

In close focus: Benefits and uses of surveys in commercial transactions

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Standard in commercial, industrial, multi-housing and office purchase agreements is the right for the buyer to perform a due diligence review of the property. Such review typically includes:

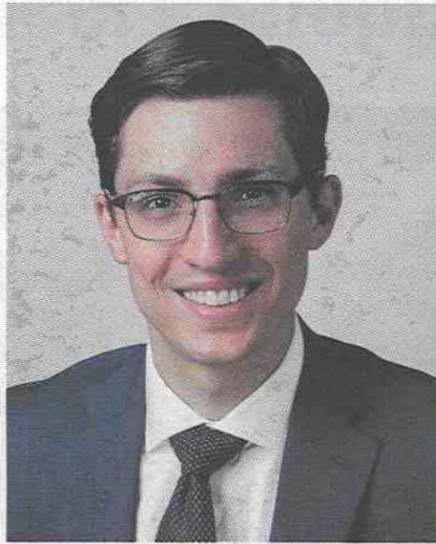
- Surveying
- Title abstracting;
- Engineering;
- Architectural and environment inspections;
- Zoning and local ordinance review;
- Soil and geotechnical inspections;
- Availability of access to public roads and utilities;
- Consistency with local, state and regional growth management plans;
- Availability or issuance of permits, government approvals and licenses;
- Scrutiny of leases and financial documents; and
- Other inspections that buyer deems appropriate to determine whether to purchase the property.

A survey can incorporate many of these due diligence items into one document. As buyers and lenders evaluate and review the condition of the property, they should early on consider whether to invest in a new survey of the property, rely upon a prior survey or go without.

Every buyer needs to weigh the value of the information and protection provided by a survey against the cost of obtaining the survey. Cost is largely determined by the size of the property to be surveyed, the hours required at the property to complete site work due to the condition of the property, office preparation time and any additional services requested by the buyer or lender. Obtain one or more bids to compare services and timelines.

If a recent survey is available and the seller has shown that the site has not changed from what is documented on the survey, the cost associated with an update is generally less than a new survey, provided the prior surveyor is still in business. Title companies will generally accept a prior survey that is no more than 10 years old with an affidavit of no change from the seller. This can be a cost- and time-effective way to obtain desired title insurance protection. If a prior survey is available, consider adding a requirement to the purchase agreement requiring seller to provide such an affidavit.

For transactions involving a very large parcel of land or a parcel with few improve-



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ments, completing an aerial survey rather than a traditional one may be more attractive in terms of cost and time involved. Aerial surveys are also desirable on highly confidential transactions or transactions in which the parties do not want to disclose the transaction to a tenant until the expiration of due diligence, as the presence of a surveyor on the property is minimal.

SURVEY STANDARDS AND TABLE A ITEMS

Surveys come in a variety of forms with different standards of care, such as the aerial survey discussed above. But the gold standard for a survey is an ALTA/NSPS Land Title Survey prepared pursuant to the Minimum Standard Detail Requirements (effective February 23, 2021). An ALTA/NSPS Land Title Survey is prepared in accordance with various surveying standards

of care developed by the American Land Title Association and the National Society of Professional Surveyors to meet the needs of buyers, lenders, and title insurance companies.

It assures the relying parties that the survey is of a professional quality and appropriately uniform, complete and accurate. A standard survey certification in which the surveyor affirms that the survey was created with the necessary standard of care and lists the parties that can legally rely on the survey is also established and set forth in the Minimum Standard Detail Requirements.

Along with the details and standards required of every ALTA/NSPS Land Title Survey, additional optional survey responsibilities and specifications (Table A Items) are also identified and can be added at a

buyer's or lender's request (and at additional cost). Among the commonly requested Table A Items is Item 6(b), zoning information, typically including setback requirements, height and floor space restrictions and parking requirements, with setbacks being graphically depicted on the survey. Due to the 2021 ALTA/NSPS updates, the surveyor may require buyers to provide a zoning compliance letter or zoning report to include such on the survey.

For a construction transaction, consider ordering Table A Items 5 and 11. Table A Item 5 adds vertical relief data to the survey, showing any flat areas, sunken areas, or slopes on the property. This is vital information for civil engineers to develop a grading plan and determine the cost of site work. Table A Item 11 adds evidence of underground utilities existing on or serving the property, an important factor in determining the availability of various utilities lines sufficient for the contemplated use. To provide Item 11 on a survey, the surveyor may require plans and reports evidencing the location of the lines and utility location of the lines.

TITLE COVERAGES AND ENDORSEMENTS REQUIRING A SURVEY

All title commitments include standard items that are excepted from title coverage, including any matters that would be disclosed by an accurate survey. In order to obtain title coverage and delete this standard exception from a title policy, an ALTA/NSPS Land Title Survey is required. If a prior survey, a survey that is not certified as an ALTA/NSPS Land Title Survey or aerial survey is to be used, it must be approved prior to closing by the title company that issued it.

An ALTA/NSPS Land Title Survey is also required to obtain several common title insurance endorsements. These endorsements include a Zoning Endorsement, Access and Entry Endorsement, Utility Access Endorsement, Contiguity Endorsement, Location Endorsement, Same as Survey Endorsement and Encroachment Endorsement.

It is advisable, early in the due diligence period, to start a conversation involving the buyer, seller, lender, title company and surveyor to determine the scope and costs of a survey and timing required.

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