

# Commercial Endorsement Underwriting & Drafting

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# Endorsements

- Endorsements provide additional coverage and/or clarification beyond the policy jacket.
- It is common for several endorsements to be requested in commercial transactions.
- Some endorsements require drafting to clarify coverage.



# General Endorsement Issuing Guidelines

- Respect the local rules and customs.
- Determine permissibility of modifying forms.
  - Impact of WATIRO
- Use Defined Terms, where possible.
- If the Land includes multiple parcels, use the same parcel references in the Endorsements as are used in Schedule A.
- Fill in all blanks. Use “NONE” where appropriate.
- Limit endorsement coverage by parcel where appropriate.
- Include Endorsements with Proforma policies.



# Definition of “Land” in the Title Policy

- "Land": **The land described in Schedule A, and affixed improvements that by law constitute real property.** The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.
- Condition 1(g) in 2006 ALTA Owner's Policy
- Condition 1(i) in 2006 ALTA Loan Policy



# Special Circumstances

- Appurtenant Easements
- Multiple Parcels
- Condominium Units
- Leased Area within larger parcel



# Endorsements Requiring Drafting

- ALTA 3 series
- ALTA 15 series
- ALTA 17 and 17.1
- ALTA 19 series
- ALTA 22
- ALTA 28 and 28.1
- ALTA 32 series and 33
- ALTA 34
- Land Under Development Endorsements
  - ALTA 3.2-06, ALTA 9.7-06, ALTA 9.8-06, ALTA 28.3-06, ALTA 35.3-06, ALTA 36.4-06, ALTA 36.5-06, ALTA 41.3-06

# ALTA 3-06 and ALTA 3.1-06

1. The Company insures against loss or damage sustained by the Insured in the event that, at Date of Policy,

a. According to applicable zoning ordinances and amendments, the Land **is not** classified Zone \_\_\_\_\_;

b. The following use or uses **are not** allowed under that classification: \_\_\_\_\_

**Drafting Notes:** Enter the current zoning for the property and identify what uses are allowed under that zoning. You are insuring against loss in the event the property is not classified as identified and the use of the property as identified is not allowed.

# ALTA 3.3-06

2. The Company insures against loss or damage sustained by the Insured resulting from:

- a. The following Non-Conforming Use **not** being allowed by the municipality or county because the Non-Conforming Use violates a Zoning Ordinance:

[Describe the existing Non-Conforming Use]

## Underwriting Notes:

- This endorsement will typically be issued with a policy describing property that contains old improvements that do not currently comply with current zoning violations.
- Only issue the endorsement if it is a “legal” non-conforming use. Just because it’s non-conforming that doesn’t mean the municipality recognizes it as permissible.



# ALTA 3.4-06

2. The Company insures against loss or damage sustained by the Insured resulting from:
  - a. The following use **not** being allowed by the municipality or county because the use violates a Zoning Ordinance:

[Describe the existing use]

## Underwriting Notes:

- This endorsement will primarily be used for property with improvements that is located in an area with no zoning ordinance.
- Essentially you are insuring there is no zoning regulation that would prohibit the use of the property on Date of Policy.

# Non-Imputation (ALTA 15 Series)

## Underwriting Notes:

- These endorsements provide a partial waiver of Exclusions 3(a), 3(b) and 3(e) with regard to loss or damage that would otherwise be excluded on account of the action, inaction or knowledge of specified parties who hold an interest in an entity that is vested in title.
- These endorsements are typically requested by incoming investors who are purchasing an interest in the title holding entity, rather than an interest in the property itself.
- Endorsements from the ALTA 15 series are usually issued with new owner's policies.
- Prior to issuance of an endorsement from the ALTA 15 series, a Non-Imputation Affidavit and Indemnity should be secured.



# Non-Imputation (ALTA 15 Series)

- Helpful hints in drafting Non-Imputation Endorsements:
  - Insert the correct names in the correct places (Knowledge Parties vs. Covered Parties)
    - Knowledge Party – the person or entity that has knowledge that could potentially result in a loss to the incoming investor as a result of Exclusion 3(a), 3(b) or 3(e).
    - Covered Party – the incoming investor who is seeking coverage from the knowledge of the Knowledge Party.
  - Refrain from expanding the covered parties by using “its successors and assigns”.
  - Refrain from expanding knowledge parties by including “its officers, directors, members, partners, and/or shareholders”.



