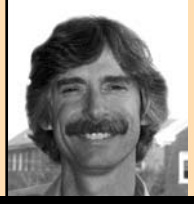
Reconnaissance



By Gary Kent, LS

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Lender Certificates—Just Say "No"

A number of years ago at an ACSM Annual Convention in Baltimore, an attorney for a lending institution made a presentation to a sizable audience of surveyors. A good portion of his program revolved around surveyor certifications.

The attorney passed out a copy of the "long-form" certificate that his employer required of surveyors who performed land title surveys. It was chock full of the same express guarantees and warranties (and traps) that surveyors typically see in most lenders' certificates.

He went to great lengths to explain how he railed on surveyors, how he threatened and cajoled surveyors–anything to get them to sign his certificate–which he demanded that they sign "as-is" with no alterations. His tactics included telling surveyors that they would be responsible should the deal fall through, that they would be responsible should the closing be delayed, that they would not get paid, that he would have to hire another surveyor–anything to get them to sign that certificate.

After a lengthy pause, the attorney then candidly advised those present that "any of you surveyors who sign this certificate are crazy!" Surveyors should accept this as full disclosure regarding lenders' certificates. Yet, why do these things continue to exist?

I don't believe I have ever seen a lender's certificate that did not contain express guarantees and warranties. For example (the following examples are both from an actual lender's certificate), *"No encroachments, protrusions, overlaps, or overhangs of any improvements located on the Premises exist upon any easements encumbering or appurtenant to the Premises..."*

If that sentence sounds harmless to you–think again. *"Any improvements"* includes that buried foundation that you did not know existed and could not possibly observe. *"Encroachment"* is a legal condition, not a matter of survey. *"Any easements"* includes that access easement that was executed, but never recorded. In short, they are asking you to provide, not survey information, but rather a *legal opinion*, regarding something you *cannot see* as it relates to a line that you *could not know existed*.

> **"It is beyond my comprehension that surveyors continue to sign these certificates..."**

Another example: *"The undersigned has examined all applicable materials relative to those types of restrictions and requirements sometimes referred to as use, dimensional, bulk and parking restrictions and requirements which relate to the Premises, and has determined that the existing improvements shown hereon conform to all of the restrictions and requirements which are applicable to the Premises under the terms and the applicable zoning ordinance."*

Any problem there? I can scarcely list all of them. For starters, did you really examine *"all applicable materials?"* Just wondering ... what might that include? More importantly, surveyors need to recognize that *"conformance"* with the restrictions and requirements of a zoning ordinance is *not a matter of survey!* Conformance is a legal issue; conformance is a jurisdictional issue; conformance is <u>not</u> a survey issue. In this case, surveyors are being asked to certify to another legal opinion–this one related to compliance with restrictions of which they may have no knowledge.

It is beyond my comprehension that surveyors continue to sign these certificates. Yet, they do–and very simply put, that's why lenders continue to demand them.

The attorney in Baltimore stated that *85% of surveyors simply signed his certificate with no questions asked!* That is why we continue to see these certificates–because most surveyors sign them! When the lender tells me that I am the first surveyor who ever refused to sign their certificate, I have trouble deciding whether I would be more upset if they were lying, or if they are telling the truth! Unfortunately, they are probably telling the truth, and that is a sorry state of affairs.

So, what is the remedy? I believe it is a six-fold prescription.

1. Use a written contract that specifies the use of the standard certificate straight from the ALTA/ACSM standards. This short-form certificate is, after all, required in paragraph 8 of the standards. When the lender sends you the certificate (which everyone knows comes long after the survey is completed, but only two days–or two hours!–before closing), you can respond that this is not what you contracted to do. And in any case, it will take more time and money–which they, respectively, don't have and don't want to spend.

2. Be intimately familiar with the standards. 95% of the people you will deal with on a land title survey have never seen the standards and have no idea what they contain. Most of the clauses in a lender's certificate (that are typically worded to put a huge burden of liability on the surveyor) are already addressed by the ALTA/ACSM standards in straightforward, non-threatening survey requirements. Be familiar, for example, with what the standards say about "encroachments" and be able to explain why the standards adequately address that issue without you having to certify that "no encroachments exist."

