

# **NDDDS**

**National Due Diligence Services**

A Division of American Surveying & Mapping, Inc.

## **Commercial vs Residential Transactions** *The Complexities & Needed Due Diligence*

*David Herrin, National Marketing Director*  
*Cindy Jared, SVP, Major Accounts*

Service Provider to the  
Fidelity National Title Group  
Family of Companies

# Thank You

## Thank You

- Thank you to ALTA and to Fidelity National Title Group for sponsorship of this Webinar and the opportunity to present to ALTA members
- My name is David Herrin the National Marketing Director of National Due Diligence Services (NDDS)
- NDDS is a Division of American Surveying & Mapping, Inc.
- We are a national land surveying and professional due diligence firm
- Established in 1992 with over 25 years of service
- One of the nation's largest, private sector, survey firms
- Staff of 150 dedicated & experienced professionals



# WHAT WE WILL COVER TODAY

## Commercial vs Residential Transactions

- **Residential Transactions** – Systematic and Regulated
- **Commercial Transaction** – Complexities
- **Commercial - Due Diligence Phase**
  - ALTA Survey
  - Related Title Endorsements
- **Other Commercial Due Diligence Needs**
  - Environmental Site Assessments
  - Property Condition Assessments,
  - Seismic Risk Assessments (PML)
  - Zoning



# Today's Speakers

## Subject Matter Expert Speakers may include:

### **David Herrin, National Marketing Director, NDDS**

Mr. Herrin offers over 35 years real estate experience including 10 years as a Georgia licensed Real Estate Broker (prior GRS & CCIM designates), regional manager for a national title insurance company & qualified MCLE instructor in multiple states.

### **Brett Moscovitz, President, ASM & NDDS**

Mr. Moscovitz is the Owner & President of ASM & NDDS. Began his land surveying career in 1983 and incorporated American Surveying & Mapping, Inc. in 1992. ASM is now one of the largest privately owned surveying & mapping companies in the country. Having worked on thousands of residential and complex commercial surveys through the years, he has been instrumental in creating and establishing many of the best business practices for streamlining the land surveying & due diligence services business for a national platform.

### **Mark Fuller, Operations Director of ASM/NDDS**

Over 35 years of experience in the commercial real estate field Mark is the Director of Operations for National Due Diligence Services (NDDS). He has spent his entire adult life working within the commercial real estate due diligence arena. After graduation from the University of Oklahoma's College of Architecture in 1989, he began learning the art of land surveying and its affect on commercial real estate transactions and title insurance. His success in business has lead him to be appointed by the Governor of Oklahoma to the State's Small Business Commission two consecutive years and 10 years at the pleasure of two different Governor's to the Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors.



# Guest Speakers

## Additional Subject Matter Expert Speakers may include:

### **Ed Stout, Esq., Vice President, FNTG (Title & Escrow)**

Mr. Stout is the Florida Commercial Escrow Manager for Fidelity National Title Group. In this role Ed works with departments that perform escrow closings and disbursements for closings of single and multi-site transactions. Ed provides legal and underwriting support to the departments involved with the above work. Ed has worked in the title insurance industry for over 24 years with the last 13 years at Fidelity.

### **Robert S. Bozarth, Esq., Senior Underwriting Counsel, FNTG (Affected Title Endorsements)**

Mr. Bozarth is a Senior, Staff Underwriting Counsel for the Fidelity National Title Group.

### **Ronnie Long, CEM, CEC, & Director of Assessment Services, NDDS (Environmental)**

Ronnie brings over 18 years of experience in environmental investigation and assessment, property assessment and forensics. Mr. Long has managed hundreds of assessment projects in all markets of the commercial real estate industry. He holds multiple licensures & certifications from all major associations related to his field.

