CHAPTER 7

Title Examinations and Title Issues

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Scope Note

This chapter discusses marketable title, conveyancing requirements, recording requirements, and the logistics of title searches. It provides practical guidance on this topic, which often has many local variations since land records are maintained by individual towns.

§ 7.1 INTRODUCTION

The law and practice of title examination in Vermont resembles a thicket. Land records are maintained in over 212 cities and towns in a state with a population of around 627,000 people (a ratio of about one system of land records for every 3,000 people). War stories among veterans of the real estate bar reveal the challenges (and often amusement) of searching these records. Some towns keep hours only once a week. Many have no system of electronic filing or indexing. Most have numerous characteristics that distinguish them from the town next door. "Local practice" means something in Vermont that is only hinted at in more-commercialized areas of the east.

The practical challenges of title examination are further complicated by governing law. Out of some common law murkiness, several concepts are revealed, or at least commonly understood among Vermont practitioners, which practitioners familiar with other jurisdictions likely may not expect. Among them are matters that should be, but are not, found of record may be title defects and matters that may impair a property's value may rise to the level of a title defect.

As will be revealed in this chapter, and perhaps for more than one reason, the essential first question the practitioner must ask before undertaking title examination in Vermont is "why am I doing this?" The extent of the search and the related professional duty owed to the client depend on the purpose for which the search is undertaken. Does the attorney represent the seller, the buyer, or the lender? What is the purpose of the examination? Is it required in connection with a purchase and sale transaction, a refinancing, or a lease? Is the client a sophisticated commercial property interest or an "ordinary" homeowner?

Ultimately, there is no clear source to answer the question, "what is the extent of my obligation in performing the title examination?" The best answer is another question. What is reasonable under the circumstances of the deal and the parties? In the seminal

case (among few) on the subject, *Estate of Fleming v. Nicholson*, 168 Vt. 495 (1998), the Vermont Supreme Court offered that "an attorney has a duty to inform and explain to the client the implications of any clouds on the title that would influence a reasonably prudent purchaser not to purchase the property." *Estate of Fleming v. Nicholson*, 168 Vt. at 499. At least one thing is certain: the practitioner should define the scope of representation early and well.

Except as otherwise specified, this chapter assumes the context of a "typical" purchase and sale transaction in which the objective of both parties is to convey for value property that can be reconveyed for value in the future. Clearly, where property cannot be freely conveyed, its value is diminished (if not extinguished entirely). Subject to the actual terms of the purchase agreement, the typical buyer and seller contract to convey and receive "marketable" title. However, a plain definition of marketable title is elusive.

The Vermont Marketable Record Title Act and the Vermont Title Standards (Vt. Bar Ass'n 2016) provide clear direction on many fronts, but the common law of Vermont holds that "record" title, i.e., that governed by the Marketable Record Title Act, is not the sole determiner of marketable (or unmarketable) title. How far off record one must look to determine marketable title or, for that matter, which records count is hard to define with certainty, leaving the reasonableness standard of *Estate of Fleming* to guide the practitioner. Adding to the challenge is a category of permit-related items whose absence from the record Vermont common law considers a title encumbrance that renders title unmarketable.

The terms "encumbrance," "marketability," and "title defect" overlap in the statutes and the case law, and they will throughout this chapter. The terms are not entirely interchangeable, but an exposition on their distinctions is beyond the present purpose. In our experience, Vermont practitioners vary in how they distinguish these concepts, leading some to categorize more clearly than others the distinction between "matters of title" and "matters not of title but still within the practitioner's duty to address." The authors find the distinction blurry at best and, as a practical matter, see little point making the distinction at all since, clearly, the duty of the title examining attorney in Vermont goes well beyond "matters of title."

The purchase agreement can, of course, be a great moderating factor in all this. Drafted properly the purchase agreement should help eliminate, as a matter of contract, grey areas surrounding title, at least as between the buyer and the seller. One difficulty in Vermont is that the practitioner is often presented the purchase agreement after it has been executed and without the opportunity for input.

Although purchase and sale agreements are covered in greater detail in chapter 2 of this book, the perils lying in wait in the title examination provisions that the authors often see warrant limited discussion here. In short, many contracts provide a simple outline where

- the buyer notifies the seller prior to closing of any encumbrances or defects that are not excepted in the contract and that render title unmarketable,

- the seller has thirty days within which to remove the encumbrance, and
- if the encumbrance is not removed, the buyer can take its deposit, terminate the contract, and pursue legal and equitable remedies.

Consider the challenges. First, it is rare that a contract in this form will take exception to any particular encumbrances. As such, any encumbrance (and there are always encumbrances) can become the subject of a title objection. The fact that only encumbrances that affect marketability may be objectionable under this construct should be of little comfort since, as will be described further below, the Marketable Record Title Act provides that marketable title is itself subject to encumbrances of record. Does this mean that no encumbrance of record is objectionable under the purchase agreement or that all of them are? Add to the mix the fact that "marketable title" is defined by common law to include matters off-record and absent from the record, and the potential for dispute increases. A better contract would not leave the parties having to wonder which encumbrances are the proper subject of a postcontract title objection.

Second, why, if there is at least the possibility of a title objection being made to anything of record (not to mention matters off-record or absent from the record), would the parties want to wait until the day prior to closing to address it?

Third, the contract would compel the seller to remediate the buyer's alleged defect at any cost. What if removal of the alleged defect is subject to approval of a third party (a likely proposition)? The seller is compelled to remove the objection at any cost or to engage counsel to litigate the grey area of whether the alleged defect amounts to an encumbrance that renders prospective title unmarketable.

Fourth, and probably worst of all, if the seller cannot (or chooses not to) remedy the title defect (at theoretically any cost), the buyer can terminate the contract and pursue damages against the seller, presumably for not curing the defect and for whatever other expenses (and perhaps even consequential damages) the buyer has incurred.

Where possible, the better approach is for the seller and the buyer to thoughtfully consider title examination as a matter of their contract. The contract should provide a mechanism for determining an agreed-upon list of permitted exceptions subsequent to the date of contract but well before closing. The seller should make an election about which of buyer's title objections it will cure and by when, and the contract should hold the seller to convey title based on that agreed-upon list of exceptions and with no other encumbrances. The seller should have no obligation to cure defects (other than those made after the date of the contract) and, based on the seller's election, the buyer should be given the opportunity to proceed with the contract or to terminate and receive back its deposit. The buyer should not be allowed to pursue other remedies except in the case of fraud or misrepresentation. This provision should survive closing, and the deed should reflect the agreed-upon state of the title.

Also, although deeds are covered in greater detail in chapter 6 of this book, this chapter also outlines conveyancing requirements. Formulating and executing a lawful conveyance is quite obviously a title issue. Including a discussion of conveyancing in

the context of title examination is also important because most real estate conveyances in Vermont, even commercial ones, are by general warranty deed (the Vermont Warranty Deed) which carries with it the covenant against encumbrances. In order to prepare the deed and take exception to encumbrances, the seller's attorney must understand the state of title to the property. Generic exclusions as to "all matters of record", for instance, may do disservice to a client whose property is encumbered by matters off-record or missing entirely.

This chapter is organized as follows. Section 7.2, beginning with an introduction to the Vermont Title Standards, describes the juxtaposition of common and statutory law as it affects title examinations and "marketable title". Sections 7.3 through 7.8 describe conveyancing requirements in Vermont in various circumstances. Sections 7.9 through 7.12 explain the mechanics of the title search itself.

§ 7.2 MARKETABLE TITLE

§ 7.2.1 Vermont Title Standards

In an attempt to provide clarity, uniformity, and guidance with respect to title examination in Vermont, the Vermont Bar Association Board of Bar Managers adopted the Vermont Title Standards available on the association's website at http://www.vtbar.org.

Title Standards 1.1 and 1.2 set the premise of any discussion respecting title examination in Vermont. Title Standard 1.1 establishes the role of the attorney examining title.

> The role of the attorney is to secure for the attorney's client a title which is in fact marketable, subject to the terms of the client's contract specifying permitted encumbrances, if any. An attorney must (i) examine the land records to determine marketable record title; (ii) take into consideration other matters outside the land records which may affect the marketability of title; and (iii) disclose and report to the client those matters affecting marketability of title which would lead a reasonably prudent buyer to refuse to take a conveyance of the property, when paying full value for it.

The role of the title examiner in Vermont is thus broader than merely establishing or securing a marketable record title, for the obligation of the attorney includes also the disclosure to, and education of, the client such that the client may make an informed decision. Comment 5 to Title Standard 1.1 reinforces this obligation:

> The attorney must disclose to the attorney's client information which may affect marketability of the title of which the attorney has actual knowledge or which is properly filed and indexed in the land records. The disclosure should be made in a manner such that it is understandable to the client and in reasonable detail to permit the client to make an informed decision regarding title to the property.

The standard of care for a title attorney in Vermont "is based on the degree of . . . skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent Vermont lawyer"; however, "the conduct of the majority of Vermont lawyers does not define reasonableness per se." *Estate of Fleming v. Nicholson*, 168 Vt. 495, 498 (1998) (internal quotation marks omitted). "An attorney has an obligation to identify those factual circumstances which constitute clouds on the title that are disclosed in the public records and report those matters to the recipient of the results of the search." Title Standard 1.1. "In conducting a title search for a client, an attorney has a duty to inform and explain to the client the implications of any clouds on the title that would influence a reasonably prudent purchaser not to purchase the property." *Estate of Fleming v. Nicholson*, 168 Vt. at 499; *see also Zimmerman v. Bjornlund*, Entry Order, No. 2013-267 (Vt. 2013) (finding standard of care satisfied when defendant discussed on numerous occasions both a map and deed and accurately described implications of those documents to the client).

To properly evaluate marketable title in Vermont, an attorney must understand that the scope of marketable title in Vermont is not limited to matters of record, for pursuant to Title Standard 1.1 set forth above, the examining attorney "must . . . take into consideration other matters outside the land records which may affect the marketability of title." This obligation is similarly reinforced in Comment 5 to this title standard, also discussed above.

Practice Note

In September 2016, the title standards subcommittee affiliated with the Real Estate Section of the Vermont Bar Association revised Title Standard 1.1 (discussed above) to include the following paragraph acknowledging the expanded role of the title examiner in the event the holding in *Fleming* was actually even broader than originally considered by the standard.

> An attorney has an obligation to identify those factual circumstances which constitute clouds on the title that are disclosed in the public records and report those matters to the recipient of the results of the search. An attorney has a duty to inform and explain to the client the implications of any clouds on title that would influence a reasonably prudent purchaser not to purchase the property.

Fleming v. Nicholson, 168 Vt. 495 (1998) citing *North Bay Council, Inc. v. Bruckner*, 563 A.2d. 428, 431 (N.H. 1989)..

That said, while challenged to evaluate matters of record, off-record, and absent from the record in determining the source of potential marketability concerns, the practitioner must exercise restraint in raising objections to marketability. Title Standard 1.2 establishes that "[i]t is almost impossible to find a title free from defects, irregularities or objections. Objections should be made or title clearing requirements imposed only when the irregularities or defects present a real and substantial basis for litigation or probability of loss." Inherently, a marketable title in Vermont is not a perfect title but one which is free of such substantial and material defects as may give rise to litigation or result in loss of bargain of their contract. See Comment 1 to Title standard 1.2:

> The built-in uncertainty of title should not drive an attorney to extreme caution far in excess of the real and substantial possibility of litigation or probability of loss. An attorney should not construe picayune irregularities or defects as substantial defects in title which might result in their client's loss of bargain of their contract. In dealing with the uncertainty of title, the attorney should be a positive and constructive force to resolve the material defects in title, but also willing, with the client's informed consent, to accept the inevitable technical defects.

In short, the practitioner should uncover all the "molehills" but not make "mountains" out of them all. Once the scope of title examination is understood to include matters of record and extra-record matters and once the examining attorney accepts that title may not be perfect and that defects and irregularities may be encountered, the examining attorney is confronted with the issue of how to establish marketable title. This section examines in greater detail how marketable title is determined in Vermont.

