



By Gary Kent, LS

Gary Kent is Director, Integrated Services at The Schneider Corporation in Indianapolis. He is past-president of ACSM and chairs the ALTA/ACSM Committee for NSPS and the Liaison Committee for ALTA. He is on the Indiana Board of Registration and lectures both locally and nationally.

## Developments and Questions Regarding the New 2011 ALTA/ACSM Standards

**A**fter more than two years of diligent work on the part of a number of persons and with the passing of February 23rd, the effective date of the new 2011 ALTA/ACSM Standards, one could have mistakenly thought that all of the hard work was done. However, as word of the new standards got out, and surveyors, attorneys, title companies and lenders started studying them, a number of questions, comments and suggestions have resulted. Some have arisen due to confusion or wording that the committee should have done better with in writing the new standards. Others merely reflect developments since the February 23, 2011 effective date.

With this column, we will share the various developments, comments, concerns and general 'buzz' about the standards that we are hearing about and responding to. Hopefully, this information will help surveyors be better prepared for the issues they may face. Credit should be given to Richard Bales (Attorney with Chicago Title), Kelly Romeo (ALTA), and the rest of the joint committee for assistance in putting together a set of FAQs that address much of what follows in this column.

The actual FAQ document (which will be revised occasionally) can be found on [www.ACSM.net](http://www.ACSM.net). Click on the "Standards" tab near the top center of the home page, then select "ALTA/ACSM Standards," and "FAQs." They are also on ALTA's web site at [www.alta.org](http://www.alta.org). Click on the "Publications" tab near the top center of the home page, then select "Policy Forms," and scroll down to "Most Requested."

One thing that the new 2011 Standards have caused is actually very good for everyone involved. As I have routinely asserted in my columns and programs, most attorneys, title companies, realtors and lenders who order, review or otherwise deal with the ALTA/ACSM Standards have actually never

Another attorney took exception to the fact that the certification no longer included a statement that any new description prepared by the surveyor described one and the same property as the record description. I politely responded that the ALTA/ACSM certification has never included such a statement, but

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read them—and not just the 2011 version; many have never read any version.

Because word is out that the 2011 version represents a major rewrite and reorganization of the standards, many of those who have never read them are actually now doing so. This is a good thing! The result, however, is a bit frustrating sometimes.

One email forwarded to me was from an attorney who was very upset with the wording in Section 2 requiring that the person placing the order for the survey provide written authorization from the party responsible for paying. I pointed out that the wording he was taking exception to has actually been in the standards, virtually unchanged, since 1992. That would be for the last 19 years and five versions of the standards!

that there has never been a prohibition against including some sort of note to that effect (in fact, it would be desirable for the surveyor to do so, but only if it's a true statement.)

Notwithstanding those issues, there have been recurring questions associated with some of the requirements in the 2011 Standards.

### Section 3.A Effective Date (Updates and Recertifications)

Any prior ALTA/ACSM Land Title Survey which is “updated” or “recertified” needs to now be made in accordance with the 2011 Standards. A client and surveyor *could* agree to different terms—including the use of earlier ALTA/ACSM Standards—but in such cases the

final plat or map cannot be identified as an ALTA/ACSM Land Title Survey.

## Section 4 Adjoiner Deeds

The American Land Title Association's position has always been that title research should be provided to the surveyor.

Notwithstanding that, here are a few tips that will help address questions that may arise with respect to this requirement.

- The ALTA/ACSM standards are actually a contract between the surveyor and client. Although the standards anticipate that title research will be provided by the title company, they cannot actually *force* that (unless, presumably, the title company is the actual client).
- Many, if not most, states require that surveyors conduct at least a portion of their own title research, although even in those states, some surveyors will likely try to obtain assistance from the title company by invoking Section 4.
- There is nothing in the standards stating that the research must be provided by the title company *at no cost*.

Some title companies are declining to provide adjoiner deeds, while others are providing it for a fee. In any event, surveyors should try to ascertain what is going on their areas and quote their surveyors accordingly (i.e., including the research in their fee where appropriate).

## Sections 4 and 6.B.x Title Commitment

Under the 2011 ALTA/ACSM Standards, the most recent title work must be provided to the surveyor and noted on the survey. The actual wording in Section 4 says "*most recent title commitment*," but the committee's intent would also cover the most recent title policy or title opinion.

Surveyors should keep in mind that the "most recent" title work provided may be older than they would really like. This is beyond the surveyor's control. Surveyors may wish to point out in their contract and/or on their plat or map that older title work may place the client at risk because there may have been changes in the chain of title that could negatively impact the surveyed property.

Surveyors may send out pro forma copies of their plats/maps before receiving title work, but the final signed/sealed survey must reference the title work or it cannot be titled an ALTA/ACSM Land Title Survey.

## Section 7 Certification

There has been some concern in the client and lending community regarding the use of the words "*only*" and "*unaltered*" in Section 7 of the 2011 Standards; however, most lenders and clients seem to be adapting.

