Surveys 101 - changes for some start this month

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When questions from prospective purchasers of real estate repeatedly pop up, at the top of that list is, "Do I really need a survey? The building has been there forever."

Other than for the purchase of a condominium unit for which the recorded plats and plans govern, there are no viable reasons not to get a new survey. Common sense dictates that a purchaser see what is present on the property, and identify access, easements, set backs, improvement locations, parking and the like. Boundary lines and improvements - buildings, signs, dumpsters, fences, etc. - do not always match up, and a survey is the only real means to make such determination. Boundary disputes and encroachments have been problematic in Virginia since colonial times. As early as 1639, the Virginia Assembly established laws relative to the sufficiency of surveys, regulation of surveyors and the adequacy of fencing.

A new survey should be certified to the purchaser - and, if requested, the lender and the title insurance company - and dated subsequent to the date of the purchase agreement. Certification is required so that a party relying on a survey can sue directly on a breach of the certification in the event of the surveyor's negligence. The current date evidences reliance on the surveyor's work.

Most commercial real estate contracts contain covenants that prohibit the seller from undertaking any action that would give rise to a change in the physical condition of the property without the purchaser's consent, such as the granting of an easement, dedication of a right of way.

The Real Estate Information Network standard purchase agreement, which is used in most residential real estate purchases in Hampton Roads, requires that the seller convey "marketable and insurable" title to the property, but does not specifically permit the purchaser to object to matters of survey. The REIN purchase agreement specifically requires that the property have "marketable and insurable access to a publicly dedicated road."

We are often asked, "What type of survey do I need?"

There are many different types of surveys, for instance, a physical survey, a boundary survey, a topographical survey or an ALTA/ACSM survey. In most commercial transactions, the purchaser's lender will determine the answer. In a residential transaction,

a surveyor typically delivers a physical survey of the property to state standards locating the boundary lines, improvements, setbacks and easement locations.

It is a good idea to give the surveyor the title report so all easements can be located. We frequently see building encroachments and boundary disputes on both residential and commercial surveys. An ALTA/ACSM survey is the preferred form of survey for a commercial transaction since it is prepared to agreed standards promulgated by the American Land Title Association and is a standard product across all jurisdictions. The current ALTA/ACSM standards will change on Feb. 23. The new standards require a uniform surveyor's certification and set mandatory language for the surveyor's use. It will take lenders a period of time to adjust to the mandatory language during which period, lender's counsel, borrower's attorneys and surveyors will most certainly disagree over the new form language.

A survey can arguably be out of date the day after the survey was conducted if the owner takes some action to change the condition of the property. Use of survey affidavits became popular as providers of closing services endeavored to reduce closing costs. A survey affidavit is not a good answer. While a title insurance company may accept the affidavit and delete the standard survey exception, a survey problem can create delays in construction, resale problems and other difficulties that far outweigh the cost of a survey.

While the use of survey affidavits makes sense in a residential refinance, use in a commercial refinance - from a lender's perspective or any acquisition - is not typically recommended. A seller's execution of such an affidavit could lead to liability beyond limitations negotiated in the purchase agreement or provided by law. The Florida Insurance Commission has gone so far as to prohibit use of survey affidavits other than in refinance transactions.

We are often asked what to do about old utility easements that appear to be no longer in use. The answers vary depending on the situation. In both residential and commercial development, obtaining a physical survey of the property early in the due diligence period is critical. A title insurance commitment should be obtained with copies of all title exceptions and copies of all source deeds. The title commitment and exception documents are delivered to the surveyor so that such encumbrances can be located on the survey.

With the title commitment in hand, the surveyor can provide the survey of the property being acquired, identifying all easements referenced in the title commitment. Often a particular easement cannot be located. There are instances when the description of the area encumbered by the easement is generic; other times, the easement is old and cannot be located because the utility lines no longer physically exist. Alternatively, the surveyor may determine that the easement is now located within an adjacent right of way.

Easements that cannot be located affect the marketability of title and the right of use of the property subject to the easement. While many lenders will accept a special endorsement to insure against loss or damage that the lender may sustain as a result of the

exercise of the right of use of an unlocated easement, title insurance coverage does not exist to provide comfort for a prospective purchaser. Title companies are not typically willing to accept the risk for either interference with the right of use or marketability issues.

A purchaser should object to such an unlocated easement if permitted under the terms of the purchase agreement. A purchaser should endeavor to place the burden of vacating or quit claiming such easement on the seller. If the seller is unwilling to assist in vacating such easement or the purchase agreement does not provide such a remedy, the purchaser should undertake the steps necessary to vacate or quit claim such easements, preferably before closing.

Virginia Power, Cox Communications and Virginia Natural Gas are all fairly responsive to such requests and generally helpful. Local municipalities are also generally cooperative with sewer, water and drainage easements as long as the utility is not in use.

The process with local governments may be more involved. Vacating telephone line easements can become more involved as well because mergers in the telephone industry may make it more difficult to track down the beneficiary of the easement.

Leaving the easements for another day is not an option we recommend. Since owner's title insurance coverage is not typically available, it is much easier to address the problems before acquisition than it is to wait until a later date when the unlocated easement may cause any number of problems.

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