§ 7.2.2 Common Law Marketable Title—Permits as Encumbrances

Marketable title in Vermont is first established by the common law. Vermont Title Standard 1.3 provides a common law definition of marketable title by reference to two Vermont Supreme Court decisions. Title Standard 1.3 provides that

> [a] marketable title is one that may be freely made the subject of resale. *Krulee v. Huyck & Sons*, 121 VT 304 (1959). A marketable title is one that allows an owner to hold the land free from the probable claim of another. It is a title which would allow the holder of the land if he or she wanted to sell, to transfer a title which is reasonably free from doubt. A title is marketable when its validity cannot be said to involve a question of fact and is good as a matter of law. *First National Bank v. Laperle*, 117 VT 144, 157 (1952).

This common law definition is refined by Vermont's Marketable Record Title Act, described below, but the common law definition remains useful, for example, in considering questions related to permits and land use regulations as encumbrances affecting the marketable status of title to Vermont real property. Land development in Vermont is often regulated at both the municipal and state levels, and of course many projects implicate federal jurisdiction as well. A full analysis of the regulation of land use and development exceeds the scope of this chapter. The authors' intention here is to focus on the juxtaposition of permits and title in Vermont.

Many jurisdictions hold a clearer line than does Vermont between permitting matters and title matters. On the face of it, title is presumed to answer the question "who owns the property?" and is typically derived as a matter of private contract. Permitting informs what the owner (whoever that may be) can do with the property and is typically derived from the exercise of governmental police power.

Overlap exists of course where, for instance, deed restrictions and covenants, e.g., homeowner association documents, enforce the use and development of property. And notices of zoning or land use violations often end up in the land records, thus clearly becoming a title matter. Indeed, even the standard ALTA Owner's Policy of Title Insurance covers permitting matters for which a notice is recorded in the public records.

In Vermont, legislative and regulatory provisions requiring the recordation among the land records of certain land use and development permits have helped ensure a nearly complete overlap between permitting and title. The statewide land use statute, 10 V.S.A. § 6001 et seq. (Act 250), affects both the subdivision and the development of certain land (as further described in § 7.10 below). Act 250 permits for subdivision and development are required to be recorded in the land records of the municipality in which the property is located. Act 250, Rule 33A.

Likewise, wastewater system and potable water supply permits, 10 V.S.A. § 1971 et seq., are required to be recorded in the land records for the municipality in which a project is located. 10 V.S.A. § 1973(h); Vt. Dep't of Envtl. Conservation Envtl. Prot. Rules § 1-307. The recording requirement extends to all required design and installation certifications; other documents that are required to be filed under the rules, or under a specific permit condition, are also recorded and indexed in the land records. Similarly, stormwater permits are required to be recorded in the local land records. *See, e.g.*, Environmental Protection Rules § 22-312. The concept of permit recording seems to be growing, apparently outside of any discussion of such recording rules' effect on marketability of title. For example, 30 V.S.A. § 51(f)(1), governing Residential Building Energy Standards, provides that a certificate of compliance be recorded by the builder among the land records. Similarly, 30 V.S.A. § 248(a)(7), governing certain energy projects approved by the Vermont Public Service Board, now requires recording a notice of approval, known as a certificate of public good, in the land records and furnishing proof of recording back to the Public Service Board.

The stated purpose of these rules is laudable enough: to provide actual notice to purchasers and investors of the terms and conditions of permit approvals. However, one can reasonably question the means by which this end is achieved. Over time, the recording of permits and their progeny of amendments clogs the land records and results in title to property encumbered by literally volumes of permits and their conditions. One could reasonably question whether these matters affect title to the property or rather, perhaps more simply, the property's use.

As a practical matter, when permits are properly recorded, they do provide the notice that the rules intend. The title examiner readily finds the permits duly recorded among the land records and reports the findings of the permits to the client (and likely its title insurer who will duly take exception to all identified permits). The client is informed and can address the permitting matters as it would any other matter affecting the property, whether a title matter or otherwise. But that, as complicated as it renders record title to property, is the low-hanging fruit from a title examination perspective.

Once permits are made a matter of title, does it not follow that the title examiner must consider the effect of the absence of a permit from record title? On its face this

seems nonsensical. If a more typical "title" matter is not revealed among record title, the examiner's inquiry typically ends. If, in fact, unrecorded instruments exist (prior deeds, contracts, rights of first refusal, easements, etc.), their effect on title is governed by well-established law relating to priority, notice, bona fide purchasers, and the like.

But this is not so with respect to permit jurisdiction that, as a matter of statutory or regulatory enactment, runs with the land. It is readily understood that a permit that exists but is not recorded is not voided by the sale of the property to a bona fide purchase without notice. As a result, if the existence of permits is a matter of title, then the absence of permits (where they are required) is arguably one as well. And, of course, it is not just the absence of permits the examiner must consider. As described above, the environmental rules require recordation of design and installation certifications and other documents that are required to be filed under the rules or under a specific permit condition. By extension, the examiner is thus on notice not only to locate permits that are required to be recorded but also to review those permits, their conditions, and their applicable rules and determine whether all certifications and documents required thereby have also been recorded.

Cumbersome though it may sound, this has indeed become part of the common law of marketable title in Vermont. The two seminal cases in this respect are *Hunter Broadcasting, Inc. v. City of Burlington*, 164 Vt. 391 (1995) and *Bianchi v. Lorentz*, 166 Vt. 555 (1997), through which the rule may be stated: title defects include any matter that may result in a substantial diminution of value in the property.

In *Hunter Broadcasting*, the Vermont Supreme Court held that a failure to obtain a required state subdivision permit was an encumbrance on title. In so doing, the court adopted a fairly expansive definition of an encumbrance as a "right to or interest in land that may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee." *Hunter Broad., Inc. v. City of Burlington*, 164 Vt. at 393. While the court's holding in *Hunter* applied specifically to the requirements of the old state subdivision regulations authorized by former 18 V.S.A. § 1218, there is nothing to provide the practitioner comfort that the court's reasoning would be so limited. And, indeed, footnote 2 of the court's decision suggests that a failure to obtain a permit for subdivision under Act 250, 10 V.S.A. § 6081, would also constitute an encumbrance on title. *Hunter Broad., Inc. v. City of Burlington*, 164 Vt. at 394.

In *Hunter Broadcasting*, the court, in distinguishing other cases, suggested maintaining a distinction between permitting defects that are latent (not encumbrances) and those that are obvious (encumbrances), but the fine line between the two is not clear. The rule of *Hunter Broadcasting* seems to be that a defect is not latent if an ordinary person using ordinary common sense can understand and comply with the applicable rule or regulation. The rule seems to assume that the ordinary person is aware of and able to locate the applicable rule or regulation in the first place.

In *Bianchi*, the Vermont Supreme Court further expanded the realm of marketable title, holding that an encumbrance need not be a matter that impairs record title if the matter diminishes the value of the land. *Bianchi v. Lorentz*, 166 Vt. at 559. The *Bianchi* court held that the absence of a certificate of occupancy required by the applicable

municipal zoning ordinance prior to the occupancy of the buildings and other improvements constituted an encumbrance on title.

The Vermont legislature passed curative legislation in response to the *Bianchi* decision in 1998 and in both 1999 and 2000 retroactively amended the curative legislation to resolve ambiguities. 1998 Vt. Acts & Resolves 125; 1999 Vt. Acts & Resolves 46; H. 601 (65th Biennial Session, Adjourned Session (2000)). The amended curative legislation added a section to the Vermont Marketable Title Act, providing that neither a failure to obtain a required municipal land use permit nor a failure to comply with the terms and conditions of a required municipal land use permit constitutes an encumbrance on record marketable title. 27 V.S.A. § 612(a). The term "municipal land use permit" includes municipal zoning, subdivision, site plan, and building permits and approvals, wastewater system permits, and certificates of occupancy and compliance. 24 V.S.A. § 4303(11).

The amended curative legislation also establishes a statute of limitations, requiring commencement of an enforcement action within fifteen years after the failure to obtain or comply with the terms and conditions of a municipal land use permit first occurred. 24 V.S.A. § 4496(a). The amended curative legislation preserves the right of the municipality to bring an enforcement action to abate or remove public health risks or hazards. 24 V.S.A. § 4496(c).

It is critical to note, however, that, while the legislature has acted so that the failure to obtain or comply with municipal land use permits no longer constitutes an encumbrance on title, the possibility of an enforcement action for a recent violation or for a public health risk or hazard could still be held to impair the *value* of the property, thus affecting marketability as established by the *Hunter* and *Bianchi* decisions. Moreover, the curative legislation further provides a buyer of property with a right to terminate a purchase and sale contract without liability if the property is required to have, but does not have, one or more municipal permits. In effect, the curative legislation provides a safe harbor for sellers after closing but not before. By statute, a municipal permit violation effects marketability prior to closing but not after.

Taken alone, *Hunter Broadcasting* could have been construed fairly narrowly to apply to a regulation that prohibited the sale of property in the absence of the applicable permit. Indeed, a subdivision permit was missing in *Hunter Broadcasting,* and one may ask how property could be properly conveyed if it was not properly created in the first place. However, *Bianchi* expanded *Hunter Broadcasting*'s reach dramatically by focusing on diminution of value. As the court made clear in *Bianchi*, *Hunter Broadcasting* did not limit the effect of regulatory violations to impairment of title; rather, "the point of *Hunter Broadcasting* was that the subdivision rule created a substantial diminution in value." *Bianchi v. Lorentz*, 166 Vt. at 1048.

By a later decision, in *Trinder v. Connecticut Attorney's Title Insurance Co.*, 2011 VT 46, the Vermont Supreme Court rejected an owner's claim against a title insurance company (seeking coverage against unmarketable title) based on diminution of value. In so doing, the court stated that the owners' "ability to sell their home at a reasonable price is separate from the question of whether [they] hold marketable title

to their property. . . . [D]efects which merely diminish the value of the property, as opposed to defects which adversely affect a clear title to the property, will not render title unmarketable within the meaning and coverage of a policy insuring against unmarketable title." *Trinder v. Conn. Attorney's Title Ins. Co.*, 2011 VT 46, ¶ 17.

While this seems to take the sting out of the "diminution of value" rule of *Hunter Broadcasting* and *Bianchi*, the case may be distinguished on its facts. The claim at issue in *Trinder* was that title to the property was unmarketable because the septic system serving the property was located off-site. In effect, the absence of a beneficial off-site easement diminished the value of the property but did not affect its marketability in the context of the insurance contract that, presumably, covered only the property itself (and not the off-site septic system). Further, the *Trinder* decision made no reference to either *Hunter Broadcasting* or *Bianchi*. While the latter cases addressed the warranty against encumbrances and *Trinder* addressed marketability in a title insurance context, one may find it surprising that the *Trinder* discussion of value made no reference to *Hunter Broadcasting* or *Bianchi*. We are left to conclude that matters resulting in a diminution of value may be encumbrances for warranty deed purposes but do not affect marketability for title insurance purposes.

Perhaps the court's discussion of value in *Trinder* may help resolve future litigation concerning the effect of matters that diminish value. In the meantime, the practitioner should assume that the common law proposition of *Hunter Broadcasting* and *Bianchi* prevails and that, curative legislation notwithstanding, matters that affect a substantial diminution of value in property may well be considered title defects. And, in any event, the practitioner must take notice that, title defect or not, the existence of matters that affect value should be disclosed to the client in keeping with the practitioner's professional duty.

Practice Note

The title standards subcommittee affiliated with the Real Estate Section of the Vermont Bar Association has recently included a new comment to Standard 2.2, reminding the title examiner that there may be an adverse impact on marketability of title if

- a municipal or state land use permit is required but not obtained;
- a certificate of occupancy was required and was not obtained; or
- proof of compliance with the terms of a permit in the form of written documentation is required but cannot be found.

See Comment 1 to Vermont Title Standard 22.

