



# CONCEPT

## New ALTA/ACSM Survey Standards Effective Feb. 23, 2011

By Valerie Jahn Grandin, Fund Sr. Underwriting Counsel, Commercial Account Executive

In January 2011, the new ALTA Survey Standards **were** approved by the National Society of Professional Surveyors (NSPS) and the American Land Title Association (ALTA). The new Standards, known as **The 2011 Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys**, replaced the current 2005 Standards and took effect on Feb. 23, 2011.

The purpose of the Minimum Standards, first promulgated in 1962, is to create a nationally recognized uniform standard for land surveys and to assist title insurance underwriters, surveyors, and lenders. **Fund TN 25.03.06** requires a survey in order to remove the standard survey exception from the final title insurance policy.

The new Standards will, among other enhancements, include the following new requirements:

1. Additional information and detail concerning easements and rights-of-way lines;
2. Discourage the drafting of new legal descriptions;
3. A reference to the title commitment must be included on the face of the plat;
4. A vicinity map must be shown;
5. An affirmative statement that there are no buildings on the surveyed parcel; and
6. Outside of Florida, require the use of a standard certification clause. Please note that The Fund does not require a certification in

order to remove the standard survey exception, but Fund Members should remind lender clients to forgo the use of a custom certification and instead should utilize the newly effective standard certification on surveys for their out-of-state transactions.

The Feb. 23, 2011, revisions have added a new Table A to the standard survey form. Fund Members and their lender clients should become familiar with these optional items which may be most helpful in providing specific details for the transactions but may come with significant upcharges from the surveyor.

Optional survey enhancements set forth on Table A include:

1. Item 17 requires the surveyor to show proposed changes in right-of-way lines as well as observed evidence of recent street construction or repairs.
2. Item 19 requires the surveyor to show the location of wetlands.

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## CASE REVIEWS

### 'Legally or Naturally Dependent' Defined for Homestead Tax Exemption

*Willens v. Garcia*,  
36 Fla. L. Weekly D184  
(Fla. 3d DCA 2011)

The owner of homestead property deeded the property to his adult son, reserving to himself a life estate. Upon the father's death, the county property appraiser re-assessed to full value the homestead property. The chief detriment of the re-assessment to the son was the loss of some 18 years of cumulative three percent annual caps on the increase in assessed value of the property under the Save-Our Homes Constitutional Amendment.

The son argued that he served as the full-time, in-home, resident caretaker for his stroke-bound father and thus was "legally or naturally dependent" upon his disabled father and this entitled him to retain the benefit of the Save-Our-Homes driven assessment reduction enjoyed by his father prior to his death. On review the circuit court concluded that the son was not "legally or naturally dependent" on his father during those years of care within the meaning of Sec. 193.155, FS., on the assessment of real property for ad valorem tax purposes.

On appeal the Third District Court affirmed the re-assessment of the property to full value, holding that a moral obligation to support an able-bodied adult son and mere familial ties were not sufficient to render that person "legally or naturally dependent upon the owner" for ad valorem homestead exemption purposes.

### General Assertion of Affirmative Defenses Not Sufficient

*Tacher v. Helm Bank*,  
50 So.3d 1239  
(Fla. 4<sup>th</sup> DCA 2010)

A bank sued to foreclose a mortgage, contending that the mortgagor stopped making payments after June 2008. The mortgagor filed a 19-paragraph

laundry list of affirmative defenses; some are legally insufficient on their face and others state general legal conclusions without any facts. The trial court entered a summary judgment for the bank. The mortgagor filed a one-and-one-half page motion for rehearing contending only that each of his affirmative defenses had not been "conclusively refuted on the record." The trial court denied the motion.

On appeal to the Fourth District Court, the mortgagor's short brief did nothing more than generally state that affirmative defenses were not refuted and that genuine issues of material fact remained. The bank's affidavit disproved the affirmative defenses of payment, tender, and accord and satisfaction. The appellate court concluded that the mortgagor's brief did not specifically discuss a single affirmative defense, nor did it describe what issues of fact need to be tried, and thus the mortgagor had not carried his "burden of making 'any reversible error clearly, definitely, and fully appear.'"

