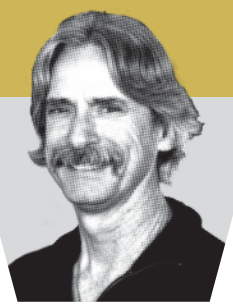

Reconnaissance

The Ridiculous and the Ludicrous

Lender's Certificates

Recently I heard from a surveyor who had performed an ALTA/ACSM Land Title Survey on a property three years earlier. The lender—who shall remain unnamed—now wanted an "update" with a certification that included the following clauses:

1. [T]he undersigned certifies that [choose one of the following] (i) Relative Positional Precision of this survey does not exceed that which is specified therein or (ii) the maximum Relative Positional Precision is ___ [feet].
2. The survey was made on the ground by an instrument survey and correctly shows the location and type of all buildings, structures and other improvements situated on the subject property and any other matters situated on the subject property.
3. The location of all improvements on the subject property is in accord with minimum setback, side yard and rear yard lines, provisions and restrictions of record affecting the Property.
4. Municipal water, municipal storm sewer and municipal sanitary sewer facilities and telephone, gas and electric services of public utilities are available at the boundary of the property in the locations indicated hereon.
5. The subject property does not serve any adjoining property for visible subsurface drainage structures, visible water courses, utilities or structural support.
6. Except as shown on the survey, there are no wetlands located on the property.
7. The parties listed above and their successors and assigns are entitled to rely on the survey and this certificate as being true and accurate.

The surveyor reported that he refused to execute this certification as the lender demanded, so the lender told the buyer's attorney to find another surveyor. The transaction involved about 30 sites across the country and apparently (or perhaps the correct word is "supposedly") every other surveyor had agreed to provide the certificate.

Now, I know that I am not the only surveyor who sees major problems with this certification wording—I have written about such issues in this column in the past—but apparently there are many surveyors who (a) do not see a problem with any of it, (b) sign it without reading it, (c) don't mind violating their registration acts (d) don't mind practicing law while they are at it, (e) are intimidated into signing it by the lender's attorney, or (f) are afraid of losing the work. Or maybe all of the above.

> "Apparently there are many surveyors out there who do not mind violating their registration act and practicing law while they are at it."

What's wrong? Let's dissect this train crash.

First of all, even if a surveyor was inclined to work with the lender to provide an alternate certificate, pursuant to Section 7 of the 2011 ALTA/ACSM Standards that additional certificate *cannot appear on the face of the plat or map.* It would have to be provided on a separate sheet of paper.

Beyond that, item 1 of the certificate is a mashup that draws from wording out of the 2005 ALTA/ACSM Standards. It is not consistent with, and goes beyond, the mandatory certification wording in Section 7 of the 2011 Standards.

As worded, item 2 states that the surveyor has shown "all" buildings, structures and "other improvements" (whatever those might be) including all subsurface buildings, structures and improvements – much of which the surveyor could not possibly have observed. If you think that, in a dispute caused by a utility vault not appearing on the survey because the surveyor did not observe it, the plaintiff will amenably agree that "all" did not include subsurface features, you are woefully misinformed. The surveyor *will* be held to unqualified certification wording. This is why the 2011 standards use the phrase *"observed in the process of conducting the survey"* throughout. *That* you can certify to; "All" you cannot.

The word "correctly" in item 2 implies "without error." And worst of all, if anyone can explain what "*any other matters situated on the subject property*" means, then I suppose they would be safe certifying to have shown those. In my opinion, however, that phrase is fatally ambiguous and any surveyor certifying to it has just certified to having shown pretty much everything on the property—observable or not—including anything the lender decides (after the fact) that you should have shown.

Regarding item 3, surveying is a "where" exercise, it is not a "what" exercise. The building is 18 feet from the boundary line. The setback is 20 feet. Those are matters of survey. Whether that condition is in accord with a setback, provision or restrictions is most assuredly not the practice of surveying.

Certifying to the unqualified wording of item 4 requires surveyors to practice their X–ray vision. Good luck defending your misreported location of that gas line in court after they had to redesign around it

Item 5 calls for an engineering analysis (structural support) and a topographic survey. And that ignores the obvious Catch 22 of whatever constitutes a "visible subsurface" drainage structure.

Unless the surveyor is a qualified wetlands biologist, he or she had better run away from item 6 as fast as possible.

There is no word to describe the wording of item 7 other than "ludicrous." Seriously: I have listed the certified parties at the top of the certificate, yet I still have to state that they are actually entitled to *rely* on the survey and certificate?!

We have addressed "successors and assigns" in this column in the past. Despite the phrasing "the parties … and *their* successors and assigns" this is not about anyone other than the lender. And there is no harm in certifying to the lender's successors and assigns. If you want to charge an additional fee for that, do so, but there is not really any additional liability because you are liable to a lender for the length of the loan. If the original lender sells the loan to another entity, it does not lengthen the term of the loan and you are still liable to a lender.

Title companies do not need "successors and assigns." And any surveyor who certifies to the owner or buyer's successors and assigns is obviously not thinking about what that really means.

Lenders require these ridiculous certifications because there are ignorant surveyors who continue to bow to their unreasonable demands. In the process, those surveyors are practicing law, violating statutes and rules, and taking on an unacceptable amount of liability. What does it take to educate them? ■

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