

Land Surveys For Real Estate Transactions



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What is a Survey?

In common usage, the term ‘survey’ refers to a drawing of a parcel of real property. This drawing depicts the results of the surveyor’s measurements made in the field and his or her interpretation of evidence relating to the location of the boundaries of the property based on a legal description furnished to the existence, the identity, the location and the dimension or size of natural or artificial features on land or visualization if needed, of such documentation.

There are numerous types of surveys:

- As-built (also called record)
- Boundary
- Condominium
- Construction layout
- Control
- Topographic
- Hydrographic

The most commonly encountered type is the boundary survey, which determines the perimeters of a parcel or tract of land by establishing or re-establishing corners, monuments and boundary lines for the purposes of describing the parcel, locating fixed improvements on the parcel, dividing the parcel or platting.

Reasons for Obtaining a Survey

Surveys are a part of nearly all modern real estate transactions. Many institutional lenders require a survey as a condition before making a loan secured by a mortgage encumbering real estate. An accurate survey, coupled with a physical inspection of the property, is by far the best way to determine the location of the boundaries of the property and the location of improvements on the property. It will also show whether the location of the property on the ground is the same as the written legal description.

The survey also adds value to your transactions by providing an additional level of protection coverable through title insurance. Most real estate transactions in the United States are covered by title insurance because of the protections it provides.

A current survey provides information that will allow a title insurance company to delete the exception for matters of survey in the title insurance policy, such as boundary lines, encroachments and parcel area.

A **wise buyer** will always obtain a survey to be certain that, among other things, the property is in fact located where the buyer thinks it is located. Nothing is more frustrating than discovering that the fence line is NOT the true property line, and your buyers just ‘lost’ twenty feet of property to their new neighbor.

A **seller** will generally be less concerned about a survey than will a buyer, unless the survey reveals problems or defects which the seller is obligated to remedy or unless the purchase price is based on the quantity of property (normally in terms of acreage or square feet) as determined by a survey.



Surveys in Real Estate Contracts – BUYERS

When representing buyers, the agents' duty is to protect their clients and ensure that they pay the best possible price for a clearly defined property. Conveying land from one party to another ALWAYS requires a clear and accurate description of that property, because any ambiguities or uncertainties in the legal description can invalidate a deed. A survey is the best way to clearly and accurately define property.

What if you have an existing survey?

You may have an older survey in your possession, perhaps given to you by the seller's agent. There are advantages and disadvantages to using an existing survey instead of commissioning a new one:

Advantages:

- Useful to conceptualize property's shape and size
- Inexpensive, often free
- Typically available from seller, county or title company in a short amount of time

Disadvantages:

- Not a current survey, reflects information available only up to the date the survey was completed
- May not include all of the information that is pertinent to your transaction. Often, there have been changes to easements, encroachments or other issues affecting the property that are not shown on an outdated survey. Here are some examples of potential problems:
 - Utility company installation of new or updated transmission lines may result in changes to the existing easement, which may not be shown on an older survey.
 - Existing survey may not show the existence or location of underground utilities that could affect the buyer's plans for the property, such as installation of a sport court or expansion of the house. A new survey will disclose all of this information.
- May not have been intended for use in property transfer. For example, the survey may have been prepared only to locate one property line for installation of a fence or other appurtenance, or for construction of the house, and may not accurately reflect all the encumbrances or other features on the property.

If the existing survey reveals problems such as evidence of unrecorded easements or encroachments, the time to face those problems and deal with them is before the contract is signed. Even if the seller's agent does not have a survey, he or she might know about survey problems. For example, a neighbor may have built a fence or other structure that appears to cross over the boundary line.



What if you are aware of survey-related problems in the pre-contract stage of the transaction?

The buyer is relying on you to provide all of the real estate know-how that they lack. As the buyer's agent, you have a fiduciary responsibility to disclose material facts, and a survey-related problem is clearly material to any parcel of land. Therefore, it is in your best interests to give them access to all the resources they need to make an informed decision. If there are issues related to the boundary of the property or other survey-related problems, it is up to you to steer your client through the transaction.

