

WLTA Education Seminar


November 2, 2013

Session 5a: Commercial Transactions

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I. Introductions:

- A. To the Speaker: Background, practice and experience.
- B. To the Topic: Present areas of concern for title professionals issuing commitments and policies in Washington. These are lessons learned from the battlefields of numerous closings and claims.
- C. To the Format: Hypothetical facts followed by analysis, answers and recommendations. Assume 2006 ALTA forms. Names, persons, entities, places and events have been changed or blurred.
- D. To the Perspective: Things are never what they seem. 




II. Priority and Statutory Liens

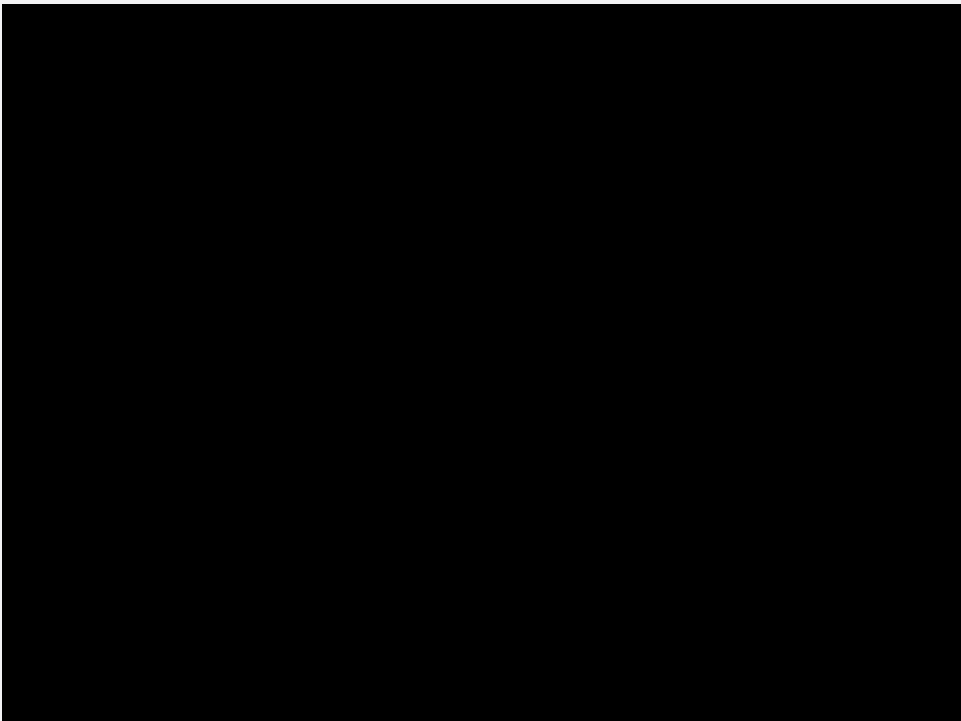
- **Hypothetical:** Owner enters into contract to design and erect a manufacturing plant. Contract requires delivery of a written notice to proceed before contractor may begin work on the property. Closer gives precise instructions to local title office to record deed of trust and issue extended lender's policy. Auditor's file numbers are required before notice to proceed can be delivered and disbursement of initial payment was made to contractor. Title unit records without inspection or survey. Contractor had equipment, laborers and materials on the property before recording; business fails and contractor claims money due.
- What happens in the subsequent action to foreclose a lien under RCW 60.04? *Colorado Structures v. Blue Mtn. Plaza.*
- Conclusion: Keep it simple. 