# ALTA 15-06 – Full Equity Transfer

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the Policy solely by reason of the action or inaction or Knowledge, as of Date of Policy, of

**[identify exiting or contributing partner(s) of the insured partnership entity, member(s) or manager(s) of the insured limited liability company entity, or officer(s) and/or director(s) of the insured corporate entity....aka the Knowledge Party]**

whether or not imputed to the Insured by operation of law, provided

**[identify the “incoming” partners, members, or shareholders...aka the Covered Party]**

acquired the Insured as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the Policy.

# ALTA 15.1-06 – Additional Insured

For purposes of the coverage provided by this endorsement,

**[identify the “incoming” partner, member or shareholder...aka Covered Party]**

(“Additional Insured”) is added as an Insured under the Policy. By execution below, the Insured named in Schedule A acknowledges that any payment made under this endorsement shall reduce the Amount of Insurance as provided in Section 10 of the Conditions.

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the Policy solely by reason of the action or inaction or Knowledge, as of Date of Policy, of

**[identify, as applicable, the existing and/or exiting partner(s) of the insured partnership entity, member(s) or manager(s) of the insured limited liability company entity, or officer(s) and/or director(s) of the insured corporate entity...aka the Knowledge Party]**

whether or not imputed to the Additional Insured by operation of law, to the extent of the percentage interest in the Insured acquired by Additional Insured as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the Policy.

# ALTA 15.2-06 – Partial Equity Transfer

The Company agrees that it will not assert the provisions of Exclusions from Coverage 3(a), (b), or (e) to deny liability for loss or damage otherwise insured against under the terms of the Policy solely by reason of the action or inaction or Knowledge, as of Date of Policy, of

**[identify, as applicable, the existing and/ or exiting partner(s) of the vestee partnership entity, member(s) or manager(s) of the vestee limited liability company entity, or officer(s) and/or director(s) of the vestee corporate entity...aka the Knowledge Party]**

whether or not imputed to the entity identified in paragraph 3 of Schedule A or to the Insured by operation of law, but only to the extent that the Insured acquired the Insured's interest in the entity as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, adverse claim, or other matter insured against by the Policy.