In any event, the nature and extent of the survey problems will dictate what the parties decide to do (or not do) about them.

Surveys in Real Estate Contracts – SELLERS

What if you have an existing survey?

You may have an older survey in your possession, either from the seller or from another source. If the survey reveals problems such as evidence of unrecorded easements or encroachments, the time to face those problems and deal with them is before the contract is signed. Even if your seller client does not have a survey, he or she might know about survey problems. For example, a neighbor may have built a fence or other structure that appears to cross over the boundary line. *If your client informs you of these problems, you have a duty to disclose these latent defects to the buyer.*

What if you are aware of survey problems in the pre-contract stage of the transaction?

Again, a selling agent has a duty to disclose latent defects, or defects that are not discoverable by ordinary inspection, to a buyer. As a seller's representative, one way to deal with survey problems is to provide in the contract that the particular survey problems do not constitute title defects, but rather are deemed permitted exceptions. In any event, the nature and extent of the survey problems will dictate what the parties decide to do (or not do) about them.

Procurement of New Survey

Although the buyer normally pays for the survey, this is often negotiable (as are virtually all terms of any real estate contract). State which party pays for the survey.

Regardless of which party you represent, be sure that the following dates are defined:

- Deadline dates with respect to the delivery of the title insurance commitment
- The procurement of the survey
- The closing date
- Other key contract dates



Buyer: Most contracts provide that the buyer may obtain a survey within a specified timeframe, although in rare cases the seller is required to obtain the survey. If the seller is required to procure the survey, provide in the contract for a remedy in favor of the buyer if the seller fails to deliver the survey in a timely manner. That remedy might be an extension of the inspection period, an extension of the closing date or reduction in the purchase price. If your buyer has the option of procuring a survey, you may wish to incorporate some flexibility into the contract so that your client does not have to obtain (and hence pay) for the survey until 10 days or so before the closing (or whatever time period your surveyor requires to complete the survey). Keep in mind, however, that delaying procurement of the survey increases the risk that you may not have sufficient time to object to defects revealed by the survey. It is generally preferable to obtain and review the survey before the end of the inspection period in case the buyer wishes to terminate the contract for any reason. Once the inspection period expires, the seller's obligation to cure survey defects may be limited under other provisions of the contracts.

Seller: Provide that the last day for obtaining the survey is no later than the last day for delivery of the title insurance commitment; the delivery of the title insurance commitment; the delivery of the survey is generally what triggers the commencement of the time period in which the buyer must make objections. Some real estate professionals, especially those representing buyers, prefer to require that the title insurance commitment be delivered at least 10 days before the last day for obtaining the survey; then, the surveyor may be given a copy of the title insurance commitment in order to locate the survey easements and other matters listed on Schedule B of the title insurance commitment.

Survey Requirements

Typically, the specific requirements are not detailed in the real estate contract because the buyer is paying for the survey and is able to specify the requirements for the finished product directly with the surveyor. However, if you represent the buyer and the seller is providing the survey, you should specify the survey requirements in the contract to make sure that all of the necessary information is included. There are varying degrees of information that can be included on a survey, and you want to be sure your buyer sees everything he or she needs to make an informed decision.

When drafting the contract, provide that problems or defects revealed by the survey (that are not permitted exceptions under the contract) will be treated as title defects under the paragraph of the contract concerning title matters. Some examples of problems and defects that a survey might reveal include the following:

- Easements that are not permitted exceptions under the contract.
- Rights of way that are not permitted exceptions under the contract
- Violations of any building, zoning, land use, or other laws, ordinances, rules or regulations imposed by governmental authority.
- Encroachments of improvements onto the lands of others, or encroachments of other improvements onto the property
- Overlaps or missing slivers of property
- Lack of legal access for either ingress and egress or utilities.

The survey might reveal variations between the legal description in the contract and the actual measurements on the ground.