III. Coverages and Document Quality

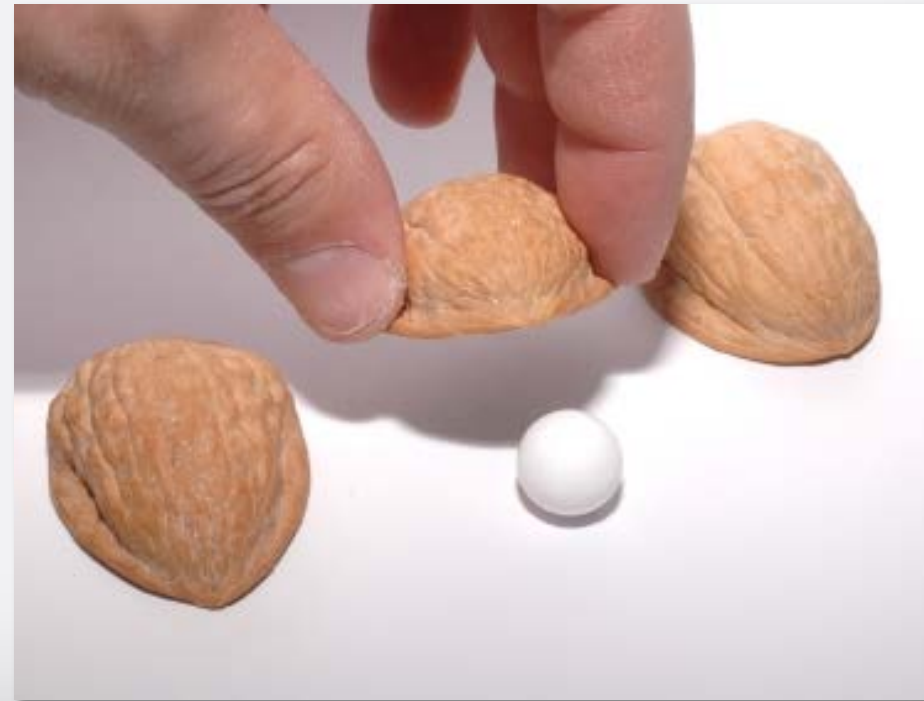


- **Hypothetical:** Purchaser of apartment complex finances acquisition. Lender requests *pro forma* policy with endorsements and affirmative coverages. Chain of title includes a release of affordable housing covenants after developer failed to perform and forfeited tax benefits. Lender requests affirmative coverage over loss arising out of enforcement of existing violation of covenants. Lender instructs escrow to close when and only when policy is issued consistent with *pro forma*. Buyer instructed escrow to close based upon commitment without any reference to affirmative coverage.
- After closing, owner's policy is issued that contains a typographical error: affirmative coverage for the restrictive covenant. The owner remodels and increases rent, which results in a class action suit.
- What happens when the owner makes a claim and insists it intended to receive same coverage as lender?
- A seamless team effort. 




