive testing. Environmental testing may be limited to a "Phase I" test without further consent because of reporting requirements if hazardous substances are actually found at the property.
 - a. While general practice has evolved so that the inspection right is often essentially a "free look," sometimes inspection is limited to specific property and development matters. Independent consideration should be established for the inspection right so that the purchase contract is not void or voidable for lack of mutuality. This independent

consideration is often a small portion of the earnest money (\$100) being delivered to the seller on termination within the inspection period, rather than all of the earnest money being returned to the purchaser.

8. Additional property covenants are important. Most important is protecting the current status of title and leasing of the property, so that the seller does not impose new matters or obligations on the property which could impede or adversely affect the purchaser's intentions. These matters might be new mortgages, or amendments which cross-collateralize or cross-default the property with other properties, new leases, property covenants and restrictions. A seller may want to retain the right to alter title or leasing during the inspection period, with purchaser's consent, not to be unreasonably withheld, but after the inspection period, the purchaser should have the benefit of its bargain and be able to withhold its consent.
9. Casualty provisions help to shift the risk of loss of the property pursuant to negotiated parameters. On a tear-down, or vacant land, the purchaser has no compelling interest in having a termination right if there is a casualty. However, with improved property, damage to improvements impacts cash-flow and the purchaser justifiably has reason to be concerned. Negotiated thresholds seem to revolve around "major" and "minor" damage, perhaps keyed to

a dollar amount, or sometimes to tenant lease terminations resulting from a casualty. If the seller fails to maintain its insurance, the purchaser may be harmed, which is why maintenance of insurance is often a separate covenant. Upon the occurrence of a major casualty, the purchaser generally has the right to either take the insurance proceeds and close, or to walk from the transaction. A minor casualty would not invoke a termination right. Sometimes, the closing may be delayed to allow time for the seller to repair the damage (major or minor). Deductibles under insurance policies are sometimes negotiated as being payable by the seller to the purchaser, but unless they are unusually large, the purchaser cannot justifiably request payment because it would have a similar deductible under its own insurance policy were it the owner of the property.

10. Condemnation is also sometimes phrased in terms of major or minor takings, but the emphasis is on the impact on the property operations, or on the purchaser's intended development of the property. *De minimus* takings, such as for road widenings, should not give rise to a termination right, unless access is also restricted.
11. Default provisions are generally restricted as follows: The seller receives the earnest money as liquidated damages upon the purchaser's default, and the purchaser has the right to terminate and receive a return of the earnest money upon the seller's default,

or the right to specific performance. Specific performance is sometimes an illusory remedy, especially if the seller is unable to convey the property to the purchaser, as when the seller has delivered title to another party for more profit. For this reason, and others, the purchaser may demand the right to seek and obtain damages, generally restricted to actual, out-of-pocket, damages or to a liquidated amount in such event. A provision allowing attorney's fees to the prevailing party is advisable.

12. Assignment rights: Contracts with payment in cash are under Georgia law assignable, so without an assignment provision, the purchaser will have an assignment right. This allows the purchaser to "market" the property under contract and make a profit on the "flip." The seller generally wants to restrict that right because a flip means that the seller has left money on the table. Even if assignments are restricted, the purchaser could purchase the property and immediately sell the property to its target purchaser, suffering only the transfer tax and additional transaction closing costs. The best practice is to restrict assignments to those companies controlled by or under common control with the purchaser.
13. "As Is, Where Is" and Representations and Warranties: There has been a trend over recent years to make many sales "as is, where is." This reverses a more civil time when a fair market purchaser

was entitled to basic representations and warranties. An “as is” sale was limited to those that were REO (foreclosures) property or discounted sales. When paying fair market value, insisting on basic representations and warranties is fair and reasonable. If nothing else, the seller can limit them to “best knowledge” or “actual knowledge” or some other reasonable qualifier. The purchaser is entitled to know what the seller knows about the property. The representations and warranties are often reaffirmed at closing, and if there is a material change, the purchaser may have termination rights. If the change is due to a breach of a seller covenant, the purchaser should have the right to damages. The seller may argue that reaffirmation in effect extends the inspection period, and the seller may be correct in this assertion.

a. Financial representations, such as those involving rent rolls and operating statements, may be crucial rather than merely optional.

14. Brokerage sections should contain specifics on which parties are being represented by which broker, who is paying the commission and how it is split. Broker lien waivers and affidavits are closing requirements because of the broker lien law. Indemnities against breaches in the brokerage representations as to the brokers who are involved in the transaction must survive the closing. Finally, if the seller or the purchaser (or principals thereof) are brokers or sales

persons, this matter must be disclosed.

15. Tenant estoppel and rent roll requirements: Delivery of tenant estoppels is usually a requirement and condition to closing in any office or retail context. The amount of required estoppels may vary – in a large complex, the number may be limited by percentage of square footage (i.e. 85% of gross rentable area) but with major tenants being absolutely required. The estoppels should be certified to the purchaser and to the purchaser's lender. The landlord may reserve the right to certify on behalf of recalcitrant tenants. Beyond the status of the lease (rent, commencement date, security deposit, term), the purchaser may want to know about any tenant buildout allowances and brokerage commissions. Be careful to discover any rights of first refusal (lease or purchase), any purchase options, and any exclusives, all of which can be revealed in an estoppel certificate. The estoppels should match the information contained in the rent roll, which should be included in with a representation in the contract, and updated and certified by the seller at closing.
16. Sellers may be obligated to complete infrastructure or other improvements either prior to closing, or thereafter. Escrow arrangements, with a draw procedure and cushion on the estimated amount to complete, are advisable, with an outside completion date, failing which the purchaser would be able to complete

construction, using draws, or other funds required from the seller.

