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CREC contracts: Reviewing the ILC or survey and making objections

This is the 12th in a series of 18 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 and special taxing districts, and ordering the new improvement location certificate or survey. This article addresses reviewing the new ILC or new survey (sometimes referred to below only as the "new survey" although applying equally to a new ILC) and making objections to it.

As to reviewing the new survey and making objections, the contract sets out the following procedure:

1) If the new survey is not delivered by the "new ILC or new survey deadline" (a date chosen by the parties), or if, after it is delivered and the buyer reviews it, the buyer has any objection it requires the seller to correct, the buyer may either terminate the contract or notify the seller of its objection before the "new ILC or new survey objection deadline" (a date also chosen by the parties) (§9.3).

2) If the buyer makes a timely objection to the new survey, the seller may respond to the objection(s), but is not required to.

3) If the seller does not respond to the objection(s), or if the buyer and seller otherwise do not have a written agreement resolving the objection(s), the contract will terminate on the new ILC or new survey resolution deadline unless the buyer withdraws the objection(s) on or before that deadline (§9.3).

There are a number of "traps" in that procedure. These are some of the same traps in making a title objection as discussed in the ninth article in this series. While the survey provisions in §9 are similar to the title review provisions in §8, some subtle but important differences are noted below.

Trap: *The buyer has the right to terminate the contract if the new ILC or new survey is not obtained by the new ILC or new survey deadline even if the buyer is responsible for obtaining the new ILC or new survey.* The seller might want to add a clause to the contract to the effect that the buyer waives all of its rights relating to survey matters if the buyer does not obtain the new ILC or new survey on time.

Trap: *The seller is not in default under the contract if the seller is supposed to order and pay for the new survey but it is not delivered to the buyer on time.* The contract simply provides that the buyer "will receive" the new survey by the contract deadline; there is no covenant by the seller to actually deliver it.

Trap: *The contract does not provide for an extension of time for delivery of the new*



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survey. In many commercial contracts written by lawyers, if the survey is delayed, then the time for delivery is automatically extended, as are other time periods that are dependent on having the survey in hand, such as the time to object to title and survey matters. This makes sense since survey

work is not infrequently delayed, and, in any event, neither the buyer nor the seller control the surveyor's performance. The time for closing may also be extended, but that is allowed less often. **Trap:** *If delivery of the new ILC or new survey is delayed, and the buyer and seller want to keep the contract and the right to address survey objections alive, the new ILC or new survey deadline must be extended, which can only be accomplished by a written agreement (see §26).*

Trap: *The buyer has an option to terminate the contract for a survey objection; the seller does not.* The buyer can get out of the contract if any aspect of the survey is "unsatisfactory" (§9.3). The seller can get out of the contract only by refusing to address all of the buyer's survey objections. Sometimes, a survey will reveal something that would make the seller want to terminate the contract, or at least renegotiate it. A not uncommon example is the seller's discovery from the new survey that the acreage of the property is greater than the seller thought.

Trap: *A buyer's survey objection does not need to be reasonable; it only needs to be made in good faith.* If the buyer has a survey objection, the buyer is to deliver to seller "a written description of any matter that was to be shown or is shown in the new ILC or new survey that is unsatisfactory and that buyer requires seller to correct" (§9.3.2). Section 29 requires the buyer to act in good faith. Proving in a legal action that the buyer is not acting in good faith is very difficult. The leeway given to the buyer means the seller rarely can challenge the buyer's right to make a particular title objection. All the seller can do is choose not to address it and risk losing the deal.

Trap: *If the buyer has a survey objection, it may elect to terminate the contract under §9.4, without giving the seller an opportunity to cure it.* As such, it is easier for the buyer to get out of the contract based on a survey objection than it would be if the seller was automatically given time to cure a survey objection (a right the seller might want to add to the contract).

Trap: *Unlike a title objection under §8.3 and §8.4, the buyer must provide "a written description ... that is unsatisfactory" and any objection must be one "that buyer requires seller to correct" (§9.3.2).* Under that provision, the buyer cannot simply send the seller a notice that states, "The buyer objects to the new survey." A bit of honesty is required of the buyer, at least enough to be able to articulate what survey objection(s) the buyer has.

