

# USING TITLE INSURANCE ENDORSEMENTS TO YOUR CLIENT’S ADVANTAGE

Mississippi Valley Title 2016 Agency Seminar: Commercial Real Estate Transactions

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## I. INTRODUCTION

**A. Title Policies.** You get one in virtually every real estate transaction: a title insurance policy. There are various types of title policies, such as the owner's policy and extended owner's policy. The most commonly used forms of title policy come from the American Land Title Association ("ALTA"). The ALTA policy coverage terms, whether in an owner's policy or a loan policy, are standardized. However, a title insurer can modify the policy and give additional insurance coverage through the use of endorsements to the policy. The purpose of an endorsement is usually to limit the effect of an Exception or Exclusion or to modify a policy Condition.

### **B. Endorsements to a Title Policy.**

1. History. The idea of adding insurance coverage to a title policy through endorsements has been around for a long time. For many years, endorsements were free-form documents drafted by practitioners and negotiated with the title insurer. In the past several decades, the title insurance industry has worked to formalize the types of endorsements to be used. There are still non-standard endorsements being issued. For instance, an endorsement may be drafted to address a particular state law issue or an issue unique to a particular transaction.
2. Forms of Endorsements. Many of the title insurance endorsement forms used today have been promulgated by the ALTA. ALTA is the national trade group of title insurance underwriters and title insurance agents. The ALTA Forms Committee reviews and revises existing endorsements and periodically issues new form endorsements. It is important to confirm that you are using the most recent form of an ALTA endorsement. The ALTA endorsements are intended for national use. However, certain states, such as California, Florida, Texas and New York and others, have adopted their own state-specific forms of endorsements that must be used in place of ALTA endorsements in those states.
3. Underwriting Endorsements. Title insurers do not automatically give endorsements to title policies; each endorsement requires underwriting. Some endorsements, such as a tax parcel endorsement, are easy to obtain and require very little underwriting review. Other more complex endorsements, such as a mineral rights endorsement, require in-depth review and consideration, which requires additional time to complete. Keep that in mind in planning your closing schedule if there are unusual or difficult endorsements to be issued.
4. Availability of Endorsements. Each state has its own regulations governing title insurance products. In certain states, you can only use

state-approved endorsements, and the endorsements cannot be modified. In Mississippi, you can modify the language of a particular endorsement. That is why you may find that certain endorsements are not available in states such as Texas and Florida but are available in Mississippi.

- C. Endorsements Tailored to Transaction.** There is no one master of list of endorsements that should be used in every purchase transaction or loan transaction. While there are endorsements typically used in most transactions, it behooves buyer's counsel and lender's counsel to see whether there are other, non-typical endorsements that could provide the client with additional title insurance coverage in ways that are unique to that particular transaction.

## **II. NEW DEVELOPMENT PROJECT**

### **A. Scenario 1: Development of a Downtown Affordable Housing Project.**

An affordable housing developer wishes to build a new 48-unit apartment building in downtown Gulfport. The site selected for the project consists of four metes and bounds parcels, which are located on the southwest corner of a city block. The developer is purchasing each parcel individually from different sellers.

The state has awarded low-income housing tax credits to the project. The developer has found an investor who will acquire the tax credits in exchange for an equity investment in the project. The project property will be owned by a single purpose limited liability company which will in turn be owned by the developer and the investor.

The developer will construct a parking lot on the southern portion of the property and the main entrance of the apartment building will face south. The apartment building will be located right along the western 10' set-back line. The title commitment discloses a prior federal tax lien on a predecessor owner, John Smith, recorded eight years ago. The title commitment also discloses multiple declarations of covenants and restrictions affecting title to the parcels.

What title insurance endorsements will provide additional assurances to the owner and the lender in this transaction?

1. Tax Parcel Endorsement (ALTA 18) Because this project requires four separate tax parcels to be joined together, the developer and lender will want assurance that each parcel has its own tax identification number and that no other property is covered by that tax identification number.

