ALAN L. STEIN
ALAN L. STEIN, P.C.
P.O. Box 202740
Denver, CO 80220
303.468.0022
alanstein@alansteinlaw.com

COMMERCIAL CONTRACTS: CONTRACTS 101 and BASIC CONTRACT PREPRATION STRATEGIES

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CONTRACTS 101: BASIC CONTRACT CONCEPTS.

A brief definition of a contract. A contract is a private agreement between parties in which legal duties are created. The duties can be anything other than those activities which are frowned upon by persons of common sensibilities or which are against the law.

Unilateral versus Bilateral Contracts. A bilateral contract is one in which a promise is made for a promise, or a promise is made for the act of forbearance or for the payment of money. The promises have been made by each side and each party owes an obligation to the other.

A unilateral contract is one in which one party has performed and awaits performance from the other side. A party who sets aside money for a reward and waits for performance by another party has acted unilaterally.

Offers to Contract. One of the essential elements of the formation of a contract is that the parties must reach some kind of agreement, at least to the degree that only minor variances exist in the perceptions of the parties relative to their respective duties. In a sense, the offer and acceptance process confers power to the parties involved. For example:

A offers to purchase B's car for $1,000.00 on Friday. B, as offeree, has the power to either accept or reject A's offer. If B accepts A's offer, B has bound A to purchase his or her car and a contract has been formed.

This concept of power in which rights and duties are created in the process of offer and acceptance is not one which readily apparent. But consider that A's promise to purchase B's car is one which rises to the level of a legal power since this is a promise that can be enforced in a court of law.

Offers must conform to some common sense rules in order to be effective. An offer must be reasonably definite. For example, A's offer to purchase B's car for approximately $1,000.00 or so when A has the money is probably be too indefinite to be an enforceable contract if accepted by B. Even if the condition "when A has the money" was satisfied at some later date, the consideration is too uncertain. Offers generally must state the time for performance and describe the subject matter of the eventual contract with sufficient detail to make the offer reasonably definite. Intent is another factor in the formulation of an

offer. For example, if A says to B, "I'd give $1,000.00 for an x-car" and if B obtains an x-car to sell to A, B will not be able enforce A's offer to pay $1,000.00 for the x-car unless there was a reasonable showing of A's intent to pay B for B's car. For example, if A had said "I'll give you $1,000.00 when you have an x-car to sell me", the intent is more clearly stated and the promise to pay more likely to be enforced once the condition is satisfied.

Acceptance of an Offer. An offer can be accepted in any reasonable manner unless the offer specifies the method by which it is to be accepted. If the offer is accepted word for word, the acceptance of the offer constitutes a contract. If the offeree communicates acceptance of terms materially different than those contained in the offer, a counteroffer has been made. If such is the case, the same process of offer/acceptance is initiated with the offeror rather than the offeree now in the "power" position of being able to create a contract.

Acceptance of a contract also can be communicated by part performance. For example, if A offers to buy B's car for $1,000.00 on Tuesday "if B has the muffler fixed no later than Saturday", B's acceptance can be communicated by B notifying A that he has taken the car to the local muffler shop on Friday to satisfy the condition. Part performance is a powerful means of galvanizing a contract. If a landlord delivers keys to a tenant for certain premises even prior to delivery of a signed lease agreement and the tenant takes possession of the premises, the parties have probably entered in to the lease relationship even though all of the terms and conditions have not been fully determined. If later, the parties were not able to agree upon the open issues concerning the lease, a court would probably enforce the lease supplying its reasonable interpretation of the missing terms rather than to rescind the lease.

The old common law rule for offers and acceptance demanded that the acceptance of the offer had to be the mirror-image of the offer. Any minor variance from the offer constituted a counteroffer. Today, most courts agree that material variations from the offer in the offeree's response constitutes a counteroffer but trivial minor variations in the acceptance from the original offer are often interpreted to supplement the offer but not to counter the offer.

Similar to the rules for offers, an acceptance can be revoked by the offeree prior to communication of acceptance, or notice of acceptance to the offeror. The classic conflict is the offeree who, upon receipt of a higher offer for his or her property, attempts to revoke an acceptance of a lower offer made by a prior offeror. If the prior offeror has received notice of acceptance consistent with the terms of his offer, a contract has been formed.

Consideration. The concept of consideration is widely misunderstood. Courts rarely look at the adequacy of the consideration recited in a contract. A court will usually limit its review of consideration to whether each party changed its position as the result of a bargain or, in other words whether a legal benefit or detriment was conferred. Consideration is not a concept limited to the amount of money paid for an item. Consideration sufficient to support a contract can be a promise for a promise or the agreement not to act (forbearance). If a seller of a parcel of land promises to sell and a buyer promises to purchase, even absent the payment of earnest money or any other sums in advance of the closing, the promises ripen into a contract which is enforceable.

The courts will require adequate consideration to support an option for sale and purchase of property. If a property owner agrees to allow an a party the right to purchase a property in the future, it is the promise to sell in the future and not the act of selling in the future that must be supported by adequate consideration.

In Texas and California, courts have held that the exercise of the unrestricted right of termination may create the risk of a failure of consideration that converts the contract into an unenforceable option

contract. Consideration may be deemed to be insufficient unless (i) the contract contains an agreement of the buyer to assume an obligation that cannot be avoided by the right of termination or (ii) if part performance of an obligation in fact occurs during the due diligence period (e.g., submissions for platting). In such states, practitioners structure a nominal earnest money deposit (e.g., $100) into the contract as independent consideration that is not refundable in the event buyer terminates during the due diligence period. However, in Colorado, no court has held that a failure of consideration exists in a contract that provides for a "free look," and practitioners do not generally utilize the concept of independent consideration. It has been held (though in a case that did not involve analysis of a "free look") that "[a] promise exchanged for a promise imposes mutual obligations and is sufficient consideration to render the contract enforceable." It has also been held (in a case involving an arbitration clause for the benefit of only one party) that "every contractual obligation need not be mutual as long as each party has provided some consideration to the contract."

Parties to a Contract. There must be two parties to a contract. A person may contract with himself, however, if such contract is made with the person acting in one capacity contracting with himself acting in another capacity (e.g., a person who is an heir contracting with himself as a personal representative of an estate).