Under the 2011 Standards, the only certification allowed on the face of an ALTA/ACSM Land Title Survey is that specified in Section 7, except as may be required by law or regulation (see Section 3.B. of the 2011 Standards). Some state surveying boards, for example, require that specific wording be included in certifications in their states.

The certification in Section 7 is a "short-form" certificate that simply states that the survey was conducted in accordance with the 2011 Standards and including the listed Table A items.

For those clients or lenders who absolutely require an additional or alternate certification, it is permissible for the surveyor to negotiate such, but *it must be placed on a separate sheet of paper* (e.g., company letterhead) and cross-referenced to the Survey. Alternatively, the surveyor *could* put it on the face of the plat/map, but if that is done, *it cannot be identified as an ALTA/ACSM Land Title Survey*.

If the client or lender has some esoteric issue that the Section 7 certification does not cover, usually a simple statement/note on the plat or map, or in a Surveyors Report, will suffice.

The change effected by the wording in Section 7 of the 2011 Standard is essentially a statement from ALTA and NSPS/ACSM that title insurance coverage can be provided without burdensome, and often unreasonable, alternate certifications.

By the way, every lender's certificate I ever saw created unconditional warranties or guarantees on the part of the surveyor, so if the surveyor does decide to provide it on a separate sheet, he or she needs to review the wording very carefully and negotiate modifications as appropriate.

Some lenders are trying to say that Section 3.B. allows the use of alternate certifications, but it does not. 3.B. specifically addresses *jurisdictional* statutes, rules, ordinances, and standards of practice, not lender requirements. Others claim that under Table A item 12, HUD can require their certificate. I believe the joint committee will agree that there was no intent that Table A item 12 could trump the very clear wording ("*only*" and "*unaltered*") of Section 7 regarding the certification.

## HUD Requirements

HUD seems to have at least three sets of survey requirements. The first are the HUD LEAN 232 standards which cover nursing home-types of properties. The new HUD LEAN requirements came out on February 22nd—the day before the new ALTA/ACSM Standard became effective. They adapted well to the new Standards—even adopting the new Section 7 certification!

Second are the HUD Multi-family requirements, a new version of which is now out (dated May 2011). Unfortunately, despite some advocates for the short-form Section 7 certification within HUD, their attorneys apparently do not trust surveyors to follow the ALTA/ACSM Standards, thus they have stuck with requiring their own certificate wording. Although their certification wording is not bad, it is contrary to the Section 7 requirement as to the required certification.

It is well-documented that some HUD offices are completely inflexible on the certification wording; however, others are not—so surveyors should not give in on the certification without asking. There is also definitive evidence that HUD Multi-family will allow their certification to be provided on a separate sheet. If they can be persuaded to allow that, then there is no conflict with Section 7 (which addresses only certifications on the face of the plat or map).

There is, I believe, yet another set of HUD requirements, the revision for which is still in development (probably not finalized and approved until late summer). I'm hoping our advocates inside HUD can prevail on them to go with the Section 7 certification, but that remains to be seen.

My advice to surveyors is to ask and probe, but in the end, they will have to make their own decisions on what to do when it comes to a HUD office that is inflexible.

## Table A, Item 6 Zoning

In most cases, this Item is related to the client or lender requesting an ALTA 3.1 "*Completed Structure*" zoning endorsement from the title company. This endorsement is very important and requires careful research on the part of the title company before they will issue one. Title companies generally do not rely on the surveyor's research to support issuance of this endorsement.





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cannot delineate wetlands unless they are qualified. One could perhaps argue that Item 19 requires that the surveyor review the Wetlands Inventory map, but that was not intended.

### **Table A, Item 21 Professional Liability Insurance**

This new Table A item was included because there was a consensus on the joint committee that most persons believe all surveyors carry professional liability insurance. This belief has actually been validated by the numerous questions from title companies and attorneys resulting from the inclusion of the item.

Under Item 21, surveyors will need Professional Liability Insurance (*a.k.a.* “Errors and Omissions” Insurance). The term of coverage will need to be agreed upon between the surveyor and client. Most states have a statute of repose, in addition to their statute of limitations, limiting the length of time that the surveyors are liable for their professional services. Such laws may define the period of time unless the parties contract to a different time frame. Surveyors should review the terms of their policy to be sure they are not contractually agreeing to something outside the scope of their policy.

The amount of insurance referred to in Table A, Item 21, is also a matter that must be negotiated between the surveyor and the client. The client may take into consideration the answers to questions such as: If the surveyor were to make a mistake, what might be its nature? What would be the potential monetary damages resulting from this mistake? The answers will depend, at least in part, on the value and location of the land, and the type of improvements, if any, constructed on the land. For example, it seems reasonable to conclude that the potential damages resulting from an error made while surveying a twenty-acre tract of vacant land in the middle of a rural countryside will not be as great as the potential damages stemming from an error made while surveying a twenty-story office building in the downtown of a metropolitan area.

### **Looking Ahead**

As before, the committee is keeping track of all suggestions and apparent confusing language so they can be addressed with the next version of the ALTA/ACSM standards; the list is already nearly three pages long! 