The ALTA 18-06 and 18.1-06 endorsements insure that an insured parcel is: (a) maintained on the real estate tax rolls as one tax parcel (ALTA 18-06) or as several different parcels which are insured as each having a unique tax identification number (ALTA 18.1-06); and (b) contains no more or less property than the property described in Schedule A. The ALTA 18.1-06 endorsement also insures against loss if the insured easement(s), if any,

described in Schedule A can be cut off by non-payment of real estate taxes or assessments against the burdened property.

#### Access Endorsement (ALTA 17)

In order for its plans for the site to be economically feasible, the developer wants to be sure that the property's main access point is located on the south side of the property where the parking lot will be located. The access coverage afforded in Covered Risk 4 of the ALTA Owner's Policy insures only that the property has legal access to some public right-of-way. Insurance for legal access to the property from the west-side road over a ten foot space between the sidewalk and the apartment building does not provide any economic benefit to the developer. To confirm the exact location of access to the property, the developer and lender should each obtain an ALTA 17 endorsement. In addition to the assurance of both vehicular and pedestrian access to the property, the ALTA 17 series also give assurances with respect to the right to use existing curb cuts or other entries along that portion of the public right-of-way abutting the property.

ALTA 17-06 insures direct vehicular and pedestrian access to a public right-of-way abutting the property. To obtain this endorsement, the developer must have a recent survey or other appropriate means to show that (a) the public right-of-way is physically contiguous with the property, and (b) the property owner has the legal right to use that means of access. The title insurer may also want to assure itself that any governmental entity maintaining the access has not placed any limitation on that access.

The ALTA 17.1-06 insures indirect vehicular and pedestrian access to a public right-of-way pursuant to an easement identified in Schedule A of the policy. To obtain this endorsement, the developer must produce a recent survey or other appropriate means showing that the access easement runs to both the property and a public right-of-way, and also that the property owner has a legally enforceable right to use that access easement and that use cannot be terminated by the enforcement or foreclosure of a prior interest affecting the burdened property.

The ALTA 17.2-06 insures the of right of access to specific utilities or services over, under or upon rights-of-way or easements in the event there is: (a) a gap or gore between the boundaries of the insured property and the rights-of-way or easements; (b) a gap between the boundaries of the rights-of-way or easements; or (c) a termination by a grantor, or its successor, of the rights-of-way or easements. To issue this endorsement, the survey must show that the utility or service specified in the endorsement does have access to the property. It is not necessary that the utility and/or service lines are connected and available just that access is available if needed.

2. Contiguity Endorsement (ALTA 19)

The ALTA 19-06 insures that two or more insured parcels are contiguous to each other without any gaps or gores along their common boundary. The ALTA 19.1-06 insures that the insured parcel is contiguous to an uninsured parcel of land along defined lines or boundaries.

The ALTA 19-06 would be of value for both the owner's policy and the loan policy in this scenario because the project involves an aggregation of metes and bounds parcels that were previously separate parcels. If there is a gap between any of the assembled parcels, the title policy, with this endorsement, will cover losses up to the insured amount of the policy.

3. Zoning Endorsement – New Improvements (ALTA 3.2)

The ALTA 3 series of endorsements provides owners and lenders assurance that the property described in the policy is zoned in a specific classification and lists one or more of the uses allowed in that classification. Typically, an Insured will want an affirmative statement that its contemplated use of the property is authorized under the relevant zoning classification.

In this scenario, the developer and the lender should each obtain an ALTA 3.2-06 which is specifically designed for an ongoing or contemplated construction project in which improvements have not yet been completed. To obtain the ALTA 3.2-06, the title insurer must be provided with existing plans and specifications which depict the contemplated improvements. The 3.2-06 also affirmatively insures that the future improvements will comply with the zoning classification regarding use, building site dimension, floor space, setback, height, and parking provided that the "Improvements" (as that term is defined in Section 1(a) of the endorsement) are constructed according to the plans identified in Section 1(b) of the endorsement. Some states may not permit title insurers to issue these endorsements on the theory that they provide insurance for future events.

