



**COMMITMENT
TO CLOSING**
TEXAS TITLE INSURANCE REVIEW & DOC PREP

**Understanding Surveys
and Survey Review**

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 **SOUTHWEST
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The History of Land Surveying

- Land surveying is the process by which land is surveyed and measured using mathematical means.
- The history of land surveying dates back thousands of years.
- Forms of land surveying have been around since ancient man in all major civilizations across the globe.
- Land surveying is in fact one of the oldest professions in the world.



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The History of Land Surveying

- Land surveying results were much less accurate in the past, not due to the inabilities of the land surveyors themselves, but due to the inaccuracy of the tools that they had access to.
- As new technology and theories have become available, the techniques and methods used in land surveying have evolved.
- Current land surveyors have access to much more accurate tools, such as GPS (global positioning systems).

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The Future of Land Surveying

- During the past 50 years, surveying and engineering measurement technology has made five quantum leaps: the electronic distance meter, total station, GPS, robotic total station and laser scanner.
- According to one author, unmanned aircraft systems (“UASs”) or drones (also known as unmanned aerial vehicles or “UAVs”) will be the sixth quantum leap in technology.



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Why Do We Need A Survey?

- Because title to real estate is conveyed using the legal description of the property, and because documents are recorded and indexed in the real property records using the legal description.
- Thus, we must have a complete legal description, documented by a licensed surveyor via a survey, for use in:
 - the search and exam process,
 - the conveyance and/or encumbrance of real estate, and
 - the issuance of title insurance policies.

Why Do We Need A Survey?

- Once a survey has been completed on a particular tract of land, a new survey may not be required every time the subject property is sold or encumbered.
- The parties to the transaction, the lender, and the title company may be willing to proceed to closing without a new survey.
- In that case, the existing or “old” survey may be “updated” via an Affidavit, such as the Residential Real Property Affidavit, Form T-47 (which can be modified for commercial transactions).

When Do We Need A New Survey?

- There's a problem with the old survey;
- The property has been replatted or a portion of the property has been sold, conveyed or taken by adverse possession or eminent domain;
- The copy of the survey provided to the title company is not legible or does not have all of the required elements;
- Improvements have been completed on the property;
- A copy of the prior survey cannot be located; or
- One of the parties to the transaction, or the lender, wants a new survey.

The Purpose of a Legal Description

- The purpose of the legal description is to identify in writing the location of a specific and unique parcel of land.
- This description must satisfy one basic requirement: it must indicate how to identify a particular parcel of land relative to monuments on the face of the earth.
- The examiner must determine the validity of a legal description before beginning the examination process and may need to make a requirement to cure a defect in the legal description.

Texas Platting Requirements

- I don't have time to go through this information today, but I've included a summary of Texas platting laws in the paper that I found on the Texas Attorney General's websites related to:
 - Plats
 - Unrecorded plats
 - Condominiums
 - Metes and bounds
- These platting laws are the building blocks of the legal descriptions that will be used in real estate transactions.

Texas Board of Professional Land Surveying

- All land surveys in Texas must be performed by Registered Professional Land Surveyors as defined by the Texas Occupations Code and The General Rules and Procedures and Practices set out by the TBPLS.
 - Note: Effective September 1, 2019, HB1523 created the Texas Board of Professional Engineers and Land Surveyors (PELS), merging the engineering and land surveying boards.
- PELS standards and specifications are mandatory and have the effect of law.
- If not followed, a surveyor is subject to fines and/or suspension or forfeiture of license.



Texas Society of Professional Surveyors (TSPS)

- The TSPS has adopted standards and specifications for 11 categories of surveys, which are set forth in the Manual of Practice for Land Surveying in Texas. (Note: There are actually 9 categories, since both categories 3 and 4 have been deleted.)
- Each of the 11 categories is defined in the manual and has specific requirements. Those 11 categories are listed on Page 7 of the paper.
- The standards and specifications are for voluntary use by surveyors doing work in Texas.



