

**Homebuyers  
Guide to  
A Land Survey**

## Reasons for a Survey

In recent years, few and fewer property buyers are getting a professional land survey done. This is due, in large part, from advice from real estate professionals, mortgage companies, and title insurance companies. Simply because a mortgage company or title insurance company does not *require* a survey for their underwriting requirements, that doesn't mean they are looking out for the best interest of the buyer of the property or the seller for that matter. Buyers and sellers should be aware of matters that could adversely effect the title, marketability, or value of their property.

Many new homebuyers are relying upon old outdated surveys to evaluate survey matters. This is unwise. An old survey is certified to the seller, not to the buyer. Therefore, the new buyer should not rely on the old survey for obvious reasons of assurance and liability. A new survey should be conducted and certified to the buyer. A new survey will address encroachments onto and off of the property, access to and from a public right-of-way. A current survey will identify and locate new structures, fences, walls and additions. A new land survey will also identify recent, missing, destroyed and erroneous property corners. Flood hazard areas will also be delineated, as they relate to the subject property and the improvements.

A recent development has property owners signing a "survey affidavit" as a substitute for a survey for the new buyer. This practice puts the homeowner (or seller) in an awkward position of certifying an old survey, and stating that there have not been any changes since the date of the old land survey. These homeowners have been persuaded into signing the so-called affidavit do not have any way to determine if the old survey is correct, much less a way to identify any changes or if there was an error. Nor do the sellers know what matters and to what standards a survey should be conducted for a survey to be correct. This practice might also put the seller in a position of covering up and not disclosing issues in order to save some money.

The request for the survey affidavit usually comes from a title insurance company for their motivation of shedding liability. The seller, by signing the affidavit, assumes the survey related responsibility. The buyer, in turn has no assurance or recourse if there are survey related matters that adversely affects the marketability and value of the property. The buyer cannot seek recourse from the title company, because they usually take exception to survey related matters and any matters that a "correct" survey would disclose. The only course of action would be to seek damages from the past seller of the property.

All parties should also be aware is that a survey is an original creation and is protected under the federal copyright laws. Any unauthorized reproduction of an old survey can result in a lawsuit. The original survey is certified to the original homeowner and is not transferable. A third party cannot rely upon an old survey. A new survey should be conducted and specifically certified to the new buyer. Also the Tennessee Real Estate Commission recently noted, "if the surveys given to prospects are not accurate, a court could hold (real estate) licensees liable for providing a party with misinformation."

In conclusion, buyers of real property should have a new survey conducted. Those buyers who do not have a new land survey will be purchasing property without reliable information as to encroachments, overlaps, boundary line disputes and other matters that might be disclosed by an accurate survey of the property by a registered professional land surveyor.

**Here is just some of the problems that you could encounter:**

- 1. House encroaching off property**
- 2. House encroaching into utility easements**
- 3. House into easement, encroachment off property and utility lines over property**
- 4. Garage encroaching off property**
- 5. Fences not on property line/s and encroachments**
- 6. Access drive encroaches beyond subject property**
- 7. Driveway and fence encroachments**
- 8. Misc. encroachments, house, parking & driveway**
- 9. Access encroachments, utility line/s and driveway encroachments**
- 10. Flood Zone encroachments**

# The Future of Mortgage Loan Surveys (Inspections)

by

*Knud E. Hermansen, P.L.S., P.E., Esq.*

I have frequently been asked about the future of mortgage loan surveys. I will attempt to give the general consensus among title attorneys and real estate attorneys on the future of mortgage loan surveys. To comprehend the future of mortgage loan surveys, surveyors must have a general understanding of mortgage title insurance and risk factors.

The mortgage loan survey can trace its inception to the regulations governing the secondary mortgage market. These regulations promulgated in part by the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) require all mortgages sold on the secondary mortgage market have title insurance covering the mortgaged property. Furthermore, the title insurance cannot contain a survey exception. To remove the survey exception, title insurance agents have required "accurate surveys" as evidenced by survey plans depicting the property. A plan allowed the agents to remove the survey exception from the title policy. It should be made clear at this point that the title policy is for the mortgagee and NOT the buyer. While the buyer can and frequently does purchase title insurance, the buyer's policy usually does contain the survey exception and may have different terms. As a result, the property may have two insurance policies written for it. One policy will be written to protect the mortgagee and another separate and different policy is written to protect the buyer.