III. Acquisition Due Diligence: Protecting the Client and the Lender

A. A prudent review of property includes title and survey matters, environmental matters, soils matters (on new development) zoning, physical inspection of improvements.

1. The title commitment or title binder should be accompanied by those endorsements that add value to title insurance, such as endorsements regarding tax parcel, access, survey and perhaps zoning (3.1). The lender may require that the arbitration and creditor's rights exceptions be removed by endorsement.

2. On construction loans, the lender will require a pending disbursements clause:

“Pending disbursement of the full proceeds of the loan secured by the security instrument set forth under Schedule A hereof, this policy insures only to the extent of the amount actually disbursed, but increases automatically as each disbursement is made up to the face amount of this policy.”

3. There is much debate about zoning endorsements. The 3.1 zoning endorsement does provide some assurance that the property and improvements comply with zoning in 5 key respects:

- (a) Area, width or depth of the land as a building site for the structure;
- (b) Floor space area of the structure;
- (c) Setback of the structure from the property lines of the land;
- (d) Height of the structure; and
- (e) Number of parking spaces.

The zoning 3.0 endorsement provides assurance as to the zoning classification of the property. It is based on a zoning certification

letter from the appropriate governmental authorities, which provides the same assurance. The zoning certification letter is generally a pre-closing requirement of any lender, although sometimes zoning information contained on an ALTA survey is sufficient for closing purposes. Actual compliance can be verified by architects, engineers or other inspectors trained in such matters. In Georgia, lawyers traditionally do not give zoning opinion letters.

4. Obtaining a Phase I environmental report is essential to qualify for the innocent landowner defense under The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (42 U.S.C. 9601 (35)). The Phase I should be addressed to both the purchaser and to the lender. If the report is only addressed to the purchaser, either it can be amended, or the environmental engineer can issue a “reliance” letter allowing a third-party, such as the lender, to rely upon it. The report discloses “recognized environmental conditions” which may warrant further investigation. This further investigation is referred to as a “Phase II” environmental report, which should be carefully tailored to test for specific possible contaminants, using defined laboratory methods. The type and extent of contamination determine the potential for liability and required remediation costs. Gasoline is a relatively easy matter to rectify, as long as it is not in the

groundwater (gasoline readily evaporates). If it is in the groundwater, then it has to be extracted, and could have migrated offsite. Long-term monitoring wells will be required to validate attenuation over time.

- a. Additional comfort can be derived from the Georgia Underground Storage Tank Act, which imposes liability on the operator of the gasoline facility and establishes a trust fund to assist with remediation costs.
 - b. Brownfield designation also limits the liability of purchasers to remediation approved at the time of designation.
5. Investigation of raw land should include analysis of soils conditions to determine if the soils are suitable for construction. The following are some of the more paramount issues to consider when reviewing the property condition: costs associated with unusual or difficult property conditions; costs associated with unusual soil conditions or rock; slope or other easements required for construction or lateral support; utility or sewer easements which will shorten the distance to required facilities and hence reduce the cost; neighboring property which adversely impacts development plans; and topographic conditions which might necessitate unusual grading which can increase cost and increase time for construction. Geotechnical soils reports, or soils

inspection reports, reveal conditions of the property which are not apparent and which can significantly impact a project. Ideal soils conditions have soils which have the proper density to permit the load factor of construction at the depth called for in the plans and specifications without the requirement of adding materials for stabilization. A soils inspection report reveals the test results and analysis of a geotechnical engineer, who takes soil samples and drill samples to determine soil characteristics at various layers of depth. Soils must be of such a condition to allow for the proper compaction and density, and retention of compaction, to support the weight and load factor of the proposed improvements. Wet soils, or those with a high moisture content, will not sustain building foundations and footings. If the ground water level is high, either the foundation level must be raised or other measures taken so that the building slab is not adversely impacted. The presence of rock on a project site is a special concern because rock must generally be removed from site for proper construction.

6. Analysis from Lender's Inspector: The lender's inspector usually is a professional who has been in the construction industry as an engineer or an architect, and has the responsibility for oversight of the construction project from start to finish. The inspector is the lender's eyes and ears on the ground. He will review the initial plans and specifications in conjunction with the construction

budget and provide a general opinion as to the ability of the project to be completed within budget on a line item by line item basis. The inspector begins by receiving a complete copy of the plans and specifications, and a copy of the construction contract, which should be accompanied by a budget. The inspector will also make periodic visits to the construction site and converse with the job superintendent and other contractors on the job as part of the draw request process. As each draw is requested, the inspector may be asked to insure that the project is doing well, qualitatively and quantitatively, within budget, and can be completed with remaining loan funds, and that the work which has been claimed to be finished is in fact work in place. If not, an additional equity infusion may be required from the borrower. The inspector receives copies of various field tests and analysis and daily reports and logs, including geotechnical tests. A good inspector will initially review the status of project approval from the several governmental agencies which might be involved. Governmental involvement varies from locality to locality. The inspector insures that the project is being constructed in accordance with all applicable governmental codes, ordinances and regulations, and in accordance with the plans and specifications. The inspector also tries to determine the location of utility lines and drainage which is necessary for the project to operate after completion.

7. Appraisals: It has been said “ask for the appraisal you want and you shall receive,” meaning that appraisals have a knack of uncovering the required appraised value to support loan value regardless of the circumstances. While there is some truth to the notion that appraisals often support underlying loan value requirements, it is not true that they are always on target. Banks need appraisals to comply with their internal and governmental auditing requirements. If an appraisal is delivered with a low value, the borrower will be asked to contribute more equity, either in the form of cash or other collateral, or in the form of deferred fees contained in the loan budget to lower the actual amount of loan which may be disbursed until higher project value is attained. Appraisers generally employ three methods: The “cost” approach, the “income” approach and the “market” approach. The appraiser is generally asked to reconcile the differing values obtained using each of these methods to arrive at a truer value. The cost approach uses the anticipated costs of constructing the project as the basis for value. One problem is hidden or soft costs which can inflate the cost and not really add to value. These costs may be development fees, professional fees, or overhead and profit. The income approach uses presumed income following presumed lease-up and stabilization, and derives value based on capitalization rates (“cap rates”) which institutional investors

might use to estimate returns on investment if the project were purchased for cash. The market approach seeks comparable sales figures for projects in the same general vicinity and similar to the project being constructed. Appraisers have a network of information which allows them to closely derive income figures from those of similar projects.

