

2021 ALTA/NSPS MINIMUM STANDARD DETAIL REQUIREMENTS FOR ALTA/NSPS LAND TITLE SURVEYS (EFFECTIVE FEBRUARY 23, 2021)¹

By E. Duffy Myrtetus



E. Duffy Myrtetus, of Eckert Seamans in Richmond, is an experienced real estate, business transactions, and commercial litigation attorney. His practice is principally centered on the representation of various parties involved in transactional and litigation matters related to the acquisition, sale, lease, financing, development, and operation of real property assets and interests. Mr. Myrtetus is admitted to all state and federal courts in Florida and Virginia, and to the United States Supreme Court. He is the past chair of the Real Estate Section of the City of Richmond Bar Association, is a past president of the Out of State Practitioner's Division of the Florida Bar, and currently serves as a member of the Florida Bar's Board of Governors. He is AV rated by Martindale Hubbell, and has been recognized as one of Virginia Business magazine's Legal Elite.

The *2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys* (the “**2021 Standards**”) approved by the National Society of Professional Surveyors, Inc. (the legal successor to ACSM – the American Congress on Surveying and Mapping) and the American Land Title Association (ALTA) took effect February 23, 2021. The **2021 Standards** replace the prior 2016 revised standards. As of the new effective date, all previous versions of the Standard Detail Requirements for ALTA/ACSM Land Title Surveys are superseded by the **2021 Standards**. A complete copy of the revised **2021 Standards** is available on-line at the NSPS website at: <https://www.nsp.us.com/page/2021ALTA>²

Additionally, one other document, which is also available at the NSPS website, is an excellent resource and quick reference to facilitate a review of operative changes in the **2021 Standards** vis-a-vis the **2016 Standards**. It is a redline of the 2016 Standards, reflecting specific revisions, inclusive of changes to standard *Table A*:

https://cdn.ymaws.com/www.nsp.us.com/resource/resmgr/alta_standards/2021_ALTANSPS_Standards_redL.pdf

This is an incredibly useful tool in the form of a redlined mark-up of the 2016 Standards compared against the new **2021 Standards**, which reflects detailed redline additions and deletions of revised terms, inclusive of changes to standard *Table A*.

The changes were unanimously adopted by the members of the joint ALTA/NSPS Committee, which is comprised of members of both NSPS and ALTA. The majority of the revisions represent what some commentators have argued is the next step in a continuing retreat from the more stringent historic minimum standards preceding the 2011 Minimum Standards. For example, the shift from use of the word “shall” to “must” throughout the revisions reflects something more than a nuanced change in syntax – it reflects the additional risk that is now retained by/shifted to the requesting party seeking a survey.

The Committee apparently relied upon the ruling in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) to make this particular change. That case involved an action where a federal employee was sued for wrongful or negligent acts, triggering provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the “Westfall Act” which modified the Federal Tort Claims Act (FTCA)). Justice Ginsburg delivered the Supreme Court’s opinion, overruling

¹ The opinions expressed herein are solely those of the author. –Ed.

² Multiple electronic versions are available in a .PDF format. Note that the ALTA website includes a copyright reservation and registered trademark notations as to the 2021 Standards.

the Fourth Circuit. In part, the opinion includes an analysis of the use of the word “shall,” inferring contextual ambiguity upon the general mandatory connotation of the word in legal usage. The Committee apparently was not persuaded by Justice Souter’s dissent, including that the Court has “... repeatedly recognized the normally uncompromising directive that it [shall] carries”...“The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive”); Black’s Law Dictionary 1375 (6th ed. 1990) (“As used in statutes ... this word is generally imperative or mandatory”....). In that sense – and reviewing comparable changes made in the most recent revisions to the Minimum Standards – the Committee appears to have continued a trend to relax the scope of minimum surveyor required action.

Other selected changes:

Standard of Care 3(D) - “Boundary Resolution” is now just “Boundary” in terms of corners and boundary lines to be established. It is unclear what improved clarity or precision in establishing boundaries is achieved with this change.

Standard of Care 3(E)(i) – “Measurement Standards” for Relative Positional Precision (an apparent counter-intuitive effort to address “Precision”) incorporates (in the author’s opinion) one of the worst run-on sentences ever adopted by the Committee, culminating with the introduction of a new Ninety Five Percent (95%) confidence level in determining the required positions. Does this mean that there is now a Five Percent (5%) acceptable range of error in establishing positions? What happens when two surveyors contest the 5% delta in the new Standard? Note the ripple effect of this new standard into Sections relating to Fieldwork; Lines of Possession and Improvements along the Boundaries; etc. (see Standard 5).

