

A Time-Saving Alternative To Complicated, Long-Winded Survey Certificates (With Form)

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With survey certificates, shorter can definitely be better.

ALMOST EVERY REAL ESTATE acquisition, financing, or development transaction requires a surveyor to inspect and measure the real property, then draw a survey diagram and deliver a certificate to back it up. This package of information lets the parties and their counsel better understand the physical characteristics of the real property and identify issues that might impair its value. To some degree, a survey gives the players a substitute for visiting and inspecting the site.

Perhaps out of instinct, real estate lawyers who close significant commercial transactions sometimes try to develop comprehensive and thorough certificates for any surveyor to sign. These certificates often consist of a single long paragraph that goes on for a page or more. This overwhelming block of type asks the surveyor to give as many factual assurances as possible about the real property.

Lawyers use long form survey certificates both to avoid leaving out something that others would have included and to try to include new improvements that others might not have imagined. Survey certificates of this type can, however, come as quite a burden to surveyors, many of whom operate relatively informal one-person shops. They have limited enthusiasm for huge blocks of single-spaced text whose length might better be measured with a ruler than by counting lines. The results: procrastination, negotiations, extra expense, and unnecessary excitement when the absence of a “satisfactory” survey certificate creates a last-minute emergency at closing.

USING INDUSTRY SURVEY STANDARDS • Lawyers can prevent this time-consuming process. The title insurance industry and the surveying profession have prescribed through reasonable standards exactly what a survey should show and exactly what assurances a surveyor should give his or her client. By relying on those standards as much as possible, a real estate lawyer can substantially trim back and simplify the required form of “surveyor certificate,” yet obtain comfort

entirely appropriate for the typical real estate loan or other transaction. The real estate lawyer can achieve all this with very little verbiage at all.

The industry-wide survey standards have been updated several times, most recently in 1999, as the combined work of the American Land Title Association (“ALTA”), the American Congress on Surveying and Mapping (“ACSM”) and the National Society of Professional Surveyors (“NSPS”). The latest edition is called the *Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys* (“ALTA/ACSM Survey Standards”), and can be found online at www.acsm.net/99altawd97.doc.

Collectively, the authors of the ALTA/ACSM Survey Standards have identified and handled almost every issue that a typical lawyer’s long-winded survey certificate would address. Moreover, the ALTA/ACSM Survey Standards add a level of precision otherwise absent from survey certificates, and also take into account the limitations, expectations, and practices of the surveying profession.

Use ALTA/ACSM Standards As Base

Using the ALTA/ACSM Survey Standards as a base, you can ask a surveyor to provide only an extremely minimal surveyor’s certificate—sufficient merely to confirm that the surveyor complied with the applicable requirements of the ALTA/ACSM Standards and a few other matters. Such a certificate effectively incorporates by reference the ALTA/ACSM Standards, and hence as a practical matter forces the surveyor to show on the survey all matters that should typically concern a lawyer and his or her client.

You must then confirm that someone looks at and pays attention to the survey and thinks about the information that the survey shows—a step in the closing process that should already happen anyway, but may not receive the emphasis it should if the attorneys and paralegals are devoting their efforts to fighting over survey certificates. If the attorneys and paralegals use a simplified form of survey certificate, though, they may find that they receive the survey itself sooner in the closing process and can devote their efforts to reviewing it rather than being distracted by the need to negotiate a survey certificate that really shouldn’t need to be negotiated at all. You will discover any survey issues earlier in the process, and perhaps reduce delays and last-minute crises.

The ALTA/ACSM Standards define some optional items that a survey might or might not disclose, all listed in Table A of the Standards. In practice, any careful business person or real estate attorney will want the survey to cover almost all the Table A items. Appendix 3 at the end of this article indicates which Table A items you can usually omit, and why.

Appendix 1: Minimalist

Surveyor's Certificate

Appendix 1 offers an example of a minimalist surveyor's certificate, which should do the job for any real estate transaction requiring a survey and survey certificate, absent special and unusual circumstances. The sample certificate in Appendix 1 requires the surveyor to state that the survey complies with the ALTA/ACSM Standards and includes most of the optional items listed in Table A of those standards. If you obtain a surveyor's certificate in this form, you have covered all the bases that usually need to be covered, except anything site-specific or deal-specific.

Appendix 2: Common But Unnecessary Language

To support that statement, Appendix 2 of this article includes sample language extracted from many survey certificates that have crossed the author's desk or that the author has perpetrated for transactions. In each case, the commonly seen language is unnecessary because the ALTA/ACSM Survey Standards (including the specified Table A items) already cover exactly the same requirements—often with greater precision and detail than the commonly seen language extracted in Appendix 2. For each sample of common language in survey certificates, Appendix 2 demonstrates why that language is unnecessary, by quoting the relevant requirements of the ALTA/ACSM Standards. In each case, the ALTA/ACSM Standards fully cover the same ground as the the commonly seen language, often with greater detail and practical scope. Given this overlap, lawyers and their clients lose nothing by requiring only an extremely minimal form of surveyor's certificate, such as the one in Appendix 1.

Appendix 3: Non-Customary Assurances That Create Problems

The forms of surveyor certificate that lawyers create also often raise problems by asking the surveyor to provide assurances that are either irrelevant or outside the surveyor's expertise. Many of those are summarized in Appendix 3. A surveyor does not usually expect to be responsible for these issues. If you ask the surveyor to assume that responsibility, the surveyor will likely object, because the requirement is not standard for the market, at least as the surveyor understands the market. You can therefore streamline the survey process by not asking for these assurances. If you nevertheless intend to ask for them, you should do so early in the process and be ready for objections. If necessary, find someone else (such as local counsel, a title insurance company, or an engineer) to provide the desired comfort if you really need it.

CONCLUSION • By using a minimal survey certificate like the one in Appendix 1, and by limiting the surveyor's responsibilities to a set that

is standard in the relevant market, you can assure that the survey certificate, a “routine” element of the closing process, stays routine and simple, and does not produce negotiations, delays, or surprises. At the same time, the use of such a certificate will give your client all the comfort typically obtained from a survey and surveyor’s certificate, assuming the property raises no special issues or concerns.