8. Additional Due Diligence: Certificates of occupancy should be obtained, to the extent available. Copies of building permits are not a substitute, but are other evidence of governmental oversight. SNDA's may be required on leases by lenders, but the terms of the lease, having self-operative subordination and attornment language, can limit their necessity in a crunch.

IV. Title is a bundle of rights in land, all of which taken together give the owner certain control or dominion over the land.

- A. "Fee simple" title is the grandfather of all titles, and superior to all other rights. The rights contained in fee simple are divisible and alienable, so that certain rights in the land may belong to someone other than the owner of the fee simple title. For example, mineral rights may belong to the state, or to Shell Oil Company, while fee simple title remains in the Greenacre estate.
- B. Others may have rights of possession only, pursuant to leases or license agreements. Still others may have rights of access or to use utility or other facilities located on the land. These rights can be expansive or limited,

depending on the documentation creating their rights.

- C. What is “good and marketable” title? Or even more to the point, what is “title” and what makes it “good” and what makes it “marketable”?
- D. Rights in property may arise by express instrument, either by grant or reservation, or by prescriptive right (aka adverse possession), or by necessity. In the perfect world, title to each parcel of land would be traced back to the origins of the nation, from the seizure of land from indigenous Indian tribes by the colonial and federal powers, using “google-like” search engines which penetrate the vaults and archives of the states to the beginning of the republic. In reality, however, title examiners pour over volumes upon volumes of indexed records, back in time to before photocopying, word processing, and even type-writing. Back before then, handwritten deeds appear in the public records, with flowery script, difficult to decipher and more difficult to derive locations and distances as to the affected property. Legal descriptions may refer to the “x” on the oak tree at the corner of the Hatfield and McCoy properties. Hatfield’s and McCoy’s have long since disappeared from the scene, and the tree was felled before the start of the century.
- E. How these rights may interfere with the use and alienability of the property determines whether title is “good” and “marketable.”
- F. Related to our discussion is the applicability of title insurance. Title insurance provides compensation for unknown defects which infringe the use of the property, and includes the agreement of the insurer to defend

lawsuits arising as a result of a defective title.

1. There are, however, important distinctions as to what is good and marketable, on the one hand, and what is insurable, on the other hand. Title companies are in the business of issuing insurance, and consequently, make business decisions as to insurability which are distinguishable from the legal conclusion of whether title is good and marketable. For example, in recent years, title insurers, facing pressure from HUD and federal agencies trying to keep residential closing costs low, completely removed the requirement of surveys as a precondition to the issuance of residential title insurance policies. As a result, surveys are no longer required on most residential transactions. This is not to say, however, that survey problems do not exist and have magically disappeared. It is only that title insurers have made the business decisions to underwrite the risk of problems through the collection of premiums rather than by minimizing risk by analysis of on the ground information provided by surveys. Therefore, we have title which may be insurable, but nevertheless subject to encroachments which may otherwise make title not “good” and not “marketable,” without rectification of the defect.

V. Review of title and survey matters is designed to discover any matters which could impact either development, use or marketability of the property. The examiner must be skilled in locating and revealing potential issues and allowing the professional reviewer determine the relative harm which might result therefrom.

A. The types of problems which might arise are varied. These could involve any one or more of the following:

1. Easements encroaching on improvements
2. Impositions of repair or monetary obligations burdening the property
3. Physical encroachments onto or from the property

4. Broadly defined easement areas which grant rights over existing or contemplated improvements

5. Leases which are superior to the owner's or lender's title

B. Creation of Easements by:

1. Express easement agreement or declaration

2. Reservation in a deed

3. By implication or necessity (most rare and least reliable).

Practice point – It is a great idea to attach drawings of easement areas instead of mere descriptions

C. Types of Easements

1. Utility and Drainage Easements

a. Utility easements are commonly found on title to most developed property. Sewer, water and power easements are essential for any improved property. If the property is adjacent to a public right-of-way (a road which is either built by the governmental authority (DOT, County or City), and there are utilities within the road bed, then an easement may not be necessary.

b. One of our functions is to review the presence and/or location of utilities serving property, and to seek assurance that the utility does not cross any "private" land. If the utility line crosses "private" land without a proper easement, then the owner of the "private" land has the right to cut off the utility line.

d. Georgia Power or affiliated electric membership companies routinely use "broad form" general or blanket easements when installing electric power. The record rooms are full of these documents which give the power company the right to enter into property for purposes of installing electric lines.

i. The problem is that the easement areas are not

specified and broad rights of entry can impact future development. There are two solutions:

1. Containment letters – routinely provided by power companies limiting the easement repair, maintenance and replacement of existing facilities
 2. Don't worry – if power companies exercised these rights broadly, we would have a revolution of sorts.
- e. Florida Power and Light and other municipalities and counties use general utility easements for installation of all utilities to facilitate development.
2. Specific Easements
- a. Cable easements – found generally in apartment complexes, condominiums, town homes. Might be accompanied by a reservation of rights to the installed cable equipment.
 - b. Natural gas or petroleum easements – these are often clearly marked, and permit surface development (parking areas, driveways)
 - c. Defined electric power line easements – the terms of the easement will control rights to develop at or near the utility lines
 - d. Drainage easements – all property needs drainage rights. All, development authorities monitor drainage as part of development approval.
 - i. By law, property owners have the right to drain “downhill” but if a raw piece of land is development, the parking and other surface areas do not absorb as much water, and “runoff” increases. This can lead to detrimental effects on neighboring

properties.

