

**New Jersey
N2K Hour:**

**Insuring a
Commercial
Transaction**

Webex Presentation,
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Commercial Searches

- Commercial files require a full 60-year search in NJ for purchases and refinances.
- We have a bulletin which addresses the use of starters for a search on commercial files, [SLS2011004](#).
- Subject to any local regulatory requirements, establishing more stringent standards, you may use starters as follows:
- You may use a prior Owner's Policy with specific Schedule B title exceptions to begin your search, even if the prior Owner's Policy was issued by another title insurer (even if it has been merged into another title insurer) or title insurance agent.

Starter Policies and Commitments

- You may use a prior Loan Policy with specific Schedule B title exceptions to begin your search for issuance of a new Loan Policy, even if the prior Loan Policy was issued by another title insurer or title insurance agent. If you will issue a new Owner's Policy based on a prior Loan Policy as a starter, you should begin your search one year before the date of the prior Loan Policy.
- You may use a prior Commitment for Title Insurance, from a prior transaction or otherwise approved by our underwriters, with specific title exceptions to begin your search, even if the prior commitment was issued by another title insurer or title insurance agent.

Starter Policies and Commitments (cont.)

- For a **commercial** transaction, the use of a commitment must be approved by a senior underwriter.
- You may not use a commercial or residential short form (a form not containing specific title exceptions) or short form commitment as a starter for an Owner's or Loan Policy that will have specific title exceptions.
- You may not use a Limited Coverage/Home Equity/Junior Loan/Foreclosure Policy or Guarantee as a starter.
- You should also do your regular search of names for parties who are in the chain from the time of commencement of your examination, including those parties shown as vested in title by the starter.

Starter Policies and Commitments (cont.)

- A regular search for taxes, assessments and other charges must also be done.
- If a significant gap between the current date and the date of the available title records exists in the applicable county, you should also search that approximate gap time behind the date of the starter.
- For a commercial transaction, you must (1) secure copies of all instruments referred to in the prior title evidence, (2) secure the instrument vesting title in the current owner, (3) review all such instruments and write your own exceptions in your own words after such review (unless you have a prior Stewart policy).

NJ Mansion Tax

- The NJ mansion tax is part of the RTF and imposes a 1% fee on the entire amount of consideration for certain types of property when the consideration recited in the deed is in excess of 1 million dollars.
- The fee, as per the statute, is imposed upon the buyer.
- The parties to a transaction can of course negotiate the responsibility for the payment.
- The types of property subject to the tax, based on property tax classification, are 4A (commercial), 2 (residential), 3A farm property (regular).

NJ Mansion Tax (cont.)

- The definitions of these types of property classifications can be found in N.J.A.C. 18:12-2.2. Your tax search is going to show the type of property tax classification, so you should be able to determine when the mansion tax applies.
- The other classes of property which are not subject to the tax are defined in the administrative code section N.J.A.C. 18:12-2.2.
- Industrial properties and apartments are examples.
- Contact your underwriter if there is any question as to applicability.

1031 Exchanges

- A 1031 exchange is a swap of one investment property for another that allows capital gains taxes to be deferred.
- The name is derived from Section 1031 of the U.S. Internal Revenue Code.
- This provision allows an individual or entity to avoid paying capital gains taxes when an investment property is sold and to reinvest the proceeds from the sale within certain time limits in a property or properties of like kind and equal or greater value.
- The taxpayer who owns the relinquished property must also be the same taxpayer who takes ownership of the replacement property.

1031 Exchanges (cont.)

- 1031 exchanges are frequently utilized on commercial transactions.
- In the context of a commercial transaction, a title company can act as a Qualified Intermediary in a 1031 exchange in conjunction with its ability to serve as an escrow officer throughout the transaction.
- The title company can serve as an escrow officer on behalf of the taxpayer as he or she disposes of an initial property and identifies prospective properties that meet the requirements of a 1031 exchange to defer capital gains tax on realized gains.

1031 Exchanges (cont.)

- If the title company does not act as the qualified intermediary, then the title company will not deal directly with the buyer or seller, but instead will deal solely with the Qualified Intermediary facilitating the exchange.
- The title company's central role in a 1031 exchange is that the agents on either side of the deal have access to all pertinent information and that the exchange can legally take place.