4. Comprehensive – New Improvements – Loan Policy (ALTA 9.7)

Because of the numerous declarations of covenants and restrictions shown in the title commitment, the lender in this transaction should obtain an ALTA 9.7 endorsement to its loan policy. This endorsement provides the lender with coverage in the event of a loss caused by: (a) a violation of any covenant, condition, limitation or restriction contained in a recorded document ("Covenant") which divests, subordinates or extinguishes the lien of the Insured Deed of Trust, results in the invalidity, unenforceability or lack of priority of the lien of the Insured Deed of Trust; (b) a violation of an enforceable Covenant by an improvement or future improvement (unless a Schedule B exception identifies the violation); (c) enforced removal of an improvement or a future improvement as a result

of a violation of a building setback line shown on a plat of subdivision recorded at Date of Policy; and (d) a notice of violation recorded as of Date of Policy of an enforceable Covenant relating to environmental protection describing the Land and referring to the Covenant, but only to the extent of the violation referred to in the recorded notice.

Coverage is also provided as to: (a) encroachments of improvements or future improvements located on the Land onto an easement located on or adjoining the Land; (b) damage to an improvement or future improvement that encroaches onto a portion of the Land subject to an easement if the damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved; and (c) damage to an improvement or future improvement resulting from the right to extract or develop minerals or other subsurface substances excepted in the policy.

The ALTA 9.7-06 excludes coverage as to loss or damage arising from: (a) any Covenant contained in an instrument creating a lease; (b) any Covenant relating to obligations to perform maintenance, repair or remediation on the Land; (c) any Covenant relating to environmental protection of any kind, including loss arising from hazardous or toxic matters, except as provided in Section 3.d. of the endorsement; (d) loss arising from contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; and (e) negligence by a person exercising a right to extract or develop minerals or other subsurface substances.

5. Comprehensive – New Improvements – Owner’s Policy (ALTA 9.8)

For the same reasons discussed above, the developer should also obtain an ALTA 9.8-06 endorsement to its owner’s policy. The ALTA 9.8-06 provides the insured owner of the property that is being developed and for which specific Plans (as identified in Section 2.d.) have been provided, coverage against loss or damage caused by: (a) a violation of an enforceable Covenant by an improvement or future improvement, unless a Schedule B exception identifies the violation; (b) enforced removal of an improvement or a future improvement as a result of violation of a building setback line shown on a plat of subdivision recorded at the Date of Policy; and (c) a notice of violation recorded as of the Date of Policy of an enforceable Covenant relating to environmental protection describing the Land and referring to the Covenant, but only to the extent of the violation referred to in the recorded notice.

The Endorsement excludes coverage as to loss or damage arising from: (a) any Covenant contained in an instrument creating a lease; (b) any Covenant relating to obligations to perform maintenance, repair or remediation on the Land; (c) any Covenant relating to environmental protection of any kind, including loss arising from hazardous or toxic

matters, except as provided in Section 3.d. of the endorsement; (d) loss arising from contamination, explosion, fire, vibration, fracturing, earthquake or subsidence; and (e) negligence by a person or an entity exercising a right to extract or develop minerals or other subsurface substances.

6. Affirmative Coverage Endorsement (ALTA 34)

In this transaction a title insurer is most likely not going to remove the old federal tax lien as an exception on Schedule B even if it determines the risk associated with the exception is low. However, given the age of the federal tax lien and the commonality of the prior owner's name (John Smith), the title insurer may be willing to "insure over" the federal tax lien exception with the issuance of the ALTA 34-06 endorsement.

The ALTA 34-06 is intended for those situations in which the title insurer is not willing to delete a certain exception from Schedule B of a title policy, but believes the risk of loss to a prospective Insured is so slight that it is willing to provide a limited form of indemnification with respect to the specific defect, lien, encumbrance or other matter excepted to.

The creation of the ALTA 34-06 endorsement was ALTA's attempt to standardize the various "affirmative coverage" endorsements in the marketplace which indemnify against loss or damage occasioned by certain title matters of record which are not likely to cause a loss of title or be enforced against the named Insured. Often the "affirmative coverage" language appears in Schedule B following an exception. ALTA also believed the ALTA 34-06 would be particularly useful in light of certain state case law that hold an Insured cannot get affirmative coverage over a title matter when the affirmative coverage is stated in the exception itself.