Capacity to Contract. Some persons are under a total or partial disability to contract. For example, under most circumstances an infant or minor child may contract but the contract is voidable by such individual. For all purposes, an individual reaching the age of twenty-one may contract and, in many states, an individual eighteen years or older, living outside of the parent's home and self-supporting is considered emancipated and may contract. Mental competency is another factor which may render a contract voidable.

Void and Voidable Contracts. Certain defects can render a contract void or voidable. A voidable contract is one in which the defect was material to the formation of the agreement. A void contract is one in which the subject matter is illegal.

Fraud may render a contract voidable but not invalid. An injured party would have to show that the effect of the fraud was material to the extent to render the consideration wrongly given by the injured party or that the fraud materially induced the decision to enter into the contract. In addition to false statements, fraud may also include the failure to disclose a material fact. A fraud may allow an injured party to rescind a contract or the injured party may sue in tort for damages.

Duress forms a defense to a contract. For example, a contract executed between a lawyer and a client may be voidable if it can be shown that the effect of the relationship of attorney and client resulted in placing undue pressure on the client or the opinions of the attorney unduly influenced the decisions of the client. Simple coercion by one party against the interests of another may rise to the defense of duress if the relative bargaining positions of the parties are so disproportionate that the injured party really had no choice in the matter.

Mistake is another concept which is little understood but may excuse performance of a party to a contract. Mistake may take the form of the following:

a. Mutual mistake as to the existence to a state of facts. If the parties enter into an agreement based upon a set of facts which do not exist, the contract is void.

b. Mutual mistake as to the identity of the subject matter of the contract. A contract for the purchase of “stock” in a non-profit corporation might be an example of a mutual mistake.

c. Mutual mistake as to the quantity of the subject matter. A material difference in the size of a parcel of land is an example of this kind of mistake.

d. Mutual mistake as to law is another form of mistake in which the parties misapprehend a legal right. For example, the right of ownership of an item of property may be the source of a mutual mistake of law.

Unilateral mistake by one party generally will not render a contract voidable since the law assumes persons will manage their affairs competently and with knowledge of all pertinent facts.

Illegality. It is fundamental to the law of contracts that, in order to make a contract enforceable, the basis of the agreement must be for a legal purpose. It follows, therefore, that a contract for an illegal purpose is void. Examples of illegal contracts are a contract for usurious loans, a gambling or wagering contract, a contract restraining marriage or a contract in restraint of trade (anti-trust violation).

Statute of Frauds. The statute of frauds has ancient origins in which the English Parliament, in 1677, enacted the "Statute Against Frauds and Perjuries" which required certain contracts to be in writing to be enforceable. In essence, the modern statute of frauds provides that "no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party charged therewith, or some other person thereunto by him lawfully authorized". This version, enacted in the United Kingdom, is similar to statutes of frauds enacted in nearly every state in the United States.

Included in the statute of frauds is the requirement that any contract for the sale of real estate (lands) must be in writing. Some oral forms of real estate contracts or amendments are enforceable, but only on the basis that one party can assert estoppel or some other equitable claim.

In Colorado, the Statute of Frauds for the sale of land is expressed as follows:

> **§ 38-10-108. Contracts for interests in land - must be written**
> Every contract for the leasing for a longer period than one year or for the sale of any lands or any interest in lands is void unless the contract or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the lease or sale is to be made.

Statute of Limitations. A statute of limitations simply places a statutory time limit on the period of time a party may enforce an obligation. The common law term for this concept is “laches”.

Contract Conditions. A party's obligations may be discharged by performance or by non-performance, or breach of contract. A party may be excused from performance if a condition to the contract has not been met.

Express conditions are those set forth in the agreement to which the parties intended to condition their performance. An example of an express condition is a property inspection provision in the contract. Conditions can be implied by the conduct of the parties or implied by law. A condition precedent is one in which one party's performance is not possible until the other party has performed. For example, an inspection contingency which conditions the buyer's performance upon a satisfactory inspection is a condition precedent. Likewise, an agreement may provide that on the occurrence of a certain event, the duty created by the contract shall be extinguished. This is referred to as a condition subsequent. An

example of a condition subsequent is a lease provision allowing for a tenant to terminate the lease if the parking lot is taken by a public authority under the power of eminent domain (condemnation action).

A condition placed in the contract for the benefit of a party may be excused or waived by the party. A condition which is so broad or vague may create an illusory contract because the parties' obligations are not mutual. For example, a contract in which the seller may cancel his obligations at any time for any reason is an illusory contract because the seller is under no obligation to sell and the buyer has no right to enforce the agreement. In many kinds of contracts the substantial performance of certain obligations meets the legal threshold for compliance of the contract terms. Performance under a construction contract is commonly measured by substantial performance.

Is a promise to deliver a title commitment by a certain date a contract condition? Is this promise a covenant and not a condition? From the Colorado case, Rohauer v. Little, 736 P.2d 403 (Colo. 1987), the Colorado Supreme Court discussed this issue and made the determination that the seller's agreement to deliver a title commitment to a buyer is a promise (covenant) and not a condition:

> We recognize that where a contract unequivocally conditions the purchaser's performance on the seller's undertaking to provide a title insurance commitment, the failure of the seller to strictly comply with the condition will excuse the purchaser's duty of performance under the contract. [Citations omitted]. Where, however, there is doubt as to whether a contractual provision is intended as a promise or a condition, it is preferable to construe the provision as a promise, thereby avoiding the potentially harsh effects of a forfeiture that can result in some cases by a contrary construction. [Citations omitted].
>
> In the instant case, paragraph three of the contract states that an abstract of title or a title insurance commitment "shall be furnished the purchaser on or before July 10, 1981." This contractual language is similar to provisions which other courts have construed as a promise by the party under obligation to perform rather than as a condition precedent to the other party's obligation. [Citations omitted]. Although paragraph nine of the contract refers to the remedies available to one party upon the other party's failure to make payment or to perform "any other condition," we cannot say with fair assurance that the contracting parties in this case intended the provision regarding the furnishing of a title insurance commitment on or before July 10, 1981, as an express condition precedent, the failure of which would result in a forfeiture of the sellers' rights under the contract even though the furnishing of the title insurance commitment might well have been within the time required for the purchasers to adequately prepare for closing. Given the uncertainty as to whether the parties intended the contractual provision regarding the title insurance commitment as a condition precedent to the purchasers' contractual obligations or as a promise, we elect to construe that provision as a promise.