### **Cindy Jared, SVP, National Accounts, NDDS**

Ms. Jared offers 27 years of multi-state experience in the title insurance and real estate industry. Her areas of expertise include twenty-two years of title and escrow operations including turnaround management, merger and acquisitions, leadership development, regulatory compliance and due diligence for national title insurers.



# Today's Discussion

## Commercial vs Residential Transactions

- **Commercial real estate usually is business-focused.** It involves property that is sold, leased, or used to achieve a predetermined business objective. It's used as an investment to achieve an anticipated rate of return on the funds invested.
- **Residential real estate revolves around the wants and needs of a homeowner and his family.** It involves property purchased for individual use, most often to provide housing for families.



# Real Estate Settlement Act - RESPA

## RESPA does not affect commercial real estate closings

Two significant effects of RESPA (The Real Estate Settlement Procedures Act) **not** applying to commercial real estate closings is:

1. Buyers and sellers must perform detailed due diligence on the property and the other parties to the transaction, which can delay the closing of the deal because it is much more extensive.
2. The lack of RESPA frees the parties to be more creative in structuring the deal and in the types of closing documents they choose to use.



# Real Estate Settlement Act - RESPA

## Lack of RESPA and Due Diligence

The Real Estate Settlement Procedures Act (RESPA) is the main federal law that governs residential home sales. This law requires sellers to make several guarantees and warranties to buyers about the condition of the property and the absence of a variety of environmental defects. RESPA also governs the form of closing documents that can be used. The purpose of the law is to protect homebuyers from being deceived and buying a house that is dangerous or uninhabitable. RESPA does not apply to commercial real estate transactions.

## What the Lack of RESPA Means to Commercial Real Estate Closings

The lack of RESPA affects commercial real estate closings in two major ways. **One, it means that buyers and sellers must perform detailed due diligence on the property and the other parties to the transaction**, which can delay the closing of the deal. **Two, the lack of RESPA frees the parties to be more creative in structuring the deal and in they types of closing documents they choose to use.**

During a commercial transaction the buyer is constantly trying to preserve the right to withdraw from the deal as long as possible and the seller is trying to limit the right of the buyer to withdraw. Buyers are looking to add contingencies and sellers are looking to close all contingencies long before escrow and the closing process. The buyer is also trying to keep the seller on the hook for any problems that become apparent after the sale for as long as possible while the buyer wants to terminate its liability as close to the closing date.



# Transaction Parties

## The Parties

### Residential

- Buyer
- Seller
- Title/Escrow
- Lender

### Commercial

- Buyer (legal entities)
  - Buyer's Attorney (s)
- Seller (legal entities)
  - Seller's Attorney (s)
- Lender
  - Lender's Attorney (s)
- Title/Escrow
  - Underwriter

# Purchase Agreement

## Purchase and Sale Agreement - PSA

**There are no rules.** The purpose of the PSA is to protect the parties rights, obligations and liabilities in order to close the transaction. Every term is up for negotiation. Most CRE agreements include commonly used provisions. Understanding these provisions is essential for both the buyer and seller.

- Purchase Price
- Closing Date
- The full names of all the purchasers
- **A legal description – description of property to be conveyed, real or otherwise**
- Earnest money and default
- Contingencies
- Information about the closing or escrow agent
- Closing date and date of possession
- Responsible for Title
- Responsible for Survey
- **Clear Title**

# Residential Transactions

## Residential transactions:

- Standardized Residential Sales Agreement
  - Or, Purchase Offer or Purchase Agreement (States vary with Agreement formats)
- Home appraisal
- Land survey - Some states require some do not
  - like commercial property the purpose is to remove standard survey exception
  - mortgage inspection
  - boundary survey
  - maybe a “No change” Affidavit from Seller
- Home inspection
- Disclosure statement from Seller – indicating current or impending issues
- Natural hazard disclosure statement (generally only CA, but other states are beginning to require this type of report)
- **Clear title** - Expectation to enjoy benefits from ownership, i.e., occupy, use of property, free from debts or obligations not agreed upon, free to sell or use as collateral for loan.