PACA/PSA

- PACA refers to the Perishable Agricultural Commodities Act, while PSA refers to the Packers and Stockyards Act.
- PACA was passed by Congress in 1930 to protect agricultural produce suppliers from unscrupulous vendors who refused to pay the suppliers for their goods.
- These federal statutes can pose a title risk as they create a trust for the benefit of unpaid sellers and suppliers of perishable agricultural commodities and poultry, poultry products, livestock, dairy, and meat products.
- Property acquired or commingled with trust funds may subject that property to the PACA/PSA trust.

PACA/PSA (cont.)

- If a fee owner is planning to sell real property which contains a grocery, restaurant or convenience store, an indemnity is typically required from the fee owner against any PACA liens that the tenant may incur on the property.
- Otherwise, an exception for PACA/PSA must be included on all commitments and policies.

UCC Liens

- The Uniform Commercial Code (UCC) financing statements record and protect a secured party's interest in the collateral offered by a debtor for a loan.
- In all cases, a Form UCC-1 is filed with the Secretary of State's office in the state where the debtor is incorporated to record the security interest.
- If the conditions change, a Form UCC-3 may be filed to amend the initial filing.
- Most UCC liens are self-subordinating, but if self-subordinating language is not contained in the document, then a UCC-3 Termination is required.

UCC Liens (cont.)

- The UCC-3 will also reflect the current relationship including continuation of the maturity date, amendment of the conditions or information in the original filing, termination of the obligation, assignment to another, or partial release of the collateral listed.
- UCC liens have a duration of 5 years from the date of filing, unless a continuation statement is filed.
- A UCC-3 form must be filed with the Secretary of State's office in the appropriate state to terminate a security interest in personal property.
- UCC liens must always be raised as requirements on Schedule B-I of the title commitment.

Mineral Rights

- Mineral rights are also referred to as subsurface rights; that is, the rights to the natural resources lying below the earth's surface.
- Any transfer of land may be accomplished with or without the transfer of the subsurface rights.
- Minerals are subject to the same rights of ownership, possession, and alienation as any other land.
- A conveyance of land without any exception or reservation of the minerals thereon carries with it the minerals as well as the surface of the land.

Mineral Rights (cont.)

- In NJ, we do raise an exception for mineral rights in Schedule B-II, but if our review of the real property and our county search does not disclose any mineral rights on record, we can get comfortable in omitting the general exception.
- Most properties in NJ do not have an issue when it comes to mineral rights, but we do still need to be careful if our property is located in a rural area, where mineral rights may be a concern.
- The ALTA 35 series is also available in NJ for providing affirmative coverage of mineral rights on both an Owner's and Loan policy.

Insuring a Construction Loan

- If you are insuring a construction loan, please be sure to add the pending disbursements exception in Schedule B of the loan policy.
- The pending disbursements exception provides that the policy insures only to the extent of the amount actually disbursed but increases as each disbursement is made in good faith for the payment of construction costs, up to the face amount of the policy.
- However, this exception still accounts for a continued rundown search which will disclose any potential Notices of Unpaid Balance or Construction Liens that need to be discharged of record.

Construction Loan Endorsements

- In NJ, only two endorsements are available for construction loans.
- The first endorsement is the Special Construction Loan Policy endorsement, which converts the loan policy into a special construction loan policy.
- Please keep in mind that coverage on a construction loan policy will expire three years from its effective date, and the lender would need to obtain a permanent loan policy by paying the balance of the applicable underwriting rate on or before the expiration date.

What is a Construction Lien?

- A construction lien is a claim made against real property by a contractor, subcontractor, or supplier who has supplied labor or materials for work on that particular property.
- The lien protects the claimant from the risk of not being paid for services rendered on the property.
- The lien law is governed by The New Jersey Construction Lien Law (CLL), N.J. Stat. § 2A:44A-1 et seq.
- This statute permits a lien claimant performing work or services or furnishing materials or equipment to file a construction lien under certain circumstances.

Underwriting Construction Liens in NJ

- New Jersey is actually one of the better states in terms of underwriting construction liens.
- Since NJ is a race-notice jurisdiction, a construction lien only enjoys priority as of its filing date, unless a Notice of Unpaid Balance (NUB) was previously filed.
- Other states, such as North Carolina and Pennsylvania, do not have this luxury, as the lien claimant is given a certain timeframe to file the mechanic's lien, and once the lien is filed, it relates back to when the construction first commenced on the property.
- This type of lien priority is problematic, since title insurers in these states will require lien waivers from the lien claimant in order to insure a loan.