Non-Performance or Default. A party's failure to perform under a contract is commonly known as a default. The non-defaulting party generally is not required to notify the defaulting party and demand performance nor is a non-defaulting party expected to tender performance after a default has been declared or has become readily apparent. If a party, by word or by conduct, communicates an intent not perform under a contract, this act rises to a breach of the contract known as an anticipatory breach of contract. Performance by the non-defaulting party is not expected, even if certain conditions precedent exist under the contract which would otherwise excuse the defaulting party's performance.

A non-defaulting party may sue at law for damages. The measure of damages is that which would put the party in the same position as the party would have been in had the contract been performed. If a party's damages are not capable of measure, such as a contract for the purchase of property, an injured party

may seek an equitable remedy rather than a remedy at law. In such circumstances, a party may request a court to enforce performance of the contract in an action for specific performance since all parcels of property are considered unique in the eyes of the law.

Interpretation and Construction of Contracts. In cases where a court is required to interpret or construe a written agreement between parties, the court usually is limited to an analysis of the "four corners" of the contract itself. All prior and contemporaneous negotiations and writings as said to merge into the final written document. A court may not consider the earlier conversations and writing in its interpretation of the contract under the parole evidence rule. A court's first duty is to determine the intent of the parties from the written document. If the contested contract provisions are ambiguous, the court may hear evidence concerning the circumstances under which the agreement was formed and expert testimony concerning the subject matter of the dispute. Ordinarily, however, a court will limit its analysis to the content of the contract.

Contract Remedies. When a party breaches its obligations under a contract, the non-breaching party is entitled to seek a relief in the form of a remedy. Such relief may be in the form of damages which sometimes termed "a remedy at law" or the remedy may be in the form of "a remedy in equity" if the adverse effect to the non-breaching party cannot be quantified in terms of damages. For example, if a seller refuses to convey a property to a buyer, the buyer may seek equitable relief in the form of "specific performance" of the contract because the law regards each parcel of property to be unique and damages is not an adequate remedy. Usually, a court will award damages to provide the non-breaching party with "the benefit of the bargain". For an example, a party who buys a property with an undisclosed defect known to the seller will be awarded damages in an amount necessary to fix the defect so that the buyer will eventually get a property free from defects.

CONTRACT PREPARATION STRATEGIES

1. **Using Checklists.** A checklist is essential to the preparation of good contracts. Even the most experienced lawyers routinely use checklists for contracts and leases, even in simple cash transactions, to prevent the omission of a key provision.

Real estate contracts generally can be divided into three types:

a. Land or development transactions;

b. Investment transactions; and

c. User transactions.

Although you may see variations of the three themes named above, a buyer can generally be characterized by one of the three motivating factors named above. In other words, a buyer will want to build for a profit, use the property or invest in the property. You may see combinations of a these themes; for example, a buyer may develop a parcel of vacant land for its own use. Another example is a sale and lease-back transaction which involves user issues and investment issues. But these three themes repeat themselves in some fashion in virtually every real estate transaction.

There are six essential parts to a real estate contract: parties, property, title, financing, investigation and remedies. All of the other terms of a contract involve one of these components. If you change the date for performance in one part of the contract, you need to consider the timing of performance in the other parts of the contract. For example, an extended physical inspection period in a contract may warrant an

extended financing period for approval for a new loan. Each part of the contract is dependent upon the other.

2. **Parties.** You must identify the parties to the contract. This requirement also implies you must know how the parties are organized, if they are not natural persons, and the jurisdiction in which they are organized. If the buyer intends to assign its rights under the contract, you must address these issues, including the obligation of the assignor to remain liable for the obligations of the assignee, and the rights of the seller to object to the assignment or the assignee.

3. **Property.** What is being conveyed? In law school, students are taught to think of property as a "bundle of sticks" in which each stick in the bundle represents an interest in property. For example, easements, rights-of-way, and reservations are each a stick which may be in the bundle. Likewise, water rights and mineral rights are also valuable property interests. This overlaps with the title concepts discussed below but it worthy of mention that you should have a good legal description of the real property when you prepare a contract. A detailed inventory of any tangible personal property should be attached at the time the contract is prepared or made a part of the contract soon after execution. In addition, there may be intangible property interests you should consider in the contract. For example, if an apartment development has been operated under the name of "Peaceful Acres", your buyer may want an assignment of the trade name and goodwill associated with the name. In certain zoned areas in Denver, certain "development rights" exist which may be severed from the property. These are all property interests which have value. If you do not know what the buyer is contracting to acquire, you will have difficulty analyzing the title to the property and formulating a due diligence strategy.

4. **Title matters.** Before you prepare a contract, you should have some working knowledge about the condition of the title to the Property. One way to obtain information about the Property, if you are the listing agent, is to review the owner's title insurance policy. If you are a cooperating broker, order copies of title documents from a title company. At the time the contract is prepared you should know:

a. The names of the parties and, if the parties are not natural persons, the type of entity and the state in which the entity was organized.

b. The legal description. A legal description includes easements and other appurtenances together with any vacated streets and alleys.

c. You should be able to account for any encumbrances or liens affecting title to the Property including tax liens, mechanics' liens and lis pendens, if any.

d. Is the use of the Property restricted by any private agreements like a restrictive covenant?

e. Are there any recorded leases? Does any tenant have an option or a first right of refusal to purchase the Property?

f. Are there any unfinished subdivision or development obligations?

5. **Financing.** Many buyers believe, with justification, that the price for a property is not nearly as important as the manner in which the price is paid. Financing is undoubtedly the most critical part of the acquisition. Loans for commercial purchases are very hard to find and even more difficult to structure because of the demand for the borrower's personal liability and large down payments.