Standard of Care 4 – “Records Research” is a revamped provision, but does not generally appear to reflect material substantive changes. However, the author has recently received a requirement from a surveyor to provide “...*The current record descriptions of any adjoiners to the property to be surveyed, except where such adjoiners are lots in platted, recorded subdivisions....*” (Standard of Care 4(c)(i)). Where this requirement is interposed by the surveyor, title companies no doubt will require the added expense of determining record title ownership to adjoining parcels.³

Standard of Care 5(ii), (iii), and (iv) – “Easement and Servitudes” seem to narrow the surveyor’s duty to include easements that are not disclosed in the record chain of title, but are physically observed in conducting fieldwork in subpart (ii), including deletion of the conjunctive reference to: “...*and on adjoining properties....*” This seems to be an unusual deletion. The explanatory notes at the NSPS website are vague at best. Query whether an old unrecorded easement/path/road/access way originating off site of the property to be surveyed, that vaguely appears to affect all (or portions) of the topography of the property to be surveyed, and then reappears off site on a contiguous parcel must still be noted after this change?

Table A revisions are extensive, but all remain subject to negotiation. One of the most notable changes is the deletion of former Section 18 as to delineation of wetlands. This again seems like an unhelpful change, as the requesting party would have been required to mark the former Section 18 and negotiate the detail to be provided.

In the context of title insurance coverages, Covered Risk 2(c) in the 2006 (and proposed 2021) ALTA Policy forms requires a “survey reading” of a **2021 Standards** compliant plat by the underwriter in order to obtain a deletion of the otherwise applicable standard survey exception. Moreover, endorsement coverages for the ALTA 9 series, ALTA 17-06, ALTA 17.1-06, ALTA 19-06 and ALTA 19.1-06, among other special endorsements, also presumably require additional new underwriting of a **2021 Standards** compliant survey. The standard policy terms and conditions do not expressly

³ Recent discussions with staff counsel at several national title underwriters indicates that these requests have historically not been regularly made to date.

adopt the ALTA/NSPS standards; however, they have been the practical benchmark for underwriting purposes for decades.

As the new **2021 Standards** are implemented, the ripple effect will additionally beget a broad range of timely practical issues worthy of consideration:

- (i) In the context of foreclosures, deed-in-lieu, and related transactions, lenders/loan servicers/trustees, etc. will need to consider how the newer standards may impact a prospective disposition of distressed property. Updated survey data would presumably require compliance with the newest **2021 Standards**; and, existing mortgagee coverage with exceptions under the older standards may not be adequate for coverage on survey related matters for a purchaser at a foreclosure auction, grantee in a deed-in-lieu, or other transferee of title pursuant to an insured deed of trust/mortgage;
- (ii) In the commercial real estate transaction context, it remains to be seen how the new procedures and commensurate expense of satisfying underwriting conditions will affect the timing and costs of CRE transactions. Presumably institutional lenders, conduit lenders, etc. will adopt objective underwriting criteria that mirror the new minimum standards and detail in the **2021 Standards**; and,
- (iii) It remains to be seen how the new **2021 Standards** and detail will affect local planning, zoning, subdivision and related requirements and procedures.

Under Standard 7 of the **2021 Standards**, the requirements provide limitations upon a surveyor's ability to deviate from the mandatory form certification, confirming compliance with the **2021 Standards**. A deviation is permitted only if required under applicable federal, state and/or local laws, rules, regulations, etc. Pursuant to Standard 3(B), the surveyor must complete the survey in compliance with the requirements of the **2021 Standards**, and the requirements of applicable federal, state and local statutes, administrative rules, regulations and/or ordinances that set out standards regulating the practice of surveying within a subject jurisdiction. In Virginia, reference should also be made to the provisions of Va. Code §54.1-400, et seq.; 18VAC10-20; and, 18VAC10-20-370, et seq., as well as the applicable locality's planning, zoning and subdivision ordinances for minimum plat requirements and detail.

The **2021 Standards** on balance reflect changes that continue a trend away from historic minimum requirements for surveyor scope of work. It is essential that lenders, attorneys and others, who order, use and rely upon surveys become familiar with the **2021 Standards**.