§ 7.2.3 Vermont Marketable Record Title Act

In addition to Vermont's common law development of "marketable title" and the many statutory promulgations with respect to permitting encumbrances, Vermont has adopted the Marketable Record Title Act, 27 V.S.A. § 601 et seq. Pursuant to Section 601 of this Act,

> [a]ny person who holds an unbroken chain of title of record to any interest in real estate for 40 years, shall at the end of that

> period be deemed to have a marketable record title to the interest, subject only to such claims to the interest and such defects of title as are not extinguished or barred under this chapter, and such interests, limitations or encumbrances as are inherent in the provisions and limitations contained in the muniments of which the chain of record title is formed which have been recorded during the 40-year period.
>
> For purposes of this section and sections 602 and 603 of this title, "person" shall mean and include any natural person, firm, partnership, corporation, association, executor, administrator, guardian, trustee, fiduciary or any other legal entity, excepting the state of Vermont, political subdivisions of the state, and the United States.

Practice Note

"Muniments" are the recorded documents in the chain of title such as deeds, easements, and covenants. Any interest, limitation, or encumbrance which exists in the documents of title by express reference is incorporated into the forty-year chain of unbroken title by Section 601(a) and is not extinguished by the Marketable Record Title Act. Likewise, only those claims and defects of title that are specifically extinguished by the effect of the Act are so extinguished; other defects, that are not so extinguished remain, even if they were recorded prior to the forty-year unbroken chain.

To properly understand and utilize the Act, an attorney examining title must understand the Act's critical terms.

(a) *Person*

Section 601(a) establishes that a "person" may be deemed to have marketable record title, but note that Section 601(b) excludes the State of Vermont, political subdivisions of the state, and the United States as "persons" under the Act.

Practice Note

Note also that another section of the Act, 27 V.S.A. § 604(b), limits the Act's scope against these same political entities, expressly establishing that the Act "shall not affect the right, title or interest in real estate owned or held by the United States, the state of Vermont, or any political subdivision of the state." If the practitioner is aware of a potential governmental interest in the property, additional research may be required.

(b) *Unbroken Chain of Title*

Section 602(a) of the Marketable Record Title Act defines the requisite "unbroken chain of title." Under this subsection,

> (a) A person shall be deemed to hold an unbroken chain of title to an interest in real estate for purposes of this subchapter when the official public records disclose:
>
> (1) A conveyance not less than 40 years in the past, properly executed and recorded according to law, which purports to create such interest in such person with nothing appearing of record during the 40-year period purporting to divest the person of the purported interest; or
>
> (2) A conveyance not less than 40 years in the past, executed and recorded according to law, which purports to create such interest in some other person and other conveyances or events of record by which the purported interest has become vested in the person first referred to, with nothing appearing of record during the 40-year period purporting to divest the person first referred to of such interest.

Practice Note

Under the Marketable Record Title Act, the last link, i.e. first in time, in an unbroken title chain must be a conveyance of an interest recorded for at least forty years. Because the Act protects only an unbroken chain to a particular interest in property, a deed containing a property description only by reference to an earlier deed is inadequate as a last link. Further documents should be reviewed to identify and confirm that the particular interest being transferred by the document in the chain is the same as the one being searched.

(c) *Conveyance*

Section 602(c) of the Marketable Record Title Act defines the conveyances that may be the last link of an unbroken chain of title. Under this subsection, "'conveyance' means any deed, lease, decree or other written instrument proper on its face to transfer title to an interest in real estate under the laws of this state, and also includes the transfer of an interest in real estate by inheritance or descent occasioned by death." In practice, the Marketable Record Title Act imposes a forty-year statute of limitations for certain, but not all, claims of divestiture against the interest being established by the Act. It also extinguishes interests, liens, claims, and charges, the existence of which depends in whole or in part upon any act, transaction, event, or omission that occurred prior to such forty-year period, unless a written notice is recorded to preserve them against the effect of the Act. Pursuant to Section 603 of the Act,

> [a] person holding a marketable title under this subchapter shall hold the same, and it shall be taken by his or her successors in interest, free and clear of any and all interests, liens, claims and charges the existence of which depends in whole or in part upon any act, transaction, event or omission that occurred prior to such 40-year period, whether or not the instrument purporting to create such interest, lien, claim or charge

> was properly executed so as to validly create the interest, lien, claim or charge, and all such interests, liens, claims and charges are declared void and of no effect either at law or in equity, except that any such interest, lien, claim or charge may be preserved from the effect of this chapter if the holder of the interest files for record within the 40-year period, a notice in writing, duly verified by oath, setting forth the nature of the claim as provided in section 605 of this title.

Practice Note

"[A] claim of 'marketable title' pursuant to the statute does not trump a claim of record title pursuant to a chain of deeds." *Chase v. Taft Hill Tree Farm, Inc.*, Entry Order, No. 2014-092 (Vt. 2014).

For a written notice to be effective to preserve any such interest, lien, claim, or charge from the effect of the Marketable Record Title Act, it must comply with Section 605. That section provides:

> (a) To be effective the notice referred to in section 603 of this title shall contain a full and accurate description of the land affected by the notice, set forth in particular terms, shall be recorded at length in the land records in the office where a deed of the land is required to be recorded, and shall be indexed in the general index for deeds under the claimant's name as grantee and under the name of the current record owner of the land as grantor.
>
> (b) The notice provided for in this section and section 603 of this title may be filed by a claimant or any person acting on behalf of a claimant if such claimant is:
>
> (1) Under a disability;
>
> (2) Unable to assert a claim on his or her own behalf; or
>
> (3) One of a class whose identity is uncertain.
>
> (c) When a notice is filed for record under this section, it shall remain effective for a period of 40 years from the date of filing.

(d) *Preserved Claims Under the Act*

However, not all claims against the title interest are affected by the limitations of the Act. Certain claims to the interest and defects of title are not extinguished or barred under the Record Marketable Title Act if a notice is not recorded. Section 604(a) defines the claimed interests that are not affected by the forty-year period established under the Act, which include

> (1) the interest of any lessor or his or her successor as reversioner of the right to possession on the expiration of any lease or any lessee or the successor to his or her rights in and to any lease;

(2) any interest of a mortgagee, or interest in the nature of a mortgagee's interest, until after the obligation secured by the mortgage has become due and payable;

(3) any interest of a mortgagee, or interest in the nature of a mortgagee's interest, when the instrument creating the interest contains no due date for the obligation secured thereby;

(4) any interest held by adverse possession not evidenced by a recorded instrument;

(5) any remainder interest, reverter or reversionary interest or interest arising upon a condition, except an interest arising upon a condition as to the distance between a structure on real estate and a public highway or other property of a municipality;

(6) any easement or interest in the nature of an easement, the easement, the existence of which is clearly observable by physical evidences of its use;

(7) any easement or interest in the nature of an easement, or any rights appurtenant thereto granted, excepted, or reserved by a recorded instrument creating such easement or interest, or

(8) any conservation rights or interests created pursuant to 10 V.S.A. chapter 155.

Practice Note

Subsection (a)(6) of 27 V.S.A. § 604 preserves easements or interests in the nature of an easement, the existence of which is clearly observable by physical evidences of its use, even if it is not recorded. This suggests that a survey or other physical examination of the property may be recommended to verify whether there is observable evidence of such possible uses. For example, in *Richart v. Jackson*, 171 Vt. 94 (2000), the Vermont Supreme Court held that the existence of a dock and a small boathouse put the buyers on notice that other persons were claiming an interest in the property and that further inquiry would have discovered a declaration of covenants that allowed a homeowners association to maintain the dock and the boathouse and assess maintenance fees. Because the court held that reasonable inquiry would have discovered the declaration, the buyers were held liable for such fees even though the declaration was not recorded in the land records prior to the conveyance of their property to their predecessor in title. *See also Traders Inc. v. Bartholomew*, 142 Vt. 486, 492–93 (1983) (holding an easement by necessity to be exempt from the Act because it was clearly observable due to its use).

Practice Note

Comment 4 to Standard 2.2 alerts title examiners to the possibility that certain documents discovered in the title search may put the examiner on inquiry notice necessitating further review or research. The subcommittee concluded that a person with actual or inquiry notice may be bound by the obligations that would be disclosed by a diligent inquiry as established in *Richart* (discussed above).

§ 7.3 CONVEYANCING REQUIREMENTS

The manner of conveying an interest or an estate in real property in Vermont is provided in 27 V.S.A. § 301: "Conveyance of land or of an estate or interest therein may be made by deed executed by a person having authority to convey the same, or by his or her attorney, and acknowledged and recorded as provided in this chapter."

§ 7.3.1 Vermont Deed Customs

Vermont does not have a statutory form of deed. By custom and practice, the most common form of conveyance instrument in Vermont is a warranty deed. The customary form of warranty deed includes the following:

- a preamble naming the grantor and the grantee,
- granting language effectuating the conveyance,
- a description of the property being conveyed,
- the habendum ("to have and to hold"),
- four expressly stated warranties,
- an execution block for the grantor, and
- a notarial acknowledgment.

Typically, Vermont warranty deeds expressly include the four following warranty covenants:

- title: the grantor promises that the grantor owns the title purportedly conveyed by the deed;
- seisin: the grantor promises that its possession of the property follows with its title and is not subject to superior rights;
- against encumbrances: the grantor promises that its title is not subject to any encumbrances or claims not disclosed in the deed (This covenant extends as far back in time as any encumbrance may be lawfully asserted and is not limited by the forty-year period stated in Vermont's Marketable Record Title Act. And, as described above, this covenant may include the promise that certain permitting requirements have been met.); and
- to defend: the grantor promises to defend any claim against the title by third persons.

Practice Note

If the buyer is satisfied that it will receive marketable title without offending deed restrictions that the seller wishes to impose, the inquiry ends. Marketable title cannot be used to advance the interests of the seller against the wishes and interests of the buyer. A proposed deed provision requiring the buyer to pay common area maintenance fees to the seller based upon a permit condition requiring property maintenance fails. *See Clayton v. Clayton Invs. Inc.*, 2007 VT 38.

The use of a warranty deed in Vermont allows application of the doctrine of after-acquired title (also referred to as the doctrine of estoppel by deed).

> If a warranty deed or another instrument containing covenants of warranty similar to a warranty deed is a wild instrument and the grantor of such wild instrument subsequently acquires title to the property purported to be conveyed by the wild instrument, then the wild instrument shall be effective to convey the title described in the wild instrument to the grantee named in the wild instrument.

Vermont Title Standard 2.4A. For Vermont cases related to after-acquired title, see *Cross v. Martin*, 46 Vt. 14 (1873), and *President and Fellows of Middlebury College v. Cheney*, 1 Vt. 336 (1828).

One variant of the warranty deed is a limited warranty deed, also sometimes referred to as a special warranty deed. A grantor using a limited warranty deed expressly modifies the deed covenants to warrant only that the grantor has done nothing to encumber the title during the period of its ownership but expressly makes no warranty of title for any period prior to the grantor's ownership.

Quitclaim deeds are also used in Vermont. A quitclaim deed promises to pass only the status of title that the grantor may have at the time of making the deed. This is a valid conveyance and is effective to pass whatever title the grantor may have, though the conveyance is without the typical covenants of a warranty deed. Most commonly, quitclaim deeds are used in Vermont to release claims or interest in property that the grantor may have or if the status of title is unsure. No after-acquired title passes with a quitclaim deed.

Corrective deeds should be used with caution.

> A grantor who has conveyed by an effective, unambiguous deed cannot, by executing a subsequent deed, make a substantial change in the name of the grantee, decrease the size of the premises or the extent of the estate granted, impose a condition or limitation upon the interest granted, or otherwise diminish the grant of the prior deed, even though the corrective deed purports to correct or modify the prior deed. Recording of a deed that violates this standard will not impair the marketability of the title established by the prior deed.

Vermont Title Standard 4.1.