Texas Society of Professional Surveyors

- Updates to the TSPS Manual of Practice were Approved by the Board of Directors October 7, 2021, Effective December 31, 2021.
- The purpose of the update was to add Categories 9 and 10, and to delete Category 4 3.
- The Category 1A Land Title Survey is the survey real estate professionals will encounter most often.
- The pages of the revised Manual that sets forth the Category 1A specifications are attached as **Exhibit A**.

Texas Society of Professional Surveyors

- Introduction to the 2021 TSPS Manual of Practice:

Texas Society of Professional Surveyors (TSPS)

2021 Manual of Practice

2. Introduction. This Manual of Practice is offered for voluntary use. The rules and regulations of the Texas Board of Professional Engineers and Land Surveyors (TBPELS) are mandatory and have the effect of law. The purpose of this Manual of Practice is to prescribe a more stringent standard of practice for land surveying in the State of Texas.

The Manual of Practice was first adopted in 1977 by Texas Surveyors Association (TSA), now Texas Society of Professional Surveyors (TSPS). In 1992, the Texas Board of Professional Land Surveying (TBPLS) adopted minimum Professional and Technical Standards, known as “board rules.” The original TBPLS rules were largely derived from the Manual of Practice. Though changes have been made over the years, the influence continues even today with the rules in place at TBPELS.

While the tools available to surveyors are rapidly changing, this manual does not provide instructions for the proper use of various tools. Rather, the objective of this manual is to provide a uniform standard for professional surveying services.

ALTA/ACSM (Now ALTA/NSPS) Land Title Survey

- Another type of survey that those working in the real estate industry need to become familiar with is the ALTA/NSPS LAND TITLE SURVEY.
- The American Land Title Association (ALTA) and the National Society of Professional Surveyors (NSPS) worked together to adopt details and criteria for the minimum standard of performance for ALTA/NSPS Land Title Surveys.
- Note: NSPS is the legal successor organization to the American Congress on Surveying and Mapping (ACSM).



ALTA/ACSM (Now ALTA/NSPS) Land Title Survey

- **Section 2 of the Minimum Standards reads as follows:**
 - **Request for Survey** - The client shall request the survey, or arrange for the survey to be requested, and shall provide a written authorization to proceed from the person or entity 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/NSPS LAND TITLE SURVEY" is required and which of the optional items listed in Table A, if any, are to be incorporated. **A copy of Table A is attached as Exhibit B.**



ALTA/ACSM (Now ALTA/NSPS) Land Title Survey

- Certain properties or interests in real properties may present issues outside those normally encountered on an ALTA/NSPS Land Title Survey (e.g., marinas, campgrounds, mobile home parks, easements, leases, mineral interests, other non-fee simple interests).
- The scope of work related to surveys of such properties or interests in real properties should be discussed with the client, lender, and insurer, and agreed upon in writing with the surveyor prior to the surveyor commencing work on the survey.
- When required, the client shall secure permission for the surveyor to enter upon the property to be surveyed, adjoining properties, or offsite easements.

The “Area and Boundary” Exception

- Because title agents search written instruments filed in the public record, and do not normally inspect the land itself, certain matters visible on the land cannot be discovered in the title search.
- Therefore, a standard survey exception is included in Schedule B of every title policy, at least at the beginning. That exception excludes from coverage:
 - *Any discrepancies, conflicts, or **shortages in area** or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.*

Providing “Survey Coverage”

- Upon request of the insured, Procedural Rule P-2 allows amendment of the area and boundary exception in the OTP and/or the LP.
- P-2 indicates that upon compliance with certain conditions, the A & B (or “survey”) exception can be amended by deleting all words - except the words “shortages in area.”
 - ~~*Any discrepancies, conflicts, or **shortages in area** or boundary lines, or any encroachments or protrusions, or any overlapping of improvements.*~~

Providing "Survey Coverage"

- What are the P-2 conditions?
 - The title company must be provided a new survey, or an old survey together with a T-47 Affidavit - notwithstanding the age of the survey or the identity of the person for whom the survey was prepared.
 - The policy to be issued must cover the same land as described in the existing real property survey.
 - The survey must be acceptable to the Company.