# *Commercial Transactions*

**Four major steps to closing a commercial real estate deal. Some are ongoing and other overlap.**

**Every transaction will go through:**

- 1. Escrow**
- 2. Signing authority verification**
- 3. Due Diligence**
- 4. Signing & processing title and closing documents**

# Escrow

## Escrow in a Commercial Real Estate Transaction

Most private home sales have an informal escrow process. Because commercial sales often involve larger sums of money and are more complex, escrow in this setting is formal and tightly controlled. Capital for a commercial transaction will often come from many different sources. Additionally, because there is less regulation of commercial real estate deals the parties must do more due diligence to protect their investments. The paperwork involved is highly customized and more extensive than the form documents used when buying a home.

The parties will often have negotiated an escrow agreement that the escrow agent must verify has been satisfied before releasing any funds

# Escrow

## Title Agents as Escrow Agents

While there is no legal requirement for who the buyer and seller must chose to serve as the escrow agent, most of the time the title agent will act as escrow agent. Title agents are usually already familiar with the details of the transaction and have no financial interest in the success or failure of the deal as their fee is for services rendered regardless of the outcome of the deal. Title agents also have the expertise to create the customized closing documents vital to most commercial real estate transactions.

# Escrow

## Escrow Agreement

Before money can be transferred to the escrow agent, the parties have to come to some agreement as to what the escrow agent's duties are and what will satisfy escrow and allow the funds to be released to the seller of the property.

Unlike residential sales, the escrow agreement in commercial real estate closings is unique for each deal. However, there are several common escrow agreement provisions such as:

- Clause appointing the title agent to act as escrow agent and to waive any fee acting as an escrow agent
- Clause ordering escrow agent not to commingle funds sent by the buyer with any other monies.
- Statement of when written instructions from buyer and seller need to be received before funds can be released.

Typically escrow agents won't have any responsibility for verification of any part of the deal other than only releasing funds when instructed from both the buyer and the seller. Instructions to release the funds are almost always required to be in writing.



# Signing Authority

## Dealing With Legal Entities and Authority

Instead of a contract between two people, a commercial real estate deal involves one or more contracts between two or more legal entities. Because these deals are expensive all parties want to limit their liability and often create legal entities for the sole purpose of owning a piece of commercial real estate. For every entity such as a corporation, LLC, or LLP involved, additional steps must be taken to verify their fitness and ability to conduct the transaction.

## Why Legal Entities Are Used

Investors know that commercial real estate can come with large risks. Legal entities are used to protect individual investors from liability both as sellers and buyers.

Even existing legal entities buying additional property will sometimes create a new legal entity or subsidiary, to isolate the risk of acquiring or selling a piece of property.

In many states there are tax advantages to owning commercial real estate in a legal entity.



# Signing Authority

## Signing Authority Verification

A corporation or other legal entity may be the actual party to a transaction, but a human being will still need to sign and execute documents on the behalf of the entity. This creates an extra layer of paperwork in the commercial real estate closing process.

Both sides will want proof that the person signing on the dotted line has the authority to do so. This is called signing authority. Proof of signing authority can be in the form of a corporate charter that expressly gives the individual such authority, letters of authorization from the president, CEO, or board of directors of the entity, or a resolution from the board of directors or equity partners.

Until documents demonstrating signing authority have been received, a party will not allow the money in escrow to be disbursed. The seller wants to make sure the buyer has the legal authority to commit to the transaction and the buyer wants to make sure the seller is legally authorized to dispose of the asset.

# Signing Authority

## Making Signing Authority Easy

Before proceeding too deeply into a commercial real estate deal, you should make sure the proof of signing authority will not be an issue for your legal entity. Here are a few ways to setup authority before entering into a transaction:

- Designate someone by name or title in the corporate charter to have the authority to enter commercial real estate transactions.
- Get authorization from the board of directors to execute the purchase or sale of a specific piece of property
- Have a signed and notarized letter from the other partners authorizing the transaction and designating someone to have signing authority on behalf of the entity.