3. Understand the lender's issues and concerns. Remember Stephen Covey's 5th Habit–"Seek First to Understand, then to be Understood." We cannot dismiss the lender's concerns out of hand–we need to understand them, and be able to accommodate reasonable requests. However, by being intimately familiar with the standards, we should be able to alleviate their concerns logically and within the context of the standards and the short-form certificate. (If we cannot, then what they are asking for is probably not something we can certify to anyway.)

4. Carry errors and omissions insurance and rely on your agent to guide you in rejecting certification wording. The bank would like you to have E & O coverage; do they really want you to jeopardize that coverage by using their certification wording?

5. Negotiate with the right person. Often you will find you are talking to a legal assistant who probably has a checklist in front of them. This person has no authority to make a decision or negotiate the certificate. Ask to speak with the attorney. Often you will find them flexible, reasonable and understanding of your issues.

6. Be able to communicate your concerns clearly, respectfully and with confidence. If surveyors will pull together and present a united front on the issue of long-form lenders' certifications, I believe we will see them become less prevalent.

Clarification & Response on Title Commitment Descriptions

In his article "Of Title Policy Descriptions and Reality" that appeared in the May 2005 issue of *The American Surveyor,* Associate Editor Joel Leininger took me to task for suggesting in my January/February article "The Surveyor's Responsibility in Boundary Surveys and Disputes," that the description in a title commitment is *"reliable for* [surveyors] *to use in retracement"* and implying that it *"may be nearly sufficient on its face."*

While Joel extrapolated my comments out further than I intended and beyond what I stated, I *was* remiss in not better qualifying my opinion. I did *not* intend to imply that *any* description offered up by the title company is adequate.

My point as stated was that the title company takes responsibility for senior rights when they agree to insure a description. I stand by that statement. I absolutely agree with Joel; however, that surveyors should not blindly accept any description offered up in the title commitment.

If the title company's description contains errors, or (in the case of a retracement survey) is not from a record document (or both), then the surveyor should, at a minimum, communicate with the title company to determine the source of the description, explain any problems and concerns related to the description, and attempt to resolve (or at least clearly document) any discrepancies between the record description and what the title company is insuring (assuming they insist on using their undocumented or otherwise erroneous description). Serious questions should be raised about any description that is erroneous or of questionable lineage.

***Leininger,** continued from page 10*

provenance. What is to stop anyone from placing a monument wherever he wanted to claim, and then claim based on that monument? Clearly this jeopardizes our system of land tenure. Taken to its logical conclusion, every boundary in the land would become elasticized, constrained only by the imagination of land owners. And subject to change when the neighbor next spring decides to plant pipes instead of flowers.

Rejecting the earlier monument, on the other hand, begins the pin-cushion corner process. How many pipes at the same corner are too many? 4? 10? It would be difficult to persuade uninterested third parties that 10 monuments at a corner reflected well on our profession. And yet, strict adherence to the exactness doctrine above, over time, will result in just that.

So we find ourselves pondering the dilemma, one of many resulting from the collision of mathematics and law. There is no easy solution to this problem.

One Approach

Personally I treat uncalled-for monuments in two ways. First, I try to discover writings that document or otherwise explain the monument. I believe I can defend the adoption of the monument if I can tie it to a survey which I can demonstrate is credible. Obviously the means of doing that will vary from situation to situation, depending on the writings available to me. At other times I am confronted with an unknown monument that, over the course of the analysis, *persuades* me to adopt it. How, you ask? By its character: the size, type, and apparent age of the monument; its consistency with the character of other monuments found on the same property; its relation to those monuments and my ability to correlate the positions of them with the positions specified in the controlling documents, etc. Absent either of these two scenarios, I reject the monument, and set another.

Clearly, these are judgment calls. They demand more time and attention, corner for corner, than other points to be determined in the survey. They also constitute, generally, the less defensible decision points in any retracement. But that does not mean indefensible. Our charge is to discover, evaluate and decide. Uncalled-for monuments present challenges to that charge, but do not alter it.