# Access (ALTA 17 Series)

- 17-06-Access and Entry
- 17.1-06-Indirect Access and Entry

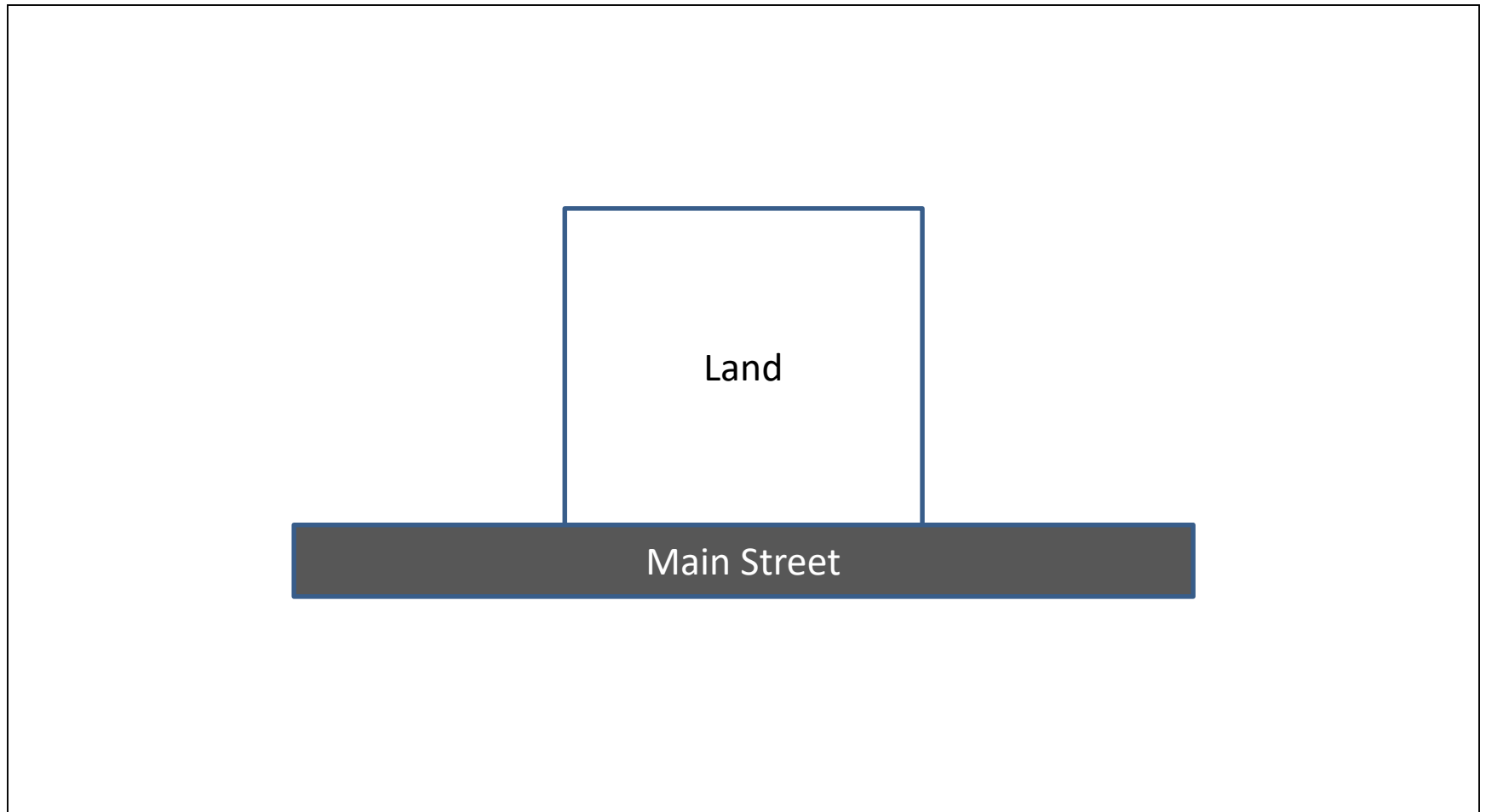


# ALTA 17-06 - Access and Entry

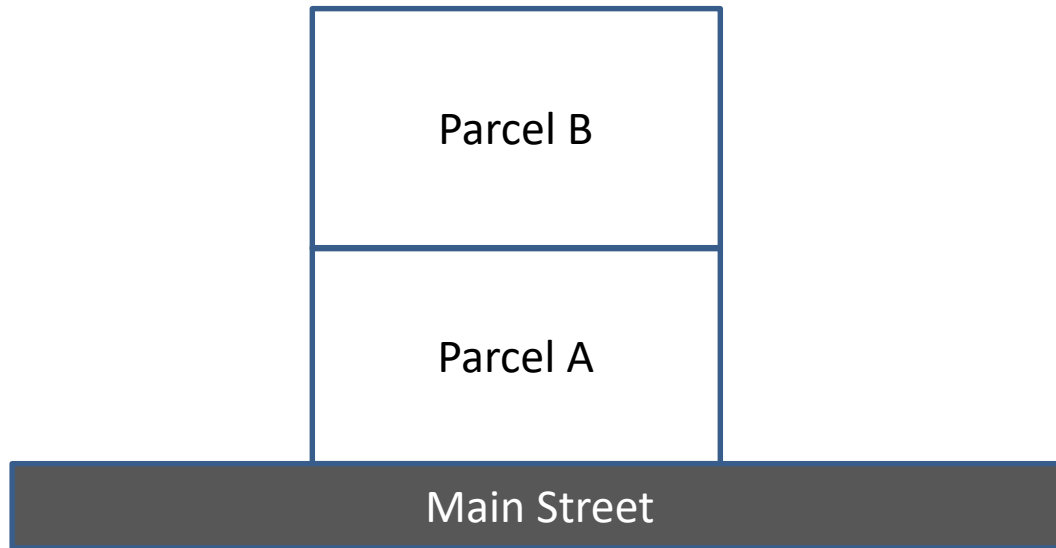
- The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the Land does not abut and have both actual vehicular and pedestrian access to and from **[insert name of street, road, or highway]** (the “Street”), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Land.