The ALTA 34-06 endorsement provides coverage in the event that a final court order or decree enforces an identified risk in favor of an adverse party. It also insures, subject to certain conditions stated in the endorsement, against loss or damage as a result of the release of a prospective purchaser or lessee of the title or lender on the title from the obligation to purchase, lease or lend as a result of the identified risk.

7. Tax Credit Endorsement (ALTA 40)

Finally, the tax credit investor in this project should obtain a tax credit endorsement. This is an endorsement to the developer's owner's policy that benefits the tax credit investor. ALTA issued a new form tax credit endorsement (ALTA 40) in April, 2014.

The tax credit endorsement insures against loss sustained by the tax credit investor as a result of a reduction in the amount of tax credit that is caused by a title defect for which coverage is provided in the Covered Risks of



the policy. The endorsement does not insure the amount of the tax credit, the project's eligibility for the tax credit, or the tax credit investor's entitlement to the tax credit.

The ALTA 40-06 operates as a partial assignment by the Insured to the tax credit investor of a right to a payment for loss or damage otherwise payable to the Insured. The Insured also acknowledges by executing the endorsement that any payment made by the title insurer to the tax credit investor reduces the amount of insurance under the policy in accordance with Section 10 of the Conditions.

The ALTA 40.1-06 is the same concept as the ALTA 40-06, but it sets out a specific amount of additional insurance which applies only to loss or damage payable to the tax credit investor. The additional amount of insurance payable to the tax credit investor is in addition to the policy amount payable to the owner.

### III. FINANCING COMMERCIAL PROPERTY

#### A. Scenario 2: Construction Loan.

Entrepreneur Bob is developing a new shopping center in the suburbs of Oxford, and things are not going well. When the project started in September, 2015, the estimated project costs were \$20 million. Bob obtained a \$16 million construction loan from Big Lender. As Bob only had about \$1 million in equity to put into the project, he obtained a second, junior bridge loan for \$3 million secured by a second Deed of Trust. Both Deeds of Trust were recorded and the following day Bob began work on the site.

The fates conspired against Bob. He encountered unexpected bad soil conditions, which stalled the construction schedule. The price of materials sky-rocketed in the six months since Bob's general contractor priced materials. Under Bob's cost-plus construction contract, the construction costs went up \$5 million.

Bob went back to Big Lender and requested an additional \$5 million of construction funds. When Big Lender said no, Bob went to Risks-R-Us Lender, which agreed to advance the \$5 million. Risks-R-Us Lender would like to assume the Big Lender note and Deed of Trust. Risks-R-Us Lender, knowing the project has had a rocky past, wants to make the loan on terms less favorable to Bob. Risks-R-Us Lender, after getting assignment of the note and Deed of Trust from Big Lender, amends and restates the loan agreement, note and Deed of Trust in their entirety to secure the \$21 million in principal funds that are outstanding.

What type of title insurance coverage can Risks-R-Us Lender obtain for the amended and restated Deed of Trust?

##### 1. Assignment of Endorsement (ALTA 10)

First, Risks-R-Us Lender will want to get an ALTA 10 endorsement in connection with the Deed of Trust assignment. The ALTA 10-06 and 10.1-06 endorsements insure against loss from failure of the assignment to vest title to the Insured Deed of Trust in the Insured and any partial or full reconveyance or release of the insured lien recorded in the public records.

An ALTA 10-06 is issued upon assignment of a Deed of Trust and insures the new assignee of record against loss: (a) sustained by failure of the assignment document to properly transfer the Insured Deed of Trust; and (b) sustained by prior modifications or releases as stated in paragraph "(b)" of the endorsement, if any.

The ALTA 10.1-06 does the same thing, but is used with a request for assurances regarding status of title from the original Deed of Trust date to the date of the assignment ("date-down"). It includes coverage regarding taxes, federal tax liens, and pending bankruptcy proceedings, except as set forth

in the endorsement. The endorsement also adds any intervening exceptions, encumbrances, liens or other matters, if any, to Schedule B of the policy.

2. Modification Endorsement (ALTA 11)

Risks-R-Us Lender will also want an ALTA 11 endorsement for the Deed of Trust modification. The ALTA 11 endorsements are issued in those cases where a Deed of Trust is modified after its original date by agreement of the parties. Modification endorsements have been issued by title insurers for many years in various forms. The ALTA 11-06 and 11.1-06 were adopted in the interest of providing a standardized form for Insureds.