Underwriting Construction Liens in NJ (cont.)

- In NJ, a mortgage enjoys priority over a Construction Lien Claim (CLC) or Notice of Unpaid Balance (NUB) as long as the mortgage is recorded before the filing of the CLC or NUB.
- Also, a recorded Notice of Settlement will defeat the priority of a construction lien claim if the NOS is recorded first.
- As a result, lien waivers are not required from NJ title insurers if your title search does not disclose any filed construction liens or Notices of Unpaid Balance.

Enforcement of Construction Liens

- An action to enforce a New Jersey construction lien claim must be initiated within 1 year from last providing labor or materials, and a notice of lis pendens must be filed.
- If the property owner or other interested party serves a notice requiring the claimant to commence an action to enforce the lien claim, the claimant must do so within 30 days.
- A suit resulting from a construction lien claim is procedurally similar to a foreclosure action, and a final judgment in the action can direct the sheriff to sell the property.

Enforcement of Construction Liens (cont.)

- Like a foreclosure, the claimant must join in the action the property owner and all other parties having an interest in the property which would be adversely affected by the judgment.
- A construction lien claim can be discharged by a filed certificate of discharge after payment or satisfaction of the lien claim or after settlement of the lien dispute within the earlier of 30 days after payment, satisfaction, or settlement; or 7 days after demand by any interested party. N.J.S.A. 2A:44A-30.

Discharge by Bond

- Pursuant to N.J.S.A. 2A:44A-33, in the event that a construction lien has not been paid off or satisfied, the lien can be discharged by the filing of a bond with the county clerk.
- Upon the execution and filing with the county clerk of a surety bond in favor of the claimant in an amount equal to 110% of the amount of the lien claim, the lien is effectively "bonded off" of the property.
- The surety company that issues the bond must be duly authorized to practice suretyship in the state and executed by a licensed agent or attorney in fact and acknowledged before a notary.

Insuring a Leasehold Interest

- A standard title search must be made including all the components that would normally be done in connection with insuring a fee interest.
- Note that all liens and matters affecting the fee interest must be set up as exceptions in the commitment.
- In the past leasehold estates and interests were insured utilizing the ALTA Leasehold Owners Policy (1992) and the ALTA Leasehold Loan Policy (1992).

Leasehold Policies and Endorsements

- When ALTA Endorsements 13 (Leasehold – Owners) and 13.1 (Leasehold – Loan) were adopted in 2001, they were designed to be annexed to the ALTA 1992 Owner's and Loan Policies, superseding the Leasehold Policies.
- The 1992 policies have now been withdrawn in favor of the ALTA 2006 policies.
- In 2006, ALTA did not create new versions of the 1992 Leasehold policies.
- Hence, leasehold coverage is now given solely by the use of the ALTA 13 and 13.1 endorsement in conjunction with the 2006 ALTA Owner and ALTA Loan Policies.

Leasehold Policies and Endorsements (cont.)

- There are several acceptable methods for determining the amount of insurance for a leasehold owner's policy as set forth in the rate manual.
- One method is to insure for an amount equal to the aggregate amount of the total rent contemplated under the lease.
- A second method is to insure for an amount equal to the total rent for the first six years of the lease following settlement. (For percentage leases the usage of a statement of estimated rent is acceptable).
- Lastly, the approved fair market value established by an acceptable appraiser may also be used.

Leasehold Policies and Endorsements (cont.)

- If insuring an assignment of a leasehold estate the amount of insurance is calculated by adding the full consideration to the amount of any assumed obligations.
- In the event that a leasehold owner's policy is to be issued simultaneously with a fee owner's policy, the rate manual provides that the premium for the leasehold policy will be a percentage of the amount charged for the fee policy.
- An exception must be included in the Leasehold Owner's policy for the terms and conditions of the leases including, without limitation, the lessor's right of reversion.

Leasehold Policies and Endorsements (cont.)