Practice Note

Comment 1 to Title Standard 4.1 cautions as follows:

> A grantor may not undo or qualify an otherwise valid conveyance in order to correct or modify the prior valid conveyance unilaterally. To effect any change of the type de-

> scribed in this standard, the original grantee or his or her successor should convey back to the grantor of the prior deed and the grantor of the prior deed should then execute a corrective deed effecting the change which should then be recorded.

§ 7.3.2 Deeds by Trustees and Deeds to Trust

Pursuant to 1 V.S.A. § 128, a trust is not a person under Vermont law, so title to trust-held property is properly vested in the trustees of the trust. Similarly, property that is held in trust can be properly conveyed only by the current trustees of the trust.

Notwithstanding the foregoing, 27 V.S.A. § 351(a) deems a conveyance or a grant of an interest in real or personal property made to a trust, that names the trust as a grantee, to be a conveyance to the trustee of such trust in like manner and effect as if the trustee had been named the grantee, preserving the validity of such trust conveyances. Similarly, 27 V.S.A. § 351(b) validates discharges, mortgage discharges, releases, and conveyances made by a trust that names the trust as the grantor if executed by the trustee authorized to execute the instrument. These sections apply retroactively to trust instruments whenever created and executed and to past and future conveyances, grants, mortgage discharges, satisfactions, and releases.

When giving or receiving a deed executed by a trustee, a certification of trust may be offered or requested. The contents of such certification are established by 14A V.S.A. § 1013, which also provides a statutory presumption of the trustee's authority to act as specified. Trustee certifications are frequently and customarily recorded in the land records to establish the trustee's authority to act, though there is no statutory requirement for the demand of such certificate.

§ 7.3.3 Deeds by Executors, Administrators and Guardians

Executors and estate administrators, certain trusts created by the terms of a will or controlled by the Probate Division, and guardians may not sell, lease, mortgage, or otherwise convey interests in property without a license from the Probate Court. While such a license is generally not subject to any statutory time limit on its exercise, the license itself may include such limitation. An exception exists for guardians' licenses, which are valid for only two years. Some licenses authorize a negotiated private sale, while other licenses may require a public sale at auction or by sealed bid. Careful attention should be given to the terms of any license to sell, both to confirm that the requirements are satisfied and to avoid doubt about the validity of any such transaction.

Similar ancillary proceedings are required for estates, testamentary trusts, and guardianships under the jurisdiction of other states if the transaction involves Vermont property. In such cases, an ancillary proceeding may be required in Vermont in the Probate Division with jurisdiction over the property.

§ 7.3.4 Deeds by Divorce Judgment

If properly recorded, divorce judgments are effective to convey property. A certified copy of the judgment or relevant parts thereof, when recorded in the town land records in which the property is located, is effective to convey or encumber the real estate in accordance with the terms of the judgment as if the judgment were a deed. 15 V.S.A. § 754. In practice, some Vermont attorneys assert that the decree must contain words of conveyance to become effective or that the decree itself is not effective if it suggests that future documents may be executed to effect a transfer, though these positions are not supported by the statute's plain language.

Practice Note

Many divorce decrees contain ambiguous or ill-described property descriptions. Pay careful attention to verify that the property is sufficiently described for the conveyance to be effective without clouding the title.

§ 7.3.5 Probate Decree

Under Vermont law, real property, but not personal property, passes from the deceased to the heirs or persons entitled to the property under the will immediately upon death. However, the property is burdened with a claim for the amount of the deceased person's debts. The executor or administrator may be required to sell the property to pay the estate's expenses. If the property is not sold to pay such debts, the Probate Court issues a decree confirming that the debts are fully paid and confirming the conveyance of the property to the persons who received it. A decree of distribution from a Probate Division is evidence of the finality of a transfer of property from the deceased to the heirs or other persons entitled to the property.

Practice Note

The decree may include limitations on the transfer of the property, including time limits, such as only a life estate for the devisee, or that all of the heirs took title as either tenants in common or as joint tenants. Pay careful attention to the express terms of the probate decree to confirm the nature of the estate that is confirmed.

§ 7.4 IDENTIFYING THE REAL ESTATE AND PROPERTY DESCRIPTIONS

Confirming that the property affected by an instrument is the same as the property being searched is an essential element of title examination. An effective land records search requires the comparison of sequential property descriptions for likeness or aspects of dissimilarity. If the description has changed, the examiner should determine how and why.

The property description is essential to a valid instrument because it identifies the affected property. If the description is insufficient to describe any parcel of land or is so ambiguous that it may refer to more than one parcel of land, the description is

defective. If the defect is not readily cured, the instrument may be deemed ineffective and the purported conveyance may be invalid. Property descriptions may include one or more of the following methods of description.

§ 7.4.1 Reference to Prior Deeds and Instruments

Practice Note

When a title examiner encounters a property description by prior instrument reference, each referenced document must be reviewed, even if the document would otherwise be outside of the chain of title, for the law considers each referenced document to be brought forward as though set out in full. See the discussion of the Marketable Record Title Act, below.

Practice Note

A problem arises when an element of the reference is incorrect. Minor errors that are readily resolved, such as transposed dates or book references or misspelled names, may not render a document fatally defective if there is sufficient information in the document to sufficiently identify the correct reference. Conversely, an error that is so egregious that the property cannot be determined may render the document defective. *See* Vermont Title Standard 10.1.

§ 7.4.2 Reference to Lot Number and Map

Practice Note

A Vermont title examiner relying upon a map reference should determine that the plan has been approved, as most towns have subdivision ordinances requiring that subdivisions be shown on an approved plat. Moreover, such plan approvals expire if the plan is not recorded within ninety days of the approval, so the title examiner should confirm that the recording was timely and prior to expiration of any approval. Finally, the subdivision's boundaries, roadways, common areas, and utilities should be the same on the plan used for the property description and on the approved subdivision plan.

§ 7.4.3 Reference to Monuments

Practice Note

Monuments may be natural, such as rivers and trees, or artificial, such as iron pins, pipes, and abutter boundaries. Also, the law presumes that reference to a cardinal direction (north, south, east or west) is a true compass direction unless modified by words such as "generally" or "northerly." Monuments may be lost or multiple monuments may be found in differing locations. Resulting ambiguity may require the opinion of a surveyor to resolve, and if too ambiguous to be determined, a monumented description may be too inaccurate to sustain a valid document or instrument of conveyance.

§ 7.4.4 Description by Course and Distance

Practice Note

Descriptions by courses and distances should only be taken from surveys prepared by licensed surveyors. Ensure that the courses close and that there are no transposed errors in the chain of title.

§ 7.4.5 Ambiguity and Rules of Construction

When ambiguity in a description is discovered, it is paramount to enforce the intent of the parties. The intention of the parties, set out in the words of the instrument itself, must be given effect. *See Withington v. Derrick*, 153 Vt. 598, 603 (1990); *Spooner v. Menard*, 124 Vt. 61, 62 (1963). First, effect should be given to every part within the four corners of the instrument. If conflict prevails, obviously incorrect or the least reliable provisions may be discarded. If conflict still prevails, the grantee is entitled to a construction most favorable to the grantee and against the grantor who drew the deed. See *Spooner v. Menard*, 124 Vt. at 63. However, if ambiguity is not well established or if the interpretations raising ambiguity are not equally reasonable, the grantee may be denied such favorable construction. *See deNeergaard v. Dillingham*, 123 Vt. 327, 332 (1963).

If ambiguity cannot be resolved by the four corners of the document, evidence of the making and execution of the instrument and the parties' situations may be appropriate. *See Sheldon Slate Prods. Co. v. Kurjiaka*, 124 Vt. 261, 267 (1964). If the parties have given effect to a particular construction, that effect may be given credence. *See Kennedy v. Rutter*, 110 Vt. 332 (1939).

Further rules of construction have also been established by the Vermont courts.

- A particular description will always control a general description. *See Pine Haven N. Shore Ass'n v. Nesti*, 138 Vt. 381, 386 (1980). Reference to a prior deed is a general description. *Pine Haven N. Shore Ass'n v. Nesti*, 138 Vt. at 386.
- Monument references prevail over distance descriptions and acreage descriptions. *See Phillips v. Savage*, 151 Vt. 118, 119 (1989). Reference to a neighboring property's boundary is a monument reference. *Phillips v. Savage*, 151 Vt. at 119.
- Natural monuments prevail over artificial ones, and artificial monuments over courses and distances. *See Marshall v. Bruce*, 149 Vt. 351, 353 (1988); s*ee also Haddock v. Poutre*, 139 Vt. 124, 127 (1980).
- The least reliable form of description is a statement of acreage. *See* S*tate Highway Bd. v. Jamac Corp*., 131 Vt. 510, 514 (1973).

§ 7.5 AUTHORITY

§ 7.5.1 Name Variances in the Chain of Title

> It should be manifest from the face of the document that the grantor is the same as the grantee in the instrument conveying title to the grantor. Generally, this means that the name of the grantor will be the same as the prior grantee; or, a subsequent deed contains a recital that the grantor in such deed and the grantee in a prior deed are the same person. Notwithstanding, a greater degree of liberality should be indulged with the greater lapse of time and in the absence of circumstances appearing in the land records which raise reasonable doubt as to the identity of the parties.

Vermont Title Standard 8.1.

> Identity of parties should be accepted as sufficiently established where: (a) common abbreviations, derivatives or nicknames are used for first names; (b) differently spelled names sound alike, or their sounds cannot be distinguished easily, or common usage by corruption or abbreviation has made their pronunciation identical; or (c) in one instance a first name or names of a person is or are used, and in another instance the initial letter or letters only of any such first name or names is or are used but the surnames are the same or *idem sonans*; (d) in one instance a first name or initial letter is used, and in another instance is omitted, but in both instances the other first names or initial letters correspond and the surnames are the same or *idem sonans*.

Vermont Title Standard 8.1, Comment 1.

Practice Note

"In the event of a change in the name or status of an owner of an interest in real estate, including a merger or consolidation, the examining attorney should assure himself/herself that the requirements of 27 V.S.A. § 350 have been met." Vermont Title Standard 8.1, Comment 2.

Section 350 provides:

> Any person or corporation owning real estate or having an interest in real estate whose name has been changed, and any corporation which has been merged into or consolidated with another, may file with the town clerk of the town in which the real estate is located a certificate giving the names before and after the change, merger or consolidation, and the town clerk shall record and index the certificate in the land records.

§ 7.5.2 Attorney as Grantor; Powers of Attorney

In Vermont, a deed or other conveyance of lands or of an estate or interest therein may be executed on a grantor's behalf pursuant to a power of attorney. The manner of creating a power of attorney, and the scope and duties of the attorney, are set forth at 14 V.S.A. § 3501 et seq. Generally, a power of attorney for all lawful subjects and purposes is sufficient to convey real estate in Vermont. *See* 14 V.S.A. § 3504. In practice, a more-limited power of attorney is frequently used for real estate transactions only, which power of attorney may describe the involved property, specify more-limited powers for the agent, and curtail the duration of the appointed agency.

Practice Note

No agent may convey lands belonging to the principal or an estate or interest therein unless the terms of the power of attorney explicitly provide that the agent has such authority and the power of attorney meets the specific execution requirements of 14 V.S.A. § 3503. *See* 14 V.S.A. § 3504(c).

Pursuant to 27 V.S.A. §305, to be effective, a power of attorney must be signed, witnessed by one or more witnesses, acknowledged, and recorded in the land records where such deed is required to be recorded. Prior to statutory amendment of this section in 1995, two witnesses were required for an effective power of attorney. This amendment applied retroactively to all deeds and conveyances executed prior to July 1, 1995, excepting only those being contested in a suit begun or pending on that date.

The general rule that a power of attorney may not be witnessed and notarized by the same person, *see* 14 V.S.A. § 3503(a), is waived for a limited power of attorney for the sale, transfer, or mortgage of real estate executed in conformance with 27 V.S.A. § 305, provided that the real estate is specifically identified and the duration of the power of attorney is no more than ninety days.