Trap: *The contract does not require the seller to do anything to cure a survey objection.* Indeed, the seller does not even have to respond to the survey objection. If the seller does not respond, or the seller declines to address all of the buyer's survey objections, the buyer has a choice. It can accept the survey matters it objected to or let the contract terminate. **Trap:** *That the contract automatically terminates if all survey objections are not resolved can be tough on a party that really wants the deal to close because the objections may give the other party a way out of the contract.* Later installments in this series of articles address contract termination in more detail.

■ **Reviewing the new survey.** An ILC or survey is, at least for the lawyer and the title insurance company, the primary "eye" for viewing the property. Reviewing an ILC or survey is an exercise in detail. An important part of the review is to determine that everything that is shown on the new survey matches up with the recorded documents shown in the title commitment. That involves, first, determining that the ILC survey shows everything it is supposed to show based on the requirements for an ILC or the type of survey you ordered. It includes matching up the legal description in the vesting deed and the title commitment with that in the ILC or survey (both the words and by what is shown on the drawing). It involves determining that all rights contained in the exception documents in the title commitment (e.g., easements) are shown (though they might not be on an ILC. It also involves examining that all improvements that are supposed to be on the property are shown (and that none that are not supposed to be there are shown) and looking for encroachments (things that shouldn't be where they are) and other conflicts between what is on the ground and what the recorded documents provide for.

Bock & Clark, a national surveying firm has an excellent Handbook for ALTA/ACSM Land Title Surveys available online at <http://www.bockandclark.com/EducationTools.aspx>. The handbook also includes valuable suggestions and checklists for ordering and reviewing a survey.

■ **Making objections to the new ILC or new survey.** **Tip:** *If the buyer is lodging a survey objection, the buyer should do so clearly and by stating objections, not just requests.*

A survey objection is often written as a series of requests to the seller or the title insurance company, without clearly stating that the buyer objects to the title matter. Perhaps the buyer is trying to hedge its bets by not clearly making an objection. This is not a wise approach. **Trap:** *If the buyer makes requests without calling them objections, the seller ignores them and the buyer does not then withdraw them before the title resolution deadline, the contract may automatically terminate.* The buyer needs to know in its own mind what is and is not an acceptable title matter since the contract forces the buyer to decide what title matters are deal breakers if they remain. Similarly, the seller needs to decide what title objections it will not fix even if it means losing the deal.

Trap: *The contract is somewhat unclear as to whether the buyer is deemed to have accepted everything shown in the new ILC or new survey to which the buyer does not timely object.* Section 9 does not have a clause parallel to the last sentence of each §8.2 and §8.3, which makes clear that the buyer accepts title subject to title matters disclosed to buyer, or of which the buyer has actual knowledge. Section 13.3, however, states that title to the property will be conveyed subject to "those specifically described rights of third parties not shown by the public records of which buyer has actual knowledge and which were accepted by buyer in accordance with off-record title and new ILC or new survey," suggesting that the same principle applies. Accordingly, it is critical that the buyer examine the new survey carefully to determine whether any "rights of third parties" are shown. Sometimes such rights are shown on a survey in an indirect way, such as by an encroachment of improvement from an adjoining property, by a dirt track that extends onto adjoining lands or by a neighbor's fence that encloses some of the property.

Tip: *Complete the survey review early enough so that the buyer can find out what changes the surveyor is willing to make to the new ILC or new survey and what endorsements the title insurance company is willing to give to insure over encroachments or other troubling matters shown on the new ILC or new survey.* Unfortunately, that is not always feasible within the time allowed by the contract. If the buyer resolves issues with the surveyor and the title insurance company before the new ILC or new survey objection deadline, the buyer is able to lodge fewer survey objections to the seller. Fewer objections means less time wasted in negotiation and less opportunities for the seller to terminate the contract. The buyer can object to only those matters that require the seller to do something about the new ILC or new survey that the buyer really wants and has not succeeded in resolving with the surveyor and the title insurance company.▲