The source of a new loan can be either a third party lender or the seller. If a third party lender is the source of financing, the contract must be prepared with the thought that the buyer will have to pay a

loan origination fee, points and the lender's attorney fees to obtain the loan. If such is the case, the timing of the buyer's other obligations should be accelerated, to the extent possible, to avoid needless expense if the property is not viable for the buyer's intended use.

If the seller provides the buyer with a carry-back loan, there are other considerations. For example, if the buyer intends to redevelop the property, the buyer may require that the seller subordinate the carry-back loan to a new construction loan. If you are an agent of the seller and the buyer negotiates a carry-back loan, the buyer should be required to obtain property insurance during the term of the loan with seller named under a mortgagee's standard endorsement. In addition, the seller should be insured under a mortgagee's title insurance policy.

6. **Investigations.** There are two parts to a buyer's investigations. The first part is commonly referred to as the "due diligence" period and, in most contracts, this is the time period the buyer conducts such inspections and studies to determine whether the property satisfies the buyer's requirements in terms of its physical condition, location and other attributes. Usually a "due diligence" provision is framed as a contract contingency in which the scope of the buyer's investigations is outlined in one broad paragraph.

Part two of this analysis is the use of contract warranties to draw information from the seller concerning the seller's current knowledge of the physical condition of the property and any impending governmental or private actions which might affect the buyer's intended use of the property. The depth and degree of certainty of seller's response to the warranties can be a negotiated point in a contract. For example, there is a significant difference in a buyer's ability to enforce a warranty in which a seller "warrants and represents as of the date of this contract and as of the closing date" and a warranty in which the seller "warrants and represents to the best of seller's current information, actual knowledge and belief and without making further inquiry with respect to the truth thereof as of the date of this contract". Nevertheless, any warranty is simply intended to draw as much information from the seller as is practical concerning the seller's knowledge of the property.

7. **Remedies.** A buyer, unless otherwise provided in the contract, always has the right to enforce a contract by an action in specific performance. As discussed above, if a non-defaulting party's damages are not capable of being measured or ascertained in some manner, a remedy at law is not available. In such case, a court may resort to an equitable remedy such as specific performance to allow the non-defaulting party to obtain the benefit of such party's bargain. Since every parcel of real estate is considered unique in the eyes of the law, if a seller refuses to convey the property, the only remedy available to the buyer is to enforce the performance of the seller's agreement to sell the property to the buyer.

A seller's damages, on the other hand, can be measured. In most cases, the parties estimate in advance what seller's damages will be if the buyer defaults and term such damages as "liquidated damages". This is the basis behind the "liquidated damages" provision found in nearly every commercial real estate contract and such provisions allow for some amount of money to be held by the seller or some third party to be surrendered to the seller if the buyer cannot perform under the contract. The parties can agree to hold the buyer to perform under the contract under a specific performance provision but this is uncommon unless the buyer is changing the character of the property, like a rezoning or replatting, during the executory period of the contract.

A liquidated damages provision is the parties' reasonable attempt to estimate what the seller's damages will be in advance of a default of the contract. Since the law will not recognize "forfeitures", the term "liquidated damages" must always be used in its place because the seller may never appear to attempt to penalize the buyer if the buyer cannot complete its performance under the contract. Penalties and forfeitures should never appear in contracts, only in board games like Monopoly.

8. **A Checklist for Land Contracts.** The preparation of a land or development contract requires a certain prescience and creativity. If you let your imagination wander for a moment, you can almost visualize a piece of ground giving birth to nearly any kind of development. The potential of a vacant development parcel is only limited by the developer's whimsy, the financing available and the prevailing attitudes of the local jurisdictions regulating the use of the land. Consider the following as a basic land or development checklist:

a. Names of parties, including jurisdiction where entities are formed.

b. Property description.

c. Financing. Consult with counsel.

d. Survey Clause.

e. Acreage Adjustment.

f. Due Diligence.

i. Title examination.

ii. Physical inspection.

iii. Mineral inspection.

iv. Zoning contingency.

v. Water rights evaluation.

vi. Special contingencies.

vii. Sign, pasture, farm, grazing, crop or other lease evaluation.

viii. Syndication provision.

g. Warranties and representations.

h. Tax proration provision and "parcel from larger tract" provision.

i. Legal counsel.

9. **A Checklist for Investment Contracts.** The most basic of investment contracts rely upon buyer's investigation of the physical condition of the property and verifying the sources of income for the property. More complicated investment transactions require an analysis of the financing and tax burdens as compared to the income generated by the property, the potential to increase the income over time, and the remaining useful life of the property and the costs to maintain the property. Consider the following as a general checklist for investment contracts:

a. Names of parties, including jurisdiction where entities are formed.

b. Property description.

i. Real property including easements, rights of way and other appurtenances.

ii. Incorporeal property rights including development rights.

iii. Tangible personal property.

iv. Intangible personal property including trade names.

c. Financing. Consult with counsel.

d. Survey.

e. Due Diligence.

i. Investigation of Leases.

(1) Estoppel statements.

(2) Review leases.

(3) Rent roll and security deposits.

ii. Title examination

iii. Review of financial statements, income and expense statements, tax returns, and books and records of the property.

iv. Management contract.

v. Service contracts.

vi. Physical inspection of Property.

vii. Environmental survey.

viii. *Americans with Disabilities Act* survey.

ix. Insurance issues.

f. Warranties and representations.

g. Special contingencies.

h. Legal counsel.

10. A Checklist for User Contracts. A buyer intending to use a property for its own business has its own agenda, including plans for expansion or growth.

a. Names of parties, including jurisdiction where entities are formed.

b. Property description.

i. Real property including easements, rights of way and other appurtenances.

ii. Incorporeal property rights including development rights.

iii. Tangible personal property.

iv. Intangible personal property.

c. Financing. Consult with counsel.

d. Survey.

e. Due Diligence.

i. Zoning and use permits.

ii. Investigation of Leases.

(1) Estoppel.

(2) Review leases.

(3) Rent roll and security deposits.

iii. Title examination.

iv. Physical inspection of Property.

v. Environmental survey.

vi. *Americans with Disabilities Act* survey.

vii. Insurance issues.

f. Warranties and representations.

g. Special contingencies.

h. Legal counsel.

CONTRACT ISSUES.