IV. Equitable Subrogation

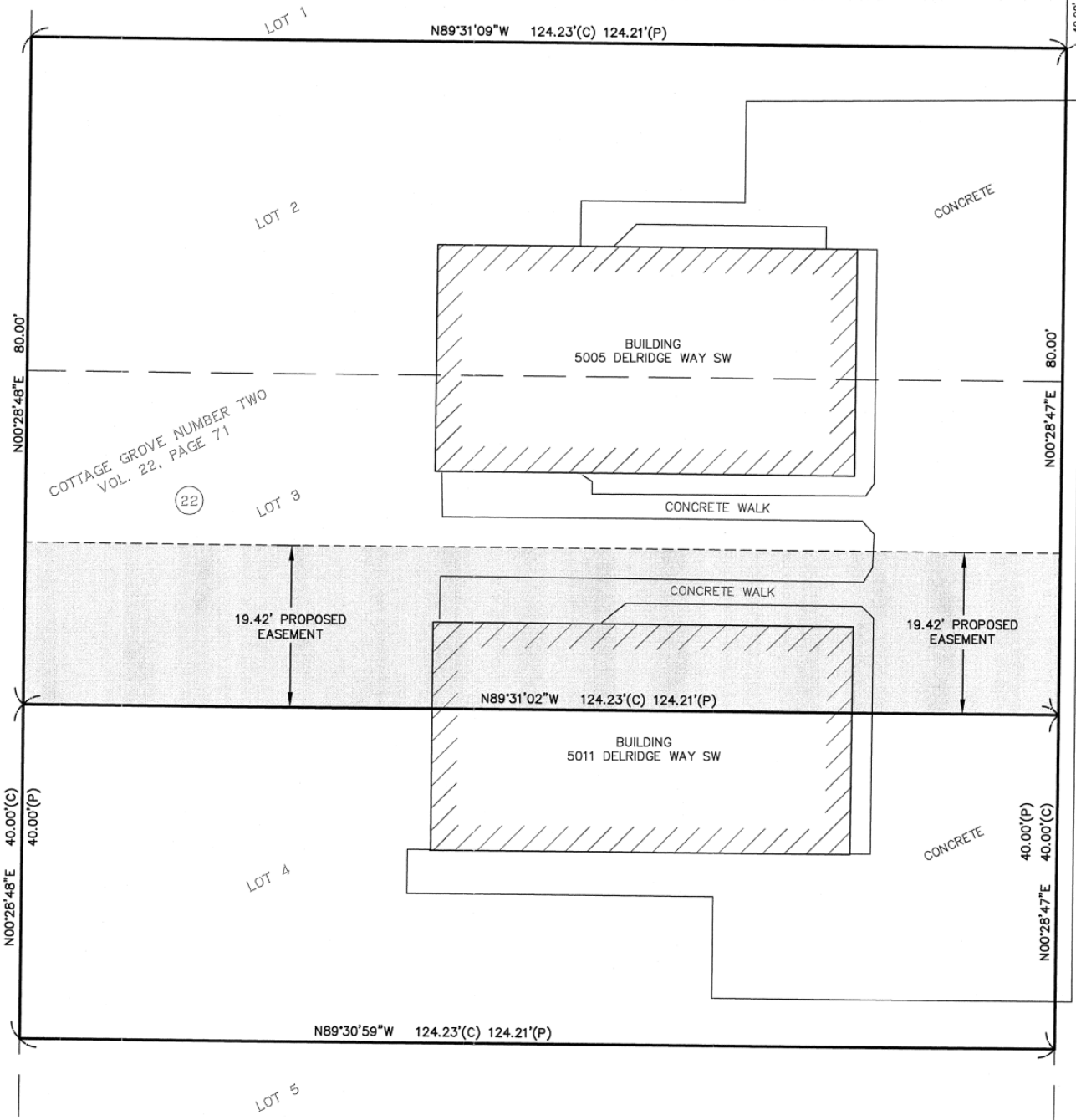
- **Hypothetical:** Commitment omits a recorded deed of trust. After closing lender that was not paid by seller initiates non-judicial trustee's sale process.
- *B of A v. Prestance Corp.*
- *Columbia Community Bank v. Newman Park*
- What happens when lender tries to foreclose?



V. Boundaries and Easements

- **Hypothetical:** Standard coverage policy for duplex. Twin duplex on adjacent lot. Insured's improvements straddle boundary line. Owner of adjacent duplex held both lots until recent foreclosure. 
- **Possible solutions:** Boundary line agreement; boundary line adjustment; quiet title action; other.
- **ALTA/ASCM survey requirements:** Table A options

LOT 36
LOT 35
LOT 34
LOT 33
LOT 5



40.00' (C)
40.00' (P)

N00°28'48"E 80.00'

N00°28'47"E 80.00'

16'

N00°28'48"E 40.00'(C)
40.00'(P)

40.00'(P)
40.00'(C)
N00°28'47"E

N89°30'59"W 124.23'(C) 124.21'(P)

COTTAGE GROVE NUMBER TWO
VOL. 22, PAGE 71
(22)

19.42' PROPOSED
EASEMENT

19.42' PROPOSED
EASEMENT

BUILDING
5005 DELRIDGE WAY SW

BUILDING
5011 DELRIDGE WAY SW

CONCRETE

CONCRETE WALK

CONCRETE WALK

CONCRETE

V. Boundaries and Easements

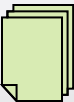
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TABLE A

OPTIONAL SURVEY RESPONSIBILITIES AND SPECIFICATIONS

NOTE: The items of Table A must be negotiated between the surveyor and client. It may be necessary for the surveyor to qualify or expand upon the description of these items (e.g., in reference to Item 6(b), there may be a need for an interpretation of a restriction). The surveyor cannot make a certification on the basis of an interpretation or opinion of another party. Notwithstanding Table A Items 5 and 11(b), if an engineering design survey is desired as part of an ALTA/ACSM Land Title Survey, such services should be negotiated under Table A, item 22.