By making sure the authority issue is resolved before the closing process you will save valuable time.

# Due Diligence

## Sellers will typically obtain confirmation of the following:

- The contract for sale has been properly executed
- Buyer has delivered down payment to escrow agent
- The escrow agent has deposited the money in a segregated interest bearing account
- Filed a response to any objections to the title and survey report
- Execution of assignment and assumption of leases by buyer

Every transaction is different and certain deals may require even more steps in the due diligence process than those discussed above.

# Due Diligence

**Because there are fewer state and federal protections for buyers and sellers in a commercial transaction, the due diligence process is much more extensive. Buyers will want to make sure the following areas are in order:**

- The contract of sale has been properly executed
- A current title insurance commitment is ordered and reviewed
- Review and accept true copies of all leases
- Review of new environmental phase 1 assessment
- Review any Property Condition Reports that may be applicable
- Understand and accept Termination notice conditions and due diligence deadline
- Review of the seller's books and records
- Order zoning report to review and accept zoning compliance issues
- Search for any outstanding tax cases or liens
- Results of a new ALTA Survey





# 2016 ALTA Standards

## Strict Set of Standards ALTA/NSPS Standards

1. **Purpose** – Members of the American Land Title Association (ALTA) have specific needs unique to the title insurance matters, **when asked to insure title to land without exception as to the many matters which might be discoverable from survey and inspection, and which are not evidenced by public records.**

For a survey of real property, and the plat, map or record of such survey, **to be acceptable to a title insurance company for the purpose of insuring title to said real property free and clear of survey matters** (except those matters disclosed by the survey and indicated on the plat or map), certain specific and pertinent information must be presented for the distinct and clear understanding between the insured, the client (if different from the insured), the title insurance company (insurer), the lender, and the surveyor professionally responsible for the survey.

### MINIMUM STANDARD DETAIL REQUIREMENTS FOR ALTA/NSPS LAND TITLE SURVEYS (Effective February 23, 2016)

*NOTE - Attention is directed to the fact that the National Society of Professional Surveyors, Inc. (NSPS) is the legal successor organization to the American Congress on Surveying and Mapping (ACSM) and that these 2016 Minimum Standard Detail Requirements for ALTA/NSPS Land Title Surveys are the next version of the former Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys.*

1. **Purpose** - Members of the American Land Title Association® (ALTA®) have specific needs, unique to title insurance matters, when asked to insure title to land without exception as to the many matters which might be discoverable from survey and inspection, and which are not evidenced by the public records.

For a survey of real property, and the plat, map or record of such survey, to be acceptable to a title insurance company for the purpose of insuring title to said real property free and clear of survey matters (except those matters disclosed by the survey and indicated on the plat or map), certain specific and pertinent information must be presented for the distinct and clear understanding between the insured, the client (if different from the insured), the title insurance company (insurer), the lender, and the surveyor professionally responsible for the survey.

In order to meet such needs, clients, insurers, insureds, and lenders are entitled to rely on surveyors to conduct surveys and prepare associated plats or maps that are of a professional quality and appropriately uniform, complete, and accurate. To that end, and in the interests of the general public, the surveying profession, title insurers, and abstractors, the ALTA and the NSPS jointly promulgate the within details and criteria setting forth a minimum standard of performance for ALTA/NSPS Land Title Surveys. A complete 2016 ALTA/NSPS Land Title Survey includes:

- (i) the on-site fieldwork required pursuant to Section 5,
- (ii) the preparation of a plat or map pursuant to Section 6 showing the results of the fieldwork and its relationship to documents provided to or obtained by the surveyor pursuant to Section 4,
- (iii) any information from Table A items requested by the client, and
- (iv) the certification outlined in Section 7.