The ALTA 11-06 is issued after a modification agreement has been executed and recorded. The endorsement insures against loss or damage due to the invalidity or unenforceability of the Insured Deed of Trust as a result of the terms of the modification agreement. It also insures that the priority of the Insured Deed of Trust, as modified, continues over any defects, liens and encumbrances on the title, other than those listed as exceptions in either the policy or the endorsement.

The ALTA 11.1-06 is issued when an intervening lien appears in the title search and is made subordinate to the Insured Deed of Trust by agreement. Conversely, the 11-06 is used in connection with a modification where no subordination of an intervening lien is executed.

The ALTA 11.2-06 is issued when a Deed of Trust is being modified or amended and the amount of the Deed of Trust is being increased. The endorsement specifies the new amount of insurance being provided. The endorsement also adds any new intervening encumbrances, liens or other matters to Schedule B of the policy.

These endorsements are not the same as a "date-down" endorsement as they do not extend all the coverages under the policy to the date of recording of the Deed of Trust modification agreement.

3. Mechanic's Lien Coverage (ALTA 32)

The ALTA 32 series of endorsements are intended for use by lenders when the lien of an Insured Deed of Trust does not have priority over potential mechanic's liens, and the title insurer is not willing to provide the coverage for mechanic's lien in Covered Risk 11(a) of the ALTA Loan Policy.

a. ALTA 32-06 (Loss of Priority Construction Loans)

The ALTA 32-06 provides coverage to a construction lender only to the extent that the charges for labor and materials rendered were designated for payment in the documents supporting a construction loan advance disbursed by or on behalf of the Insured on or before the Date of Coverage. This endorsement does not require the title company to disburse the construction funds.

b. ALTA 32.1-06 (Construction Loan – Loss of Priority – Direct Payment)

The ALTA 32.1-06 provides coverage to the extent of the direct payments to the labor and material suppliers have been made by the title insurer or by the insured lender with the title insurer's written approval. This endorsement does require either: (i) that construction disbursements be made by the title insurer to labor and material suppliers; or (ii) by specifically authorizing, in writing, that such a payment be made.

c. ALTA 32.2-06 (Construction Loan – Loss of Priority – Insured's Direct Payment)

The ALTA 32.2-06 provides coverage to the extent of the direct payments to the labor and material suppliers have been made by the Insured or on the Insured's behalf on or before the Date of Coverage. It does not require the title company to disburse the construction funds.

**B. Scenario 3: Acquisition Loan.**

Benchmark Apartments Real Estate Investment Trust is acquiring a portfolio of nine multi-family properties located in four states for \$64 million, which includes a \$7 million 240 unit complex located in Jackson. Big Lender is providing an acquisition financing loan in the amount of \$58 million, of which \$6 million is allocated to the Jackson site. What title insurance endorsements should Big Lender get to its loan policy?

1. Environmental Protection Lien Endorsement (ALTA 8.1-06)

ALTA endorsement form 8.1-06 insures a residential lender against loss of priority due to (i) a federal or state environmental protection lien filed in the public records as defined in the endorsement at the date of policy, and (ii) an environmental lien provided for by a state statute (super lien) in effect on the date of policy, but excepting those statutes listed in paragraph (b) of the endorsement. The 8.1-06 endorsement is only applicable to loan policies where the land is used or intended to be used primarily for residential purposes, including multi-family apartment projects. The endorsement should

not be issued where the land is not used or to be used primarily for residential purposes (e.g. industrial property, commercial property, farms and ranches). Further, this endorsement may not be given to an owner.

The endorsement has two insuring provisions:

Paragraph (a) of the endorsement insures that there have been no environmental protection liens recorded in records within the scope of your present search and in the records of the United States District Court for the district in which the land is located.

Paragraph (b) of the endorsement requires completion by you. In paragraph (b) you must show state statutory provisions creating a super lien or providing for recording of liens in records other than those presently searched for purposes of issuing policies. If there are no such state statutory provisions, the word "None" should be inserted to complete paragraph (b).