The terms of the mortgagee's title insurance policy will usually provide payment in the form of coverage in the event three conditions occur. First, the title (or more properly the mortgage) to the property is jeopardized or made unmarketable. Second, the buyer or purchaser of the property (mortgagor) stops paying on the loan. Third and finally, after the lending institution calls in the note and sells the property, the net amount received must be less than the outstanding balance of the mortgage. Until the last two conditions occur, the mortgagee has not suffered any damages.

Insurers make money by knowing the risks. The less the risk, the less the insurer is concerned. What surprises many surveyors is that survey problems present little or no risk for mortgage title insurance. To understand the last statement, consider an example of the mortgage market of the future where no surveys may be required to obtain mortgagee title insurance.

Albeit, most property does not have a title problem, but for purposes of carrying an example forward assume 20% of the mortgaged properties have a title problem. Of the 20%, assume one-half of the problems could have only been discovered by an accurate survey. As a result, 10% of the mortgaged properties have title problems only discoverable by an accurate survey. Furthermore, assume 10% of these problems are substantial. This would include such problems as the garage or entire septic field extending over the boundary onto the neighbor's property. At this point, we have 1 out of every 100 properties or 1% of the mortgaged property with substantial title defects that could have been discovered by an accurate survey. This number does not represent the title insurer's risk on the mortgage title insurance. As previously stated, the mortgagee's title insurance does not have to pay damages yet. First, the buyer must stop paying on the mortgage. Realistically, this does not happen even if the garage or septic field is discovered to reside on the wrong side of the boundary. If the buyer were to stop paying on the mortgage, the buyer creates several problems for themselves. First, the buyer runs the danger of losing the equity they have accumulated in the home. Since most mortgages start at 80% or less of the appraised value, even the most recent home purchaser risks losing up to 20% of the appraised value by walking away. Second, the buyer that walks away from the mortgage still has to rent or pay for housing someplace else. Faced with this prospect, most buyers think it is better to pay for a house they own and a garage they don't own than pay rent for a house and garage they don't and will never own. Third, the cost for removing the garage or coming to terms with the neighbor may be expensive but it will usually be less expensive than walking away from the mortgage. Walking away from the mortgage risks an expensive lawsuit and probable loss of a good credit rating. Failure to pay on a mortgage, no matter how justified, will almost certainly cause a request for a loan to purchase another home to be denied. Finally, walking away from the mortgage is not the same as walking away from the debt. A person has an obligation to pay even if the lending institution has collateral to seize. The lending institution may opt to sue on the note only or foreclose and sue for any remainder under the note. The bottom line is that the buyer will owe the money no matter how big the problem with the title.

Going back to the example again, it appears reasonable to state that only 0.5% of the serious title defects will result in the buyer refusing to pay on the mortgage. Even in the few cases this percentage represents, the mortgagee's title company still does not have to pay compensation. The final condition for compensation has not been met. The bank must foreclose on the note, sell the property, and fail to recover the outstanding amount. Therefore, to continue with the example, assume less than 10% of foreclosures bring less than the outstanding mortgage. This is a reasonable assumption since mortgages seldom exceed 80% of the appraised value, five or more years of payments have been made before foreclosure occurs, and many banks simply refuse to sell the property by foreclosure for less than the outstanding mortgage. The end result of all these events coming together in this example is that an insurance firm risks paying substantial damages (buying the mortgage) one time for every 200,000 mortgages. (To put this in perspective, if the insurance were to stop asking for mortgage surveys and charge \$1 more for each policy, they could save the buyer an extra \$100-\$300 in closing costs and have the money to purchase the typical residential mortgage if forced to buy one.)

Given these small risks, what does this mean for the surveyor who prepares mortgage surveys. First, as most surveyors are well aware, the title insurance company is not concerned with the quality of the product. They don't pay for the services and they will not suffer for poor quality services except in extremely rare cases. Second, to lower closing costs and remain competitive with other lending institutions, they can safely look toward reducing or eliminating the survey costs. In many cases banks are already allowing the less costly owner affidavits to substitute for surveys. In other words, the mortgagee's title insurer and the lending institution have little if any risk even if every transaction uses an owner's affidavit. Under the circumstances, a mortgage loan survey cannot be cheap enough because the surveyor is competing against a free or nominal costing piece of paper with no realistic increase in risk imposed on the title insurer. The trend to pay less concern with the survey exception can be expected to continue until the survey exception is removed as a matter of course from the mortgagee's title policy.