T-19 and T-19.1 Survey Coverage

- In the event that the lender and/or the buyer/borrower are not satisfied with the survey coverage provided by the amendment of the survey exception as described above, they may ask for additional survey coverage via the Restrictions, Encroachments and Minerals Endorsements (T-19 for a Loan Policy, and T-19.1 for an Owner's Policy).



Is the Survey Acceptable?

- Your paper includes a list of “Elements of an Acceptable Survey” for Title Insuring Purposes on Page 12. Let’s briefly review that list.
- The policy to be issued must cover the same land as described in the existing real property survey – so make sure you have a survey(s) that cover all the land to be insured.
- The survey must be acceptable to the Company – so know your various underwriters’ requirements.

Other Survey Considerations for Title Folks

- When is a survey “too old?” In other words, does my underwriter have rules that say: “you cannot accept a survey that is over 10 years old (or 20 years)?”
- What if the survey is missing the surveyor’s signature, or seal?
- What if the survey has copyright language on it?
- Who should/can sign the T-47?
- What if the T-47 indicates that there have been improvements added since the date of the previous survey?
- Can my seller/borrower sign a T-47 in conjunction with a survey and T-47 that was provided to him when he acquired the property?

Primary Purpose of Survey Review

- **Survey Review – From a Title Company Perspective**
- If the survey provided to the title company is acceptable, the survey will be reviewed for encroachments or protrusions of improvements, easements that do not appear in the real property records, etc.
- If survey matters are disclosed during the survey review, a specific exception to each survey matter found will be added to Schedule B of the commitment.
- The goal of the title company’s survey review is to identify matters which might lead to claims or disputes and then to make an informed underwriting decision regarding acceptable risk re: those matters.

Primary Purpose of Survey Review

- **Survey Review – From a Real Estate Attorney Perspective**
- Your paper includes 10 pages excerpted from “Title & Survey Objection Letter, Instruction Letter: Guidelines and Solutions,” written by Mr. G. Roland Love, Esquire, and presented at the 41st Annual Advanced Real Estate Law Course in 2021, starting on Page 15.
- Two of the key takeaways I’d like you to get from this section are:
 - An understanding of a variety of items that turn up on a survey that affect title insurance, and
 - How those “variety of items” may end up as survey exceptions or require some sort of curative action. Roland’s paper describes that better than I ever could!



Primary Purpose of Survey Review

- The items discussed in Roland's paper represent a series of requirements that have been determined, over the years, to be of importance in the review of almost every survey.
- Careful consideration of these items is critical to conducting a proper and complete review of a survey as an important part of the due diligence process.
- These items also reveal a variety of survey nuances that affect title insurance coverage and the real estate transaction.



Certifications

- Under the 2021 Standards, the only certification allowed on the face of an ALTA/NSPS Land Title Survey is the Certification in Section 7, except as required by law or regulation. Some state surveying boards, for example, require specific wording for Certification.
- The Certification in Section 7 is sufficient in most cases, and this standard "short-form" Certification covers every issue that the Surveyor can actually and honestly certify to by stating that the Survey was conducted in accordance with the Standards.



Certifications – ALTA/NSPS

Section 7 of the Minimum Standards reads as follows:

Certification - The plat or map of an ALTA/NSPS Land Title Survey must bear only the following unaltered certification, except as may be required pursuant to Section 3.B. above:

To (name of insured, if known), (name of lender, if known), (name of insurer, if known), (names of others as negotiated with the client):

This is to certify that this map or plat and the survey on which it is based were made in accordance with the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys, jointly established and adopted by ALTA and NSPS, and includes Items _____ of Table A thereof. The fieldwork was completed on _____ [date].