- ii. One solution is retention ponds and detention areas, which slows the rate of flow. Specific rights to use these areas is often granted, with a corresponding obligation to contribute to the cost of maintenance
- e. Sewer easements – generally described by a metes and bounds description, or by reference to a centerline, so a surveyor should be able to plot specifically

C. Rights of Way and Condemnations

- 1. Right of Way Deeds grant to a public governmental authority (county or city usually) actual acreage or easement rights for use by the public.
 - a. Typically used for roads, water and sewer lines
 - b. Never accept a “right of way” to a road as a title exception. Once the right of way deed is granted, the acreage ceases to be part of the property description. If the right of way deed is excepted, then there is acreage potentially missing from your property. The surveyor should be able to limit the applicability of a right of way deed to easements contained therein, typically slope and drainage easements.
 - c. Sewer right of way deeds are acceptable, but should be located on the survey to assure that the development or improvements do not encroach. A sewer line that goes directly under a building might be difficult to repair without destroying the building.
- 2. Condemnations perform the same function as a right of way deed, but are used when there is a dispute between the property owner and the government (usually over costs, but could be other issues). Once the property is condemned, then the acreage condemned ceases to be part of the property, so the same issues involved with rights of way deeds are applicable to your analysis of the impact on

the property.

3. Plats – used to subdivide property with development authorities, and often also used to create easements or dedications of roads and utilities to the public.
 - a. Easements can be created by drawing the easement areas on the plat with a description (i.e. “access easement”, “drainage easement”) sometimes with a note that the owner desires to create the easements shown thereon.
 - b. Dedication is effected by express intent, and the plat is then signed by the owners and the various governmental officials who “accept” the dedication by express language. There may be certain maintenance bond requirements which extend beyond the date of dedication (often 1 year for new roads)
 - c. Do not accept a recorded “plat” as an exception. The survey (discussed below) should incorporate all matters shown on the plat, and therefore, no additional information is added by excepting to the plat and it should be removed. At a minimum, you should require that the plat contain detailed exceptions.
4. Parking easements – obvious problem is if the easement area is over the area to be developed. Otherwise, be mindful of parking rights that could impact your property’s potential by taking up too much parking (restaurants, bars, pool halls are notorious parking hogs)
 - a. Parking easements can also impact zoning compliance. Your property may require parking to meet zoning requirements
5. Sign easements – often visible signage along a well-used thoroughfare is required for maximum exposure of businesses. A sign easement might give this advantage. It could be a right to be

on a pylon in a shopping center, or a right to install signage on a street corner. Also would need maintenance and replacement rights. Sign should always comply with then existing codes and ordinances.

- a. Obnoxious signage impacts development surrounding a site, so the easement should specify the kind of signage permitted, and limit offensive uses (i.e. no flashing lights).
6. Encroachment Easements – used to rectify encroachment problems. In some cases, they are “anticipatory” in advance of development to permit minor encroachments over property boundaries. If an encroachment exists, an encroachment easement allows the encroachment to remain, subject to the limitations contained in the easement
 7. Party wall easements and agreements – describes rights and obligations of neighbors who share a wall. Used in tight urban environments, or in condominiums, or any circumstance where you have a wall separating two properties.
 - a. Maintenance and repair of the wall is the large issue, requiring care and forethought. If one party fails to repair, the other should have the right. Lateral support must be maintained by each party to prevent damage or destruction of the wall.
 8. Construction and temporary easements – these often accompany other easements granting the right to construct the actual facilities described in the easements. The area usually extends 10 or 20 feet around the perimeter of the easement areas, and terminate at a specified date, usually within a year of the date of the easement, which grants time for construction to be completed.
- D. The Reciprocal Easement Agreement – otherwise known as an “REA”. Provides for mutual easement rights flowing to the benefit of owners of adjacent properties. Used often in shopping center development to

coordinate between the main center and outparcels. Can be used in any other context.

1. Larger developments anticipate easement needs and incorporate them into an REA.
2. Look for express easements contained in the REA benefiting or burdening your property.

E. Other issues in easements:

1. Anticipate repair or maintenance obligations and how costs are prorated
2. Might see lien rights on failure to make payment towards shared costs. May also contain indemnities and insurance provisions.
3. Best to have one party responsible for maintenance to avoid inaction.
4. Duration should be stated as “perpetual.”
5. Relocation rights; Right to tap-in - A good pre-planning tool is to reserve to the grantee a “relocation right” and a “tap in right” whereby the grantor reserves the right to relocate to easement areas and to use and tap into the easement facilities to accommodate future improvements or alterations. Capacity of the facilities may remain an issue, although today, most governmental agencies have capacity requirements which can accommodate additional users.
6. Fees or cost sharing – sometimes easements require contributions toward construction or maintenance; Affirmation by estoppel certificate may required.
7. Plan approval – a good easement requires plan approval by the grantor, although rarely does anyone require evidence of approval after the fact

F. Restrictive Covenants – can be created by deed or other document. Sometimes found inside a Declaration of Covenants, Conditions and Restrictions.