### Waiver of Homestead Rights

*Habeeb v. Linder*,  
36 Fla. L. Weekly D300  
(Fla. 3d DCA 2011)

A husband and wife owned their home, a condominium unit. In 1979 they both executed a warranty deed from the husband and wife to the wife. The deed, while a full statutory warranty deed, did not contain any express waiver of the husband's constitutional homestead interest. The husband and wife thereafter both made wills reflecting that the wife was the owner of the unit. Her will devised a life estate in the unit to her husband with the remainder to her sister.

After the wife passed away in 2008, the husband petitioned for administration of the wife's estate and for a homestead determination in that probate proceeding. The husband died in 2009, and his personal representative challenged the deed as effectively conveying all of the husband's marital homestead rights. The trial court held that the husband had relinquished his entire interest in the property by the warranty deed, including any spousal rights in the homestead.

On appeal to the Third District Court, the personal representative argued that lenders, purchasers, and title insurers ordinarily require the

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joinder of a spouse when dealing with homestead property, even after a deed such as the one in question. The appellate court affirmed the trial court's judgment, holding that the warranty deed and the parties' actions after the deed clearly reflect the intention the husband's intention to convey his martial homestead rights. The court held that the term "hereditaments" in the deed encompasses the homestead rights of each grantor as survivor and further that the warranty deed satisfied the requirements of Sec. 732.702, F.S., for waiver of the homestead rights involved.

## Homestead and Joint Tenancies

*Marger v. De Rosa*,  
36 Fla. L. Weekly D214  
(Fla. 2d DCA 2011)

Title to certain residential property was deeded to a son and his mother as "joint tenants with full right of survivorship." At the time the son had two minor children. Later, he died intestate and was not survived by a spouse, but he did have two minor children and one adult child. The administrator ad litem for the son's estate claimed that the property should have homestead status for the benefit of the children. The probate court held that the property was not homestead for administration of the son's estate and became the sole property of his mother at the instant of the son's death.

On appeal to the Second District Court, the administrator argued that the deed was invalid because the son had minor children when title was taken and the property was homestead and that the right of survivorship was a "future devise of homestead upon his death to a third party" which is prohibited by the Florida Constitution as the right survivorship cannot overcome the constitutional protection of homestead. The appellate did not accept these arguments and affirmed the probate court's ruling.

## Servient Owner's Use of Access Easement

*Dama v. Bay Bank & Trust Co.*,  
36 Fla. L. Weekly D218  
(Fla. 1<sup>st</sup> DCA 2011)

Dama owned the main parcel in a shopping center. He attempted to erect a sign on a portion of the main parcel, and Bay Bank, which had a branch

located in the shopping center, sued, claiming that the sign was being erected on a parcel over which it had easement rights for ingress and egress. Dama contested that the declaration agreement was insufficient to create an easement and, even if there was an easement, the sign was not inconsistent with the easement. The trial court entered a permanent injunction.

On appeal the First District Court reversed the trial court's judgment, distinguishing a line of cases on which Bay Bank relied. Those cases held that, where written easements provide for an easement on the entirety of a parcel of land, the servient owner may not reduce or infringe the ability to ingress or egress any portion of the land. By contrast, the instant appellate court held, the easement in this case applied only to the common areas devoted to use by the general public for ingress and egress. In this case, Bay Bank admitted that the sign was not going to be erected on the driveway dedicated for vehicular access and that the land on which the sign was going to be placed had never been used for ingress or egress. Thus, the appellate court concluded that Bay Bank had failed to show that the sign would substantially impair its right to ingress or egress.

## Post-Foreclosure Bankruptcy by Mortgagor

*Powers v. SunTrust Bank*,  
2011 WL 397656  
\_\_\_\_ F.Supp. \_\_\_\_  
(M.D. Fla., Feb. 4, 2011)

A bank successfully pursued a foreclosure action in state court against a borrower. The borrower subsequently filed this action in the federal Middle District of Florida alleging violations of the Truth in Lending Act. The borrower then also filed a Chapter 7 bankruptcy petition. In defense of the TILA violation complaint against it, the bank moved to dismiss based upon (1) res judicata and (2) lack of standing due to the bankruptcy.