For surveyors that have looked down upon mortgage loan surveys as being sub-professional services this is good news - the temptation for surveyors to perform these services will be gone. Surveyors that have counted on these services to sustain their business are probably horrified at the thought that this service will no longer be sought by lending institutions. In order to prevent loss of business, these surveyors have sought to prevent owner's affidavits or require surveys with every sale. Realistically, both efforts are probably doomed to failure. First, outlawing owner's affidavits will not force insurers to start requiring surveys again. On the contrary, insurers will jump directly to the inevitable and not require surveys or affidavits. Second, state statutes requiring surveys will have no affect on the title insurance industry. The secondary mortgage market and to a large extent lending institution regulations are governed by federal regulations - not state regulations. It is probably an accurate statement to say that the lending institutions and title insurers will generally ignore state regulations with impunity. On the other hand, the buyer will be affected by any statute requiring surveys at closing. As a result, buyers can be expected to either show outrage at the additional cost of closing or continue to seek the low costs "inspections" and use them like they were high cost, quality surveys. In each situation the surveyor will be the loser.

In conclusion, the surveyor who has relied upon mortgage loan surveys to sustain their business must shift their market. This may not be as difficult as it appears. During the time that surveys were required by lending institutions, many buyers' attorneys (perhaps incorrectly) began to rely on them to disclose potential problems for their clients. As a result, some attorneys now find them as indispensable for closing as radon tests, termite inspections, building inspections, and other common services usually sought by the cautious buyer. The value of a survey or inspection of the property before purchase by the buyer should be stressed and marketed.

---

The above articles was provided by:  
Knud Hermansen, P.E., P.L.S., Ph.D., Esq.

## **NSPS, INC. RESOLUTION ON SURVEY AFFIDAVITS**

Whereas, it has come to the attention of the membership of the National Society of Professional Surveyors that a trend is developing throughout the nation whereby Lenders, Title Companies and Realtors are abandoning the long established practice of ordering a survey at the time of real estate sales or mortgage transactions; and

Whereas, in lieu of a new survey, some of the above listed entities are requiring an affidavit from a previous homeowner as to the facts shown on an old survey; and

Whereas, in light of the many survey related problems that may develop over time, particularly with respect to residential property, the Society believes that it represents unsound business practice to request that anyone other than a licensed professional land surveyor sign such affidavits as are described in the preceding paragraph; and

Whereas, our Society members are now being approached by the recipients of these affidavits and/or outdated or altered survey map/plats; and

Whereas, these recipients have questions, concerns, misunderstandings and misgivings as to their property lines and as to whether the original surveyor may be liable for problems now in existence; and

Whereas, residential property owners in general often times express their disbelief upon learning that they have no title insurance coverage for survey matters, and that the original surveyor is insulated from liability upon the expiration of the statute of limitations or because the survey was not issued in their behalf or because the drawing has been altered; and

Whereas, it is the belief of the Society that such matters are not being adequately disclosed to the residential home buyer and the interest of the residential home buyer are not being sufficiently protected; and

Whereas, it is the opinion of our Board of Directors that such practices as are summarized in the foregoing preambles are detrimental and will result in financial loss to a considerable number of those members of the public who, without the benefit of a survey, will be purchasing residential property and putting it up as collateral without any reliable information as to encroachments, overlaps, boundary line disputes and other matters that might be disclosed by an accurate survey of the property by a licensed surveyor.

Be It Therefore Resolved by a vote of the Board of Directors of the National Society of Professional Surveyors that the general public be made aware of the pitfalls that they may encounter as a result of not insisting that a survey of the property be made by a licensed surveyor and furnished to them as a condition precedent to closing.

Be It Further Resolved that this organization is on record as strongly condemning and resisting the practice of eliciting affidavits from sellers of property as to matters of survey.....and the practice of distributing and using altered or outdated survey map/plat for transactions other than for which they were prepared.

### **ADOPTED NSPS BOARD OF DIRECTORS - APRIL 23, 1996**

**NOTE:** There are many terminologies and procedures for the licensed land surveyors' professional work product. These variations are typically dictated by state Land Surveyor Boards or state statute. As used herein, the word "survey" refers to the professional work product(s) dictated and/or approved in any particular state.