- Assignments of Leases can also be insured by issuing a new policy or endorsing an existing policy.
- When insuring an assignment of lease, the commitment must contain a requirement calling for an estoppel certificate.
- The estoppel certificate is to be signed by the lessor and states that the lease has not been assigned to a different party and that the assignor is not in default under the terms of the lease and the lease is in full force and effect.
- In fact, an estoppel certificate must also be obtained when insuring a leasehold mortgage or sublease.

Insuring a Leasehold Mortgage

- The appropriate exceptions must be taken for items affecting the fee interest. (e.g. mortgage liens, easements, restrictions, etc.)
- Many leases contain automatic subordination clauses, meaning that the lease will be subordinate to any mortgage placed against the fee interest in the future.
- If there is no automatic subordination clause, a new lender on the fee interest may require the lessee to execute a subordination, attornment and non-disturbance agreement (SNDA).
- The SNDA subordinates the lease to the new mortgage and recognizes the new lender as the landlord in the event of foreclosure.

Right of First Refusal and Option to Purchase

- A “right of first refusal” or “option to purchase” is the provision contained in an instrument requiring the owner of the property to offer another person the first opportunity to purchase or lease the property.
- The holder of the "right of first refusal" has no right to buy or lease the property unless and until the property owner offers the same for sale or lease to others or entertains an offer to purchase or lease the property from others.
- Any "right of first refusal" as shown by the public records as affecting the title of the land to be insured must be made a matter of an appropriate title exception in Schedule B-II.

Right of First Refusal and Option to Purchase (cont.)

- The title commitment must also contain a requirement in connection with the proper waivers or releases to be executed by those upon whom the right was granted.

Enforceability of Commercial Mortgages

- The case of *Security National Partners v. Mahler* held that the mortgagee's right to enforce the mortgage by foreclosure expires 20 years after it accrues or when the mortgagor ceases to make payments.
- However, the problem here is that it is impossible to know from a record search if the borrower has ceased to make payments, and when this exactly occurred.
- You may be familiar with N.J.S.A. 2A:50-56.1, but this statute only applies to **residential** properties.

Reviewing Corporate Entity Documents

- When dealing with Corporations or LLCs holding title, a thorough review of the entity documents is required on every transaction.
 - Require certificates of incorporation/formation, bylaws, and operating agreements for each transaction.
 - These will tell you who can act on the entities' behalf and any specific requirements.
 - If an entity refuses to provide operating documents, contact your Underwriter.

Corporate Entities – Transfer of Title

- What happens to title insurance coverage if title is transferred to or from an entity?
- The ALTA 2006 Owner's Policy (Condition 1(d)(i). Definition of Terms), defines the term "Insured" to also include:
 - (B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;
 - (C) successors to an Insured by its conversion to another kind of Entity;

Corporate Entities – Transfer of Title

- D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title
- (1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,
- (2) if the grantee wholly owns the named Insured,
- (3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or

Corporate Entities – Transfer of Title

- (4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.

Insuring an Appurtenant Easement

- If we are insuring an easement for ingress and egress as part of our legal description, the easement must benefit our parcel.
- An appurtenant easement benefits a specific parcel of land, known as the dominant estate.
- An appurtenant easement also attaches to the ownership of the dominant estate.
- If the dominant estate is sold, the appurtenant easement will pass to the new owner, and if the servient estate is sold, it will remain subject to the easement.

Insuring an Appurtenant Easement (cont.)

- An appurtenant easement search must also be done on the servient estate to confirm ownership and any existing mortgages.
- If any mortgages are on record, the owner and all existing mortgagees must consent to the easement.
- The mortgagees must also agree to subordinate their mortgages to the easement agreement, so the easement cannot later be extinguished if there should be a foreclosure.

Insuring an Appurtenant Easement (cont.)

- Please note that an appurtenant easement search can take just as long as a standard title search, so we need to know as soon as possible if there is a request by the parties to have us insure an appurtenant easement.
- When reviewing a recorded easement, the easement agreement should clearly define the specific purpose of the easement.
- If the easement agreement is not clear in its terms or provisions, please contact your underwriter for further guidance.

Gap Coverage

- NJ does **not** have a GAP endorsement available.
- Gap coverage is already provided to the lender via Covered Risk No. 14 on the loan policy jacket.
- Covered Risk No. 14 reads as follows:
 - **Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records.**
- If you receive a request for gap coverage from the lender, please contact your underwriter.