There is a statutory presumption of validity for any power of attorney executed in compliance with 14 V.S.A. § 3501 et seq., and by statute, a photocopy or an electronic facsimile of a duly executed original power of attorney may be relied upon to the same extent as the original. 14 V.S.A. § 3513.

Practice Note

Title Standard 6.5 provides:

> In the absence of actual knowledge or constructive notice derived from properly indexed instruments in the chain of title to the contrary, a title examiner may presume that an individual grantor who has conveyed property pursuant to a properly executed and recorded power of attorney, whether or not durable, was (a) competent to execute the power of attorney, (b) competent and alive at the time the deed was delivered, and (c) the power of attorney had not been revoked at the time the deed was delivered.

Practice Note

The age of the power of attorney is not relevant to its validity unless the power of attorney has expired by its own terms. *See* 14 V.S.A. § 3502(d)(1). Despite the presumption of validity established in 14 V.S.A. § 3513, if a power of attorney is being used long after it was granted, an affidavit may be requested confirming that the power of attorney has not been terminated for any reason specified by statute. If the power of attorney is not "durable" and is being used in a current transaction, an affidavit should be provided if requested and may be recorded. *See* 14 V.S.A. § 3507(d); Vermont Title Standard 6.5, Comment 3. Termination of a power of attorney does not revoke properly taken action when the power of attorney was in effect.

§ 7.5.3 Statutory "Persons" as Grantor

(a) *Corporations*

"A public or private corporation authorized to hold real estate may convey the same by an agent appointed by vote for that purpose." 27 V.S.A. § 346.

(b) *Limited Liability Companies*

The Vermont Limited Liability Company statute is set forth in Chapter 25 of Title 11 of the Vermont Statutes Annotated. Vermont Title Standard 22.1(A) provides:

> When a deed or other instrument of a limited liability company ("LLC"), whether foreign or domestic, appears in the chain of title, and with respect to a domestic LLC, such instrument is dated and recorded on or after 1 July 1996, and is executed by a person or persons described therein as managers or members of the limited liability company, it may be presumed that such person or persons was or were authorized to execute such deed or other instrument for and on behalf of the limited liability company named therein, and that the limited liability company was legally in existence at the time the instrument took effect.
>
> **Comment 3:** When an attorney is merely examining a recorded deed or other instrument in the chain of title which names an LLC as the grantor and has been executed by a person on behalf of the LLC, in the absence of actual knowledge to the contrary, the following presumptions may be made by the title examiner: a) if the instrument was executed by a person described as a member of the LLC, it may be presumed that the management of the LLC is in its members and that the person who executed the instrument was, at the time of such execution, a member of the LLC; b) if the instrument was executed by a person described as a manager of the LLC, it may be presumed

> that the management of the LLC was vested in one or more managers under its articles of organization and that the person executing the instrument was, at the time of such execution, a manager of the LLC; and c) it may be presumed that the person who executed the instrument on behalf of the LLC was duly authorized to execute and deliver the deed or other instrument on behalf of the LLC and that the conveyance had been approved by the necessary vote of the members or managers of the LLC as required by statute or by the operating agreement of the LLC.
>
> Vermont Title Standard 22.1, Comment 3.

Vermont Title Standard 22.1(B) further provides:

> Where a limited liability company is designated as the grantee or releasee in a deed or other instrument and with respect to a domestic LLC, such instrument is dated and recorded on or after 1 July 1996, it shall be presumed that such limited liability company was legally in existence at the time of delivery of such deed or other instrument.
>
> **Comment 1:** It is probable that the concept of a de facto LLC would be applied by Vermont courts to deal with the problem of acquisition of title to real property by an LLC which initial articles of organization had not been filed with or accepted by the Secretary of State at the time of a conveyance into a purported LLC. Similarly, a conveyance by an LLC of property in its name where the LLC had not been properly formed, or which having been properly formed, had been dissolved, raises the same question as in the corporate context. It would seem reasonable and practical to assume that courts would apply a de facto LLC doctrine to recognize the validity of such conveyances. For these reasons the title examiner may presume that a grantee named in a deed in the chain of title which is described as a limited liability company was in fact legally in existence at the time the instrument took effect, provided the deed was dated and recorded on or after 1 July 1996. The title examiner may also presume that, where a deed or other instrument of conveyance has purportedly been executed on behalf of an LLC, the LLC was in existence at the time of the execution and delivery of such deed or other instrument.
>
> Vermont Title Standard 22.1, Comment 1.

(c) *Partnerships*

Partnerships are recognized in Vermont to be the association of two or more persons to carry on as co-owners of a business for profit formed under 11 V.S.A. § 3212, predecessor law, or comparable law from another jurisdiction. 11 V.S.A. § 3201(6).

The acquisition of partnership property is addressed in 11 V.S.A. § 3214:

> (a) Property is partnership property if acquired in the name of:
>
> (1) the partnership; or
>
> (2) one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.
>
> (b) Property is acquired in the name of the partnership by a transfer to:
>
> (1) the partnership in its name; or
>
> (2) one or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.
>
> (c) Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.
>
> (d) Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.

The transfer of partnership property is addressed in 11 V.S.A. §3222:

> (a) Partnership property may be transferred as follows:
>
> (1) Subject to the effect of a statement of partnership authority under section 3223 of this title, partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by a partner in the partnership name.
>
> (2) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.
>
> (3) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity

as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held."

(b) A partnership may recover partnership property from a transferee only if it proves that execution of the instrument of initial transfer did not bind the partnership under section 3221 of this title; and

(1) as to a subsequent transferee who gave value for property transferred under subdivisions (a)(1) and (2) of this section, proves that the subsequent transferee knew or had received a notification that the person who executed the instrument of initial transfer lacked authority to bind the partnership; or

(2) as to a transferee who gave value for property transferred under subdivision (a)(3) of this section, proves that the transferee knew or had received a notification that the property was partnership property and that the person who executed the instrument of initial transfer lacked authority to bind the partnership.

(c) A partnership may not recover partnership property from a subsequent transferee if the partnership would not have been entitled to recover the property, under subsection (b) of this section, from any earlier transferee of the property.

(d) If a person holds all of the partners' interests in the partnership, all of the partnership property vests in that person. The person may execute a document in the name of the partnership to evidence vesting of the property in that person and may file or record the document.

(d) *Multiple Owners*

Tenants in Common

Conveyances and devises of lands, whether for years, for life or in fee, made to two or more persons, shall be construed to create estates in common and not in joint tenancy, unless it is consistently and unambiguously expressed therein that the grantees or devisees shall take the lands jointly or as joint tenants or in joint tenancy or to them and the survivors of them. This provision shall not apply to (a) devises or conveyances made (i) in trust; (ii) a married couple; (iii) to parties who are parties to a civil union where the civil union and the conveyance were both made after June 30, 2000; or (b) a conveyance in which it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy.

Vt. Title Standard 14.1.

"In the event that the Grant clause and the Habendum clause in a particular deed specify different tenancies, it is likely that the presumption would be that the deed creates a tenancy in common." Vermont Title Standard 14.1, Comment 4 (quoting *Kipp v. Chips Estate*, 169 Vt. 102 (1999)).

In summary, Vermont law regards tenancies in common as follows:

- Interest can be conveyed without consent of others.
- In the event of death, ownership passes in accordance with will or state law.
- Probate is typically required to confirm title in heirs.
- Death of out-of-state owner requires two probate proceedings, one in the decedent's home state and one in the state where the land is located.

Joint Tenants with Right of Survivorship

> The formation of a joint tenancy must satisfy the four unities, being the unity of time, title, interest and possession. The unity of time requires that the estate of the tenants are vested for one and the same period (e.g.: joint tenants for a term of years, joint tenants in fee simple; the estates are running at the same time and for the same length of time; joint estates cannot run for different or successive time periods); The unity of title requires that the joint estate of all of the tenants be acquired in a single transfer. In contrast, tenants in common may take property by several titles. The unity of interest requires that all tenants acquire and hold the same size or percentage share; joint tenants may not have joint interests in a property of different character, scope or size. The unity of possession requires that the tenants hold the same undivided possession of the whole and enjoy the same rights until the death of one. See 27 V.S.A. § 349 for statutory modifications to creation of jointly held estates.

Title Standard 14.1, cmt. 8.

In summary, Vermont law regards joint tenancy with a right of survivorship as follows:

- In the event of death of any, title automatically passes to surviving owners without probate.
- There is no required deed or probate; merely recording a death certificate is sufficient confirmation, but it is not required.
- An interest can be conveyed without the consent of others.

Tenancy by the Entirety; Marriage and Civil Unions

> Conveyances or devises of an interest in land to two persons whose marriage or civil union is recognized by the State of Vermont creates a tenancy by the entirety, unless it manifestly

> appears from the tenor of the instrument that it was intended to create an estate in common or a joint tenancy.

Title Standard 14.1. "The common law incident of survivorship prevails for tenancies by the entirety in Vermont." Title Standard 14.1, cmt. 1 (citing *Town of Corinth v. Emery*, 63 Vt. 505 (1891)).

In summary, Vermont law regards tenancy by the entirety as follows:

- available only to married couples,
- cannot be conveyed without the consent of both,
- a creditor of one cannot reach the asset, and
- by statute, "to A and B, partners to a civil union" creates a tenancy by the entirety. *See* 15 V.S.A. § 1204(e)(1).

Practice Note

If the conveyance does not state the grantees' marital relationship, that does not necessarily impair marketability. Title Standard 14.1, Comment 2 provides guidance on this situation:

> The failure to identify or state the marital relationship of plural grantees in a conveyance does not impair marketability if such identity or relationship is otherwise established by, or can be readily inferred from, other recorded instruments, acknowledgments or affidavits, it is good practice, however, to recite the marital or civil union relationship in the deed; i.e.: "A & B, husband and wife as tenants by the entirety" or "A & B, parties to a civil union as tenants by the entirety" as applicable.

§ 7.6 WITNESS REQUIREMENTS

Vermont no longer requires that deeds or other conveyances of lands, or of an estate or interest therein, be witnessed.

Practice Note

Prior to November 1, 2004, there was a requirement that each signature be witnessed by at least one person. That requirement was removed by statutory amendment to 27 V.S.A. § 341, effective July 1, 2004. In practice, one will find many documents that are still executed with a witness to the signature. The existence of the witness does not affect the validity of the document, though it is no longer required. The witness requirement does persist for memoranda of leases under 27 V.S.A. § 341(c).

§ 7.7 ACKNOWLEDGED

By statute, "[d]eeds and other conveyances of lands, or of an estate or interest therein, shall be signed by the party granting the same and acknowledged by the grantor before a town clerk, notary public, master, county clerk or judge or register of probate." 27 V.S.A. § 341(a). In Vermont, such acknowledgement before a notary public is valid without any requirement for an official seal. 27 V.S.A. § 341(a).

Deeds, mortgages, and other conveyances of land in fee simple or for a term of life, or a lease for a term in excess of more than one year, that are not properly acknowledged are not effectual against any person but the grantor and his or her heirs. 27 V.S.A. § 342.

Deeds and similar conveyances may be acknowledged out of state and still be effective. Pursuant to 27 V.S.A. § 379,

> (a) If deeds and other conveyances, and powers of attorney for the conveyance of lands, the acknowledgment or proof of which is taken out of state, are certified agreeably to the laws of the state, province or kingdom in which such acknowledgment or proof is taken, they shall be as valid as though the same were taken before a proper officer or court in this state. The proof of the same may be taken, and the same acknowledged with like effect before a justice, magistrate or notary public within the United States or in a foreign country, before a commissioner appointed for that purpose by the governor of this state, or before a minister, charge d'affaires, consul or vice consul of the United States in a foreign country.
>
> (b) Acknowledgments for deeds and other conveyances, and powers of attorney for the conveyance of lands, which are taken out of state before a proper officer of this state, shall be valid as if taken within the state.