Buyer: Include a provision to the effect that survey defects include all matters that would, in the buyer's sole opinion, interfere with the buyer's intended use of the property.



Seller: Provide that notwithstanding anything to the contrary contained in the contract, survey matters shall not be treated as title defects if the title insurance company agrees to remove the standard exception for matters of survey and does not insert in its place a specific exception relating to the particular potential title defects or to matters appearing on the survey in general.

Multiple Legal Descriptions

Buyer: The property might be described by metes and bounds in the instrument by which the seller acquired title and in the survey by reference to several separate legal descriptions. You should specify that if the surveyor writes a combined or aggregate legal description and certifies that the new legal description describes the same property as the combined old legal descriptions, the seller will convey the property using the new legal descriptions.

Seller: If the subject property has multiple legal descriptions and the surveyor writes and certifies a new legal description, you should ask that the instrument of conveyance include, after the new legal description, the phrase "also described as" followed by the old legal descriptions. Including the old legal descriptions clarifies the seller's intent to convey the property.



Ordering a Survey

Who Orders the Survey?

Depending on your client's level of sophistication, they may order the survey or they may ask you to order the survey. If you are not the one who orders the survey, **always confirm** that it has in fact been timely ordered and that the survey specifications include all of the necessary information. That way, all of the requirements will be timely and properly communicated to the surveyor and delays avoided. Even if you do not place the initial order for the survey, at some point you should communicate with the surveyor as to the form and content of the survey.

How and When to Order Survey

Your client may instruct you to use a particular surveyor. If not, choose an experienced, reputable, dependable, local surveyor; keep in mind that such a surveyor may not be the least expensive one. If you are not familiar with the surveyors in your area, ask for recommendations from other real estate attorneys, real estate brokers and mortgage lenders. You should discuss the following items with the potential surveyor:

- **Timeframe.** As soon as the contract is signed, call the surveyor and inquire about how much time it will take, at most, to receive the survey once it is ordered. When scheduling for delivery of the survey, it is wise to give yourself a cushion of at least a few days to allow for unexpected delays, especially since surveyors may get backlogged due to inclement weather.
- **Scope of Work.** To give an accurate estimate of the time and cost, the surveyor will need to know what the basic requirements for the survey will be. Send the legal description specific instructions and a proposed form of surveyor's certificate as soon as possible.
- **Fee Quotation.** Ask the surveyor for a fee quotation, and then be sure this is acceptable to the client. Be sure to carefully balance qualifications and fees. Surveyors should not be selected based on price alone; your clients are paying for a professional service and for expertise in a specific area and specialty.
- **Payment Responsibility.** If you are ordering the survey on your clients' behalf, make sure that the surveyor understands that your client-not you-is responsible for payment, unless you have the money in your trust account and your clients' authorization to use it to pay the surveyor's bill.

You should also confirm the fee and the payment arrangement. Inform the surveyor as to the buyer's planned use of the property, in order to assist the surveyor in defining the scope of the survey. It is also a good idea to alert the surveyor about any boundary problems of which you are aware. Call the surveyor two or three days later to be sure the information has been received.

General Notes about Ordering Surveys

Does a Boundary Survey Include Improvements? – There is some ambiguity as to whether the term "boundary survey" refers to a survey that shows improvements such as building or not. Never rely on a boundary survey alone, unless all you are interested in is the perimeter of the property. Instead, ask for a survey that shows all improvements. Using the descriptive names: "boundary and improvements survey" or "boundary and location survey" alleviates much of the confusion, even though those types of surveys are not expressly defined in the Idaho Administrative Code.



Lender Requirements – The lender will sometimes impose requirements for the survey that are more onerous than (or at least different than) those you have imposed on behalf of your buyer client. This is more likely to be the case in a large commercial transaction. The best approach in that situation is to initiate communication between you, the surveyor and the lender’s attorney as early as possible so all parties understand the scope of the surveyor’s work and are satisfied with it. As a buyer’s representative anticipate a typical lender may be involved in the transaction at some point, so you should try to anticipate a typical lender’s requirements when you order the survey.