2. **Request for Survey** - The client shall request the survey, or arrange for the survey to be requested, and shall provide a written authorization to proceed from the person or entity responsible for paying for the survey. Unless specifically authorized in writing by the insurer, the insurer shall not be responsible for any costs associated with the preparation of the survey. The request shall specify that an "ALTA/NSPS LAND TITLE SURVEY" is required and which of the optional items listed in Table A, if any, are to be incorporated. Certain properties or interests in real properties may present issues outside those normally encountered on an ALTA/NSPS Land Title Survey (e.g., marinas, campgrounds, trailer parks; easements, leases, other non-fee simple interests). The scope of work related to surveys of such properties or interests in real properties should be discussed with the client, lender, and insurer; and agreed upon in writing prior to commencing work on the survey. The client may need to secure permission for the surveyor to enter upon the property to be surveyed, adjoining properties, or offsite easements.





# Title & Survey

## Title & Survey Must Work Together

- **Survey Exceptions**
  - Purpose of Title is to exclude from coverage issues that would be revealed NOT by a search of the public records, but ONLY by an accurate survey
  - Exception when no survey coverage is given
  - Detailed exceptions for matters shown on the survey
- **Who, What, Where, When & How?**
  - Title will review contract requirements (Purchase Sale Agreement (PSA))
  - Send copy of Title Commitment and copies of Schedule B-2 documents to the surveyor
  - Commitment may need a specific survey requirement (ALTA/NSPS plus Table A items)
  - Confirm the legal description
  - Review the survey upon receipt and prior to closing
- **ALTA Survey's**
  - Most title coverage requires a current survey of the property prepared according to 2016 ALTA/NSPS minimum standard detail requirements & any Table A optional specifications.

# Same as Survey

## Same as Survey

- MAKE SURE THE SURVEY CONTAINS A STATEMENT THAT THE SURVEY IS THE SAME PROPERTY DESCRIBED IN THE TITLE COMMITMENT
- ALTA 25-06 (SAME AS SURVEY) ENDORSEMENT
- IF APPLICABLE REQUEST THE 25.1-06 (SAME AS PORTION OF SURVEY) ENDORSEMENT

# Access

## ACCESS

- Under the title policy, legal access is insured, but the location and quality of the access is not.
- Owner's and Lenders often request additional Access coverage
- The ALTA 17 series is used for Access coverage
  - 17-06 - Access and Entry (access by way of a public road). Provides coverage that the land abuts and has actual pedestrian and vehicular access to a designated public road
  - 17.1-06 – Indirect Access and Entry (access by easement).
  - **SURVEY IS KEY TO ACCESS COVERAGE – OBSERVE THE TYPE OF ACCESS AND REQUEST AN ACCESS STATEMENT AND MAKE SURE THE SURVEY SHOWS ALL ACCESS POINTS AND CURB CUTS**

# Contiguity

## ALTA 19 – CONTIGUITY

- Often the owner and lender want to be sure that 2 parcels they own or are taking a mortgage against are contiguous
- The ALTA 19-06 is used where both parcels are insured under the policy
- The ALTA 19.1-06 is used where the insured wants to have coverage that a parcel that is insured by the policy is contiguous to a parcel that is not being insured under the policy
- Request that the survey contain a statement that the parcels are contiguous to obtain title coverage

# Encroachments Endorsements

## NEW ENCROACHMENT ENDORSEMENTS - ALTA 28 SERIES

- ▶ **ALTA 28.1-06 (Encroachments-Boundaries and Easements)**
- ▶ **Provides encroachment coverage for:**
  - An encroachment of Improvements onto adjoining land
  - An encroachment of Improvements onto an easement (unless there is an exception on Schedule B)
  - An encroachment of any Improvements on adjoining land onto the Land (unless there is an exception on Schedule B)
  - Forced removal of an Improvement on the Land as the result of an encroachment onto an easement (if the removal is compelled by the easement right holder)
  - Forced removal of Improvements that encroach onto adjoining land.



