

CRE Commission-approved contracts: Defining the property

This is the fourth in a series of a dozen or so articles that come from some years of experience using the Colorado Real Estate Commission-approved Contracts for Purchase and Sale of Real Estate for commercial real estate transactions. The first three articles covered the buyer's name, the seller's name and remedial work to fix the seller's name. We now turn to the first of many title issues raised by the contract – the description of the property.

Tip: The legal description of the property in the contract should be the description that will be contained in the deed at closing. If the description of the property contained in §2.4 of the contract is the true and correct legal description of the property, well and good. More often, however, the contract contains an abbreviated description, say, from the tax assessor's records, or just the street address. That abbreviated description might be sufficient to make the contract enforceable, (see *Shull v. Sexton*, 390 P.2d 313 [Colo. 1964]; *Boyd v. McElroy* 100 P.2d 624 [Colo. 1940]), but it requires a fix after the contract. The deed at closing has to contain the complete legal description.

Tip: The parties should include in the contract as full and complete a description of the property as it can obtain, ideally from the deed by which the seller obtained title to the property. In the previous article on the seller name, we suggested ways to obtain the vesting deed.



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Tip: If you retype a legal description, especially a long one, have two people proof it, one reading it verbatim to the other with all the punctuation. It is very easy to miss a letter or a line when proofing it by yourself.

Trap: If the property description has to be fixed after the contract is signed, the buyer or the seller may gain a right to terminate the contract, which otherwise would not be available to it. Neither party is obligated to amend the property description after the contract is signed. One of the parties might elect not to amend the property description but, instead, terminate the contract. The right to terminate may disappoint the other party who wanted a firm contract. Of course, if the buyer and seller recognize that the property description in the contract is inadequate, they can add a provision to the contract to agree to the property description when it is determined. Even that agreement to agree, however, adds a right to terminate the contract that might not be good for the other party who does not want the contract to terminate.

Tip: If the surveyor creates a new legal description for the property, be sure that the title insurance

company will insure the new legal description. If the surveyor or the title company revises the legal description, ultimately, the title insurance company will have to determine that what the surveyor described is real property owned by the seller. If the legal description is merely being revised from what is contained in the vesting deed, have the title insurance policy reflect that the new legal is the same property as the legal contained in the vesting deed.

Tip: It is very important for the buyer that the title commitment and, even more so, the title insurance policy contain the exact same legal description of the property that is contained in the deed at closing. If the buyer is obtaining a survey, the survey also should have the exact same legal description. More on that subject in a later article about the survey. Also recall that C.R.S. §38-35-106.5 requires the name and address of the person who creates a new legal description to be included in the deed.

The definition of "property" contained in the contract also includes "interests, easements, rights, benefits, improvements and attached fixtures appurtenant thereto, and all interest of seller in vacated streets and alleys adjacent thereto, except as herein excluded." An important step the buyer should take to define the property is to determine what easements or other rights are vital to the use of the property. An appurtenant ease-

ment or right (one that, by its terms, runs with title to the property) will, by definition, be conveyed to the buyer if the deed at closing contains the words, "with all its appurtenances" or the equivalent. **Tip:** It is worthwhile to have any appurtenant easement or right identified as a separate parcel of the property in the deed at closing and in the title insurance policy, so that the buyer's title to the appurtenance is insured.

The contract contains a special provision to address parking spaces, a common appurtenant right. **Tip:** The contract should require the seller to convey the parking space(s) to the buyer by the deed or by any other method required by the declaration or other document that creates the parking space right.

Tip: The buyer should arrange with the title company to have the title insurance policy insure the buyer's title to the parking space(s). Obtaining title insurance for parking space(s) requires the title commitment to show the parking space(s) as parcels comprising the property. **Trap:** If the parking space(s) are merely right to use (i.e., licenses), the title company might not insure title to them because title insurance policies, by their terms, insure only real property and licenses are legally personal property.

Water rights are also identified in the contract section relating to the property, but they are not included in the definition of "property" and are discussed in the next installment.▲