Deadlines – When you represent the buyer, or in the rare case the seller, who is required under the contract to procure the survey, place an appropriate notation on your calendar or in your tickler system to be sure you receive the survey by the deadline. If you receive the survey after the deadline, the contract may have been breached and your time for reviewing the survey and making objections as to defects on behalf of the buyer has been shortened or eliminated. If you know that there will be a delay and that the surveyor may not deliver the survey until after the deadline provided for in the contract, contact the seller’s attorney right away. Ask for a modification of the contract extending the deadline.

Revisions - If the survey delivered to you does not meet the contract’s requirements, or those which were furnished the surveyor, request that a revised survey be delivered to you as soon as possible. Some surveyors will provide a preliminary survey for your review and comment prior to finalizing the survey.



Contents of a Survey

General Requirements

Unless you specifically request that the survey cover the items listed below, the survey might not show them, since many of these items are not part of the minimum technical standards. Items from the following list can be incorporated into your instructions to the surveyor, but be sure to delete any that are not pertinent to your transaction and to add any that are pertinent.

As a general guide, you should request that the survey include some combination of the following:

1. Be prepared by a professional surveyor, duly licensed in your state.
2. Show the boundaries of the property and the location and dimensions of all improvements located thereon.
3. Contain a certification indicating that it meets (or exceeds) the minimum technical standards set forth in Idaho Code (or any replacement or successor rule or regulation).
4. Be signed by the surveyor, dated and sealed with the surveyor's official seal.
5. Show a prominent north directional arrow and scale of the drawing.
6. Contain a metes and bounds or platted legal description which is identical to that set forth in the contract. A metes and bounds description will enable one reviewing the survey to trace the legal description of the property by following the bearings and distances around the boundaries as shown on the survey, while the platted legal description will refer to a specific lot within a subdivision.
7. Show interior lot lines, if applicable.
8. Tie into a legally established point of beginning such as a section or quarter section corner or a block corner in a platted subdivision.
9. Fix all corners with appropriate monuments unless sufficient monumentation is already in place.
10. Indicate the gross area of the property, in acres and in square feet. This is especially important if the purchase price is based on the acreage or square footage of the property.
11. Depict any easements that affect the property. Easements that benefit the property, as well as those that burden it should be shown. All easements should be referenced by recording date (i.e. official records book and page).
12. Show the following: (Optional)
 - Location and dimensions of all visible utility connections and service lines;
 - Location of setback lines, whether mandated by restrictive covenants, any applicable plat, or by building, zoning, land use, or other laws, ordinances, rules or regulations imposed by government authority;
 - Location and dimensions of natural and manufactured objects affecting the property;
 - Location of ditches, creeks, canals and other like objects; and
 - All of the contract's permitted exceptions and all exceptions in the title insurance commitment, to the extent that the same are locatable on a survey.
 - Show, if known, the street address of any improvements located on the property.
 - Show the location of walkways, paved areas, driveways and curb cuts, both on the property and adjacent to the property's boundary lines
 - Show the 100-year flood plain contour line, if applicable to the property.
 - Indicate the flood zone and map number in which the property is located on the applicable FEMA flood insurance rate map, if applicable.
 - Contain a statement that the means of access to and from the property is by a specified public roadway.



- Show any roadways or alleys that abut the property, whether public or private. Names of the roadways, along with their widths and distances from the property, should be shown too. If the property is not abutted by a public roadway, the survey should show the location of the nearest public roadway and its distance from the property
13. Show any encroachments or discrepancies between the legal description of the property as set forth in the contract and any markers or monuments on the ground designating the boundaries of the property as actually used and occupied.
 14. If the property is bounded in any manner by a water body, locate the existing water line (i.e., the approximate position of the water boundary) and any visible evidence of the location of the ordinary high water mark (in the case of a freshwater body) or the mean high water line (in the case of a saltwater body). Depending upon the intended use of the property, you might ask the surveyor to actually locate the ordinary high water mark or the mean high water line, the meander line as shown on the original government survey (if the water body in question was in fact meandered in the original government survey), the coastal construction control line, if any portion of the property is located seaward thereof, and any improvements (such as docks and seawalls) located waterward of the ordinary high water mark or the mean high water line, as the case may be (Optional)