If checked, the following optional items are to be included in the ALTA/ACSM LAND TITLE SURVEY, except as otherwise qualified (see note above):

1. Monuments placed (or a reference monument or witness to the corner) at all major corners of the boundary of the property, unless already marked or referenced by existing monuments or witnesses.
2. Address(es) if disclosed in Record Documents, or observed while conducting the survey.
3. Flood zone classification (with proper annotation based on federal Flood Insurance Rate Maps or the state or local equivalent) depicted by scaled map location and graphic plotting only.
4. Gross land area (and other areas if specified by the client).
5. Vertical relief with the source of information (e.g. ground survey or aerial map), contour interval, datum, and originating benchmark identified.
6. (a) Current zoning classification, as provided by the insurer.
 (b) Current zoning classification and building setback requirements, height and floor space area restrictions as set forth in that classification, as provided by the insurer. If none, so state.
7. (a) Exterior dimensions of all buildings at ground level.
 (b) Square footage of:
 (1) exterior footprint of all buildings at ground level.
 (2) other areas as specified by the client.
 (c) Measured height of all buildings above grade at a location specified by the client. If no location is specified, the point of measurement shall be identified.



8. _____ Substantial features observed in the process of conducting the survey (in addition to the improvements and features required under Section 5 above) such as parking lots, billboards, signs, swimming pools, landscaped areas, etc.
9. _____ Striping, number and type (e.g. handicapped, motorcycle, regular, etc.) of parking spaces in parking areas, lots and structures.
10. _____ (a) Determination of the relationship and location of certain division or party walls designated by the client with respect to adjoining properties (client to obtain necessary permissions).
- _____ (b) Determination of whether certain walls designated by the client are plumb (client to obtain necessary permissions).
11. _____ Location of utilities (representative examples of which are listed below) existing on or serving the surveyed property as determined by:
- _____ (a) Observed evidence.
- _____ (b) Observed evidence together with evidence from plans obtained from utility companies or provided by client, and markings by utility companies and other appropriate sources (with reference as to the source of information).
- Railroad tracks, spurs and sidings;
 - Manholes, catch basins, valve vaults and other surface indications of subterranean uses;
 - Wires and cables (including their function, if readily identifiable) crossing the surveyed property, and all poles on or within ten feet of the surveyed property. Without expressing a legal opinion as to the ownership or nature of the potential encroachment, the dimensions of all encroaching utility pole crossmembers or overhangs; and
 - utility company installations on the surveyed property.
- Note - With regard to Table A, item 11(b), source information from plans and markings will be combined with observed evidence of utilities to develop a view of those underground utilities. However, lacking excavation, the exact location of underground features cannot be accurately, completely and reliably depicted. Where additional or more detailed information is required, the client is advised that excavation may be necessary.*
12. _____ Governmental Agency survey-related requirements as specified by the client, such as for HUD surveys, and surveys for leases on Bureau of Land Management managed lands.
13. _____ Names of adjoining owners of platted lands according to current public records.
14. _____ Distance to the nearest intersecting street as specified by the client.
15. _____ Rectified orthophotography, photogrammetric mapping, laser scanning and other similar products, tools or the basis for the showing the location of _____ airborne/mobile technologies as



certain features (excluding boundaries) where ground measurements are not otherwise necessary to locate those features to an appropriate and acceptable accuracy relative to a nearby boundary. The surveyor shall (a) discuss the ramifications of such methodologies (e.g. the potential precision and completeness of the data gathered thereby) with the insurer, lender and client prior to the performance of the survey and, (b) place a note on the face of the survey explaining the source, date, precision and other relevant qualifications of any such data.