1. Types of restrictions:

- a. Permitted uses
 - b. Prohibited uses
 - c. Setbacks
 - d. Construction and architectural control
 - e. Conservation easements for scenic beauty
2. Governed by OCGA §44-5-60:
 “44-5-60.
- (a) The purchaser of lands obtains with the title, whether conveyed to him at public or private sale, all the rights which any former owner of the land under whom he claims may have had by virtue of any covenants of warranty of title, of quiet enjoyment, or of freedom from encumbrances contained in the conveyance from any former grantor unless the transmission of such covenants with the land is expressly prohibited in the covenant itself.
 - (b) *Notwithstanding subsection (a) of this Code section, covenants restricting lands to certain uses shall not run for more than 20 years in municipalities which have adopted zoning laws nor in those areas in counties for which zoning laws have been adopted.*
 - (c) The limitation provided in subsection (b) of this Code section shall not apply with respect to any covenant or scenic easement in favor of or for the benefit of the United States or any department, bureau, or agency thereof; this state or any political subdivision thereof; or any corporation, trust, or other organization holding land for the use of the public, but only with respect to such covenants and scenic easements running in favor of or for the benefit of the land so held for the use of the public. Such covenants and scenic easements shall run in perpetuity **[savings provision for conservation easements]**.
 - (d)(1) *Notwithstanding the limitation provided in subsection (b) of this Code section, covenants restricting lands to certain uses affecting planned subdivisions containing no fewer than 15 individual plots shall automatically be renewed beyond the period provided for in subsection (b) of this Code section unless terminated as provided in this subsection. Each such renewal shall be for an additional 20 year period, and there shall be no limit on the number of times such covenants shall be renewed.*
 - (2) *To terminate a covenant as provided in paragraph (1) of this*

subsection, at least 51 percent of the persons owning plots affected by such covenant shall execute a document containing a legal description of the entire area affected by the covenant, a list of the names of all record owners of plots affected by the covenant, and a description of the covenant to be terminated, which may be incorporated by reference to another recorded document. By signing such document, each such person shall verify that he or she is a record owner of property affected by the covenant. Such document shall be recorded in the office of the clerk of the superior court of the county where the land is located no sooner than but within two years prior to the expiration of the initial 20 year period or any subsequent 20 year period. The clerk of the superior court shall index the document under the name of each record owner appearing in the document.

- (3) No covenant that prohibits the use or ownership of property within the subdivision may discriminate based on race, creed, color, age, sex, or national origin.
 - (4) **Notwithstanding any other provision of this Code section or of any covenants with respect to the land, no change in the covenants which imposes a greater restriction on the use or development of the land will be enforced unless agreed to in writing by the owner of the affected property at the time such change is made.**
- G. Unsatisfied security deeds and liens; Obtain satisfaction or evidence of payment in full
- 1. How do we locate old grantees, or how to we validate successors by merger of financial institutions; Does contract allow for payment out of purchase price? Is cure obligation specifically enforceable?
- H. Gaps in title; Obtain deeds from missing parties, or ascertain that the gap was the result of another occurrence, such as death, followed by affidavits or deeds of ascent; Remainder interests which are not waived; improper executions
- I. Options or rights of first refusal; Might be in leases, deeds or contracts; Obtain written waiver or other irrefutable evidence of waiver
- J. Tax liens; Require payment of lien; Federal tax liens may take time to cure.

- K. Adverse possession; Can be problem or a remedy (to claim of remaindermen following life estate if executor conveyed without remainderman).
- L. Condemnations; New survey should show new boundaries
- M. Boundary overlaps; Remedy boundary line agreements or quitclaims.
- N. Survey Matters – The survey provides a pictorial, on the ground, visible representation of the property and all title and physical matters pertinent thereto.
 - 1. The survey locates the various easements described in the title binder to the extent possible or comments otherwise in notes to survey
 - 2. The survey also identifies issues not contained in the title binder, such as:
 - a. Building line encroachments
 - b. Property line encroachments
 - c. Evidence of easements not in the public record (dirt roads to nowhere, cemeteries, evidence of squatters or debris)
 - d. Water or stream issues; flood zones (do vertical improvements encroach?)
 - e. Zoning matters
 - f. Locates improvements
 - 3. The survey can resolve title issues that otherwise might be problems
 - a. A survey can alleviate concern by locating the easements relative to their position *vis a vis* physical improvements demonstrating that the physical improvements do not encroach thereon
 - b. A survey can establish a verifiable point of beginning and boundary lines and thereby eliminate disputes with neighboring property owners over boundaries
 - 4. Minimum survey detail should include:

- a. The location of an accurate, identifiable point of beginning and the boundaries of the Land by courses and distances. The legal description used on the documents should match the description obtained from the survey. A point of beginning ideally should be physically tied to the ground, such as land lot line intersections, street intersections, right of way monuments. Boundary line issues may be revealed on the survey by analysis of old deeds in the chain of title, or neighboring deed conflicts.
- b. All land lot, district and section line lines and city, county and state boundaries intersecting or adjacent to the land;
- c. All easements, title matters and rights of way with recording data for instruments establishing the same. Tying the survey to the title report is one of the essential jobs of the closing attorney. The survey may reveal easements or other items not reflected in the chain of title (i.e. old roadways).
- d. The established building lines, if any (established by either zoning code or restrictive covenant). Determine if any physical improvements violate building line restrictions. Often, zoning codes change after completion of a building and a “grandfather” provision must be relied for zoning compliance, which allow for continued use, and even restoration (subject to compliance with percentage of destruction requirement);
- e. The lines of the rights of way of streets abutting the property and the width thereof. Check for any gaps or gores between property line and right of way. Look for access points and curb cuts, and whether there is limitation of access, as might be reflected in title report
- f. Encroachments, and the extent thereof in feet and inches,

upon the land. Encroachments violate the property rights of others and are actionable. Often, declarations contain easements for minor encroachments.