ALTA 8.2-06 (Commercial EPL)

- This endorsement provides insurance for Loan and Owner's Policies on commercial properties only.
- It insures against existing recorded federal or state environmental protection liens.
- A customary examination of the real property records must be performed to confirm that there are no liens filed of record on the real property.

ALTA 3 Series - Zoning

- There are four types of zoning endorsements that can be issued for both an Owner's and Loan policy.
- Applies to both residential and commercial properties.
- ALTA 3 – Zoning Vacant Land
- ALTA 3.1 – Zoning Completed Structures
- ALTA 3.2 – Zoning Land Under Development
- ALTA 3.3 – Zoning Legal Nonconforming
- Charge: ALTA 3 – 15% of standard rate premium, or minimum of \$150; ALTA 3.1, 3.2 & 3.3. – 20% of standard rate premium, or minimum of \$150.

VU Requirements for Issuing Zoning Endorsements

- A zoning report (PZR) or a zoning letter from the municipality must be obtained for closing.
- The zoning report or zoning letter must confirm the following:
 1. The zoning classification and authorized use of the property;
 2. Compliance of the existing improvements with local zoning regulations and that there are no current violations;
 3. Compliance with local zoning ordinance as to number of parking spaces.

VU Requirements for Issuing Zoning Endorsements (cont.)

- We prefer that the letter from the zoning department or agency state that the existing improvements comply with (a) area, width or depth of the land as a building site, (b) floor area space of the structure, (c) setback of the structure, (d) height of the structure, and (e) number of parking spaces.
- Please secure a copy of the applicable zoning ordinance, and if possible, require that the surveyor include the applicable zoning classification on the survey.

VU Requirements for Issuing Zoning Endorsements (cont.)

- The surveyor should further state on the survey whether the existing improvements comply with the (a) area, width or depth of the land as a building site, (b) floor area space of the structure, (c) setback of the structure, (d) height of the structure, and (e) number of parking spaces.
- If the authorized use is based upon an exception, variance, or prior authorized nonconforming use, please consult our underwriting personnel.
- When incorporating the permitted use language on a Zoning endorsement, please excerpt the specific language from the zoning ordinance and do not state the proposed use in general terms.

VU Requirements for Issuing Zoning Endorsements (cont.)

- Lastly, if you are asked to add "number of loading docks" or "number of loading berths," on a Zoning Endorsement, you should confirm loading docks in the same manner as you confirm parking spaces.

ALTA 9.3-06 Endorsement

- This endorsement, and the ALTA 9 series generally, are subject to the exclusions in Section 4, Exclusions from Coverage and Schedule B Exceptions and Conditions.
- This endorsement may only be issued with a loan policy.
- The endorsement includes coverage for loss or damage due to a covenant violation that divests, extinguishes or subordinates the mortgage or results in the mortgage being invalid or unenforceable or suffer a loss of priority.
- If title has been acquired by the insured, (e.g. through foreclosure or a deed in lieu), coverage is provided for a covenant violation that causes loss or adversely affects the title that was acquired.

ALTA 9.3-06 Endorsement (cont.)

- Coverage is also provided for any loss due to violation of an enforceable covenant at Date of Policy unless same is added as an exception in Schedule B of the policy.
- Additionally, a notice of violation of a covenant relating to Environmental Protection which is recorded in the Land Records will be covered unless an exception is taken in Schedule B.
- The coverage is provided only to the extent of the notice of violation.
- The endorsement specifically does not cover any covenant which is contained in a document creating a lease.

ALTA 9.3-06 Endorsement (cont.)

- Coverage is also not provided for any covenant relating to a requirement to maintain, repair or remediate the property.
- Any covenant involving environmental protection, including toxic or hazardous conditions, will not be covered, except as provided in Section 3d of the endorsement.
- Any covenant which is an exception in Schedule B regarding the DCA or COAH, or any other federal, state or local regulations regarding affordable housing is not covered.
- Always check with your underwriter if there is any uncertainty regarding issuance of this endorsement.

ALTA 9.3-06 Endorsement (cont.)

- In order to issue this endorsement certain requirements must be met.
- You must verify that no applicable covenants contain forfeiture provisions, or if they do, that the provisions are expressly subordinated to the insured mortgage.
- Verify that any maintenance lien is expressly subordinate to the lien of the insured mortgage and that prior assessments are paid before closing.
- If an existing use violates a covenant or if there is an existing violation of a covenant, an exception must be taken in Schedule B.