If you are unsure as to what should be shown in paragraph (b), please seek advice from underwriting counsel.

2. Aggregation (Tie-In) Endorsement (ALTA 12-06)

An Aggregation Endorsement is often requested in multi-state transactions when deed of trusts on different properties secure the same indebtedness. In most instances, the lender requests separate policies insuring the separate parcels. The "tie-in" endorsement states that the various parcels are part of a single project, references all the policies, and indicates an aggregate amount of title insurance coverage for all the parcels of land included in the project.

This endorsement ties together several policies and provides that the amount of insurance under the Loan Policy to which the endorsement is attached shall be the aggregate of the amount of insurance under each Loan Policy identified in the endorsement. Any payments made by the title insurer under the policy, as endorsed, reduces the aggregate amount of coverage available under all of the policies listed in the endorsement. Additionally, the ALTA 12-06 endorsement has been revised and a new ALTA 12.1-06 endorsement created. The 12.1-06 is intended for use in the situation in which policies insuring Mortgages or Deeds of Trusts in more than one state are being aggregated for liability purposes in the amount of the combined sum of all security instruments. The ALTA 12-06 is the appropriate endorsement for this purpose only if the state single risk limit for all states for which policies are issued is equal to or less than the combined principal amount of all security instruments as aggregated. When the ALTA 12-06 is used it should be attached to each of the individual policies being issued on the transaction.

3. Location Endorsement (ALTA 22-06)

This endorsement provides assurance that the property insured in the policy contains a designated improvement located at a specified street address. This endorsement is most often used in metropolitan areas where it is difficult for a lender to verify this information itself, and allows the lender to verify that the property insured matches the lender's appraisal.

When issuing ALTA 22-06, you can confirm through tax records, a recent survey, or other means that the designated improvement is located at the specified street address.

4. Same as Survey Endorsements (ALTA 25 Series)

These endorsements provide coverage against loss or damage in the event the land insured in the policy is not the same as that delineated on a designated survey bearing a specific date. The ALTA 25.1-06 is functionally identical to the ALTA 25-06, but indemnifies against loss or damage in the event that the land insured in the policy is not the same as a designated portion of the land delineated on a designated survey bearing a specific date. Both endorsements include blanks that must be filled in, in order to specifically identify the survey being relied upon.

5. Easement – Damage or Enforced Removal (ALTA 28 Series)

The ALTA 28-06 indemnifies against loss or damage arising as a result of damage to any existing building located on the land or any court order directing the removal or alteration of an existing building located on the land as a result of the rights granted in a specifically described easement excepted in Schedule B.

The ALTA 28.1-06 provides limited coverage for certain encroachments. It provides coverage as to loss or damage arising because of an encroachment of an "Improvement", as that word is defined in Section 2 of the endorsement, onto adjoining land or from adjoining land onto the land as well as encroachments of the "Improvements" onto an easement unless an exception in Schedule B specifically identifies the encroachment(s). Additionally, coverage is also provided for the forced removal of any improvements located on the insured property due to an encroachment onto an easement if the owner of the easement compels removal of the improvement in order to exercise the right to use or maintain the easement. Section 4 of the ALTA 28.1-06 allows you to specifically list the encroachment(s) to which an exception in Schedule B has been taken and for which you are not willing to provide any of the coverages included in the endorsement.

The ALTA 28.2-06 provides affirmative indemnification to an Insured as to any loss or damage because of encroachments of Improvements located on the Land described in the policy onto adjoining or from adjoining land onto the Land, unless a Schedule B exception identifies the encroachment.

Further coverage is afforded as to any enforced removal of an Improvement located on the Land which encroaches upon any easement affecting any portion of the Land or the enforced removal of an Improvement located on the land which encroaches onto adjoining Land.

The term "Improvement", as used in this endorsement, refers to those improvements specifically itemized in Section 2 of the endorsement.

#### **IV. CELL TOWER**

##### **A. Scenario 4: Cell Tower Installation**

Telecommunications Company has developed a new state-of-the-art cell tower worth \$6 million. The cell tower will be installed on a small parcel of agricultural land located outside of Biloxi. The subsurface mineral rights in the parcel were severed and sold off years ago.