- g. Any improvements, to the extent constructed, and the relation of the improvements by distances to the boundaries of the land, the established building lines and the street lines. A survey which does not show improvements is merely a boundary survey and will not be reliable for title insurance purposes.
 - h. The date of original preparation and of each revision thereof.
 - i. The location of any flood plain areas on the land or the certification that none of the land lies within a flood plain.
 - j. The number of parking spaces located on the land, and any other required zoning information: height of building structures, land area covered by building improvements.
 - k. Survey is signed and sealed by registered land surveyor with a certification to the appropriate parties (lender, purchaser, title insurance company). Certifications may vary.
- 5. Obtain a surveyors inspection report on the appropriate title company's form, indicating a recent, on the ground, actual inspection by the survey.
 - 6. ALTA/ACSM Standards attached as **Addendum A.**

VI. Current Issues and Oddities

- A. Remainderman Issue: Old deed conveys property for life estate, with remainder to heirs, but deed out of estate of deceased does not include the heirs as grantors. The presumption is that they still have rights to the property.
 - 1. Solution: Use adverse possession claim to remove any remainder rights.

B. Avoidance of Lien Creditors: Conveyance of property from lien debtor to avoid lien creditors. Hypothetical: Construction company, with a variety of lien creditors (by fi.fa) owns residence of owner, and conveys residence to owner. Do subsequent. Is it fraudulent and avoidable? Governed by:

§ 18-2-74. Fraudulent transfer; determination of actual intent

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under paragraph (1) of subsection (a) of this Code section, consideration may be given, among other factors, to whether:

- (1) The transfer or obligation was to an insider;
- (2) The debtor retained possession or control of the property transferred after the transfer;
- (3) The transfer or obligation was disclosed or concealed;
- (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) The transfer was of substantially all the debtor's assets;
- (6) The debtor absconded;
- (7) The debtor removed or concealed assets;
- (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

ADDENDUM A

2005 MINIMUM STANDARD DETAIL REQUIREMENTS FOR ALTA/ACSM LAND TITLE SURVEYS

**as adopted by
American Land Title Association
and
National Society of Professional Surveyors
(a member organization of the American Congress on Surveying and Mapping)**

It is recognized that members of the American Land Title Association (ALTA) have specific needs, peculiar to title insurance matters, which require particular information for acceptance by title insurance companies when said companies are asked to insure title to land without exception as to the many matters which might be discoverable from survey and inspection and not be evidenced by the public records. In the general interest of the public, the surveying profession, title insurers and abstracters, ALTA and the National Society of Professional Surveyors, Inc. (NSPS) jointly promulgate and set forth such details and criteria for standards. It is recognized and understood that local and state standards or standards of care, which surveyors in those respective jurisdictions are bound by, may augment, or even require variations to the standards outlined herein. Where conflicts between the standards outlined herein and any jurisdictional statutes or regulations occur, the more restrictive requirement shall apply. It is also recognized that title insurance companies are entitled to rely on the survey furnished to them to be of an appropriate professional quality, both as to completeness and as to accuracy. It is equally recognized that for the performance of a survey, the surveyor will be provided with appropriate data which can be relied upon in the preparation of the survey.

For a survey of real property and the plat or map of the survey to be acceptable to a title insurance company for purposes of insuring title to said real property free and clear of survey matters (except those matters disclosed by the survey and indicated on the plat or map), certain specific and pertinent information shall be presented for the distinct and clear understanding between the client (insured), the title insurance company (insurer), and the surveyor (the person professionally responsible for the survey). These requirements are:

1. The client shall request the survey or arrange for the survey to be requested and shall provide a written authorization to proceed with the survey from the person responsible for paying for the survey. Unless specifically authorized in writing by the insurer, the insurer shall not be responsible for any costs associated with the preparation of the survey. The request shall specify that an "**ALTA/ACSM LAND TITLE SURVEY**" is required and shall designate which of the optional items listed in Table A are to be incorporated. The request shall set forth the record description of the property to be surveyed or, in the case of an original survey, the record description of the parent parcel that contains the property to be surveyed. Complete copies of the record description of the property (or, in the case of an original survey, the parent parcel), any record easements benefiting the property; the record easements or servitudes and covenants burdening the property ("Record Documents"); documents of record referred to in the Record Documents; and any other documents containing desired appropriate information affecting the property being surveyed and to which the survey shall make reference shall be provided to the surveyor for notation on the plat or map of survey.

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

3. An "**ALTA/ACSM LAND TITLE SURVEY**" shall be in accordance with the then-current "Accuracy Standards for Land Title Surveys" ("Accuracy Standards") as adopted, from time to time by the National Society of Professional Surveyors and the American Land Title Association and incorporated herein by reference.

4. On the plat or map of an "**ALTA/ACSM LAND TITLE SURVEY**," the survey boundary shall be drawn to a convenient scale, with that scale clearly indicated. A graphic scale, shown in feet or meters or both, shall be included. A north arrow shall be shown and when practicable, the plat or map of survey shall be oriented so that north is at the top of the drawing. Symbols or abbreviations used shall be identified on the face of the plat or map by use of a legend or other means. If necessary for clarity, supplementary or exaggerated diagrams shall be presented accurately on the plat or map. The plat or map shall be a minimum size of 8½ by 11 inches.

5. The survey shall be performed on the ground and the plat or map of an "**ALTA/ACSM LAND TITLE SURVEY**" shall contain, in addition to the required items already specified above, the following applicable information:

(a) All data necessary to indicate the mathematical dimensions and relationships of the boundary represented, with angles given directly or by bearings, and with the length and radius of each curve, together with elements necessary to mathematically define each curve. The point of beginning of the surveyor's description shall be shown as well as the remote point of beginning if different. A bearing base shall refer to some well-fixed line, so that the bearings may be easily re-established. The North arrow shall be referenced to its bearing base and

should that bearing base differ from record title, that difference shall be noted.