# Encroachments Endorsements

## NEW ENCROACHMENT ENDORSEMENTS - ALTA 28 SERIES

- ▶ ALTA 28-06 (Easement-Damage or Enforced Removal)
- ▶ Provides coverage against a loss sustained due to the exercise of rights to maintain an easement that results in:
  - Damage to an existing building located on the Land
  - Forced removal or alteration of an existing building located on the Land
- ▶ Only covers damage to the building not other improvements



# Due Diligence

## Environmental Reports

Because liability for environmental problems can be so severe, the parties will usually require a separate report and document to deal with the current understanding of environmental issues such as a known wetland or known ground or water pollution. The buyer will want some statement from the seller stating the property is otherwise free from issues and the seller will want to try and avoid making such a statement. A document detailing the final agreement of the parties as to both the nature of any environmental issues and future liability for later discovered issues will be part of most commercial real estate closings. (May be in the form of an Indemnification Document)

# Environmental

## Phase I Environmental Site Assessment

Tailored to meet the American Society for Testing & Materials  
(ASTM E-1527-13)

Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, the ESA Standard

- Identify recognized environmental conditions (REC)
- Identify the likely presence of any hazardous substances or petroleum products
- Identifies the potential or existing environmental contamination liabilities
- Includes potential environmental concerns from surrounding area
- Supply a professional report with opinions and recommendations
- The Scope of Work included in our ESA can be customized to meet client needs

### Additional Environmental Services

(Not included in scope of work for ESA)

- Asbestos Containing Building Materials (ACM)
- Indoor Air Quality (Includes vapor intrusion)
- Lead-Based Paint (LBP)
- Lead in Drinking Water
- Mold
- Radon
- Wetlands
- Endangered Species

# Property Condition

## Property Condition Assessments


Tailored to meet the American Society for Testing & Materials  
(ASTM E-2018-08)

Standard Guide for Property Condition Assessment:  
Baseline Property Condition Assessment Process

- Cost Savings
- Avoid Liabilities
- 12 Year Capital Reserve Schedule
- Estimate System Life Expectancy
- Customized to Meet Your Needs

The PCA generally includes: Walk Through Survey, Document Review, Personal Interviews, Records Research, Opinion of Probable Cost to Remedy Physical Deficiencies, Modified Capital Reserve Schedule

**MODIFIED CAPITAL RESERVE SCHEDULE**



**NDDS**  
National Due Diligence Services

One Greenway Centre  
300 Innovation Drive  
Franklin, Tennessee  
ADAPTED Project Number 19-007

Project No: 19-007  
Assessment: 19-007  
Date: 10/20/19

Category	Year	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	
<b>ROOFING</b>	Asph/Flt	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
<b>MECHANICAL</b>	Boiler	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
<b>ELECTRICAL</b>	Panel	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
<b>PLUMBING</b>	Water	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
<b>HAZARDOUS</b>	Asbestos	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
<b>OTHER</b>	Paint	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1
<b>TOTAL</b>		1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1

<b>Summary</b>																								
<b>Total Reserve</b>																								
<b>Year 1 Reserve</b>																								
<b>Year 12 Reserve</b>																								

# Seismic

## Seismic Risk Assessments Probable Maximum Loss (PML)

Conducted in accordance with  
**ASTM E2026-07**

For Seismic Risk Assessment of  
Buildings, Approved May 1, 07

**ASTM E2557-07**

Standard Practice For  
Probable Maximum Loss (PML)  
Evaluations for Earthquake Due  
Diligence Assessments, Approved  
May 1, 07.



### 1.0 Findings

As per the Standards governing this evaluation, PML is a user-defined term. A 475-year return period was used to identify expected ground shaking at the property. In accordance with client-determined protocols, the PML has been defined as the Scenario Expected Loss in the event of ground shaking with a 10% chance of exceedance in 50 years, the Design Basis Earthquake.