16. _____ Observed evidence of current earth moving work, building construction or building additions.
17. _____ Proposed changes in street right of way lines, if information is available from the controlling jurisdiction. Observed evidence of recent street or sidewalk construction or repairs.
18. _____ Observed evidence of site use as a solid waste dump, sump or sanitary landfill.
19. _____ Location of wetland areas as delineated by appropriate authorities.
20. _____ (a) Locate improvements within any offsite easements or servitudes benefiting the surveyed property that are disclosed in the Record Documents provided to the surveyor and that are observed in the process of conducting the survey (client to obtain necessary permissions).
- _____ (b) Monuments placed (or a reference monument or witness to the corner) at all major corners of any offsite easements or servitudes benefiting the surveyed property and disclosed in Record Documents provided to the surveyor (client to obtain necessary permissions).
21. _____ Professional Liability Insurance policy obtained by the surveyor in the minimum amount of \$ _____ to be in effect throughout the contract term. Certificate of Insurance to be furnished upon request.
22. _____

*Adopted by the Board of Governors, American Land Title Association, on October 13, 2010.
American Land Title Association, 1828 L St., N.W., Suite 705, Washington, D.C. 20036.*

*Adopted by the Board of Directors, National Society of Professional Surveyors, on November 15, 2010.
National Society of Professional Surveyors, Inc., a member organization of the American Congress on Surveying and Mapping, 6 Montgomery Village Avenue, Suite 403, Gaithersburg, MD 20879*



VI. Fraud and Forgeries

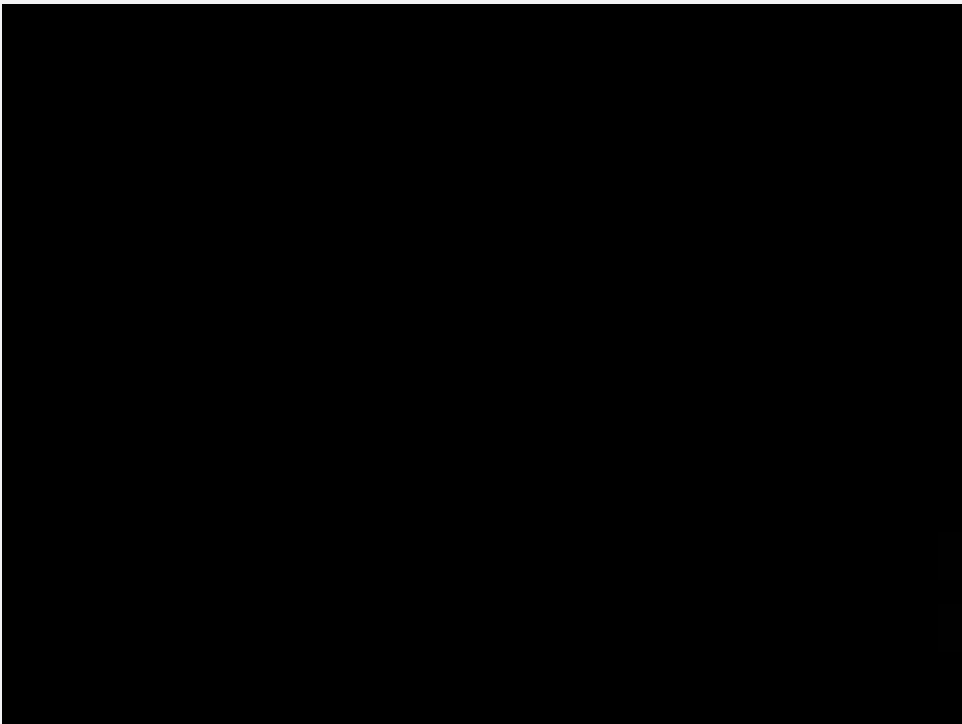
- **Hypothetical:** Miscreants prepare a fraudulent assignment and forge signatures from a lender to a fictitious entity. That entity enters into a “cash for keys” agreement with the borrower. Thinking he will lose the property, the owner executes a deed in lieu. The fictitious entity lists and sells the property to a *bona fide* purchaser and lender. The fraud and forgeries are discovered after closing.
- What happens when the trustee for the real lender notices a non-judicial sale?
- Frauds and forgeries are everywhere. 



VII. Conclusions, Comments and Recommendations

A. Understand the facts.

B. Have a plan. 



VI. Conclusions, Comments and Recommendations

- A. Understand the facts.
- B. Have a plan.
- C. Thorough underwriting avoids claims, and lessons learned from claims strengthen underwriting.

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