# ALTA 17-06 - Access and Entry



# ALTA 17-06 - Access and Entry



# ALTA 17-06 - Access and Entry

Best practice is to limit access endorsement to Parcel A :

“. . .(i) **Parcel A** of the Land does not abut and have both vehicular and pedestrian access to and from Main Street (the “Street”), . . .”

It is not necessary to take a lack of access exception for Parcel B.

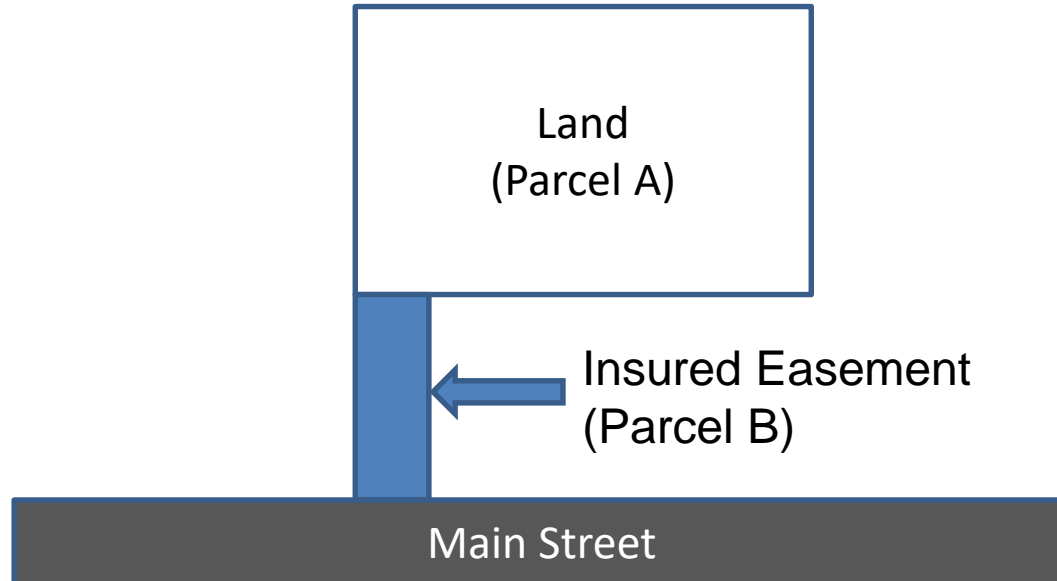
What if Parcels A and B are contiguous?

- Include qualifying language clarifying that Parcel B’s access is through Parcel A, which abuts Main Street.
- Consider what they are doing with the property.
  - Approved site plans
  - Overburdening

# ALTA 17.1-06 – Indirect Access & Entry

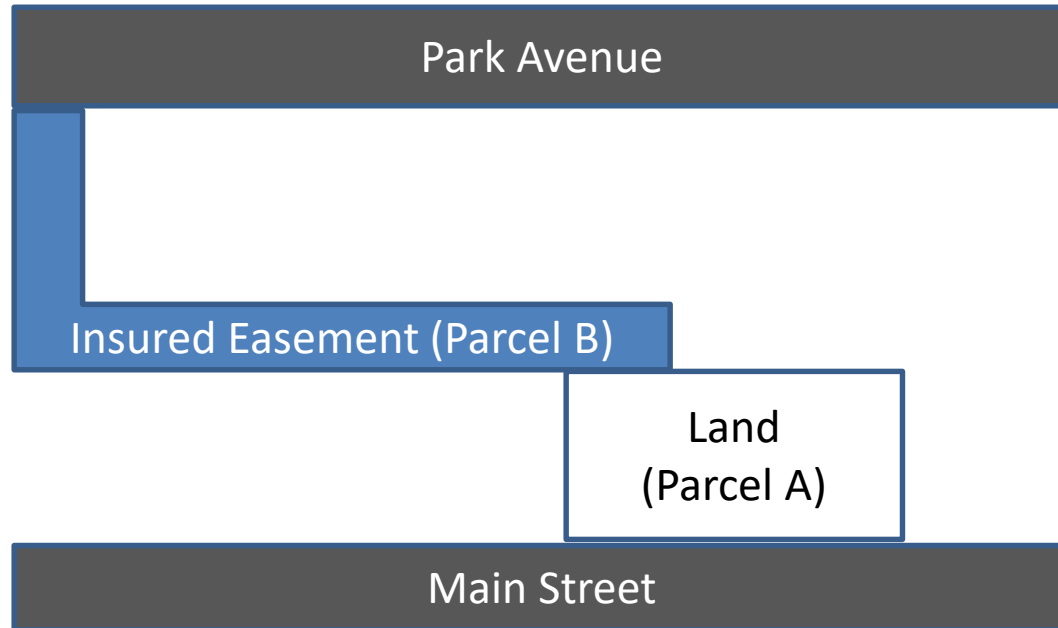
The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified [as Parcel \_\_\_\_\_] in Schedule A (the “Easement”) does not provide that portion of the Land identified [as Parcel \_\_\_\_\_] in Schedule A both actual vehicular and pedestrian access to and from [insert name of street, road, or highway] (the “Street”), (ii) the Street is not physically open and publicly maintained, or (iii) the Insured has no right to use existing curb cuts or entries along that portion of the Street abutting the Easement.