PML (SEL)	15%
Seismic Zone (UBC 1997)	Zone 4
Alquist Priolo Special Study Zone	No
Nearest Fault:	Upper Elysian Park Blind Thrust Fault
Return Period:	475
Magnitude (Richter):	6.4
Distance to Site:	< 1.0 mile
Local Intensity (MMI <sup>2</sup> ):	X
Peak Ground Acceleration (pga):	Average "a": 0.54 (g)
Damage Ratio:	$d = 0.554 (b \text{ ms})^{0.641}$
Scenario Expected Loss (PML50)	15%
b = 0.33; ms = 1.30	

<sup>2</sup> MMI refers to the Modified Mercalli Scale, a commonly accepted method of characterizing ground shaking intensity. A copy of the MMI scale is provided in the appendix.

# Due Diligence - Zoning

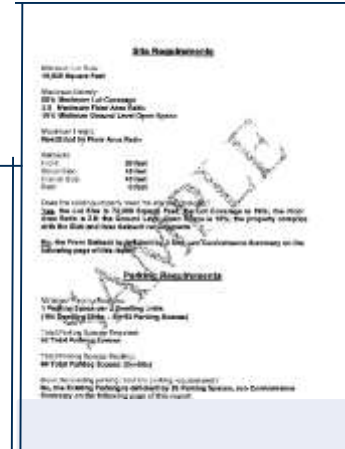
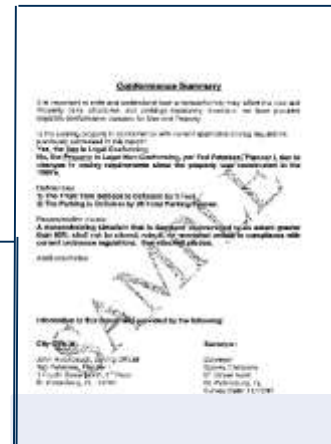
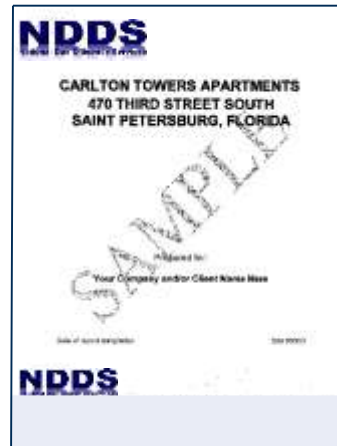
## Zoning

Buyers will want reassurances that the property is correctly zoned for its current use and for the buyer's intended use. As part of the closing documents the parties will want a report that proves a zoning search has been conducted and that there are no known zoning issues. Depending on the jurisdiction, this report may include letters from the local municipalities, endorsements to the title of the property, or a detailed report.

# Zoning

## Zoning Reports & Letters

- Both Loan and Owners Policy have exclusion for zoning matters
- Customers routinely request zoning coverage
- Survey plays a key role in zoning coverage.



# Due Diligence - Zoning

## ZONING & THE SURVEY

- ▶ CONFIRM ZONING INFORMATION IS INCLUDED ON THE SURVEY
- ▶ MAKE SURE ZONING ON SURVEY MATCHES INFO IN THE ZONING REPORT
- ▶ REVIEW THE SURVEY NOTES AND DRAWINGS FOR ANY ZONING SETBACK ENCROACHMENTS
- ▶ ALTA HAS 3 DIFFERENT ZONING ENDORSEMENT FORMS OFTEN REQUESTED
- ▶ ZONING – UNIMPROVED LAND (3-06)
- ▶ ZONING – COMPLETED STRUCTURE (3.1-06)
- ▶ ZONING – LAND UNDER DEVELOPMENT (3.2-06)



# Zoning - Unimproved

## ALTA 3-06 (Zoning Unimproved Land)

- ▶ Most basic zoning coverage. Covers:
  - the zoning classification (as stated).
  - the use permitted under zoning ordinance (as stated).
- ▶ Also insures against loss if the stated use is prohibited by a final court order invalidating the zoning ordinance
- ▶ No coverage for failure to comply with any conditions, restrictions or requirements contained in the zoning ordinance, including any consents or authorizations.
- ▶ No coverage based upon the refusal of any person to buy, lease or loan against the land due to a zoning matter (marketability).