ALTA 9.3-06 Endorsement (cont.)

- Verify whether the restrictions create maintenance liens, easements, options, or rights of first refusal to purchase.
- If any of these provisions appear in the restrictions, separately and explicitly except to those provisions in Schedule B.
- A survey is not required for issuance of the ALTA 9.3-06, but if a survey is obtained, it must show all current improvements on the property.
- An exception must be taken in Schedule B for all encroachments over building setback lines.

ALTA 9.3-06 Endorsement (cont.)

- Any affirmative insurance on this requires underwriter approval.
- An exception in Schedule B must be added for any recorded notice of violation of a covenant relating to environmental protection found in the Public Records.

ALTA 9.6-1-06 Endorsement (Private Rights)

- Private rights are defined in the endorsement to include any private charge or assessment due and payable at Date of Policy, an option to purchase or right of first refusal or a right of prior approval of a prospective purchaser or occupant.
- If any such covenant as described above exists, an exception must be taken in Schedule B of the policy.
- The coverages and exclusions contained in this endorsement are essentially the same as in the ALTA 9.3-06.
- This endorsement may only be issued with a loan policy.

ALTA 9.6-1-06 Endorsement (cont.)

- In order to issue this endorsement, you must verify that any maintenance lien in the Covenant(s) is expressly subordinate to the lien of the Insured Mortgage and that prior assessments are paid before closing.
- Any option to purchase or right of first refusal in the Covenant(s) is expressly subordinate to the lien of the Insured Mortgage and that the option has not been previously exercised.
- Any right of prior approval of a future purchaser or occupant in the Covenant(s) is expressly subordinate to the lien of the Insured Mortgage.

Survey Coverage

- NJ Survey Endorsement – Coverage for both Owner's and Loan policies
- NJ Survey endorsement removes the general survey exception in Schedule B and may include a survey reading for any encroachments located on the property.
- ALTA 17/17.1 – Access and Indirect Access endorsement
- ALTA 22 – Location Endorsement
- ALTA 25 – Same as Survey (only available for loan policies in the State of NJ)

Types of Surveys – Boundary Survey

- Boundary survey will often only include a legal description, the metes and bounds of the property, and a list of encroachments.
- Surveyor has discretion as to what he/she wants to plot on the survey.
- There are no requirements that the surveyor must follow when issuing a boundary survey.

Types of Surveys - ALTA Survey

- Detailed survey performed by a registered licensed surveyor, prepared in accordance with the standards specified by (ALTA) and the American Congress of Surveying and Mapping (ACSM).
- Surveyor must follow the ALTA/ACSM requirements when issuing an ALTA survey.
- These requirements include plotting the boundaries of the property, the location of improvements on the subject property, including any and all structures, fences, utility lines, roads, etc., along with the location of any/all easements.

Are ALTA surveys required for coverage?

- An ALTA survey is not required for standard coverage on an Owner's or Loan policy (NJ Survey Endorsement).
- However, if we're issuing extended coverage, an ALTA survey may be required by the title company or your lender.
- Additional endorsements to consider for extended coverage:
 - ALTA 9 series (Covenants, Conditions, Restrictions)
 - ALTA 25 (only for loan policy)
 - ALTA 28/28.1 (Easements/Encroachments)

Easements, Surveys, and Affirmative Coverage

- A survey is a great tool to learn a great deal about an easement.
- A survey (which shows the easement) is almost always necessary when contemplating affirmative insurance language.
 - Usually refer to encroachment or the use of the land.
- A review of both survey and the easement are necessary to determine what, if any, affirmative coverage can be provided.
- As always, you must contact your Underwriter before including any affirmative language for easements.

The ALTA 28 Series

- The ALTA 28 Series consists of four separate endorsements and can only be issued on loan policies in NJ.
- ALTA 28 – Easement – Damage or Enforced Removal
- ALTA 28.1 – Encroachments – Boundaries and Easements
- ALTA 28.2 – Encroachments – Boundaries and Easements – Described Improvements
- ALTA 28.3 - Encroachments – Boundaries and Easements – Described Improvements and Land Under Development

Easement Coverage – ALTA 28 Endorsement

- ALTA 28 (Easement Damage or Enforced Removal).
- Provides affirmative coverage for any loss resulting from damage to an existing building from an easement.
- This damage includes the removal or alteration of an existing building located on the Land at the date of Policy.
- This endorsement, along with the ALTA 28.1 and 28.2, may be issued on Loan Policies covering 1-4 family residential properties or on Loan Policies relating to commercial transactions of up to \$25,000,000 per site without a survey, but you must include specific exceptions for matters (such as specific encroachments) actually known by you.