# ALTA 17.1-06 - Indirect Access and Entry



The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified **as Parcel B** in Schedule A (the “Easement”) does not provide that portion of the Land identified **as Parcel A** in Schedule A both actual vehicular and pedestrian access to and from **Main Street** (the “Street”)...

# ALTA 17.1-06 - Indirect Access and Entry



The Company insures against loss or damage sustained by the Insured if, at Date of Policy (i) the easement identified **as Parcel B** in Schedule A (the “Easement”) does not provide that portion of the Land identified **as Parcel A** in Schedule A both actual vehicular and pedestrian access to and from **Park Avenue** (the “Street”)...

# ALTA 19-06- Contiguity-Multiple Parcels

1. the failure of [the \_\_\_\_\_ boundary line of Parcel A] of the Land to be contiguous to [the \_\_\_\_\_ boundary line of Parcel B];

[for more than two parcels, continue as follows “of the \_\_\_\_\_ boundary line of Parcel B of the land to be contiguous to the \_\_\_\_\_ boundary line of Parcel C” and so on, until all contiguous parcels described in the policy have been accounted for;

or

2. the presence of any gaps, strips, or gores separating any of the contiguous boundary lines described above.

**Underwriting Note:** The endorsement is designed for precise drafting. State how the parcels are contiguous, rather than simply saying Parcel A is contiguous to Parcel B.



# ALTA 19.1-06 - Contiguity-Single Parcel

1. the failure of the Land to be contiguous to [describe the land that is contiguous to the Land by its legal description or by reference to a recorded instrument-e.g. "...that certain parcel of real property legally described in the deed recorded as Instrument No. \_\_\_\_, records of \_\_\_\_ County, State of \_\_\_\_] along the \_\_\_\_ boundary lines(s); or
2. the presence of any gaps, strips, or gores separating any of the contiguous boundary lines described above.

Underwriting Note: Contiguous land may be a fee or easement parcel.



# ALTA 19.2-06 - Contiguity – Specified Parcels

The Company insures against loss or damage sustained by the Insured by reason of there being any gaps, strips, or gores lying within or between [Example: Parcel A, B, C or Tract 1, 2, 3] of the Land [except as depicted on the survey made by \_\_\_\_\_ dated \_\_\_\_\_, and designated Job No. \_\_\_\_\_].

Underwriting Note: This endorsement does not specify the manner in which the parcels are contiguous, rendering it useful in situations where it is difficult to precisely describe the common boundary lines.



# ALTA 19 Series

- Avoid drafting pitfalls, such as:
  - *“The failure of the Land to be contiguous.”*
  - *“The failure of the Land to be contiguous to itself.”*
  - *“The failure of the Land to be contiguous along its common boundary lines.”*
  - *“The failure of Parcels A through D to be contiguous to one another.”*
- Remember the ALTA 19.2-06!

# ALTA 22-06 - Location

- The Company insures against loss or damage sustained by the Insured by reason of the failure of a **[description of improvement]**, known as **[street address]**, to be located on the Land at Date of Policy.
- How do you describe the improvements?
  - Use general descriptions and focus on principal structure(s) on the Land such as “office building”.
  - Do not list specific property features in the endorsement, such as “3 bedroom, 2 bathroom home with swimming pool” or “150,000 square foot office building”.