- (b) When record bearings or angles or distances differ from measured bearings, angles or distances, both the record and measured bearings, angles, and distances shall be clearly indicated. If the record description fails to form a mathematically closed figure, the surveyor shall so indicate.
- (c) Measured and record distances from corners of parcels surveyed to the nearest right-of-way lines of streets in urban or suburban areas, together with recovered lot corners and evidence of lot corners, shall be noted. For streets and highways abutting the property surveyed, the name, the width and location of pavement relative to the nearest boundary line of the surveyed tract, and the width of existing rights of way, where available from the controlling jurisdiction, shall be shown. Observable evidence of access (or lack thereof) to such abutting streets or highways shall be indicated. Observable evidence of private roads shall be so indicated. Streets abutting the premises, which have been described in Record Documents, but not physically opened, shall be shown and so noted.
- (d) The identifying titles of all recorded plats, filed maps, right of way maps, or similar documents which the survey represents, wholly or in part, shall be shown with their appropriate recording data, filing dates and map numbers, and the lot, block, and section numbers or letters of the surveyed premises. For non-platted adjoining land, names, and recording data identifying adjoining owners as they appear of record shall be shown. For platted adjoining land, the recording data of the subdivision plat shall be shown. The survey shall indicate platted setback or building restriction lines which have been recorded in subdivision plats or which appear in Record Documents which have been delivered to the surveyor. Contiguity, gores, and overlaps along the exterior boundaries of the surveyed premises, where ascertainable from field evidence or Record Documents, or interior to those exterior boundaries, shall be clearly indicated or noted. Where only a part of a recorded lot or parcel is included in the survey, the balance of the lot or parcel shall be indicated.
- (e) All evidence of monuments shall be shown and noted to indicate which were found and which were placed. All evidence of monuments found beyond the surveyed premises on which establishment of the corners of the surveyed premises are dependent, and their application related to the survey shall be indicated.
- (f) The character of any and all evidence of possession shall be stated and the location of such evidence carefully given in relation to both the measured boundary lines and those established by the record. An absence of notation on the survey shall be presumptive of no observable evidence of possession.
- (g) The location of all buildings upon the plot or parcel shall be shown and their locations defined by measurements perpendicular to the nearest perimeter boundaries. The precision of these measurements shall be commensurate with the Relative Positional Accuracy of the survey as specified in the current Accuracy Standards for ALTA/ACSM Land Title Surveys. If there are no buildings erected on the property being surveyed, the plat or map shall bear the statement, "No buildings." Proper street numbers shall be shown where available.
- (h) All easements evidenced by Record Documents which have been delivered to the surveyor shall be shown, both those burdening and those benefiting the property surveyed, indicating recording information. If such an easement cannot be located, a note to this effect shall be included. Observable evidence of easements and/or servitudes of all kinds, such as those created by roads; rights-of-way; water courses; drains; telephone, telegraph, or electric lines; water, sewer, oil or gas pipelines on or across the surveyed property and on adjoining properties if they appear to affect the surveyed property, shall be located and noted. If the surveyor has knowledge of any such easements and/or servitudes, not observable at the time the present survey is made, such lack of observable evidence shall be noted. Surface indications, if any, of underground easements and/or servitudes shall also be shown.
- (i) The character and location of all walls, buildings, fences, and other visible improvements within five feet of each side of the boundary lines shall be noted. Without expressing a legal opinion, physical evidence of all encroaching structural appurtenances and projections, such as fire escapes, bay windows, windows and doors that open out, flue pipes, stoops, eaves, cornices, areaways, steps, trim, etc., by or on adjoining property or on abutting streets, on any easement or over setback lines shown by Record Documents shall be indicated with the extent of such encroachment or projection. If the client wishes to have additional information with regard to appurtenances such as whether or not such appurtenances are independent, division, or party walls and are plumb, the client will assume the responsibility of obtaining such permissions as are necessary for the surveyor to enter upon the properties to make such determinations.
- (j) Driveways, alleys and other ways of access on or crossing the property must be shown. Where there is evidence of use by other than the occupants of the property, the surveyor must so indicate on the plat or map. Where driveways or alleys on adjoining properties encroach, in whole or in part, on the property being surveyed, the surveyor must so indicate on the plat or map with appropriate measurements.
- (k) As accurately as the evidence permits, the location of cemeteries and burial grounds (i) disclosed in the Record Documents provided by client or (ii) observed in the process of performing the field work for the survey, shall be shown.

(l) Ponds, lakes, springs, or rivers bordering on or running through the premises being surveyed shall be shown.

6. As a minimum requirement, the surveyor shall furnish two sets of prints of the plat or map of survey to the title insurance company or the client. If the plat or map of survey consists of more than one sheet, the sheets shall be numbered, the total number of sheets indicated and match lines be shown on each sheet. The prints shall be on durable and dimensionally stable material of a quality standard acceptable to the title insurance company. The record title description of the surveyed tract, or the description provided by the client, and any new description prepared by the surveyor must appear on the face of the plat or map or otherwise accompany the survey. When, in the opinion of the surveyor, the results of the survey differ significantly from the record, or if a fundamental decision related to the boundary resolution is not clearly reflected on the plat or map, the surveyor may explain this information with notes on the face of the plat or map or in accompanying attachments. If the relative positional accuracy of the survey exceeds that allowable, the surveyor shall explain the site conditions that resulted in that outcome with a note on the face of the map or plat.

7. Water boundaries necessarily are subject to change due to erosion or accretion by tidal action or the flow of rivers and streams. A realignment of water bodies may also occur due to many reasons such as deliberate cutting and filling of bordering lands or by avulsion. Recorded surveys of natural water boundaries are not relied upon by title insurers for location of title.

When a property to be surveyed for title insurance purposes contains a natural water boundary, the surveyor shall measure the location of the boundary according to appropriate surveying methods and note on the plat or map the date of the measurement and the caveat that the boundary is subject to change due to natural causes and that it may or may not represent the actual location of the limit of title. When the surveyor is aware of changes in such boundaries, the extent of those changes shall be identified.