# Zoning – Completed Structure

## ALTA 3.1-06 (Zoning-Completed Structure)

- ▶ Only used with already improved property
- ▶ Same coverage as ALTA 3-06, but also insures against loss because of:
  - (a) An area, width or depth violation;
  - (b) A floor space area violation;
  - (c) A setback line violation;
  - (d) The height of the structure; or
  - (e) A violation with respect to the number of required parking spaces.

# Zoning – Land Under Development

## ALTA 3.2-06 (Zoning Land Under Development)

- ▶ New as of April 2012
- ▶ 3.1-06 only available for already completed improvements
- ▶ 3.2-06 for use with improvements to be constructed based on a set of “Plans” referred to in the endorsement
- ▶ Provides same basic coverage as the Zoning for already improved land.

# Signing – Title - Closing

## No RESPA and Commercial Real Estate Closing Documents

In addition to the due diligence procedures discussed above, both parties will want to make sure all of the closing documents are reviewed for accuracy and properly executed on time.

In residential real estate transactions RESPA requires use of a specific form for all closing documents. In the commercial real estate closing process the parties are free from the RESPA requirements and **can draft the closing documents as they see fit**. This will often cause some back and forth as the parties negotiate over the exact form the documents will take, but it also gives the parties more flexibility to get a deal done that both sides can live with.

# Signing - Title - Closing

## Assignment and Assumption of Leases

Unlike in a residential transaction, a commercial real estate closing will include an assignment and assumption of leases. This document explains that the benefits of any lease transfers from the seller to the buyer. It also transfers future liability for breaches of the lease from seller to buyer and details responsibility for lease breaches prior to the sale. This document also notifies tenants of the change in ownership.

# Signing - Title - Closing

## Commercial Title Issues

Earlier in the process of negotiating the transaction a title company will be hired to issue a preliminary report of the state of the title to the property. Commercial real estate titles are often much more complicated than residential titles. There are any number of liens and encumbrances such as easements that have to be accounted for. Often the seller may no longer hold some of the below ground rights such as mineral or water rights.

Once the preliminary report has been issued the buyer must carefully review it and file any objections or concerns to the report under a deadline. If the buyer has any objections the seller often has a limited period of time to respond to the objections of the buyer can walk away from the transaction.

Once all of the issues with the title have been settled the title company will issue the final report. Both the buyer and the seller will then review this report for errors or concerns and any issues will have to be resolved before the transaction can move forward.

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## Title and Closing Documents

Before a deal can be completed the buyer and seller must both agree to accept a title report and execute a series of closing documents. The closing documents may include assignments and assumption of leases, deeds, environmental reports and assignments of liability, zoning disclosures and warranties, and anything else the parties decide is necessary to close the deal.

## Deeds

Like in residential transactions, part of the closing documents will be some form of deed, typically a quitclaim deed, but sometimes a special warranty deed is used. This document once recorded officially transfers ownership of the property from buyer to seller. A title affidavit will also accompany the executed deed.

Federal laws such as the Patriot Act, also require that a non-foreign entity affidavit be executed with the deed.

The title and the terms of the deed will have been reviewed and discussed long before the formal closing documents are executed.



**Thank You**

*Closing Remarks*  
**Questions &  
Discussion**

# Upcoming Opportunity

*Save the date*

# ALTA Commercial Network

June 3-5 | The Ambassador Hotel Chicago