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CREC-approved contracts: Ordering the ILC or survey

This is the 11th of 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. Previous articles dealt with the buyer, seller, property, water rights, ordering the title commitment, owner's extended coverage, title objections, off-record matters and special districts. This article addresses ordering the improvement location certificate or survey.

As to survey matters, the contract sets out the following procedure for ordering the "new improvement location certificate" or "new survey":

1) The buyer and seller state whether the exceptions for survey matters are or are not to be deleted from the title commitment, and if they are not to be deleted, the rest of the survey provisions are commonly deleted or treated as not applicable (§8.1.3).

2) The seller is required to furnish to the buyer existing surveys in the seller's possession (§8.3).

3) The parties state whether a new improvement location certificate ("new ILC") or a new survey ("new survey") is to be delivered to the buyer (§9.1) and, if so, by what date; the date they select is called the "new ILC, or new survey deadline" (§9.1).

4) The parties state whether the buyer or seller is to order or provide for the new ILC or new survey if one is to be delivered to the buyer (§9.1.1).

5) If a new survey is selected, the parties state what kind of survey and who is to pay for it (§9.1.2).

As is warned in §8.1.3, the title insurance company may require a new survey or a new ILC in order to provide owner's extended coverage, discussed in a previous article. In what follows, I point out some "tips" and "traps" relating to ordering the new ILC or new survey.

Ordering the survey. In §9.1, the contract gives the parties the option of requiring a new improvement location certificate and new survey. **Trap:** An ILC is commonly used in residential transactions, but it is of limited value and it is unwise to rely on it except for its limited purpose. C.R.S. §38-51-108(2) requires every ILC to include a statement that "it is not to be relied upon for the establishment of fence, building or other future improvement lines." An ILC only assures its recipient that "the improvements ... other than utility connections, are entirely within the boundary lines of the parcel, except as shown, that there are no encroachments ... and that there is no apparent evidence or sign of any easement ... except as noted." C.R.S. §38-51-108(2). Thus, an ILC should be



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used with caution other than in a transaction for a residence located on a platted lot, and it is unwise to use it even for that purpose if the buyer intends to construct any improvements on the property.

Tip: A better choice for most commercial transactions is an improvement survey plat, which is truly based on a survey. It will show the property by reference to monuments that are either found or set in the ground. It also will show the following: "the location of all structures, visible utilities, fences, hedges, or walls situated on the described parcel and within 5 feet of all boundaries of such parcel, any conflicting boundary evidence or visible encroachments, and all easements, underground utilities, and tunnels for which properly recorded evidence is available from the county clerk and recorder, a title insurance company, or other sources as specified on the improvement survey plat." In other words, a lot of important stuff. C.R.S. §38-51-102(9).

If the property is vacant land, another type of land survey plat, commonly called a "boundary survey," is used instead of an improvement survey plat. See C.R.S. §38-51-102(12) and §38-51-106.

One point about nomenclature: a "survey" is what the surveyor performs in the field; a "survey plat" is the drawing a surveyor makes. Most people refer to the drawing as the "survey," and so will I. **Tip:** A survey is the only connection between the documents contained in the recorder's office and listed in the title commitment and what actually exists on the ground. Thus, a survey is an invaluable due diligence tool. It is very risky to buy real property without one. I once had a client who bought a lot of real property in his business. When it came to buying his house, he didn't think a survey was necessary. It was a small transaction and a platted lot. He thought, "Why bother?" When he went to sell the house, however, the buyer ordered a survey. Much to his shock and dismay, it revealed that the property line went through the middle of the house, not around it. He got the house sold, but a year later, after the plat was amended. A lesson learned the hard way.