# ALTA 22-06 Location

## Underwriting Notes:

- Best practice to not issue Location Endorsement when Land is vacant.
  - Vacant land often has no assigned street address.
- The Location Endorsement is not intended for land under development.
  - What is located on the Land?
- Issuing the Location Endorsement post-policy upon completion of improvements does not provide helpful coverage.
  - Remember, the coverage is “...to be located on the Land at Date of Policy”.
  - The endorsement is not effective as of the date of issuance, it is effective as of the Date of Policy.

# Easements and Encroachments (ALTA 28 Series)

- 28-06-Easement-Damage/Enforced Removal
- 28.1-06-Encroachments-Boundaries and Easements



# ALTA 28-06 - Easement – Damage or Enforced Removal

The Company insures against loss or damage sustained by the Insured if the exercise of the granted or reserved rights to use or maintain the **easement(s)** referred to in Exception(s)\_\_\_\_\_ of Schedule B results in:

1. damage to an existing **building** located on the Land, or
2. enforced removal or alteration of an existing **building** located on the Land.

## Underwriting Notes:

- Consider whether any portion of an existing building encroaches upon an identified easement, or whether any identified easement could adversely impact an existing building. A survey is helpful in this analysis.
- If there are identified encroachments, consider the nature of the easement, the use of the easement, the age of the encroachment, the importance of the building portion that encroaches into the easement.



# ALTA 28.1-06 -Encroachments- Boundaries and Easements

2. For purposes of this endorsement only, “Improvement” means an existing building, located on either the Land or adjoining land at Date of Policy and that by law constitutes real property.
3. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. An encroachment of any Improvement located on the Land onto adjoining land or onto that portion of the Land subject to an easement, unless an Exception in Schedule B of the Policy identifies the encroachment;
  - b. An encroachment of any Improvement located on adjoining land onto the Land at Date of Policy, unless an Exception in Schedule B of the Policy identifies the encroachment;
  - c. Enforced removal of any Improvement located on the Land as a result of an encroachment by the Improvement onto any portion of the Land subject to any easement, in the event that the owners of the easement shall, for the purpose of exercising the right of use or maintenance of the easement, compel removal or relocation of the encroaching Improvement; or
  - d. Enforced removal of any Improvement located on the Land that encroaches onto adjoining land.
4. This endorsement does not insure against loss or damage (and the Company will not pay costs, attorneys’ fees, or expenses) resulting from the encroachments listed as Exceptions \_\_\_\_\_ of Schedule B.





# ALTA 28.1-06 - Encroachments- Boundaries and Easements

## Underwriting Notes:

- This endorsement provides two categories of coverage.
  - 3(a) and 3(b) provide coverage for “loss or damage” due to any encroachment not excepted in Schedule B.
  - 3(c) and 3(d) provide “enforced removal” coverage for any encroachment, whether or not excepted in Schedule B, but only if the encroachment is onto the lands or easements of others.
- Sometimes a good alternative to the ALTA 28-06 if there are known easement encroachments
  - Limited to enforced removal for easement encroachments (no coverage for damage to existing building).
- Note carve out in Paragraph 4.
- Not to be used for land under development.



# ALTA 32-06, ALTA 32.1-06, and ALTA 32.2-06

Section 2(a):

2. The insurance [for Construction Loan Advances] added by Section 3 of this endorsement is subject to the exclusions in Section 4 of this endorsement and the Exclusions from Coverage in the Policy, the provisions of the Conditions, and the exceptions contained in Schedule B. For the purposes of this endorsement and each subsequent Disbursement Endorsement:

a. “Date of Coverage”, is [\_\_\_\_\_] [Date of Policy] unless the Company sets a different Date of Coverage by an ALTA 33-06 Disbursement Endorsement issued at the discretion of the Company.