1. **Deeds.** In the new contract forms, the preparer is asked to select the form of deed to be used in the transaction. The "default" choice of deed is a special warranty deed.

> **13. TRANSFER OF TITLE.** Subject to Buyer's compliance with the terms and provisions of this Contract, including the tender of any payment due at Closing, Seller, provided another deed is not selected, must execute and deliver a good and sufficient special warranty deed to Buyer, at Closing. However, if the box is checked, the parties agree to use the corresponding deed instead:

☐general warranty deed ☐bargain and sale deed ☐quit claim deed ☐personal representative's deed ☐_____ deed.

Colorado statutes provide for four types of deeds: General warranty deed which is a statutory form of deed (the "Statutory Form"), special warranty, quitclaim, and bargain and sale deed.

(a) The General Warranty Deed. A deed with the words "sell(s) and convey(s)" and "warrant(s) the title to the same" is a general warranty deed. The warranties made are that: (i) grantor is lawfully seized of indefeasible estate in fee simple title with good right and full power to convey the property, (ii) title is free and clear of all encumbrances, except as set forth in the deed, and (iii) grantor warrants the quiet and peaceable possession of the property and covenants to defend the same. Conveyance of the property "with all appurtenances" constitutes a conveyance of grantor's interest in any vacated street, alley, or other right-of-way that adjoins the property unless expressly excluded in the deed. The risk of using a general warranty deed is that the grantor guarantees title against any defects arising before the grantor acquired title as well as against those that arose during the grantor's ownership.

(b) The Special Warranty Deed. Customary use of the general warranty deed has been supplanted by use of the special warranty deed in commercial (but not residential) transactions, in large part due to the fact that sellers customarily pay for the premium of the owner's title insurance policy and thus provide buyers with insurance coverage as to prior unrecorded encumbrances. A special warranty deed is given when the Statutory Form is utilized with: (i) omission of the words "and warrant the title to the same" and (ii) addition of the words "and warrant the title against all persons claiming under me." The special warranty deed constitutes a covenant of the grantor that title is free and clear of all encumbrances caused or created by, through, or under grantor, except as set forth in the deed. Seller may want to except from its warranties all matters of record, but this is not customary and allows for the anomaly of seller causing a matter to go of record before closing that is not known to buyer and not covered by seller's warranties. Buyer will want to limit the exceptions set forth in the deed to those set forth in the title commitment.

(c) The Quitclaim Deed. A quitclaim deed is given when the Statutory Form is utilized with: (i) the word "quitclaim" substituted for the word "convey" and (ii) the words "warrant the title to the same" omitted. A quitclaim deed does not convey land but only grantor's present interest in the land, and therefore it is ineffectual to pass after-acquired title.

(d) The Bargain and Sale Deed. A bargain and sale deed is given when the Statutory Form is utilized with omission of the words "and warrant the title to the same." A bargain and sale deed passes after-acquired title of grantor and is without warranty.

2. **Off Record Title Matters (Section 8.3) (2019)**. This provision states:

> **8.3. Off-Record Title.** Seller must deliver to Buyer, on or before **Off-Record Title Deadline**, true copies of all existing surveys in Seller's possession pertaining to the Property and must disclose to Buyer all easements, liens (including, without limitation, governmental improvements approved, but not yet installed) or other title matters (including, without limitation, rights of first refusal and options) not shown by public records, of which Seller has actual knowledge (Off-Record Matters). This Section excludes any **New ILC** or **New Survey** governed under § 9 (New ILC, New Survey**)**. Buyer has the right to inspect the Property to investigate if any third party has any right in the Property not shown by public records (e.g., unrecorded easement, boundary line discrepancy or water rights). Buyer's Notice to Terminate or Notice of Title Objection of any unsatisfactory condition (whether disclosed by Seller or revealed by such inspection, notwithstanding § 8.2 (Record Title) and § 13 (Transfer of Title)), in Buyer's sole subjective discretion, must be received

by Seller on or before **Off-Record Title Objection Deadline**. If an Off- Record Matter is received by Buyer after the **Off-Record Title Deadline**, Buyer has until the earlier of Closing or ten days after receipt by Buyer to review and object to such Off-Record Matter. If Seller receives Buyer's Notice to Terminate or Notice of Title Objection pursuant to this § 8.3 (Off-Record Title), any title objection by Buyer is governed by the provisions set forth in § 8.5 (Right to Object to Title, Resolution). If Seller does not receive Buyer's Notice to Terminate or Notice of Title Objection by the applicable deadline specified above, Buyer accepts title subject to such Off-Record Matters and rights, if any, of third parties not shown by public records of which Buyer has actual knowledge.

This is a very important provision for Sellers and Buyers. These are matters which are not covered by title insurance but these matters are probably within the warranties Seller is giving Buyer in either a special or general warranty deed. I always ask for a written statement from a Seller on or before the Off-Record Title Deadline. Some of these matters may show up on a survey but, in many instances, only the Seller will have actual knowledge of these matters. Listing brokers must ask Sellers about these matters.

3. **Survey (Section 9)**. The survey provision is set forth below:

9. CURRENT SURVEY REVIEW (2019).

9.1. New ILC or New Survey. If the box is checked, a: 1) ☐**New Improvement Location Certificate (New ILC)**; or, 2) ☐**New Survey** in the form of _____; is required and the following will apply:

9.1.1. Ordering of New ILC or New Survey. ☐**Seller** ☐**Buyer** will order the New ILC or New Survey. The New ILC or New Survey may also be a previous ILC or survey that is in the above-required form, certified and updated as of a date after the date of this Contract.

9.1.2. Payment for New ILC or New Survey. The cost of the New ILC or New Survey will be paid, on or before Closing, by: ☐**Seller** ☐**Buyer** or:

9.1.3. Delivery of New ILC or New Survey. Buyer, Seller, the issuer of the Title Commitment (or the provider of the opinion of title if an Abstract of Title) and _____ will receive a New ILC or New Survey on or before **New ILC or New Survey Deadline**.

9.1.4. Certification of New ILC or New Survey. The New ILC or New Survey will be certified by the surveyor to all those who are to receive the New ILC or New Survey.