If a grantor dies or leaves the state without validly acknowledging his deed, or if a grantor refuses to acknowledge a deed, execution may be proven by application to a justice of the Vermont Supreme Court or a judge of the Superior Court in the manner provided by 27 V.S.A. §§ 371–76. During such proceedings, the unacknowledged deed may be recorded and when so recorded in the proper office it shall be as effectual as though the same had been duly acknowledged and recorded until the later of sixty days thereafter or sixty days after the termination of the proceedings. 27 V.S.A. § 378.

§ 7.8 RECORDING REQUIREMENTS

(a) *Deeds and Other Conveyances of Lands, Estates, and Interests*

Deeds and other conveyances of lands, or of an estate or interest therein, shall be recorded at length in the clerk's office of the town in which such lands lie. 27 V.S.A.

§ 341(a). If the land is not in an organized town or similar, the conveyance must be recorded by the clerk of the county in which such lands lie in a book kept by the clerk for such purpose." 27 V.S.A. § 403.

To be recorded, any deed or other similar conveyance "which includes a reference to a survey prepared or revised after July 1, 1988 may be recorded only if it is accompanied by the survey to which it refers, or cites the volume and page in the land records showing where the survey has previously been recorded." 27 V.S.A. § 341(b).

Deeds, mortgages, and other conveyances of land in fee simple or for a term of life, or a lease for a term in excess of more than one year, that are not properly recorded are not effectual against any person but the grantor and his or her heirs. 27 V.S.A. § 342.

Practice Note

Timeliness of recording does not render a recorded document ineffectual. "The fact that the fourth deed was not recorded until . . . eighteen years after its execution and five years after the underlying mortgage was satisfied, does not render it invalid. See *In Re Lane's Estate*, 79 Vt. 323, 328 (1906) (deed executed and delivered in 1880 effective as of date of delivery, although not recorded until 1901)." *Merritt v. Merritt*, Docket No. 83-328 (Vt. 1985).

> Vermont is a "notice" state. Delivery of a deed, a mortgage, or other conveyance of land in fee simple or for term of life, or a lease for more than one year to a grantee who has no notice of a prior conveyance to another, establishes priority in the grantee without notice. The instrument constitutes constructive notice as of the time it is recorded.

Title Standard 2.5.

> Vermont is a pure "notice" state, not a "race-notice" state, because a claimant does not have to record to perfect a claim nor win a race to the land records in addition to giving notice nor even record at all, to have good title. *Hemingway v. Shatney*, 152 Vt. 600, 603-4 (1989). Under *Hemingway*, Vermont's core recording provision 27 V.S.A. § 342 is merely a means, albeit a powerful one, of giving constructive notice, and so establishing priority, of one's claim against the world.

Title Standard 2.5, cmt. 1.

Practice Note

Transcription and/or recording errors by the clerk do not affect the recording's effectiveness. *See, e.g.,* Title Standard 2.6 ("An instrument is considered to be recorded and effective against subsequent parties from the time it is delivered to the town clerk, even though there is (1) a delay in the transcribing or indexing; (2) a complete failure to transcribe or index; or (3) an error by the town clerk in the transcribing or indexing of the

same."); *Haner v. Bruce*, 146 Vt. 262, 264 (1985) (proper recording by the clerk is constructive notice notwithstanding clerical errors attributable to him or her in indexing the instrument in the town land records). The town clerk's indices are not part of the record; "thus the complete failure to index a recorded instrument does not invalidate the recording." Title Standard 2.6, cmt. 1.

(b) *Leases and Notices or Memoranda of Leases*

A lease with a term of more than one year "need not be recorded at length if a notice or memorandum of lease, which is executed, witnessed, and acknowledged, . . . is recorded in the land records of the town in which the leased property is located." 27 V.S.A. § 341(c). To be effective, pursuant to this section the memorandum of lease shall contain at least the following information:

> (1) the names of the parties to the lease as set forth in the lease;
>
> (2) a statement of the rights of a party to extend or renew the lease;
>
> (3) any addresses set forth in the lease as those of the parties;
>
> (4) the date of the execution of the lease;
>
> (5) the term of the lease, the date of commencement, and the date of termination;
>
> (6) a description of the real property as set forth in the lease;
>
> (7) a statement of the rights of a party to purchase the real property or exercise a right of first refusal with respect thereto;
>
> (8) a statement of any restrictions on assignment of the lease; and
>
> (9) the location of an original lease.

Practice Note

If the term of the recorded lease has expired, it is not a title encumbrance. Specifically, Title Standard 2.7 and comment 1 provide as follows:

> In the absence of notice of renewal arising from possession, record, or otherwise, a recorded lease or other instrument evidencing a right or interest in real property with a specified term does not constitute an encumbrance on title when the term expressed in such leases or other instrument has expired.
>
> **Comment 1.** The title examiner should disclose the existence of the instrument identifying the interest and an explanation of the reasons why the interest no longer constitutes an encumbrance on title.

§ 7.9 TITLES AND TITLE SEARCH

§ 7.9.1 Conducting Title Examinations

(a) *Basic Considerations*

When starting a title examination, you must first understand the scope of the search requested. Typical requests include: a full forty-year search, an update from a prior opinion or title policy, or a current owner search.

Prior to visiting the land records, call ahead and confirm open hours or unexpected closures. This is especially true for the offices in smaller towns which may have extremely limited availability. Town listers and zoning administrators often have different hours than the town clerk.

Gather information concerning the property ahead of time. Identify the book and page reference for the current owner's deed, or ideally, have a copy of the deed itself with you. Also look up the property address online in order to become familiar with the property's general location.

Upon arrival at the land records, sign in the log book and introduce yourself to the town staff. Ask for a tour of the office and for any unique filing systems. You will need to identify where the various instruments are indexed, as some may be separately indexed.

Once situated in the land records, ensure that the property has been accurately identified. If book and page information for the current owner's deed is not available, the grantor-grantee index must be used to aid in identifying the property. Once located, cross-reference the current owner's deed with other available information in the clerk's office to confirm that the correct property has been identified. Ask the clerk directly if he or she knows anything about the property. He or she can be an extremely useful resource. Also visit the assessor and/or the lister's office to view and obtain copies of the lister's card and tax map for identification purposes.

(b) *The Chain of Title*

The next step is to construct the chain of title. Starting with the current owner, search back in time to the first acceptable conveyance that is at least forty years old. This does not need to be a warranty deed. 27 V.S.A. § 602(c). Title Standard 2.1 provides:

> A Title Search covering a period to an instrument recorded at least 40 years is sufficient for a title purview of the Marketable Record Title Act (27 V.S.A., Ch 5), provided that the basis thereof is a deed, a deed under some governmental authority, a probate proceeding in which the property is reasonably identified or described, a mortgage deed subsequently foreclosed, or any other instrument which shows of record reasonable probability of title and possession thereunder, provided further, that

> none of the title instruments within that period actually searched discloses any title defects or outstanding interests in third parties, in which case, the search should be extended beyond the 40-year period in order to determine the existence and validity of such defects or interests at the time of the search.

Be sure to take detailed notes about the period of ownership for each grantee, as this will be necessary to search the title forward.

(c) *Out Conveyances*

After completing the chain of title, the next step is to search the title forward by reviewing the out conveyances for each grantee in the chain. Comment 3 to Title Standard 2.2 provides:

> Generally speaking, the period of constructive notice from the land records, and therefore the period of the title search, extends to a particular owner from the date such owner acquires title (not the date on which the transfer is recorded) to the date of the recording of a conveyance divesting the owner of the interest being examined. In this respect, such record notice and period of title search are corollary terms, the period of both being synonymous. If, after the recording of a deed from an owner, another deed is subsequently recorded from that same person to a different grantee (whether the date thereof is earlier or later is immaterial), a purchaser from the first grantee is not charged with constructive record notice of the second grantee's conveyance, though it is on record when the title is searched. This principle has general application in the case of two successive deeds from the same grantor, both deeds recorded in the order of their execution. A party thereafter purchasing from the first grantee is not charged with notice by reason of the record then existing of the second deed. This principle will also control the required period of search when the first of two deeds has been the last to be recorded.

Utilizing the notes taken to construct the chain of title, next search the grantor-grantee index for the period of property ownership of each grantee and identify any possible out conveyances (including easements and encumbrances that affect the property). Once all potential out conveyances have been identified, it may be possible to eliminate some from further consideration if the instrument is nonlocus to the property being searched or the instrument is a properly discharged mortgage. See 27 V.S.A. §§ 461–69.

If there is any uncertainty whether an out conveyance should be eliminated from further consideration, it is best practice to continue to note it for further assessment.

Review all pertinent instruments carefully, paying special attention to any language in the document which may indicate further research is required. For example, a deed may reference a subject easement or a covenant which would then need to be located and reviewed. Comments 6 and 7, respectively, to Title Standard 2.2 provide:

> Where an owner divides a tract of land, and, in conveying one portion of it, creates in favor of that grantee an easement or other right or interest over the portion retained, subsequent purchasers of such retained portion are charged with constructive notice of the existence of such easement or other right or interest, because the first recorded deed, even though conveying other land, is in the chain of title to the common grantor's remaining land. Therefore, the lack of actual notice or knowledge on the part of the subsequent purchaser to the existence of the easement or the fact that the deed stated that remaining property was free and clear of all encumbrances, are all immaterial.

and

> Because of these rules, the concept of chain of title and the corresponding duty of a title examiner, are not limited to transactions which involve the same land in which an interest is then being acquired but can and do extend to those transactions of the same grantor but involving other land.

Also carefully review any instruments relating to zoning, subdivision, development, and other permitting matters. As discussed further below, the zoning office will need to be visited to get a complete picture of the property's zoning status.

(d) *Additional Indices*

After completing the grantor-grantee index search, review any other index maintained by the clerk as well. For example, liens and surveys are commonly indexed separately. Comment 9 to Title Standard 2.2 states: "The term 'other appropriate indices' as used in this title standard includes the general grantor-grantee index (but does not include the indices of the individual record books), lien index, road record books, index of discharged instruments if kept separately, and the uniform commercial code financing statement index."

(e) *Other Documents*

Uniform Commercial Code (UCC) filings are typically stored in a separate area and should be reviewed back at least five years. UCC filings are also available online, as discussed below.

There will likely be a collection of instruments received for recording but not yet indexed that the clerk keeps at his or her desk. These are documents that have been recorded by virtue of being delivered to the town clerk. Review these recently received

documents for anything pertinent to the property. This establishes the period of examination up to the day of the visit to the town offices.

Also obtain the tax bill for the property, as well as any relevant tax information, e.g., current status of payments, tax year of the town. Either the clerk will provide this information directly or will indicate another person in the office who can. This person will also be able to provide information on the current status of water, sewer, and stormwater charges, if any.

As discussed in greater detail in § 7.10.2(d), below, visit the zoning office to review zoning records for permits and other issues. Collect all permits relevant to the property. Note that many of the permits will not have been recorded in the land records. In many instances, only notices of municipal permits are recorded. Ask the zoning officer if there are any known violations affecting the property.

(f) *Other Resources*

After returning from the land records, there are a number of online resources available to supplement what was found in the search. This includes:

- the Vermont Agency of Natural Resources (ANR) Act 250 database at http://www.anr.vermont.gov;
- the ANR wastewater permit database at http://www.anr.vermont.gov;
- the Vermont secretary of state at http://www.sec.state.vt.us;
- a UCC search; and
- corporate entity information.

§ 7.9.2 Potential Defects

There are a number of potential issues that may affect the documents pertinent to the property. These issues are described in greater detail with respect to requirements of conveyancing in Sections § 7.3 through § 7.8 above. These issues, and their potential remedies, include the following:

(a) *Defects of Execution*

If the document fails to state consideration or lacks the required witnesses or acknowledgement, it is not considered defective after it has been recorded for fifteen years. 27 V.S.A. § 348.

If an acknowledgement lacks a notary's seal, this is not considered a defect. 27 V.S.A. § 341(a).

If an instrument lacks an acknowledgement, it is effective only against the grantor and his or her heirs. 27 V.S.A. § 342.