Date of Plat or Map: _____ (Surveyor's signature, printed name and seal with Registration/License Number)



Certifications - TSPS

Certification. All Category 1A survey plats shall include a certification. Each surveyor may determine the preferred wording for the certification, but all certifications shall contain the following language:

This survey substantially complies with the current Texas Society of Professional Surveyors Manual of Practice requirements for a Category 1A, Condition ____, Land Title Survey.

Certifications – Standards Survey

I DO HEREBY CERTIFY THAT THIS SURVEY WAS THIS DAY MADE ON THE GROUND OF THE PROPERTY LEGALLY DESCRIBED HEREON (OR ON ATTACHED SHEET), AND THERE ARE NO ENCROACHMENTS EXCEPT AS SHOWN, AND WAS DONE BY ME OR UNDER MY SUPERVISION, AND CONFORMS TO OR EXCEEDS THE CURRENT STANDARDS AS ADOPTED BY THE TEXAS BOARD OF PROFESSIONAL LAND SURVEYING.

I hereby certify that on the below date, the herein described property, together with improvements located thereon, was surveyed on the ground and under my direction, and that this map, together with dimensions as shown hereon, accurately represents the facts as found on the ground this date.

I, Timothy Lane Kennedy, Registered Professional Land Surveyor No. 6119 in the State of Texas, do hereby certify to the title agency, underwriter, lender, mortgage company and/or purchaser that this drawing represents a survey performed on the ground. To the best of my knowledge the drawing correctly represents the facts found at the time of the survey; size, location and type of buildings and improvements are as shown. There are no apparent discrepancies, conflicts, encroachments, overlapping of improvements, visible utility lines, easements or roads in place except as shown.



Certifications

- The form of certification requested by the parties, particularly by lenders, has become a matter of some concern and possibly the subject matter of negotiations between the surveyor and the parties to whom the survey is certified.
- At the same time the ALTA/NSPS structure is intended to bypass these negotiations to a large extent, and provide a certificate universally accepted by parties, surveyors, and the title insurance company.
- The content of the certificate determines the degree of investigation of the site, and in many instances the surveyor is simply unable to perform the necessary investigation to support the contents of the form of certificate being requested.



Perimeter Property Lines

- All perimeter property lines must be specifically identified on the survey by courses and distances.
- A clear definition of the perimeter, with courses and distances shown, will very quickly disclose conflicts which might be a problem, especially with respect to easements and access.
- The contiguity of perimeter lines with street right-of-way lines and easements is crucial to the determination of the degree of coverage available as to matters of access.



Property Description Discrepancies

- It is not uncommon for there to be variances between the vesting deed legal description, the plat description, and the survey legal description.
- The practical tendency is to accept the survey legal description as the best contemporary description of the property, especially once any variances or discrepancies have been identified and resolved.
- The prevailing practice among lenders, in particular, is to use the survey legal description on their loan documents and to instruct the title company to be in a position to insure that description. Typically, the title company is readily agreeable to this.

Property Description Discrepancies

- You may face a grantor who will refuse to convey to the purchaser using any description of the property other than the exact description by which he took title.
- Assuming that the vesting deed legal description and the survey legal description are at reconcilable odds with each other, the title company can be asked to insure using a legal description that incorporates the survey legal description, followed with language to the effect of:

" . . . and being the same property described as follows:"

Other Property Description Issues

- Square Footage/Acres: The total number of square feet and/or acres contained in the property should be specifically identified on the survey. The total area comprising the property can be of concern to all parties, particularly if pricing or ordinances are affected.
- But remember what we said about "survey coverage" in a title policy:
 - When the title agent has a survey to review and therefore the means to discover "on the ground" problems, the exception may be amended to delete all the words in the exception *save "shortages in area."*
 - The Texas Department of Insurance has decided that liability for mistakes in computing area should lie with surveyors, not title insurers.