9.2. Buyer's Right to Waive or Change New ILC or New Survey Selection. Buyer may select a New ILC or New Survey different than initially specified in this Contract if there is no additional cost to Seller or change to the **New ILC or New Survey Objection Deadline**. Buyer may, in Buyer's sole subjective discretion, waive a New ILC or New Survey if done prior to Seller incurring any cost for the same.

9.3. New ILC or New Survey Objection. Buyer has the right to review and object to the New ILC or New Survey. If the New ILC or New Survey is not timely received by Buyer or is unsatisfactory to Buyer, in Buyer's sole subjective discretion, Buyer may, on or before **New ILC or New Survey Objection Deadline**, notwithstanding § 8.3 or § 13:

9.3.1. Notice to Terminate. Notify Seller in writing, pursuant to § 25.1, that this Contract is terminated; or

9.3.2. New ILC or New Survey Objection. 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.

9.3.3. New ILC or New Survey Resolution. If a **New ILC or New Survey Objection** is received by Seller, on or before **New ILC or New Survey Objection Deadline** and if Buyer and Seller have not agreed in writing to a settlement thereof on or before **New ILC or New Survey Resolution Deadline**, this Contract will terminate on expiration of the **New ILC or New Survey Resolution Deadline**, unless Seller receives Buyer's written withdrawal of the New ILC or New Survey Objection before such termination, i.e., on or before expiration of **New ILC or New Survey Resolution Deadline**.

I am still seeing commercial real estate contracts where Seller and Buyer have agreed a survey is not required. Except for commercial condominiums, a survey is indispensable in connection with title review by an attorney. Improvement survey plats are suitable to obtain extended title insurance coverage for survey protection. ALTA surveys are often required by commercial lenders.

(a) Improvement Location Certificates (ILCs). ILCs are <u>not</u> surveys. An ILC cannot be used in connection with a title review because the drawing cannot be relied upon for location of boundaries. A title company may accept an ILC in lieu of a survey for a commercial property in an established subdivision. An ILC cannot be used in the following circumstances:

i. Properties with known fence or boundary problems;

ii. Properties with observable improvements located on or immediately adjacent boundary lines (e.g., new or existing fences, garages, storage sheds or walkways) because of potential set-back (zoning) issues;

iii. Properties which recently have been remodeled, or which have new additions, new footprints, or which have new and substantial landscaping; and

iv. Properties with easements or other agreements (except utility agreements) which allow third parties to use portions of the property or which allow the property owner to use a third party's property.

If the contract calls for a title company to delete the standard exceptions, the title company should to be consulted whether it will require a survey or an ILC.

(b) If a survey is ordered, the surveyor should have a copy of the title commitment and title documents to enable the surveyor to show any existing easements and other matters affecting the subject property on the survey.

(c) Surveys and ILCs are not needed for commercial condominiums.

3. **Inspection (2019)**.

10.2. Disclosure of Adverse Material Facts; Subsequent Disclosure; Present Condition. Seller must disclose to Buyer any adverse material facts actually known by Seller as of the date of this Contract. Seller agrees that disclosure of adverse material facts will be in writing. In the event Seller discovers an adverse material fact after the date of this Contract, Seller must timely disclose such adverse fact to Buyer. Buyer has the Right to Terminate based on the Seller's new disclosure on the earlier of Closing or five days after Buyer's receipt of the new disclosure. Except as otherwise provided in this Contract, Buyer acknowledges that Seller is conveying the Property to Buyer in an "**As Is**" condition, "**Where Is**" and "**With All Faults**."

10.3. Inspection. Unless otherwise provided in this Contract, Buyer, acting in good faith, has the right to have inspections (by one or more third parties, personally or both) of the Property and

Inclusions (Inspection), at Buyer's expense. If (1) the physical condition of the Property, including, but not limited to, the roof, walls, structural integrity of the Property, the electrical, plumbing, HVAC and other mechanical systems of the Property, (2) the physical condition of the Inclusions, (3) service to the Property (including utilities and communication services), systems and components of the Property (e.g., heating and plumbing), (4) any proposed or existing transportation project, road, street or highway, or (5) any other activity, odor or noise (whether on or off the Property) and its effect or expected effect on the Property or its occupants is unsatisfactory, in Buyer's sole subjective discretion, Buyer may:

10.3.1. Inspection Objection. On or before the **Inspection Objection Deadline**, deliver to Seller a written description of any unsatisfactory condition that Buyer requires Seller to correct; or

10.3.2. Terminate. On or before the **Inspection Termination Deadline**, notify Seller in writing, pursuant to §25.1, that this Contract is terminated due to any unsatisfactory condition. **Inspection Termination Deadline will be on the earlier of Inspection Resolution Deadline or the date specified in § 3.1 for Inspection Termination Deadline.**

10.3.3. Inspection Resolution. If an Inspection Objection is received by Seller, on or before **Inspection Objection Deadline** and if Buyer and Seller have not agreed in writing to a settlement thereof on or before **Inspection Resolution Deadline**, this Contract will terminate on **Inspection Resolution Deadline** unless Seller receives Buyer's written withdrawal of the Inspection Objection before such termination, i.e., on or before expiration of **Inspection Resolution Deadline**.

(a) The following matters are not addressed by the inspection provision but may be considered in connection with property inspections.

i. **Copies of Reports.** In the event that buyer terminates the purchase contract, upon the request of seller, buyer shall provide to seller, at seller's expense, copies of any third party reports (excluding any attorney-client privileged communications) obtained by buyer in connection with the Inspection.

ii. **Waste Generated by Inspection.** Buyer assumes all liability for, and legal title to, all waste materials generated by buyer, its agents, employees and contractors, in the course of buyer's work on the Property under the purchase contract. Buyer shall use commercially reasonable efforts to minimize the volume of wastes generated during its work on the Property, and shall properly, handle, containerize, manage and dispose of all such wastes.

iii. **Applications and Approvals.** Buyer shall provide all notices and obtain all approvals required by any governmental or quasi-governmental entity prior to commencing work at the subject property. Any required manifest, license or permit shall be issued in buyer's name. Any activity conducted by buyer, its agents, employees or contractors pursuant to the terms of the purchase agreement shall be deemed to be taken on only buyer's behalf and not as agent for any other party.