**Note:** Date of Coverage might not always be the Date of Policy.



# ALTA 32-06 – Construction Loan

## Section 3:

The Company insures against loss or damage sustained by the Insured by reason of:

- a. The invalidity or unenforceability of the lien of the Insured Mortgage as security for each Construction Loan Advance made **on or before the Date of Coverage**.
- b. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance **made on or before the Date of Coverage**, over any lien or encumbrance on the Title recorded in the Public Records and not shown in Schedule B; and
- c. The lack of priority of the lien of the Insured Mortgage as security for each Construction Loan Advance **made on or before the Date of Coverage** over any Mechanic's Lien if notice of the Mechanic's Lien is not filed or recorded in the Public Records, **but only to the extent that the charges for the services, labor, materials or equipment for which the Mechanic's Lien is claimed were designated for payment in the documents supporting a Construction Loan Advance disbursed by or on behalf of the Insured on or before the Date of Coverage.**



# ALTA 33-06 - Disbursement

1. The Date of Coverage is amended to \_\_\_\_\_.

[a. The current disbursement is: \$ \_\_\_\_\_]

[b. The aggregate amount, including the current disbursement, recognized by the Company as disbursed by the Insured is: \$\_\_\_\_\_]

2. Schedule A is amended as follows:

\_\_\_\_\_

3. Schedule B is amended as follows:

[Part I]

[Part II]

# Land Under Development Endorsements

- **ALTA 3.2-06**  
(Zoning-Land Under Development)
- **ALTA 9.7-06**  
(Restrictions, Encroachments and Minerals-Land Under Development)-Loan Policy
- **ALTA 9.8-06**  
(Restrictions, Encroachments and Minerals-Land Under Development)-Owner's Policy
- **ALTA 28.3-06**  
(Encroachments-Boundaries and Easements-Described Improvements and Land Under Development)
- **ALTA 35.3-06**  
(Minerals and Other Subsurface Substances-Land Under Development)
- **ALTA 36.4-06**  
(Energy Project – Covenants, Conditions and Restrictions – Land Under Development – Owner's Policy)
- **ALTA 36.5-06**  
(Energy Project – Covenants, Conditions and Restrictions – Land Under Development – Loan Policy)
- **ALTA 41.3-06**  
(Water – Land Under Development)



# Land Under Development Endorsements

- Various coverages apply to improvements “to be built” or “Future Improvements” as defined by “Plans”.
- “Plans” means the survey, site and elevation plans or other depictions or drawings prepared by **[insert name of architect or engineer]** dated \_\_\_\_\_, last revised \_\_\_\_\_, designated as **[insert name of project or project number]** consisting of \_\_\_\_\_ sheets.

# Endorsements that Describe Improvements

## **ALTA 28.2 (Encroachment)**

“For purposes of this endorsement only, “Improvement” means each improvement on the Land or adjoining land at Date of Policy, itemized below:”

## **ALTA 35.2 (Surface Damage – Minerals)**

“For purposes of this endorsement only, “Improvement” means each improvement on the Land at Date of Policy itemized below:”

## **ALTA 41.2 (Water)**

“For purpose of this endorsement only, “Improvement” means each improvement on the Land at Date of Policy itemized below:”

# ALTA 34-06 – The Wild Card

1. As used in this endorsement “Identified Risk” means: **[insert description of the title defect, restriction encumbrance or other matter]** described in Exception \_\_\_\_\_ of Schedule B.
2. The Company insures against loss or damage sustained by the Insured by reason of:
  - a. A final order or decree enforcing the Identified Risk in favor of an adverse party;
  - b. The release of a prospective purchaser or lessee of the Title or lender on the Title from the obligation to purchase, lease, or lend as a result of the Identified Risk, but only if
    - i. there is a contractual condition requiring the delivery of marketable title, and
    - ii. neither the Company nor any other title insurance company is willing to insure over the Identified Risk with the same conditions as in this endorsement.





# ALTA 34-06 – The Wild Card

- This endorsement provides coverage against loss or damage resulting from a final order or decree enforcing a specified defect, lien or encumbrance (the “Identified Risk”).
- It provides a modified form of “unmarketable title” coverage against loss or damage resulting from the release of a prospective purchaser, tenant, or lender from its obligation to buy, lease or lend as a result of the Identified Risk due to the violation of a contractual condition to deliver marketable title.
  - But only if neither the Company nor any other title insurer will insure over the Identified Risk on the same conditions as set forth in the endorsement.

## Potential uses for the ALTA 34-06:

- Unexpired recorded leases when tenant has vacated the premises
- Unsatisfied mortgages
- Expired or unenforceable CC&Rs contained in a recorded document that contains other, unexpired or still enforceable CC&Rs
- ROFO/ROFR/Options relating to current transaction



# Questions?

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