---

The above information was supplied to LSRP by John Kohl, RLS.

---

## **Frequently Asked Questions**

### **What is a Survey?**

The word survey is derived from an old French word meaning "to look over", and refers to the process of evaluating real property evidence in order to locate the physical limits of a particular parcel of land. The real property evidence considered by the surveyor typically consists of physical field evidence, written record evidence, and field measurements. The surveyor, having made an evaluation of the evidence, forms an opinion as to where he believes the lines would be located if fully adjudicated in a court of law. The typical modern day surveyor sees himself as an expert evaluator of evidence. He strives to arrive at the same opinion of boundary location regardless of whether he was hired by his client or his client's next door neighbor. The surveyor's opinion is founded on experience and applicable legal precedents. Unlike the attorney, the surveyor does not see himself primarily as an advocate for his client.

While land surveying is often associated with engineering, the two professions are distinct. The evaluation of land surveying evidence is not a "science" in the sense that there is one procedure to follow which will yield the "correct" result. Surveyors occasionally disagree on the proper location of a boundary line: not necessarily because one surveyor measures better than the other but more commonly because each surveyor has weighed the evidence differently and has formed different opinions. Just as two lawyers may draw different conclusions from the same line of cases, surveyors may disagree about the appropriate location for a boundary. Being a professional opinion, a survey is subject to review by a court in the event that a boundary dispute reaches litigation. Because a survey is primarily a professional opinion, the attorney should remember that a survey and supporting documentation provided by one professional surveyor may be far superior or far inferior to that provided by another. Almost any field technician with basic training can make measurements with an acceptable degree of precision and replicability. In those instances in which locating the bounds of a land parcel requires an extensive amount of evidence evaluation, an individual with the requisite amount of education, knowledge, and experience should be employed to competently accomplish the survey.

### **Why would I want an ILC?**

An ILC (Improvement Location Certificate) is basically an inspection of the property from a land surveying perspective, to disclose any adverse matters that could effectively cloud the title and marketability of the property. Such adverse matters could also have a negative effect on the value of the home/property.

### **Why would I want a Land Survey?**

A Land Survey is when property markers (monuments) are placed at the property corners. (An ILC does not provide for this service) Each property line and corner is determined and certified as true and correct to the client. A plat map (drawing) is provided showing the results of said survey and is deposited with appropriate county offices.

### **When should I get an ILC, as compared to a Land Survey?**

An ILC is a cursory inspection, and provides a wealth of information, but if new improvements are being built and you need to know exactly where the property lines and corners are, a land survey must be conducted.

## What is professional land surveying?

Not infrequently, the boundary lines of a parcel as physically occupied or possessed by its owner differ from the distances and direction called for in the deed or differ from the monuments called for in the deed. Discrepancies between possession and the called for deed lines may range from minor variations in fence line locations to substantial encroachments of multi-story buildings. A land survey should always show the occupied lines, the deed record lines, and the extent of any mismatch. Significant mismatches suggest potential claims of ownership by senior right or adverse possession or suggest a change in a boundary line by mutual agreement and acquiescence. To cut off any potential rights of another to a claim of adverse possession, the property owner may want to record an appropriate document confirming his claim of ownership or seek a change, in possession to match the record lines. Professional Land Surveying evaluates all of the evidence to opine in the correct location of the boundary lines and corners.

## I think my neighbors fence is on my property, what should I do?

The only certain way to determine where your property line exists, is to have a complete Land Survey conducted on the parcel, in which all property corners and lines are marked with permanent markers.

## I want to build a garage, can I depend on an ILC to be accurate?

The information stated on an ILC should only be considered as approximate. The certification (state statute) specifically states:

### IMPROVEMENT LOCATION CERTIFICATE

*I hereby certify that this improvement location certificate was prepared for .... (individual or firm) ....., that it is not a land survey plat or improvement survey plat, and that it is not to be relied upon for the establishment of fence, building, or other future improvement lines.*

*I further certify that the improvements on the above described parcel on this date, .... (insert date) ....., except utility connections, are entirely within the boundaries of the parcel, except as shown, that there are no encroachments upon the described premises by improvements on any adjoining premises, except as indicated, and that there is no apparent evidence or sign of any easement crossing or burdening any part of said parcel, except as noted.*

If you are building a garage or constructing other improvements in which you need to know the location of the property line, you must have a Land Survey Plat conducted.