iv. **Buyer Pays All Costs.** All costs and expenses of the activities conducted by buyer under the limited license to enter and inspect the subject property, and of all related work conducted by, through or under buyer, shall be performed at the sole cost and expense of buyer. Buyer and all persons performing work by, through or under buyer shall, while performing work under the limited license, observe and comply with all local, Colorado and federal laws which in any manner limit, control or apply to the work performed by buyer, its authorized agents, or contractors.

v. **Buyer Obtains Insurance.** Buyer agrees that, prior to its entry onto the subject property to conduct investigations or tests, buyer shall insure that each of its inspectors, consultants and agents conducting on-site inspections or tests at the Premises obtains and maintains, at such party's sole cost and expense, (i) general liability insurance, from a reputable insurer licensed in the State of Colorado, in the amount of One Million and no/100 Dollars ($1,000,000.00)

comprehensive general liability insurance per occurrence, and Two Million and no/100 Dollars ($2,000,000.00) in the aggregate, for personal injury and property damage per occurrence, which insurance shall provide coverage against any claim for personal liability or property damage caused by such party in connection with investigations and tests at the Premises; and (iii) adequate worker's compensation insurance with an authorized insurance company or through the Colorado State Compensation Insurance Fund or through an authorized self-insurance plan approved by the State of Colorado, insuring the payment of compensation to all employees.

vi. **No Disclosure of Inspection Results.** Buyer further agrees not to disclose, and to prevent its contractor(s) from disclosing, the results of the Investigation to any person or entity other than buyer's or seller's representatives, brokers, investors, lenders and legal counsel.

vii. **Indemnity**. Buyer, at buyer's sole expense, shall repair any and all damage resulting from any of the tests, studies, inspections and investigations performed by or on behalf of buyer and buyer shall indemnify, defend and hold seller and its officers, directors, shareholders, employees and agents harmless from and against all loss, cost, damage and liability including attorneys' fees arising by reason of the tests, studies, inspections and investigations performed hereunder, which obligation of indemnification shall survive the Closing or any expiration or termination of this Agreement, however caused for a period of twelve (12) months after the termination or closing of the purchase contract. The foregoing indemnity shall not extend to (i) protect seller from any pre-existing liabilities for matters merely discovered by buyer (i.e., latent environmental contamination) or (ii) any liens, claims, causes of action, damages, liabilities or expenses to the extent attributable to the action or inaction of seller or its agent or employees.

4. **Estoppels (Section 11.1).**

11.1. Tenant Estoppel Statements Conditions. Buyer has the right to review and object to any Estoppel Statements.
Seller must obtain and deliver to Buyer on or before **Tenant Estoppel Statements Deadline** (§3), statements in a form and substance reasonably acceptable to Buyer, from each occupant or tenant at the Property (Estoppel Statement) attached to a copy of the Lease stating:

11.1.1. The commencement date of the Lease and scheduled termination date of the Lease;

11.1.2. That said Lease is in full force and effect and that there have been no subsequent modifications or amendments;

11.1.3. The amount of any advance rentals paid, rent concessions given, and deposits paid to Seller;

11.1.4. The amount of monthly (or other applicable period) rental paid to Seller;

1.1.5. That there is no default under the terms of said Lease by landlord or occupant; and

11.1.6. That the Lease to which the Estoppel is attached is a true, correct and complete copy of the Lease demising the premises it describes.

11.2. Tenant Estoppel Statements Objection. Buyer has the Right to Terminate under §25.1, on or before **Tenant Estoppel Statements Objection Deadline** (§3), based on any unsatisfactory Estoppel Statement, in Buyer's sole subjective discretion, or if Seller fails to deliver the Estoppel Statements on or before **Tenant Estoppel Statements Deadline** (§3). Buyer also has the unilateral right to waive any unsatisfactory Estoppel Statement.

When you are representing a Buyer, when should you ask for estoppels? All investment transactions? Apartment transactions? User transactions?

If the current leases do not require the tenants to sign estoppels, how do you get around this problem?

5. **Representations and Warranties.** The commercial contract to Buy and Sell Real Estate does not have representations and warranties by either Seller or Buyer. Do not use boilerplate representations and

warranties -- each transaction is different and buyer's reliance on seller warranties will be affected by circumstances of the transaction. For example, seller warranties may not be as important to a buyer if the buyer plans to demolish and redevelop a property.

The following reps and warranties are taken from a sale of a 100+ unit apartment project:

1.1 Seller represents and warrants to Buyer to the best of Seller's current information, knowledge and belief, and without making further inquiry or investigation, that the following is true and current as of the date of this Agreement and the same shall be true as of the Closing Date (defined below). All references to "Seller's knowledge" shall mean Seller's actual knowledge and not constructive knowledge or implied knowledge.

(a) Seller is a Colorado corporation duly organized and validly existing under the laws of the State of Colorado. Seller has the full right, power, and authority to enter into this Agreement and to sell and convey the Property to Buyer as provided herein, and to carry out its obligations hereunder. No rights of first offer or rights of first refusal regarding the sale of the Property exist under the organizational documents of Seller (but without requirement of delivery of a copy of same to Buyer) or, to Seller's knowledge, under any agreement by which Seller or the Property is or may be bound or affected (except as is disclosed to Buyer in the Premises Documents or the Title Documents delivered to Buyer).

(b) To Seller's knowledge the certified Rent Roll attached hereto as **Exhibit B,** Premises Documents and any operating statements provided to the Buyer by Seller and which were prepared by Seller (and not by third parties) are true, correct and complete in all material respects.

(c) Seller has taken all required actions to authorize the sale of the Property to the Buyer.

(d) Seller has not received any written notice from any governmental body having jurisdiction over the Premises as to any violation of any zoning, building, fire, environmental, health or other governmental law or ordinance affecting the Premises. Seller has not received any written notices from any insurance companies, lenders or governmental agencies or authorities of any material defects with respect to the Property (including health hazards or dangers, or nuisance) which, if not corrected, would result in termination of insurance coverage or materially increase its costs therefor.