VU Requirements for ALTA 28 Endorsement

- If a survey is provided, please confirm that the existing buildings are not impacted by the easement.
- If the surveyor includes a note that an easement is blanket in nature, we can include the easement on the ALTA 28 endorsement.
- However, if an easement is not plottable, then further review is required before providing ALTA 28 coverage.
- An issue may arise if an easement runs underneath an existing building or encroaches upon an existing improvement.

VU Requirements for ALTA 28 Endorsement (cont.)

- We must analyze the risk before issuing the endorsement for the specific easement, and the risk analysis also varies between a residential or commercial property.
- Some of the risk factors include if the easement has been abandoned, or if the easement holder has consented to offset any damage from the exercise of their easement rights on the property.
- Please always consult your underwriter for further assistance if such an issue should arise on your transaction.

Encroachment Coverage – ALTA 28.1 Endorsement

- ALTA 28.1 (Encroachments – Boundaries and Easements)
- Provides affirmative coverage against loss for an encroachment of any improvement located on the Land onto adjoining land or onto a portion of the Land subject to an easement.
- Endorsement also provides affirmative coverage over an encroachment of any improvement on adjoining land encroaching onto our Land.
- Coverage under the ALTA 28.1 is much broader than the ALTA 28 – we need to carefully analyze risk associated with encroachments on any existing improvements based on the survey.

VU Requirements for ALTA 28.1 Endorsement

- Unless underwriting guidelines by the Company provide otherwise, this endorsement requires a survey reflecting the current Improvements. All encroachments over property lines or easements should be included as exceptions.
- Section 4 of the endorsement should include any improvements which encroach over more than one half of the width of an easement; any improvements which encroach over adjoining land or onto a road; or any improvements located on adjoining land which encroach onto the Land.
- Please consult an underwriter for further guidance before issuing this endorsement.

ALTA 28.1 Endorsement Form

- Paragraph 1 states that the endorsement is subject to the exclusions and exceptions from coverage in the Policy.
- Paragraph 2 defines the word “Improvement.”
- 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.
- Paragraph 3 and subparagraphs 3a, 3b, and 3c list the affirmative coverage that is being provided by the endorsement.
- Paragraph 4 lists the exclusions from coverage.

Encroachment Coverage – ALTA 28.2 Endorsement

- ALTA 28.2 (Encroachments - Described Improvements).
- This endorsement is slightly different than the ALTA 28.1, as the coverage is broader in scope.
- The improvements need to be specifically itemized in the ALTA 28.2 endorsement, so additional affirmative coverage can be provided.
- Some examples of itemized improvements can include a fence, shed, garage, or patio, and these improvements must be itemized in Paragraph 2 of the endorsement.
- We can only issue either the ALTA 28.1 or ALTA 28.2 on a loan policy, not both.

ALTA 28.2 Endorsement Form

- Similar to the ALTA 28.1 endorsement form.
- Only difference is Paragraph 2 in which the term “improvement” is specifically defined to include the items in the survey reading.
- The VU requirements for the ALTA 28.2 endorsement are the same as if you were issuing the ALTA 28.1 endorsement.

Encroachment Coverage – ALTA 28.3 Endorsement

- ALTA 28.3 (Encroachments - Described Improvements and Land Under Development).
- Same requirements as issuing the ALTA 28.1 or ALTA 28.2 endorsement.
- However, this endorsement can only be issued if land is currently under development at the date of Policy.

ALTA 28.3 Endorsement Form

- Paragraph 1 states that the endorsement is subject to the exclusions and exceptions from coverage in the Policy.
- Paragraph “2a” defines the word “Improvement.”
- Paragraph “2b” defines the word “Future Improvement,” and limits it to buildings, structures, or paved areas, including roads, walkways, parking areas, driveways, or curbs.
- Paragraph “2c” defines the word “Plans.”
- Paragraph “2c” must disclose the full information for the building site plans that were prepared by an architect or engineer for the property in question.

