

**SURVEY & TITLE REVIEW:
Guidelines, Objections, Solutions, and Closing Instructions**

G. ROLAND LOVE, *Dallas*
Independence Title Company
rlove@independencetitle.com
214-202-1959

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TITLE & SURVEY OBJECTION LETTER, INSTRUCTION LETTER: GUIDELINES AND SOLUTIONS

I. INTRODUCTION.

The title commitment and survey are typically products of a purchase and sale agreement or a lending transaction – often both. The purchaser and lender will be provided with these with a limited time to review and object. This paper addresses many of the common concerns found in a title commitment or survey and objections and solutions. In addition, as part of the closing, an instruction letter is appropriate to set out the final closing and title policy requirements, together with any deliverables and funding. Of course, there are times when only a title commitment and/or survey is being reviewed, and the materials herein should be helpful.

The obvious, but still often overlooked, initial issue is to be sure that the time frame for review and objection only begins when both the title commitment and survey have been received. Counsel should be sure that the time allotted is sufficient. And, if delivery of the title exception documents is important, be sure that is part of the time equation. If there is an existing survey to be used, there should be a time limit to provide it and gain approval as to its quality. If the title insurance underwriter or a party does not approve the survey, there needs to be a contractual provision as to a time period to obtain and provide a new survey, and who pays for it. The title review period should not begin until all of the needed items have been provided. Finally, the agreement should address any time or obligation on the seller or borrower to cure and what happens if that does not happen.

Some additional title review considerations include allowing the title review to include all matters of record and matters shown on the survey. Physical and operational issues should be a part of a separate feasibility due diligence period. The agreement should also be written such that an objection letter extends the time to terminate the agreement.

Upon receipt, be sure the title commitment is complete, including the jacket and schedules A, B, C, and D, and it is signed. In addition, make sure Schedule A correctly identifies the parties, the dollar amounts, and the real property and estate involved. A commitment is only binding for 90 days, so periodic updates and reissuance may be appropriate.

Likewise, the survey needs to be in final form. Has it been signed and properly certified? Is it dated? Is it the correct property? The surveyed property and the title searched estate should match.

Also, immediately check through the documents provided. Are they complete? Are they legible? The review period should not commence until legible copies

are in hand, or at a minimum the review period should be extended as to that document and its effect.

Assuming one now has the title commitment, survey, exception documents, and maybe a UCC search, if relevant, all in hand, the review process can begin. Be sure the survey reflects the location of all encumbrances shown in Schedule B and C as may be applicable.

In comparison to every other state in the union, all of which utilize the American Land Title Association ("ALTA") system of title insurance and insuring forms, the Texas title insurance industry is highly regulated with respect to forms and premiums. Thus, a Texas title company cannot provide any discounts, rate reductions, nor any commitment or policy form changes except as expressly promulgated or approved by the Texas Insurance Commissioner. However, a good understanding of the title commitment/policy and the survey can greatly expand coverage and protection for the purchaser and/or the purchaser's lender. Moreover, as an important part of the due diligence process, it is generally the responsibility of the purchaser's and/or the lender's attorney to (i) review the title commitment and the survey in detail; (ii) provide appropriate objections and comments thereto pursuant to the client's objectives, often in the form of a written title and survey objection letter; and (iii) work with the title company, the surveyor and the seller to ensure that the client receives the maximum coverage and protection (subject, of course, to various cost considerations) that is available under Texas law.

II. OVERVIEW OF TEXAS TITLE INSURANCE.

These materials are clearly not intended to serve as an exhaustive review of the title and survey issues to be considered in connection with the acquisition of real property; however, a general review of the basic framework of Texas title insurance and some related ALTA comparisons should be instructive to attorneys in the context of reviewing title and survey and preparing effective objection letters.

A. Regulatory.

Texas title insurance is regulated by Title XI of the Texas Insurance Code. Pursuant to Section 2551.003, the Texas Department of Insurance promulgates the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas (the "Basic Manual"). The issuance of commitments and title policies by Texas title insurance companies is completely regulated and controlled by the Basic Manual. The Basic Manual, which is periodically amended includes, among other things, (i) Procedural Rules, (ii) Rate Rules, (iii) the forms of commitments, policies, coverage and endorsements, (iv) claim procedures, and (v) the bulletins issued by the Texas Department of Insurance. As noted, Texas title

companies are prohibited from utilizing any other title insurance forms.