Every survey will be made by a licensed surveyor or professional engineer and will contain a certificate and be stamped with his or her seal. The cer-

tificate states what the survey shows. The requirements for the surveyor's certificate on a land survey plat are stated in C.R.S. §38-51-106. Some surveyor's certificates, however, are pretty thin, usually to limit the surveyor's liability. **Tip:** When ordering the survey, tell the surveyor to whom the certificate should be given and what it should contain. If a lender is involved in the transaction, the lender usually will say what the contents of the certificate must be. Section 9.1.4 of the contract provides that the survey is to be certified to the parties to whom it is to be delivered under §9.1.3, which includes the "buyer, seller, the issuer of the title commitment (or the provider of the opinion of title an abstract of title)" and anyone else specified in §9.1.3.

Note that §9.1 of the contract does not specify what type of survey the "new survey" should be. It just leaves a blank. Appropriate entries for that blank would be "land survey plat," if there are no improvements, and an "improvement survey plat." **Tip:** For most significant commercial transactions, however, an "ALTA/NSPS land title survey," sometimes simply referred to as an "ALTA survey," has become the industry standard and should be specified. This type of survey used to be called the "ALTA/ASCM land title survey," but the National Society of Professional Surveyors has become the successor to the American Society on Surveying and Mapping, thus changing what this type of survey is called. An ALTA survey will comply with the minimum standard detail requirements for ALTA/NSPS land title surveys adopted by the American Land Title Association and NSPS, the latest version of which has an effective date of Feb. 23, 2016.

Some surveyors will quote a much higher price for an ALTA survey than for an improvement survey plat, although the level of accuracy in the boundary measurements is likely to be much the same. The difference lies in the information that is provided on an ALTA survey, which is greater than that required in an improvement survey plat. An ALTA survey will (or should) identify each title exception from the title commitment and will indicate whether the exception is shown on the ALTA survey, or does not affect the surveyed property, or affects the surveyed property but is not capable of being shown. An ALTA survey may also contain over a dozen items of additional information (e.g., addresses, flood zones, gross land area, topographic information, current zoning classification, exterior dimensions, square footage and height of buildings, substantial features, parking spaces, location of utilities and adjoining owners). When ordering an ALTA survey, the surveyor will ask you to check

the items in Schedule A of the minimum standard detail requirements that you want the survey to show. **Trap:** Even if a buyer does not want to pay the additional cost for an ALTA survey, a lender may require it, as may the title insurance company. Although the title commitment usually will state that the title insurance company requires an ALTA survey in order to delete standard exceptions 1 to 3 (the so-called "survey exceptions"), in fact title insurance companies often accept an improvement survey plat. A lawyer is generally much happier when the client orders an ALTA survey rather than something less.

Who, the buyer or the seller, orders and pays for the new ILC or new survey? This is a negotiated item, but I see that the buyer pays for the new ILC or new survey more often than the seller. Sometimes, however, the seller agrees to split the cost with the buyer or at least agrees to reimburse the buyer its cost if the deal falls through. That is fair, since the seller receives some benefit from the new ILC or new survey and the buyer gets none if the property is not purchased.

Section 9.2 of the contract has a provision that allows the buyer to change the type of survey it requires, if "there is no additional cost to seller or change the new ILC or new survey objection deadline." It also allows the buyer to waive the new ILC or new survey if "done prior to seller incurring any costs for the same." **Tip:** The buyer might want to modify the contract to change the type of survey or waive the new ILC or new survey if it agrees to reimburse the seller for any additional cost for the change or for the cost the seller expended before the waiver.

Sometimes, the surveyor creates a new legal description for the property, as happens, for example, when the seller is to convey only a part of its property to the buyer. **Tip:** You should always confirm that the title company will insure a newly created legal description. **Tip:** When a legal description is revised, but is intended to describe the same property, consider reciting the old description, preceded by "also described as." Also, have the title insurance policy reflect that the new legal describes the same property as does the legal contained in the vesting deed. **Tip:** With a new legal description derived from a survey, obtain a "survey" or "same as survey" endorsement (ALTA Form No. 25-06) for the title insurance policy. That endorsement insures any loss or damage "by reason of the failure of the (property) to be the same as that identified on the survey." Also consider the matters discussed in the fourth article in this series, "Defining the property."

In the next article we will set out some tips and traps in reviewing a survey.▲