An out-of-state acknowledgement is accepted in Vermont if it was executed properly in the state of execution. 27 V.S.A. § 379.

(b) *Name Variances*

Minor variations in the names of the grantor and the grantee are given leeway with the passage of time. Title Standard 8.1 provides:

> It should be manifest from the face of the document that the grantor is the same as the grantee in the instrument conveying title to the grantor. Generally, this means that the name of the grantor will be the same as the prior grantee; or, a subsequent deed contains a recital that the grantor in such deed and the grantee in a prior deed are the same person. Notwithstanding, a greater degree of liberality should be indulged with the greater lapse of time and in the absence of circumstances appearing in the land records which raise reasonable doubt as to the identity of the parties.

(c) *Powers of Attorney*

A power of attorney must be signed, witnessed by one person, acknowledged, and recorded. Title Standard 6.5 provides:

> In the absence of actual knowledge or constructive notice derived from properly indexed instruments in the chain of title to the contrary, a title examiner may presume that an individual grantor who has conveyed property pursuant to a properly executed and recorded power of attorney, whether or not durable, was (a) competent to execute the power of attorney, (b) competent and alive at the time the deed was delivered, and (c) the power of attorney had not been revoked at the time the deed was delivered.

(d) *Surveys*

Deeds after July 1, 1988 which refer to a survey or surveys that are being recorded in the land records must either be accompanied by the survey to which it refers or, if the survey has been previously recorded, cite the recording information. 27 V.S.A. § 341(b).

(e) *Corporate Authority*

Instruments executed on behalf of a corporate entity must indicate that the signature is the free act and deed of the individual as well as the entity. Title Standard 20.1 provides:

> When a conveyance or other instrument of a corporation executed in the name of the corporation appears in the chain of title

> and it is in proper form, it shall be presumed (1) that the person executing the instrument was the officer or agent they purported to be and was duly authorized to execute the instrument for and on behalf of the corporation; and (2) that the corporation was legally in existence at the time the instrument took effect.

(f) *Tenancy*

Conveyances to spouses, including partners to civil unions, are presumed to be by the entirety with rights of survivorship. Conveyances to nonspouses are presumed to be in common. Title Standard 14.1 provides:

> Conveyances and devises of lands, whether for years, for life or in fee, made to two or more persons, shall be construed to create estates in common and not in joint tenancy, unless it is consistently and unambiguously expressed therein that the grantees or devisees shall take the lands jointly or as joint tenants or in joint tenancy or to them and the survivors of them. This provision shall not apply to (a) devises or conveyances made (i) in trust; (ii) to a married couple; (iii) to parties who are parties to a civil union where the civil union and the conveyance were both made after June 30, 2000; or (b) a conveyance in which it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy.
>
> Conveyances or devises of an interest in land to two persons whose marriage or civil union is recognized by the State of Vermont creates a tenancy by the entirety, unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in common or a joint tenancy.

(g) *Death of Cograntor*

If a deed indicates that a party to a deed is now deceased, a death certificate should be located in either the vital records of the town or recorded in the land records. Title Standard 6.4 provides:

> If the grantor took title with a spouse or a partner to a civil union, a title examiner may presume the spouse or partner to a civil union to be deceased if (a) the deed contains a recitation to that effect and has been recorded for not less than fifteen (15) years with the clerk of the town where the real property is located; or (b) a death or burial certificate or decree issued by a court having competent jurisdiction, or other proof of death establishing the grantor's status as widowed, has been recorded or is available for filing with the clerk of the town where the real property is located.

(h) *Probate Licenses*

A probate license must be obtained and recorded by an estate prior to conveying property.

An heir's deed is considered valid after a fifteen-year period has passed. Title Standard 13.1 provides:

> A deed by heirs, whether in warranty or quitclaim form, shall be effective to pass title to real estate where the same has been of record for a period of at least fifteen years and it is established by corroborative evidence that the signatories of said deed are all of the decedent's heirs-at-law.

(i) *Leases*

After June 1, 1998, rather than recording an entire lease, a notice of lease may be recorded if it meets certain requirements. *See* § 7.8(b), above, and 27 V.S.A. § 341(c).

(j) *Trusts*

Conveyances involving trusts should be made to the trustee of the trust rather than to the trust itself, as the trust is not considered a "person" under Vermont law. A certificate of trust must be recorded with any conveyance and must meet very specific requirements. *See* 14A V.S.A. § 1013.

(k) *Mortgage Discharges*

Under Vermont law, there are several means of effectively discharging mortgages of record. Title Standard 18.1 describes the proper method for discharging a mortgage. These include the following:

By entry on the record

Pursuant to 27 V.S.A. § 461:

> Mortgages may be discharged by an entry on the margin of the record thereof in the record of deeds, acknowledging satisfaction of the mortgage, signed by the mortgagee or by his or her executor, administrator, assignee, attorney at law or attorney acting under a duly executed and recorded power of attorney, such signature to be witnessed by the town clerk or assistant town clerk having custody of such record. Such entry shall have the same effect as a deed of release acknowledged and recorded.

Practice Note

Where a nonresident mortgagee dies out of state, the mortgagee's fiduciary can discharge the mortgage without the need for ancillary administration in Vermont. Title Standard 18.1, cmt. 8.

By acknowledgement of payment

Pursuant to 27 V.S.A. § 462:

> Mortgages may also be discharged by the mortgagee or by his or her executor, administrator, assignee, attorney at law or attorney acting under a duly executed and recorded power of attorney, acknowledging payment thereof by an entry on the mortgage deed, signing the same in the presence of one or more witnesses, which entry, upon being recorded on the margin of the record of such mortgage in the record of deeds, shall discharge such mortgage and bar all actions brought thereon.

By separate instrument

Pursuant to 27 V.S.A.§ 463:

> (a) Mortgages may be discharged by an acknowledgment of satisfaction, executed by the mortgagee or his or her attorney, executor, administrator or assigns, which shall be substantially in the following form:
>
> "I hereby certify that the following described mortgage is paid in full and satisfied, viz: _____ mortgagor to _____ mortgagee, dated _____ 20__, and recorded in book ___, page ___, of the land records of the town of _____.
>
> (b) When such satisfaction is acknowledged before a town clerk, notary public, master, county clerk, or judge or register of probate and recorded, it shall discharge such mortgage and bar actions brought thereon.

Regarding potential irregularities and discrepancies in mortgage discharges, Title Standard 18.2 states: "A discharge of a mortgage is sufficient, notwithstanding error in dates, amounts, volume and page or record, property descriptions, names of parties and other information, if, considering all circumstances of record, sufficient data are given to identify, with reasonable certainty, the mortgage sought to be discharged."

Chapter 27 V.S.A. § 470 may also validate a defective mortgage discharge if the subject property is a one-to-four-family residential property. This section provides:

> Validation of mortgage discharge on one- to four-family residential property
>
> (a) Subject to the provisions of subsection (b) of this section, a mortgage discharge executed on behalf of a banking or

lending institution with respect to a mortgage encumbering a one- to four-family residential real property, including a residential unit in a condominium or in a common interest community as defined in Title 27A, that is not valid because it is not executed by or is not issued by or in the name of the record holder of the mortgage, shall be valid as if it had been issued or executed by the record holder of the mortgage if:

(1) No person has within three years after the discharge is recorded brought an action challenging the validity of the discharge and recorded a copy of the complaint in the land records of the town where the discharge is recorded; and

(2) An affidavit is recorded that is dated more than three years after the recording date of the mortgage discharge and contains the following:

(A) A statement that the affiant has been the record owner of the real property described in the mortgage for at least two years prior to the date of the affidavit.

(B) The recording information for the mortgage, any assignments, and the release.

(C) A statement that, since the date of the recording of the release, the affiant has received no demand for payment of all or any portion of the debt secured by the mortgage and has received no notice or communication that would indicate that all or any portion of the mortgage debt remains due or owing.

(D) A statement that, to the best of the affiant's knowledge and belief, the mortgage has been paid in full.

(b) The provisions of this section shall not apply to any release obtained by fraud or forgery.

(l) *Liens*

A lien notice may be recorded in the land records, but its effect may be limited to a period of 180 days before it is deemed expired by operation of law unless perfected. Liens must be perfected by recording a writ of attachment in the land records within 180 days after the recording of the notice of lien. 9 V.S.A. § 1924; 12 V.S.A. § 3291.

A recorded but unperfected lien creates a cloud upon title until this statutory expiration period has lapsed. *See Filter Equip. Co. v. I.B.M. Corp.*, 142 Vt. 499, 502 (1983) (observing that a recorded but unperfected lien can create a cloud upon title: "[A recorded lien], even without attachment, has a practical effect upon alienation, in that disclosure is required, 9 V.S.A. § 1922, and a cloud upon title created.").

Practice Note

See *Wharton v. Tri-State Drilling & Boring*, 175 Vt. 494 (2003) for a case in which the malicious failure to release and discharge an unperfected mechanic's lien gave rise to slander of title action and punitive damages. See Comment 4 to Title Standard 2.3, which includes a reference to the

> rule describing when an instrument recorded may slander title as described in *Wharton*.

Special attention should be paid to "springing liens" as described in Comment 5 to Title Standard 2.2, as a title examiner is responsible for identifying such encumbrances even if outside the chain of title.

> "Springing liens" are an exception to the general rule [a subsequent party in the chain of title will not be charged with notice of an instrument which is outside the chain of title]. Federal liens, Vermont tax liens (and those liens which purport to have the same effect as such liens) and judgment liens recorded against a person who does not own an interest in real estate at the time of the recording of such lien will attach by operation of law to any interest acquired subsequent to the recording of the lien for the effective term of the lien. The title examiner must search outside the traditional chain of title to find these liens. The recommended period of search for these liens is back twenty years from the date of the search. The title examiner must check for liens filed against each person who had title to the property being searched back for the full twenty year period. The title examiner should also check the name of the client, if the client is acquiring the property being examined.

Additionally, in September 2016, the title standards subcommittee affiliated with the Real Estate Section of the Vermont Bar Association concluded that a springing lien will attach to after-acquired property, meaning that a lien may be recorded in advance of the acquisition of title but will immediately attach to any property acquired during the period the lien is effective. See Title Standard 2.2, cmt. 5.

§ 7.10 SUBDIVISION, DEVELOPMENT AND PERMITTING

§ 7.10.1 Matters of Record

As described above, the title examiner must identify instruments of record associated with subdivision, development, and other permitting matters. In addition, the title examiner must conduct at least a cursory review of these instruments to confirm whether the conditions of any permits require further items to have been recorded in the land records. The examiner must then confirm whether such items have in fact been recorded. If so, the examiner will report such matters. If not, such matters should be identified as a possible title defect. By way of example: both waste water and potable water system permits and stormwater discharge permits include conditions requiring engineer's certifications that are typically required to be recorded among the land records.

The title examiner's search must extend beyond the land records and include a review of municipal permits records. The examiner should review municipal zoning and permitting records and compare the applications and permit approvals to the description of the improvements on the property set forth in the tax lister's card. Any discrepancies should be noted as a possible title defect. A simple example: a four bedroom house constructed on a property approved for a three bedroom house may be in violation of the property's wastewater system and potable water supply permit.

§ 7.10.2 Off-Record Matters

Again, as described above, the title examiner must also be aware of the absence of certain permits that may be required for the property. The list of potential permits for any given property depends entirely on how the property is, if at all, subdivided, developed, and used. Depending on the use of a particular property, one or more of literally hundreds of permits could be required. It is not the role of the title examiner to determine which of all those permits a property may require for its intended use, but it is the duty of the practitioner to identify those things that may affect the client's interest in the property. Depending on the circumstances, this requires the title examiner to identify at least some of the permits that are required for the property in its existing condition. While the list of permits is too great to address at length, following is a cursory analysis of some of the major ones, the absence of which could amount to a title defect.

(a) *Act 250*

Since 1970, Act 250 permits are required for many reasons. *See* 10 V.S.A. § 6081. Several key reasons the title examiner should be aware of include

- subdivision of land,
- construction or development activity, and
- material or substantial changes to previously approved subdivisions or development.