B. Texas Title Insurance Coverage.

Prior to the issuance and delivery of a title insurance policy, the title company issues a Commitment For Title Insurance (the "Commitment"). As provided in Procedural Rule P-18 of the Manual, the title company is required to issue and deliver the Commitment to proposed insureds in the approved form. P-18 provides additional requirements and obligations of the title company pertaining to issuance, delivery and expiration information. For all contemplated transactions, the liability and obligations under the Commitment end ninety (90) days after the effective date, or when the contemplated Policy is issued. In no event should the Commitment be used in lieu of a policy, as it provides no coverage, but in appropriate situations a T-13 Interim Construction Loan Binder may make sense. Therefore, during the review period, make sure the Commitment's effective date is updated. **The promulgated form of Commitment (Form T-7) is attached hereto as Appendix 1.** The Commitment, easily the most important document in a typical review of title and survey, will relate to the issuance of a specific form of title insurance policy (a "Policy"). It is important to note that although the form of Policy differs depending on the party and/or the type of transaction being insured, there is only one form of Commitment and each party to the transaction (i.e., both the purchaser and the lender) will receive identical Commitments. The primary promulgated forms of title insurance policies include: (i) the Owner's Policy of Title Insurance (Form T-1) ("Owner's Policy"); (ii) the Residential Owner's Policy of Title Insurance (Form T-1R), applicable to single-family residential properties; (iii) the Loan Policy of Title Insurance (Form T-2) ("Loan Policy"); (iv) the Texas Short Form Residential Loan Policy of Title Insurance and Addendum (Form T-2R); and (v) the Loan Title Policy Binder on Interim Construction Loan (Form T-13). For further reference, all forms and rules can be found on the Texas Department of Insurance's website at: www.tdi.state.tx.us/title/titleman or on the Texas Land Title Association's website at www.TLTA.com.

C. Endorsements

Owner and Loan Policies may also be endorsed with permitted endorsements promulgated by the Texas Department of Insurance. Of course, an endorsement overrides exceptions and exclusions to coverage and may provide specific coverage where not otherwise available. Endorsements are discussed in more detail later in this paper in dealing with and addressing Schedule B and Schedule C exceptions and protecting the borrower or lender.

III. TITLE AND SURVEY REVIEW.

A. In General.

Unlike a homeowner's, fire and extended coverage, or life insurance policy, a title insurance policy is, for the most part, the final (product) policy to be issued in strict compliance with the commitment. In other words, the coverage will not be reviewed and available for updates and/or revisions on an annual basis. In this regard, the review period allows the insured(s) the opportunity to obtain the maximum coverage and protection of the investment or collateral. However, sometimes the importance of the Commitment and the review thereof, is overlooked within the overall scope of the purchase and/or loan transaction. The review, and objection(s) if warranted, truly deserve the same level attention to detail as the other important components of a real estate transaction, such as the physical, financial, and environmental due diligence. Utilized properly, review of the commitment and survey can provide protection and save costs through the period of ownership or life of the loan. The period prior to closing is really the only opportunity to achieve this.

B. Materials for Title and Survey Review.

As noted, prior to proceeding with the title and survey review, it is very helpful to have the following: (i) a complete, current Commitment issued subsequent to the title company's review of the survey; (ii) a current survey, that includes the surveyor's review of a current Commitment; (iii) complete copies of the documents listed as exceptions or curative matters in the Commitment; (iv) a legible, complete copy of the plat of the property if the property is platted; and (v) all zoning information applicable to the property including the zoning map and zoning ordinance.

C. Review of the Commitment.

The Commitment must include the following: (i) jacket or cover page; (ii) Texas Title Insurance Information Form; (iii) Bilingual Notice; (iv) Deletion of Arbitration Provision; (v) Schedule A; (vi) Schedule B; (vii) Schedule C; and (viii) Schedule D. Some important information that an attorney needs to know in order to conduct a proper and complete review of a Commitment and the associated title exception documents is discussed below. **See Appendix 2 for a Title Commitment and Exception Document Review Checklist.**

1. Schedule A – Commitment.

Generally described, Schedule A identifies the Commitment by number and sets forth the effective date, the GF (or guaranty file) number, the issue date, the type of Policy to be issued pursuant to the Commitment, the name of the proposed insured, the interest in the land covered by the Commitment (i.e., fee simple, leasehold, life estate, etc.), who owns record title

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