ALTA Surveys

The Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys were adopted by the American Land Title Association (ALTA) and the American Congress on Surveying & Mapping (ACSM). The most recent revision occurred in 2011. Many out-of-state attorneys and lenders, because of their familiarity with these standards, and possibly their lack of familiarity with Idaho minimum technical standards set forth in Idaho, often request that the survey meet the ALTA/ACSM standards. There is some overlap between the two sets of standards, but they are by no means identical. The Idaho minimum technical standards contain some requirements not found in the ALTA/ACSM standards, and the ALTA/ACSM contain some requirements not found in the Idaho minimum technical standards, but the ATLA/ACSM standards require more work on the part of the surveyor, and thus a survey meeting those standards is more expensive. It is becoming increasingly common for attorneys to require that surveys meet both sets of standards.

Reviewing the Survey

Whether you represent the buyer, the seller or the lender, you must be able to review, analyze and understand the survey. Although your skill in reviewing surveys is most important when representing buyers and lenders, you should be familiar enough with surveys and legal descriptions to spot any significant errors the surveyor's may have made.

Buyer: The entire survey must be reviewed carefully, and discussed with your client, informing him or her of any problems or issues raised by the survey. In general, you want to ensure that the survey meets the contract's requirements and the requirements set forth in your instructions to the surveyor, that the surveyor's certificate is acceptable and that the survey reveals no problems that were not already know. As the buyer's agent, make any objections to survey defects within the time period and in the manner provided for in the contract. Objections to survey defects are usually made in the same manner as objections to title defects.

Seller: Your review of an existing (i.e. older) survey might occur before the contract is signed, in which case you will need to spot any problems that the seller should address before signing a contract or which should be addressed in the contract. Your review of the new survey (i.e., the one normally obtained by the buyer under the contract) when representing the seller will probably be limited to determining whether objections made by the buyers are valid. If the purchase price is based on the quantity of property, you will need to verify this information from the survey as well.

All Parties: Review the survey as soon as you receive it. Be sure your client has a copy of the survey, and that he or she reviews it. Because of your client's familiarity with the property, the survey might alert your client to problems that you might not be aware of. For example, the client might suddenly realize that the property is smaller or configured differently than he or she thought.

Start with the legal description - Start by comparing the legal description in the survey to the legal description in the title insurance commitment. There should be no variations. If variations are found, object to them. Follow the calls on the drawing around the boundaries of the property, looking for discrepancies, encroachments, and other problems. The drawing should conform to the legal description shown on the survey. Carefully examine the survey for any matters defined as survey defects under the contract such as encroachments, easements, setback violations and other matters that are not within the permitted exceptions under the contract.

Read the entire survey and any accompanying report. Once you become familiar with surveys, this task will not seem as daunting. If you only read part of the survey, or if you give it only a cursory reading, you run the risk of missing something important.

Old surveys and affidavits – Some title insurers will permit the deletion from the title insurance policy of the standard exception for matters of survey based on an older survey coupled with an affidavit of the current owner establishing that there have been no material changes. If you represent a buyer in a situation where a title insurer has agreed to accept an old survey with an affidavit as the basis for deletion of the survey exception, you may wish to have the survey certified to your client and the current title insurance company by a surveyor. Most surveyors, however, are reluctant to certify a survey when they have not completed the field work themselves.



Be sure to inform your client of the risk involved in such a procedure. The old survey may no longer be accurate and the owner may fail (intentionally or not) to disclose material changes that could seriously impact the subject property.

Conclusion

Real estate professionals and surveyors best serve their clients by cooperating with one another and by working together effectively. If you are in doubt about whether to consult with a surveyor, it's better to protect your client and call.