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2021 revised minimum standard detail requirements for ALTA/NSPS Land Title Surveys - by Shannon Slaughter

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The minimum standard detail requirements for ALTA/NSPS Land Title Surveys was revised in 2021, effective February 23, 2021. Among the numerous revisions made to specific sections of the minimum standard detail requirements, the joint ALTA/NSPS Committee reviewed the case of *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), which held that in certain circumstances, such as those in *Gutierrez de Martinez*, the term “shall” could mean “may.” *Gutierrez de Martinez* involved a United States DEA agent that was in an automobile accident in Colombia. The plaintiff claimed that the DEA agent’s negligence and caused physical injuries and property damage and thus named DEA agent as party defendant. Under the Westfall Act, 28 U.S.C. § 2679(d)(1), the United States Attorney General is empowered to certify that an employee was acting within the scope of his or her office of employment and such certification “shall” conclusively establish the scope of office or employment according to the statute. Upon the Attorney General’s certification, the action shall be deemed an action against the United States, and the United States shall be substituted as the defendant. The SCOTUS held that the statutory language (i.e., whether the certification by the Attorney General is subject to judicial review despite the use of the word “shall”) is open to divergent interpretations. The SCOTUS included a footnote explaining that although “shall” generally means “must,” legal writers sometimes use, or misuse, “shall” to mean “should,” “will,” or even “may.”

To illustrate examples, the SCOTUS cited certain Federal Rules of Civil Procedure using the word “shall” to authorize, but not to require, judicial action. In light of the holding in this case, the joint ALTA/NSPS Committee reviewed each use of the word “shall” in the Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys and made determinations in each instance as to whether the word “shall” was intended to be directive or permissive and made revisions accordingly.

Section 5E of the minimum standard detail requirements for ALTA/NSPS Land Title Surveys was revised to require that surveyors disclose, among other things, evidence of easements, servitudes, or other uses by other than the apparent occupants of the surveyed property not disclosed in the documents provided to the surveyor. This includes but is not limited to utility locate markings as evidence of easements and utilities including a note as to the source of the markings (with a note if unknown), pipeline markers, manholes, valves, meters, transformers, pedestals, clean-outs, overhead lines, guy wires, utility poles on or within ten feet of the surveyed property, roads, drives, sidewalks, paths and other ways of access, utility service lines, or any other surface indications of underground easements or servitudes on or across the surveyed property.

In Table A, Sections 6(a) and 6(b) were revised to clarify that zoning research by the surveyor is not required. If this Table A item is requested, clients must provide a zoning report to the surveyor. However, a surveyor may conduct zoning research if so qualified and inclined. Former Item 10(b) of Table A addressed identification of whether certain walls were plumb on the survey—an item that has no bearing on title. This item was eliminated. It should be noted that the items in Table A may be negotiated between surveyors and clients. However, there are certain items in Table A that the surveyor must include to comply with state regulations that cannot be negotiated. Clients and their

counsel are encouraged to clarify with lenders and title insurers which Table A items they require from the outset of the transaction to avoid delays and cost increases mid-transaction.

A number of other revisions were made to the 2021 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys that should be carefully reviewed.

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