ALTA 28.3 Endorsement Form (cont.)

- Paragraph 3 lists the affirmative coverage that is being provided by the endorsement.
- Similar to the ALTA 28.1 and ALTA 28.2, Paragraph 4 lists the exclusions from coverage.

Paragraph 4 of the ALTA 28 Forms

- Paragraph 4 of the following endorsements (ALTA 28.1; 28.2; and 28.3) specifically notes any exceptions for which insurance will not be provided.
- This paragraph can cause confusion, since it contains a double negative.
- Therefore, if we are providing affirmative coverage over any encroachments disclosed in the survey reading, this paragraph should be completed with the word “None” in the blank.
- The word “None” denotes that we are providing affirmative coverage over the encroachments via the endorsement.

Non-Imputation Coverage

- Non-imputation coverage involves an endorsement to an owner's policy insuring an entity against imputation by operation of law of knowledge of its partner, officer, director, or employee about unrecorded items affecting the title.
- The ALTA 15 series is available in NJ for full or partial equity transfers and adding an additional insured under the current Owner's policy.
- An indemnification and Non-Imputation Affidavit is required to be signed by the party whose knowledge is in question and that the party knows of no outstanding claims or interests.

Non-Imputation Coverage (cont.)

- Financial disclosures are also required by the proposed indemnitor evidencing the financial strength of that party.
- Lastly, an explanation of the transaction and the reason for the endorsement must be provided.
- The party whose knowledge is in question be specified by name and not generically.
- For example, knowledge must be imputed by an individual officer, not the entity itself.
- Please contact your Underwriter regarding issuance of this endorsement.
- Underwriter approval is required in all cases.

Mezzanine Financing

- A Mezzanine Loan usually involves an equity loan secured by pledges of the ownership interests in the titleholder or in upstream owners of interests in the titleholder.
- The Mezzanine Lender does not secure a mortgage on the land, or a Loan Policy, but does secure title insurance by a Mezzanine Endorsement to the Owner's Policy.
- In NJ, we offer the ALTA 16-06 endorsement for mezzanine financing.
- This endorsement provides loss payee coverage to a lender which has provided “mezzanine” financing to a real property-owning entity, which financing is not secured by a real estate mortgage.

Mezzanine Financing (cont.)

- Execution of the Stewart Non-Imputation Affidavit by the "Insured" under the Owner's Policy is required.
- Signature of the insured named in Schedule A of the Owner's Policy on the Mezzanine Endorsement, evidencing its consent.
- Otherwise, a separate letter is required from the insured consenting to issuance of the Mezzanine Endorsement.
- The name of the Mezzanine Lender must be included in paragraph 1 of the Endorsement and secure the signature of the Mezzanine Lender on the Endorsement.
- Underwriter approval is required for this endorsement.

SWAP Endorsement

- In NJ, the ALTA 29 series is provided for loan policies for an interest rate swap obligation on a mortgage.
- This endorsement insures against (1) invalidity or unenforceability of the insured mortgage as security for the repayment of the Swap Obligation; (2) lack of priority of the lien of the insured mortgage as security for the repayment of the Swap Obligation.
- The mortgage must expressly secure the Swap Obligation and comply with applicable state requirements for disclosure of Swap Obligations, if applicable.

SWAP Endorsement (cont.)

- The swap obligation must be evidenced by an existing master swap agreement and confirmation, and the mortgage also must establish a maximum amount of the Swap Obligation.
- Underwriter approval is required for issuance of this endorsement.

Wrap Up and Review

- Commercial files require a full 60-year search in NJ for a purchase or refinance transaction.
- Please refer to our Stewart bulletins on starter policies and commitments and contact us for further guidance on the use of starters.
- Please be aware of the endorsements that are typically requested on commercial files and follow the underwriting requirements for the issuance of each available endorsement.
- NJ does **not** have an ancient mortgage statute. The mortgage foreclosure defense statute only applies to residential properties in NJ.

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| <h3>Keyword Search</h3> <input type="text" value="Example : Absentee"/> <input type="submit" value="Find it"/> <input checked="" type="radio"/> All of these words <input type="radio"/> This exact phrase <input type="radio"/> Any of these words | <h3>Select a Location</h3> <input type="text" value="Select a state"/> |
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