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Colorado Real Estate Commission-approved contracts: Section 13 trap

This article is the 15th in a series of 17 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. Previous articles addressed the buyer's name, the seller, the property, water rights, ordering the title commitment, owner's extended coverage, making title objections, off-record matters, special taxing districts, ordering and reviewing the new improvement location certificate or new survey, owners' associations, rights of first refusal and contract approval. This article addresses the many traps in §13 of the contract relating to the transfer of title.

What should come out of the review of the title documents and off-record matters under §8 of the contract and of the new ILC or new survey under §9 is a list of title exceptions that the buyer has accepted, either because the buyer has stated as much or because the buyer has not objected to the title exceptions revealed in those documents. **Tip:** A buyer is wise to confirm with the title insurance company and with the seller, prior to the expiration of the deadlines for title and survey objections, exactly what exceptions to title the buyer is willing to have shown as exceptions in the deed and in the title insurance policy. Because the title and survey review can become chaotic, with lots



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of emails between the parties, the title insurance company and the surveyor, creating a definitive list of permitted exceptions is a good practice.

Section 13 of the contract prescribes the condition of title that will be conveyed by the seller to the buyer. **Trap:** §13, which may be quite detrimental to the buyer, will apply unless the contract is amended to revise or delete it. Section 8.2 allows the buyer to object to any title matters "notwithstanding §13," so the buyer can terminate the contract under §8.4 based on a title matter included in §13, but §13 does not go away just because the buyer objects to it. It is different than other title objections because the buyer has to get the seller to modify §13 if the buyer objects to any of its provisions.

Section 13 provides that the property will be conveyed "free and clear of all taxes, except the general taxes for the year of closing. The proration of "personal property taxes" and "general real estate taxes" is addressed in §16.1. Are there other "general taxes?" It is this kind of loose drafting that makes the contract more and more dangerous as the dol-

lars involved in the transaction increase. **Trap:** §13 automatically makes "governmental liens for special improvements installed as of the date of buyer's signature" the seller's responsibility. If payable in installments, as they often are, the seller might want to have the buyer pay those assessments.

The subsections of §13 are insidious for many other reasons. Section 13.2 presumes that "distribution utility easements" are somehow innocuous and should be accepted as a matter of course. **Trap:** Utility easements are not innocuous; indeed, in some cases, especially when land is being purchased for development, they can be a serious impediment. Consider, for example, a utility easement down the middle of the property that must be moved in order to permit the construction of a building on the land. While the utility company might cooperate, it has no obligation to do so.

Section 13.3 purports to identify accepted title objections based on the buyer's knowledge. **Trap:** If there is a dispute as to buyer's knowledge, the resolution may take a long time, since proving buyer's knowledge is not a straightforward matter. Section 13.4 might require the buyer to accept the inclusion of the property in a special taxing district notwithstanding an objection lodged by the buyer under §8. That happens if the buyer does not have §13.4 amended when addressing title objections relating to special dis-

tricts. **Trap:** While the borrower has a separate right to terminate the contract under §8.5, if the property is included in a special taxing district not satisfactory to the buyer, that right exists only until the off-record title objection deadline. If the buyer discovers the inclusion of the property in the special taxing district after that deadline (which might occur, for example, if the buyer does not receive the title commitment or tax statements revealing the district before that deadline), the buyer may not terminate the contract under §8.5.

Section 13.5 requires the buyer to accept any special assessment for improvements not installed as of the date of the buyer's signature on the contract even if buyer objected to the assessment under §8. Section 13.6 makes all this worse by giving the seller and its broker or attorney the opportunity to override the title and survey inspection, objection and resolution process of the contract with anything else they might think of. **Tip:** When negotiating the contract, the buyer should delete §13 in its entirety or limit it to the title exceptions the buyer specifically agrees to, following its review of record title, off-record matters and the new survey or new ILC.

In the next article, we will look at how the provisions of §13 are being added to deeds in a totally inappropriate way and without regard to the legal consequences.▲