The district court granted the motion to dismiss with prejudice, holding that because the borrower filed for bankruptcy, only the trustee of the bankruptcy estate had standing to bring the TILA claim, even though the real property underlying the TILA claim was exempt from the bankruptcy estate. The court therefore dismissed the complaint with prejudice based on lack of standing and did not address the res judicata claim.

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## Summary of Revisions to Title Notes 2010

By Beth Kaler, Fund Sr. Underwriting Counsel

*The following is a summary of the significant changes to the Fund Title Notes updated through December 2010. The Title Notes with the updates will be posted to The Fund's web portal ([www.thefund.com](http://www.thefund.com)) and may be downloaded in its entirety. Agents who are maintaining the paper binder of the Title Notes may purchase a new set using the order form that appears on our website.*

**TN 2.06.02 (Administration of Estates—Homestead Descent)** was revised to conform to recent changes to Sec. 732.401, F.S. Sec. 732.401(2), F.S., now allows a surviving spouse to elect to take an undivided one-half interest in the homestead as a tenant in common with the decedent's lineal descendants in lieu of taking a life estate. Sec. 732.401(4), F.S., also provides that if the surviving spouse's life estate is disclaimed pursuant to Ch. 739, F.S., the interests of the decedent's descendants may not be divested.

**TN 2.06.03 (Administration of Estates—Homestead and Disclaimer)** was revised to add the recent addition of Sec. 732.4015(3), F.S., which provides that homestead that was properly devised to the surviving spouse and disclaimed by the surviving spouse passes in accordance with Ch. 739, F.S.

**TN 2.06.05 (Administration of Estates—Homestead)** was amended to add the recent case of *Bayview Loan Servicing, LLC v. Giblin*, 9 So.3d 1276 (Fla. 3d DCA 2009), which discusses that when the owner resides on a property that is different from the property on which the owner's spouse resides, the property that the spouse resides on may still have homestead status.

**TN 2.10.08 (Administration of Estates—Estate Taxes)** was revised to conform with the new legislation concerning federal estate taxes for decedents dying in 2010, 2011, and 2012.

**TN 11.10.01 ( Limited Liability Companies)** was revised to add a new underwriting requirement for single member LLCs based on *Olmstead v. F.T.C.*, 44 So.3d 76 (Fla. 2010). The TN requires a determination that no creditor exists that has perfected

a lien on the member's interest in the LLC. The purpose is to verify whether ownership and control of the LLC has been acquired by a creditor of the sole member in order to determine who is the proper party to execute the deed or mortgage on behalf of the LLC.

**TN 17.03.02B (Joint Tenancies—Judgment/Lien Against One Joint Tenant)** was revised due to language in *Paternoster v. U.S.*, 640 F. Supp.2d 983 (S.D. Ohio 2009), that indicates that a federal tax lien recorded against a joint tenant who is now deceased may remain a lien on the property after the death of that joint tenant. Also, TN 18.03.05 and TN 30.02.07 (Entirety Property and Federal Tax Liens) were revised due to the *Paternoster* case to reflect that a federal tax lien against one spouse that attached to entirety property may remain a lien on the property even after the death of the spouse against whom the federal tax lien was filed. Consequently, for insuring purposes, the federal tax lien must be satisfied or released.

**TN 18.03.02C (Judgments and Liens)** was revised to add the case of *Farkus v. Florida Land Sales and Development Company*, 915 So.2d 688 (Fla. 5<sup>th</sup> DCA 2005), that holds that the omission of the creditor's address to perfect the lien of a judgment is not cured by an assignment of judgment that contains the creditor's address.

**TN 18.06.15 (Judgments and Liens—Court Imposed Criminal Financial Obligations)** was amended to address provisions of Sec. 939.185 F.S., where criminal court costs and surcharges charged against a person may become liens on real property owned by that person in the same manner and to the same extent as a judgment as provided in Sec. 55.10, F.S., when the clerk of the court causes a certified copy of the court order(s) imposing such costs to be recorded.

**TN 19.01.01 and 19.03.05 (Leases)** were revised to add the recent case of *S & I Investments v. Payless Flea Market, Inc.*, 36 So.3d 909 ( Fla. 4<sup>th</sup> DCA 2010), as authority for the requirement that the

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lease and any renewals must be fully executed and have two witnesses.