"Subdivision" includes the division of land into ten or more lots for purpose of resale and is not limited to contiguous lots. "Subdivision" for these purposes also includes lots created on property owned or controlled by the subdivider that is within five miles of the property in question, i.e., the "involved land," or is within the jurisdictional area of the same Act 250 district commission, and such "other" subdivision could have occurred during any continuous period of five years. The ten-lot limitation above is reduced to six lots in municipalities that have not adopted permanent zoning and subdivision bylaws. The title examiner must take note how and when the parcel of land in question was created, determine whether its creation would have triggered the requirement for an Act 250 permit, and disclose a title defect if that permit is not found of record.

"Development" requires an Act 250 permit (regardless of whether a subdivision is involved). "Development" likewise has many triggers under Act 250, including the

construction of improvements for commercial or industrial purposes on a tract or tracts of land involving more than ten acres of land (or one acre of land in municipalities that have not adopted permanent zoning and subdivision bylaws or that have adopted such bylaws and elected to have Act 250 jurisdiction apply) and the construction of housing projects with ten or more units. Again, the title examiner must take note how and when the parcel of land in question was developed, determine whether its development would have triggered the requirement for an Act 250 permit, and disclose a title defect if that permit is not found of record.

(b) *Wastewater System and Potable Water Supply Permits*

The requirement for wastewater system and potable water supply permits has evolved over time, so it is important for the title examiner to take note of dates of improvements on a given property. Effective January 1, 2007, the absence of a wastewater system and potable water supply permit for preexisting development would no longer be considered a title defect thanks to the so-called clean slate exemption. Of course any pre-2007 permits of record should be disclosed, as well as any apparent defects of record revealed by the conditions of approval of such permits. Importantly also, the "clean slate exemption" persists only until the preexisting system fails or one of the jurisdictional triggers for a current system is later triggered. Also, the "clean slate exemption" does not except failure to comply with conditions associated with pre-2007 permits.

After January 1, 2007, wastewater system and potable water supply permits are required for a multitude of reasons set forth in 10 V.S.A. § 1973, including

- subdivision;
- constructing, replacing, or modifying a wastewater system or a potable water supply system;
- a failed system;
- construction of a new building or structure; and
- modifying an existing building or structure, or the use thereof, in a manner that increases the design flow or modifies operation requirements of a wastewater system or a potable water supply system.

Again, the title examiner must take note of how, when, and for what purpose the property was developed, determine whether the property requires the issuance of a wastewater system or a potable water supply system permit, and disclose a title defect if that permit is not found of record.

(c) *Stormwater Discharge*

The regulation of stormwater discharge in Vermont is ever evolving and, at the time of this writing, in the midst of substantial overhaul. The title examiner will of course disclose the low-hanging fruit that are stormwater permits and their related certifications recorded among the land records. A complete discussion of the regulation surrounding

stormwater permitting far exceeds the scope of this chapter. By way of overview, the title examiner should take notice of the absence of recorded stormwater permits in the following circumstances:

- "construction or redevelopment of one acre or more of impervious surface," 10 V.S.A. § 1264(c)(1);
- "earth disturbance of one acre or greater, or less than one acre if part of a common plan of development," 10 V.S.A. § 1264(c)(4);
- expansion of "existing impervious surface by more than 5,000 square feet, such that the total resulting impervious area is greater than one acre," 10 V.S.A. § 1264(c)(5); and
- property with "impervious surface of three or more acres in size that does not have an individual permit or coverage under a general permit if the discharge was never previously permitted or was permitted under an individual permit or general permit that did not incorporate the requirements of the 2002 Stormwater Management Manual or any subsequently adopted Stormwater Management Manual," 10 V.S.A. § 1264(c)(7).

Note that the second item in this list relates to property that is part of a common plan of development. Many residences in at least some areas of Vermont were developed as part of a common plan, e.g., neighborhood subdivisions. Common plans of development would typically have a common stormwater system (and permit), but this means that the addition of any impervious surface to an individual lot would need permit approval. The title examiner should be aware of this requirement in the event the record reveals anything to suggest such an improvement has been made. Note that the last item in this list relates to existing development (not just new development). Vermont is in the process of implementing rules to require the retrofit of certain existing property to conform to current stormwater regulations. The practitioner should also be aware that stormwater permits issued under the current legislation will be valid for a period of only five years. 10 V.S.A. § 1264(h)(1). It is certainly debatable whether these things amount to pure "title" issues. Again, however, where the common law leaves "value" and "title" matters intertwined, the title examiner must be aware.

(d) *Municipal Zoning and/or Subdivision*

As described above, curative legislation has overcome the prior rule of *Bianchi* that failure to obtain a municipal permit amounts to a title defect. Again, however, the rest of the *Bianchi* rule implicating value in the marketability analysis requires, the authors believe, at least a cursory review of the municipal zoning and subdivision regulations and records to properly determine whether anything required may be missing. In theory, municipal land use records will reflect municipal permit applications and approvals consistent with the improvements shown on the town lister's card. Any inconsistencies should be reported to the client. The law of Vermont does not, so far, require the examining attorney to conduct a property inspection to confirm that the condition of the property conforms with permits. That, it would seem, would far exceed the scope of a reasonable title search (if not the scope of the examiner's training

and expertise). The legal rationale for this apparent (and clearly rational) "bright line" is not so clear, given prevailing case law.

(e) *Building Permits*

A discussion of building codes and permits far exceeds the scope of this chapter, and, to the authors' knowledge, there are no court decisions holding, or legislation or rule providing, that the failure to comply with building codes or the absence from the record of building-related permits amounts to a title defect.

That said, given the breadth of the practitioner's duty under *Estate of Fleming* and the broad definition of "marketability" derived from the impairment of value rationale of *Hunter Broadcasting* and *Bianchi*, it is difficult to divine the fine line between a building code violation that affects "title" and one that does not.

In particular in this regard, the authors believe that the practitioner should be aware of certain building and life safety requirements imposed on "public buildings" for which a fire safety permit is required. 20 V.S.A. § 2728 et seq. For the purpose of determining whether the property may be subject to inspection and permitting by the Division of Fire Safety of the Department of Public Safety under the applicable fire safety programs, the title examiner must consider the existing improvements and uses to determine if the property includes a public building which is regulated by the Division of Fire Safety of the Department of Public Safety. The current definition of a "public building" is located in 20 V.S.A. § 2730:

> (a) As used in this subchapter, "public building" means:
>
> (1)(A) a building owned or occupied by a public utility; hospital; school; house of worship; convalescent center or home for the aged, infirm, or disabled; nursery; kindergarten; or child care;
>
> (B) a building in which two or more persons are employed, or occasionally enter as part of their employment or are entertained, including private clubs and societies;
>
> (C) a cooperative or condominium;
>
> (D) a building in which people rent accommodations, whether overnight or for a longer term;
>
> (E) a restaurant, retail outlet, office or office building, hotel, tent, or other structure for public assembly, including outdoor assembly, such as a grandstand;
>
> (F) a building owned or occupied by the state of Vermont, a county, a municipality, a village, or any public entity, including a school or fire district.
>
> (2) Use of any portion of a building in a manner described in this subsection shall make the entire building a "public building" for purposes of this subsection. For purposes of this subsection, a "person" does not include an individual who is directly related to the employer and who resides in the employment-related building.

> (b) The term "public building" does not include:
>
> (1) an owner-occupied single family residence, unless used for a purpose described in subsection (a) of this section;
>
> (2) a family residence registered as a child care home under chapter 35 of Title 33, or specifically exempted from registration by 33 V.S.A. § 3502(b)(1);
>
> (3) farm buildings on a working farm or farms. For purposes of this subchapter and subchapter 3 of this chapter, the term "working farm or farms" means farms with fewer than the equivalent of 10 full-time employees who are not family members and who do not work more than 26 weeks a year.
>
> . . . .
>
> (4) a single family residence with an accessory dwelling unit as permitted under 24 V.S.A. § 4406(4)(D).

Generally, public buildings require a fire safety permit whenever there is construction, alteration, improvement, or demolition; the installation of equipment; or a change of use. Whether the absence of a required fire safety permit for a public building is a title defect (as opposed to being a violation of the law, which it is) is not conclusively resolved at this time. However, because the absence of the fire safety permit means that the owner may be fined, required to cease using the building, and required to take all actions necessary to bring the property into compliance with the applicable codes, at potentially great expense, the absence of an otherwise required permit seems to constitute an encumbrance within the scope of *Hunter Broadcasting* and *Bianchi*. If the title examiner determines that the property is a public building that may require a fire safety certificate, the authors conclude that the absence of a fire safety permit is one of those title matters that should be disclosed to the client as an encumbrance. A change of use/change of ownership inspection may be requested as described on the Division of Fire Safety's website at http://firesafety.vermont.gov/buildingcode/permits.

The authors are aware of no requirement for the recording of a fire safety permit. Unlike certain other permits, e.g., Act 250 and wastewater and potable water supply permits, that are required to be recorded, such that their absence from the record can be a flag for the examiner, the absence of a fire safety permit reaches a new place entirely. One might reasonably ask how the absence of a building permit that is not required to be recorded could ever become a title defect? The authors' best answer is to refer the reader back to the introductory sections of this chapter.

Practice Note

Why if, lamentably, the authors' analysis is correct, should review stop at fire safety permits? How is the absence of other building permits or defects in construction any different? Ultimately, under this analysis, where is the line between a property inspection report and a title report? The best answer the authors know of is to encourage a clear scope of representation and clear contracting between the buyer and the seller as to what they agree will amount to an actual issue that may affect their transaction.

§ 7.11 COMMON INTEREST COMMUNITIES

The title examiner should be aware of several matters particular to common interest communities in Vermont. Common interest communities include both condominiums and planned communities and are governed by Title 27A of the Vermont Statutes (the Act). The title examiner must locate both the declaration of the common interest community (and any amendments thereto) and the plat and/or plans that are required as part of the declaration (and any amendments thereto). Separate plats and plans are not required by the Act if all the required information is contained in either. Each plat and plan must contain a certification that it contains all the information required by 27A V.S.A. § 2-109. Bylaws of the planned community should also be found among the land records. Although not a matter of title to a unit, the practitioner should take note of 27A V.S.A. § 4-109 regarding resales of units whereby the seller of a unit is obligated to provide the purchaser copies of the condominium documents and an "association certificate," which is, in effect, an estoppel certificate from the unit owners' association. The practitioner should also be aware of 27A V.S.A. § 4-120, which provides that a unit may be conveyed only after the declaration is recorded and the unit is substantially complete.

§ 7.12 LAND RECORD ERRORS

When a municipal clerk discovers errors in the records that he or she or a predecessor made, the correction should be initialed and dated at the time of the correction. The only restriction is that clerks cannot return after their term of office has expired to correct errors made in the past. A successor to the office may correct errors when they are discovered. If a clerk discovers an error of his or her own or that of a predecessor, the clerk should make, initial, and date an appropriate correction in order that the record reflect all the facts and protect their reliability. *See* 27 V.S.A. § 401, annotation 1; 32 V.S.A. § 3485, annotation 1.

§ 7.13 CONCLUSION

As suggested at the outset, title examination in Vermont can be a thorny exercise. Important takeaways include the following:

- Clearly define the scope of engagement in light of the client's needs, circumstances, and nature.
- Draft clear contractual provisions for the title examination that ensure both parties' need for certainty. The buyer needs to know what it is buying well before closing, and the seller wants to be done with the property beyond. Clear contracts can prevent base case law.
- Understand the purpose and scope of the title examination, in light of the scope of representation and the contractual relationship between the parties. Many "rabbit holes" await those who start searching without proper context. In the authors' experience, clients don't pay for time spent in the "rabbit holes."

- Understand the overlap between matters of title and permitting matters in Vermont. This overlap results in "title" searches that must consider matters that are "off record" someplace else or even absent from the record entirely.
- When in doubt, ask questions and follow up.