

Survey the Risks of Ignoring the Survey
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Buried in the standard Colorado Real Estate Commission-approved form “Contracts to Buy and Sell Real Estate” are provisions dealing with surveys.

Boring, right?

However, particularly in transactions involving high-value vacant, commercial or even residential properties, the importance of the survey provisions should not be underestimated. Buyers and sellers of real estate who lack proper surveys can face unfortunate, avoidable and costly surprises, far exceeding the relatively small cost of the survey.

One example of such a costly surprise, involving property in Rhode Island, has been in the national news recently. In that case, the Rose Nulman Park Foundation owned a 4.5-acre parcel of oceanfront land which, by agreement, was required to remain an open-space park. A developer owned two adjacent oceanfront parcels, one of which abutted the Foundation’s parcel.

The developer, ironically named Four Twenty Corp. (FTC), failed to survey the boundary between its parcel and the Foundation’s parcel before completing construction of a home in 2011. FTC then entered into a purchase and sale agreement to sell the improved property for \$1.9 million.

The cautious prospective buyer arranged for a survey. The survey revealed that FTC’s newly built home encroached upon the Foundation’s property. Ordinarily, such encroachments are relatively slight (such as a fence, some landscaping, or the edge of an improvement across the boundary line); that was not the case in this instance. The survey revealed that the entire home built by FTC was on the Foundation’s property. The total encroachment was about 13,000 square feet, or three-tenths of an acre. The buyer terminated the purchase agreement.

Thereafter, the Foundation, bound by the open-space agreement, sued FTC for removal of FTC’s trespass, declining FTC’s offer to buy a portion of the Foundation’s parcel and keep the house where it had been built. The Rhode Island Supreme Court, in its opinion dated June 13, ruled in favor of the Foundation and affirmed a lower court’s order requiring FTC to remove the house from the Foundation’s property, at an expected cost of at least \$300,000. In this case, a relatively small expenditure by FTC for a pre-construction survey would have spared FTC the much larger costs incurred in legal fees, house-moving expenses, and a lost sale.

For example, in a 1994 case with a similar result, the Colorado Court of Appeals required the removal of a 1,800-square-foot home that was determined to be trespassing on the property of the underlying land owner in Weld County.

These kinds of cases reveal the important role surveys can play in real property transactions. In my experience, surveys commissioned by prospective buyers of commercial

properties have revealed the existence of problems such as encroachments on adjacent property, encroachments into municipal or county rights-of-way, and improvements built right over the top of utility easements without those easements having been vacated. Because the surveys were completed during the buyers' due-diligence period, the problems could be dealt with prior to closing on the property transactions, and could have spared the buyers from unpleasant surprises after purchasing the real estate.

The Real Estate Commission's contracts provide options for survey requirements. The options include an "Improvement Location Certificate" (not a survey, and does not precisely locate boundaries or property corners), an "Improvement Survey Plat" (an actual survey showing boundaries, corners, improvements, visible encroachments, and the locations of many utilities), and a space to specify more rigid surveys, such as an American Land Title Association survey.

When buying or selling a property, you should carefully consider the appropriate survey needs. The cost of a survey, even one costing thousands of dollars, can be a wise investment to avoid unwelcome future surprises.

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