8. When the surveyor has met all of the minimum standard detail requirements for an ALTA/ACSM Land Title Survey, the following certification shall be made on the plat:

To (name of client), (name of lender, if known), (name of title insurance company, if known), (name of others as instructed by client):

This is to certify that this map or plat and the survey on which it is based were made in accordance with the "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys," jointly established and adopted by ALTA and NSPS in 2005, and includes Items _____ of Table A thereof. Pursuant to the Accuracy Standards as adopted by ALTA and NSPS and in effect on the date of this certification, undersigned further certifies that in my professional opinion, as a land surveyor registered in the State of _____, the Relative Positional Accuracy of this survey does not exceed that which is specified therein.

Date: _____ (signed) _____ (seal)
Registration No.

NOTE: If, as otherwise allowed in the Accuracy Standards, the Relative Positional Accuracy exceeds that which is specified therein, the following certification shall be made on the plat:

To (name of client), (name of lender, if known), (name of title insurance company, if known), (name of others as instructed by client):

This is to certify that this map or plat and the survey on which it is based were made in accordance with the "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys," jointly established and adopted by ALTA and NSPS in 2005, and includes Items _____ of Table A thereof. Pursuant to the Accuracy Standards as adopted by ALTA and NSPS and in effect on the date of this certification, undersigned further certifies that in my professional opinion, as a land surveyor registered in the State of _____, the maximum Relative Positional Accuracy is _____ feet.

Date: _____ (signed) _____ (seal)
Registration No.

The 2005 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys are effective January 1, 2006. As of that date, all previous versions of the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys are superseded by these 2005 standards.

*Adopted by the American Land Title Association on October 5, 2005.
Adopted by the Board of Directors, National Society of Professional Surveyors on October 24, 2005.
American Land Title Association, 1828 L St., N.W., Suite 705, Washington, D.C. 20036.
National Society of Professional Surveyors, Inc., 6 Montgomery Village Avenue, Suite 403, Gaithersburg, MD 20879*

TABLE A

OPTIONAL SURVEY RESPONSIBILITIES AND SPECIFICATIONS

NOTE: The items of Table A must be negotiated between the surveyor and client. It may be necessary for the surveyor to qualify or expand upon the description of these items, e.g., in reference to Item 6, there may be a need for an interpretation of a restriction. The surveyor cannot make a certification on the basis of an interpretation or opinion of another party. Items 16, 17 and 18 are only for use on projects for the U.S. Department of Housing and Urban Development (HUD).

If checked, the following optional items are to be included in the ALTA/ACSM LAND TITLE SURVEY, except as otherwise negotiated:

1. _____ Monuments placed (or a reference monument or witness to the corner) at all major corners of the boundary of the property, unless already marked or referenced by an existing monument or witness to the corner.
2. _____ Vicinity map showing the property surveyed in reference to nearby highway(s) or major street intersection(s).
3. _____ Flood zone designation (with proper annotation based on federal Flood Insurance Rate Maps or the state or local equivalent, by scaled map location and graphic plotting only.)
4. _____ Gross land area (and other areas if specified by the client).
5. _____ Contours and the datum of the elevations.
6. _____ List setback, height, and floor space area restrictions disclosed by applicable zoning or building codes (beyond those required under paragraph 5d of these standards). If none, so state. The source of such information must be disclosed. See "Note" above.
7. _____ (a) Exterior dimensions of all buildings at ground level
(b) Square footage of:
_____ (1) exterior footprint of all buildings at ground level
_____ (2) gross floor area of all buildings; or
_____ (3) other areas to be defined by the client
_____ (c) Measured height of all buildings above grade at a defined location. If no defined location is provided, the point of measurement shall be shown.
8. _____ Substantial, visible improvements (in addition to buildings) such as billboards, signs, parking structures, swimming pools, etc.
9. _____ Parking areas and, if striped, the striping and the type (e.g. handicapped, motorcycle, regular, etc.) and number of parking spaces.
10. _____ Indication of access to a public way on land such as curb cuts and driveways, and to and from waters adjoining the surveyed tract, such as boat slips, launches, piers and docks..
11. _____ Location of utilities (representative examples of which are shown below) existing on or serving the surveyed property as determined by:
_____ (a) Observed evidence
_____ (b) Observed evidence together with evidence from plans obtained from utility companies or provided by client, and markings by utility companies and other appropriate sources (with reference as to the source of information)
 - railroad tracks and sidings;
 - manholes, catch basins, valve vaults or other surface indications of subterranean uses;
 - wires and cables (including their function, if readily identifiable) crossing the surveyed premises, all poles on or within ten feet of the surveyed premises, and the dimensions of all crossmembers or overhangs affecting the surveyed premises; and
 - utility company installations on the surveyed premises.
12. _____ Governmental Agency survey-related requirements as specified by the client.

13. _____ *Names of adjoining owners of platted lands.*
14. _____ *The distance to the nearest intersecting street as designated by the client*
15. _____ *Rectified orthophotography, photogrammetric mapping, laser scanning and other similar products, tools or technologies may be utilized as the basis for the location of certain features (excluding boundaries) where ground measurements are not otherwise necessary to locate those features to an appropriate and acceptable accuracy relative to a nearby boundary. The surveyor shall (a) discuss the ramifications of such methodologies (e.g. the potential accuracy and completeness of the data gathered thereby) with the title company, lender and client prior to the performance of the survey and, (b) place a note on the face of the survey explaining the source, date, relative accuracy and other relevant qualifications of any such data.*
16. _____ *Observable evidence of earth moving work, building construction or building additions within recent months.*
17. _____ *Any changes in street right of way lines either completed or proposed, and available from the controlling jurisdiction. Observable evidence of recent street or sidewalk construction or repairs.*
18. _____ *Observable evidence of site use as a solid waste dump, sump or sanitary landfill.*
19. _____