(e) There is no action, suit, arbitration, governmental investigation, litigation or similar proceeding pending or threatened against Seller or the Property or any part thereof. Seller has disclosed an employee of Seller is threatening an employment claim against Seller.

(f) There are no pending or planned condemnation or similar proceeding or public improvements with respect to all or any portion of the Property.

(g) Seller has not received any written notice from any governmental agency or regulatory body that the Premises violates any federal, state or local environmental laws or regulations including without limitation, the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (collectively, the "**Environmental Laws**"), and Seller has not caused any hazardous substance, waste or material to be used, generated, stored or disposed of on or transported to or from the Premises in violation of any applicable law nor, to Seller's knowledge, do any underground storage tanks exist on, under or about the Premises. For the purposes of this paragraph, "hazardous substance, waste or material" shall mean all such substances as they are defined in the Environmental Laws except customary cleaning solvents used in household cleaning.

(h) The list of Contracts set forth on **Exhibit X** is a true, correct and complete list of all of the Contracts.

(i) Seller is not an employee benefit plan (a "**Plan**") subject to the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**"), or Section 4975 of the Internal Revenue Code of 1986, as amended (the "**Code**"). To Seller's knowledge (acknowledging that Seller has no knowledge of the identity of any investor or party in interest in Buyer), Seller's sale of the Property to Buyer will not constitute or result in a prohibited transaction under Section 406 of ERISA or Section 4975 of the Code.

1.2 Buyer represents and warrants to Seller that this Agreement constitutes, and when so executed and delivered Buyer's Closing Deliveries (as defined in Section X) will constitute, the legal, valid and binding obligations of Buyer, enforceable against Buyer in accordance with its and their terms.

1.3 The representations and warranties of the parties set forth in this Agreement shall survive the Closing and the recording of the Deed (as defined in Section XX) for a period of twelve (12) months.

1.4 (a) Seller shall afford Buyer the opportunity for full and complete investigations, examinations and inspections of the Property, subject to reasonable time restraints and prior notice, and providing the proper consideration for tenants' privacy and enjoyment of their premises. Except as specifically set forth in this Agreement or in any Closing document delivered by Seller, Buyer acknowledges and agrees that (i) neither Seller nor any of Seller's affiliates has made any independent investigation or verification of, or has any knowledge of, the accuracy or completeness of any of the Premises Documents; (ii) the Premises Documents delivered or made available to Buyer and Buyer's representatives is furnished to each of them at the request, and for the convenience of Buyer; (iii) Buyer is relying solely on its own investigations, examinations and inspections of the Property and those of Buyer's representatives and is not relying in any way on Premises Documents furnished by Seller or any of Seller's affiliates, or any of their agents or representatives; and (iv) Seller expressly disclaims any representations or warranties with respect to the accuracy or completeness of the Premises Documents other than as set forth herein.

(b) Except as specifically set forth in this Agreement or in any Closing document delivered by Seller, Buyer acknowledges that it is purchasing the Property based solely on its inspection and investigation of the Property and in reliance on the representations and warranties set forth above that Buyer will be purchasing the Property "AS IS" and "WITH ALL FAULTS" based upon the condition of the Property as of the Effective Date, subject to reasonable wear and tear and loss by fire or other casualty or condemnation from the Effective Date until the Closing Date. Without limiting the foregoing, Buyer acknowledges that, except as expressly set forth in this Agreement or in any Closing document delivered by Seller, Seller and its agents have not made, do not make and specifically negate and disclaim any representations, warranties, promises, covenants, agreements or guaranties of any kind or character whatsoever, whether express or implied, oral or written, and Buyer fully and irrevocably releases Seller, its affiliates, agents, and representatives from all claims with respect to: (i) the value, nature, quality or condition of the Property, including, without limitation, the existence or nonexistence of asbestos, toxic waste or any hazardous material, water, soil or geology; (ii) development rights, bonds, taxes, covenants, conditions and restrictions affecting the Property; (iii) the compliance of the Property with any laws, rules, ordinances, or regulations of any applicable governmental authority or body including, without limitation, zoning laws, building laws or codes, fire codes or the Americans with Disabilities Act; (iv) and any other matter with respect to the Property. Except as specifically set forth in this Agreement or in any Closing document delivered by Seller, SELLER MAKES NO WARRANTY OR

REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF CONDITION, SUITABILITY OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH MAY BE CONDUCTED THEREON, HABITABILITY, PROFITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE PROPERTY AND, EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, SELLER DOES NOT MAKE, HAS NOT MADE AND SPECIFICALLY NEGATES AND DISCLAIMS ANY REPRESENTATIONS OR WARRANTIES REGARDING COMPLIANCE OF THE PROPERTY WITH ANY ENVIRONMENTAL PROTECTION, POLLUTION OR LAND USE LAWS, RULES, REGULATIONS, ORDERS OR REQUIREMENTS. SELLER SHALL NOT BE LIABLE OR BOUND IN ANY MANNER BY ANY VERBAL OR WRITTEN STATEMENTS, REPRESENTATIONS OR INFORMATION PERTAINING TO THE PROPERTY OR THE OPERATION THEREOF FURNISHED BY ANY PARTY PURPORTING TO ACT ON BEHALF OF SELLER.

(c) Except as expressly set forth in this Agreement or in any Closing document delivered by Seller, Buyer hereby fully and irrevocably releases Seller and Seller's affiliates, and their agents and representatives, from any and all claims that it may now have, hereafter acquire or assert against Seller or Seller's affiliates, or their agents or representatives for any cost, loss, liability, damage, expense, action or cause of action, whether foreseen or unforeseen, arising from or related to any condition of the Property, including but not limited to the structural elements, roofs, facilities, landscaping and appliances the presence of environmentally hazardous, toxic or dangerous substances, or any other conditions (whether patent, latent or otherwise) affecting the Property, except for claims against Seller based upon any obligations and liabilities of Seller expressly provided in this Agreement or in any Closing document delivered by Seller. Buyer further acknowledges and agrees that this release shall be given full force and effect according to each of its expressed terms and provisions, including, but not limited to, those relating to unknown and suspected claims, damages and causes of action.

(d) The provisions of this section shall survive the termination of this Agreement and the Closing.