What title insurance endorsements should Telecommunications Company seek?

##### **1. Mineral Rights Endorsement (ALTA 35)**

The Telecommunications Company should request a mineral rights endorsement because the mineral interests in the insured property have been severed.

The ALTA 35 series of endorsements provide limited coverage for damage or interference with "Improvements" (as defined in each of the endorsements) because of the development or extraction of minerals or other subsurface substances excepted either from the description of the Land or excepted in Schedule B. Section 4(c) of each of these endorsements allows the title insurer to specifically exclude from the scope of the endorsement's coverage any specific item excepted in the policy if it feels providing the endorsement's coverage with respect to such item poses too great a risk. All of the 35 series endorsements specifically exclude indemnification for loss or damage which results from contamination, explosion, fire, vibration, fracturing, earthquake, subsidence or negligence by the owner of the minerals or other subsurface substances.

##### **a. ALTA 35 – Minerals and Other Subsurface Substances**

The 35-06 indemnifies an Insured against loss or damage caused by forced removal or alteration of buildings located on the Land as of the Date of Policy arising from the future exercise of any legal right existing at the Date of Policy to extract or develop minerals

or any other subsurface substances that are excepted from the description of the Land or excepted in Schedule B.

b. ALTA 35.1 - Minerals and other Subsurface Substances-  
(Improvements)

The ALTA 35.1-06 provides the same indemnification coverage as to the Improvements as the ALTA 35-06, however, in this endorsement "Improvements" are defined to include improvements affixed to the Land as of Date of Policy which by law constitute real property, but specifically excepting from coverage landscaping, lawn, shrubbery or trees.

c. ALTA 35.2-06 - Minerals and other Subsurface Substances –  
(Described Improvements)

The 35.2-06 defines "Improvements" by reference to a specific itemized list of improvements set forth in the endorsement. The same coverage with respect to the removal or alteration of such improvements is provided as is provided in the 35-06 and 35.1-6.

d. ALTA 35.3-06 Minerals and Other Subsurface Substances –  
(Land Under Development)

The ALTA 35.3-06 defines "Improvements" in the same manner as the 35.1-06 but also has an additional definition entitled "Future Improvements". This is defined as a building, structure, and any paved road, walkway, parking area, driveway, or curb to be constructed on or affixed to the Land in the locations according to the Plans and that by law constitute real property, but excluding any crops, landscaping, lawn, shrubbery or trees. The term "Plans" is defined as it is in the ALTA 9 endorsements discussed above.

The 35.3-06 indemnifies the Insured as to loss or damage arising as a result of the enforced removal or alteration of any Improvements or Future Improvements which results from the exercise of a right existing as of Date of Policy to use the surface of the Land for the extraction or development of minerals or any other subsurface substances. This endorsement is subject to the same exclusions as the other 35 series endorsements.

2. Severable Improvements Endorsement (ALTA 31).

The land the Telecommunications Company is acquiring has little value; the expensive element of the property will be the cell tower. The



Telecommunications Company will want an ALTA 31 endorsement to provide coverage for the cell tower as a severable improvement to the land.

The ALTA 31-06 insures against covered loss with respect to certain improvements to the land that, due to the severable nature of the improvements, do not constitute real property. This endorsement applies to commercial properties and insures an Insured not only against a loss resulting in the reduction in value of the Insured's interest in a "Severable Improvement" as that term is defined in the endorsement, but also the reasonable costs associated in connection with the removal of any Severable Improvement, including the cost of transportation for the first hundred miles.

The endorsement specifically states that it does not insure ownership of the Severable Improvement, does not insure attachment, priority or perfection of any security interest in the Severable Improvement, does not insure against any defect, lien or encumbrance in the Severable Improvement, and does not insure whether any Severable Improvement constitutes real or personal property. There is no UCC coverage intended with this endorsement. The coverage afforded by this endorsement only pertains to defects otherwise insured by the title policy.

Some states may not allow the filing or use of this endorsement as it allows personal property to constitute an element of loss, notwithstanding the specific requirement to tie that loss to a covered, real estate title defect.