**TN 22.02.03 (Mortgages—Ownership of Mortgage at Time of Foreclosure)** was amended to add a part D addressing the requirements for insuring a mortgage foreclosure where there is a missing assignment of mortgage to the foreclosing lender.

**TN 22.02.07 (Mortgages—United States Right of Redemption)** was amended to add information concerning a procedure for requesting the United States to release its right to redeem property secured by a federal tax lien.

**TN 22.02.12 (Small Lien Foreclosures)** was revised to reference the requirement contained in TN 12.08.01 for appointment of ad litem for unknown defendants in small lien foreclosures.

**TN 22.02.15 (Liability of Lender for Condominium and Homeowner Association Assessments)** was amended to reflect that recent legislation changed the liability from six months to 12 months for condominium association assessments.

**TN 22.05.05D and G (Mortgages—Limitation of Action)** was amended to add as authority the recent case of *LPP Mortgage, Ltd. v. Tucker*, 48 So.3d 115 (Fla. 3d DCA 2010), holding that an assignee of a federal government agency acquires the benefit of the federal government's unlimited time to foreclose on mortgaged property.

**TN 30.01.02 (Taxation—Clerk's Tax Deeds)** was amended to add the case of *Delta Property Management, Inc. v. Profile Investments, Inc.*, 875 So.2d 443 (Fla. 2004), that held that the clerk of court is required to check the most recent tax assessment roll for any change of the legal titleholder's address before issuing tax sale notices. Also, the TN added information concerning the invalidity of tax deeds on condominium common elements and subdivision common elements.

**TN 30.06.04D (Division of Employment Security Taxes)** was amended to reflect the revision in Sec. 55.204, F.S., which provides that effective May 27, 2010, the duration of the liens securing the payment of unemployment tax obligations lapse 10 years after the date of the original filing of the notice of lien, and a second lien based on the original filing

may not be obtained.

**TN 31.06.05 (Homestead and Revocable Trusts)** added underwriting requirements for the homestead and revocable trust scenario where a bona fide seller conveys to husband as trustee of his revocable trust and to wife as trustee of her revocable trust. This is treated as creating a tenancy in common type of situation, requiring a probate administration for the first of the spouses to die.

**TN 10.01.02 (Marketable Record Title Act—MRTA)** was revised to add the latest addition to the matters not eliminated by MRTA. Effective Jul. 1, 2010, Sec. 712.03(9), F.S., provides that the right, title, and interest of the United States, TIF, and water management districts under Ch. 373, F.S., are not extinguished by MRTA. □

**FUND ALERT:** For Fund Corporate Members and Attorney Members who are required to submit monthly trust account reconciliations.

New E-Mail Address to Submit Reconciliations – Effective Mar. 1, 2011

Effective Mar.1, 2011, the e-mail address for submitting your monthly trust and escrow account reconciliations has changed.

Beginning Mar.1, 2011, please e-mail your reconciliations to [ATFSrecons@thefund.com](mailto:ATFSrecons@thefund.com).

You may also fax them to (407) 854-3700. Please note, this fax number is for reconciliations only.

If you choose to mail your reconciliations, the address remains the same:

Attorneys' Title Fund Services, LLC  
Attn: Dondra McEachern - Reconciliations  
P.O. Box 628600  
Orlando, FL 32862-8600

For Fed Ex or UPS, send them to:  
Attorneys' Title Fund Services, LLC  
Attn: Dondra McEachern - Reconciliations  
6545 Corporate Centre Boulevard  
Orlando, FL 32822

Thanks for your cooperation!

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## New ALTA/ACSM...continued from page 32

3. Item 20 requires the depiction of off-site easements which benefit the surveyed property.
4. Item 21, if checked, requires the surveyor to have professional liability insurance. Although many surveyors are upset about this new option, lenders, attorneys, and the ultimate property owner will likely make this a common request, so long as the added cost is in line with market pricing.

For more information on the new Survey Standards, visit the ALTA website, [www.alta.org/standards/standards.cfm](http://www.alta.org/standards/standards.cfm), where you may view the entire text of the Standards, with changes highlighted for ease of reference. □

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## News Flash

*Wish you had a quick and affordable search option for those iffy deals like foreclosure sales or short sales?*

Coming in April – Try The Fund’s new **Ownership and Encumbrance Search (OES)**!