Other Property Description Issues

- The title company may not want to include the total number of square feet and/or acres set forth in the legal description in the title policy – but the lender may require the legal description in both the DOT and the Loan Policy to match the survey legal description exactly.
- In this case, a statement as to the quantity of land will be included as a part of the legal description in Schedule A of the Loan Policy, followed by one of the following “notes.”
 - Note: The Company is prohibited from insuring the area or quantity of the land described herein. Any statement in the legal description contained in Schedule A, as to area or quantity of land is not a representation that such area or quantity correct, but is made only for the informal identification purposes and does not override Item 2 of Schedule B hereof. Or,
 - Note: The Company does not represent that the above acreage or square footage calculations are correct.

Exceptions to Title

- One of the primary reasons for reviewing a survey is so the purchaser and/or the lender can specifically locate and analyze all of the easements and other interests in favor of third parties which affect the property.
- All exceptions shown on the Commitment must either be:
 - shown (i.e., plotted) on the survey, or
 - identified on the face of the survey as being un-plottable.

Exceptions to Title

Roland's paper goes on to discuss in detail topics such as:

- Easements
- Building set-back lines
- Streets and Rights-of-way
- Structures and Improvements
- Encroachments
- Utilities
- Flood Zone Information – and more!!

Easements

- Each easement affecting the property must be identified on the survey by the recording information for the document creating the easement.
- With regard to each easement shown on the survey, the surveyor should:
 - (i) show both boundary lines, rather than just the centerline,
 - (ii) depict the width by arrows pointing to each boundary line, and
 - (iii) label with the applicable recording information (i.e., the volume/page number or the plat's recording number).
- What about blanket easements?

Blanket Easements

- Blanket easements were common in large tracts of unimproved property during a time when there was significant expansion of pipelines and utilities.
- If there is a blanket easement and the utility or pipeline has been placed, the companies will generally work with the borrower or lender to restrict the easement.
- If there is not a utility or pipeline in place in connection with a blanket easement, it is prudent to obtain a definition and limitation of that easement to permit the property to be improved or otherwise better utilized.

Blanket Easements

- A recent Texas Supreme Court Case addressed this topic.
- In ***Southwestern Electric Power Company v. Lynch***, the Trial Court held that the general easement at issue, which was silent as to width, limited the allowable width of the easement to 30 feet, which was the width historically used by the transmission line company.
- The case dealt with certain tracts of real property in Bowie County, Texas, each of which is encumbered by utility easements in favor of SWEPCO. The easements were each granted to SWEPCO in 1949 by the current owners' predecessors in title, and the operative language in each of the easements is identical.



Blanket Easements

- The court of appeals affirmed, concluding that because the original easements did not specify a width, the trial court properly admitted extrinsic evidence of past use to determine how much of Respondents' land was reasonably necessary for Petitioner to utilize pursuant to the easements.
- The Supreme Court reversed, holding that Respondents' properties were burdened by general easements with no defined width and that the lack of a specified width in an easement does not mandate the admission of extrinsic evidence to prescribe a width.



Blanket Easements

- In Texas, the term “general easement” (sometimes referred to as a “blanket easement”) is often used to describe an easement without a fixed width. In their ruling, the Supreme Court held that “[t]he use of a general easement without a fixed width is a strategic decision that does not render an easement ambiguous or require a court to supply the missing term.” (Southwestern Electric Power Company v. Lynch, No. 18-0768, at 20 (Tex. February 28, 2020)).
- This is a significant decision, as general easements have historically been used widely by electric utilities, pipeline companies, and other entities as tools that allow flexibility to account for future growth, innovation, and development.

Blanket Easements

- Takeaways from this case:
 - By including a limitation on width in the original 1949 agreements, the parties could have avoided this dispute all together.
 - So, property owners should seek legal assistance when negotiating any sort of easement agreement in order to avoid a similar outcome – and attorneys who are drafting easement agreements must keep this issue in mind as well.
 - Second, when purchasing property, buyers must take time to review the title insurance commitment and the supporting documents and investigate any easements on the property to determine the potential impact such easements could have on their future property use and value.

"As Shown on Survey" Language

- Ancillary to the requirement that all exceptions be shown on the survey, many purchasers and lenders will want to request that the title company note after each appropriate item that it is "*as shown on the survey*" or "*as noted on the survey.*"
- If this language is requested, the survey will need to be specifically identified in that exception by surveyor, job/project number, date, and last revised date (if applicable).

"As Shown on Survey" Language

- On the whole, title companies were agreeable to adding the "as shown on survey" language when requested.
- HOWEVER – the logic behind adding "as shown on survey" was turned on its' head in Lawyers Title Insurance Corporation vs. Doubletree Partners, L.P.



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Lawyers Title vs Doubletree Partners

- The facts in Lawyers Title Ins. Corp. v. Doubletree Partners, LP, 739 F.3d 848 (5th Cir. 2014) were that the surveyor showed the approximate location of a flowage easement on the survey drawing as covering a small portion located near the property's southern boundary.
- It was later determined that the flowage easement location was incorrectly noted on the survey, which caused a more substantial portion of the subject property to be subject to the flowage easement.
- Doubletree was unable to proceed with its plans to build several buildings near the lakeside portion of the property, so they filed a complaint against the surveyor, and filed a claim with Lawyers Title. The claim was denied.

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Lawyers Title vs Doubletree Partners

- The flowage easement was shown as an exception on the title commitment and the title policy purchased by Doubletree.

This policy does not insure against loss or damage . . . that arise by reason of . . . the following matters: . . .

6. The following matters and all terms of the documents creating or offering evidence of the matters[:] . . .

f. Flowage easement awarded to The United States of America in Condemnation Proceedings in U.S. District Court for the Eastern District of Texas, . . . a certified copy of which has been filed on January 10, 1956, recorded in Volume 418, page 372, Real Property Records, Denton County, Texas, and shown on survey dated March 22, 2006 by Mark Paine, RPLS #5078.



Lawyers Title vs Doubletree Partners

- As the approximate location of the flowage easement was shown on the survey, Doubletree's argument was the coverage of the flowage easement would only be excluded to the extent disclosed and shown on the survey.
- LTIC argued that the "as shown on the survey" was just a reference.
- Because the issue at hand had more than one reasonable interpretation, the Court adopted Doubletree's interpretation since it was the insured.
- Thus, the survey coverage clause covered the surveyor's error in identifying the location of the flowage easement in this instance.

“As Shown on Survey” after Doubletree

- To summarize: if an easement/setback line is shown as an exception in Schedule B of a commitment, and is also located on a furnished survey, it has been a common practice in the title insurance industry (upon the request of the customer) to add the following or substantially similar language after the easement/setback line exception:

“and as shown on that survey”
- However – after Doubletree, the title company may be liable for damages if such language is added but the survey is not accurate.

“As Shown on Survey” after Doubletree

Sample Underwriting Guidelines:

- First: If asked to add “and as shown on that survey” after an easement/setback line exception in Schedule B, the title agent will need to talk to their underwriter about how to proceed.
- In many cases, the title agent will be able to add “and as shown on survey” only if they can independently verify the accuracy of the location of the easement/setback line as depicted on the survey with the recorded plat or instrument creating or reflecting the easement/setback line.
- Otherwise, the additional language will not be included.



“As Shown on Survey” after Doubletree

Sample Underwriting Guidelines:

- Second: many underwriters will say that the title agent should *not* add “and as shown on that survey” or substantially similar language after an easement exception where the easement location is based upon elevation or is of variable size or an undetermined location.
- The most common examples of such easements are water flowage/inundation/drainage/irrigation easements.



COMMITMENT TO CLOSING

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