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Contact your local Fund Member Account Executive for more information on The Fund’s **OES**.

## EMPLOYMENT OPPORTUNITY

The Fund is seeking an experienced transactional Florida real property attorney with management and teaching/training experience to be its new Education Manager. This position is located in Orlando and is responsible for managing and leading the continuing legal education and product training departments for The Fund.

The Education Manager will develop and present programs and will play a leadership role in expanding The Fund’s curriculum of offerings into distance and eLearning models. Major areas of responsibility include continuing legal education seminars, title examination skills training, New Member Training, and Software Product Training Classes. Position requirements include 4 years of management experience, 4 years experience as a transactional real estate attorney, and 1 year of formal experience developing and presenting education or training materials. If interested, email a cover letter & resume to [careers@thefund.com](mailto:careers@thefund.com).

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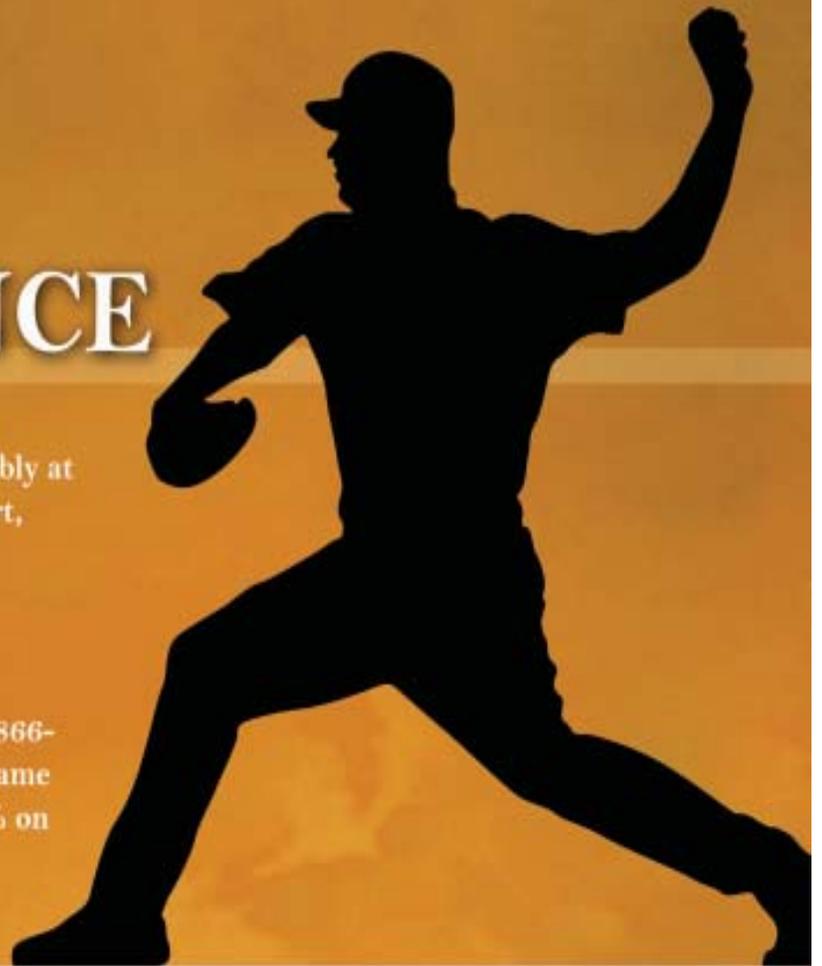
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close with confidence

## Sarah Diaz Joins The Fund's Staff

Sarah D. Diaz has joined The Fund as an underwriting counsel in the Broward County Branch located in Fort Lauderdale. She was previously a partner with Wigder & Diaz in Deerfield Beach and has been an associate at two of South Florida's most prominent law firms.



Sarah's practice included residential and commercial real estate transactions and representation of lending institutions and real estate developers. She received her Bachelor of Science degree from Barry University and her J.D. degree from University of Miami School of Law. She has been a member of The Florida Bar since 2003. Diaz is a member of the Real Property, Probate & Trust Law Section of The Florida Bar.

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