LAST CALL FOR CLE

8:30 to 9:00	**Registration and continental breakfast**
9:00 to 10:30	**State Permits: The Good, The Bad and The Ugly** Presenters: Ernie Christianson (DEC), Peter Keibel (Natural Resources) and Sean McVeigh (Enforcement)
10:45 to 12:00	**Vermont Land Trust: What it does and how it does it.** Presenters: Rick Peterson, Tracy Zschau and Caitlin Cusack VLT
12:00 to 1:00	**Lunch Buffet**
1:00 to 1:30	**State of the Title Industry** Presenter: James Czapiga, CATIC President & CEO
1:35 to 3:00	**Trust Accounts for $500 please Alex (includes 1.0 hours Ethics)** Presenters: Angela Haddad (CATIC) and Terry Pricher (Assistant Bar Counsel: MA)
3:15 to 4:15	**Current Hot Topics: New Legislation, new cases, and Andy's Title Teasers** Presenters: Liz Smith and Andy Mikell, VATC

Vermont
Attorneys Title
CORPORATION

Wastewater System and Potable Water Supply Rules

Vermont Attorneys Title Program

June 13, 2017

Montpelier, VT

Ernie Christianson

Program Manager

VERMONT

Purpose of the Rules

- **To protect human health and the environment.**

Program Description:

- **Jurisdiction over all soil-based wastewater systems < 6,500 gallons per day.**
- **Jurisdiction over all non-public water systems. (Publics include Public Community, Public Non-Transient Non-Community; Public Transient Non-Community; Bottled Water.**
- **Review and approve municipal sewers.**
- **Review and approve sewer and water connections to municipal sewer systems and water supplies.**
- **Information: http://dec.vermont.gov/water/ww-systems**

Seasonal Conversion §1-315

Special Permit Standards for the Conversion of a Single Family Residence from Seasonal to Year-Round Use

(a) Notwithstanding any other provisions of these Rules, a single family residence on its own individual lot that converts from seasonal to year-round use may be granted a permit or permit amendment under these Rules provided

(1)

(A) the potable water supply and wastewater system serving the residence are in full compliance with these Rules; or

(B) the potable water supply and/or wastewater system serving the residence are not in full compliance with these Rules. In this situation, an assessment shall be performed by a designer in order to determine the degree of non-compliance. Based on this assessment, the designer may prepare a design that uses the variance provisions of §1-806 of these Rules. No permit may be issued under this section that allows the use of a holding tank;

(2) there is no increase in the number of bedrooms; and

(3) no other actions for which a permit is required under this Rules are taken or are caused to be taken.

Guidance Document 2008-01 Second Revision

(a) Residence occupied form 180 days or more in any calendar year between December 31, 1986 and December 31, 2006 considered a year round residence unless, among other reasons:

- **there are deed restrictions;**
- **legal agreement with a municipality limiting use or ability to be occupied for more than 180 days; or**
- **building deteriorated to the point that it is considered a substantially complete building and not eligible for reconstruction according to § 1-304(a)(21) of the Rules.**

Guidance Document:
http://dec.vermont.gov/sites/dec/files/dwgwp/roguidance/pdf/guidance2008.01.pdf

Boundary Line Exemption §1-304

(a)(11) boundary line adjustments that affect either improved or unimproved lots provided that:

(A) each lot being adjusted meets one or more of the following standards:

(i) a lot being reduced in size is being reduced by no more than two percent;

(ii) a lot is increased in size;

(iii) the boundary line being adjusted is located, after adjustment, at least 500 feet from the footprint of the building or structure on an improved lot; or

(iv) the Secretary, on a case by case basis, makes a written determination that the proposed adjustment will not have an adverse effect on any existing potable water supply or wastewater system on the affected lots.

(B) a diagram is submitted to the Secretary that shows the existing and revised lot boundaries; and

(C) a copy of the diagram and, if applicable the Secretary's written determination, is recorded and indexed in the land records for the municipality where the lots are located by the landowner.

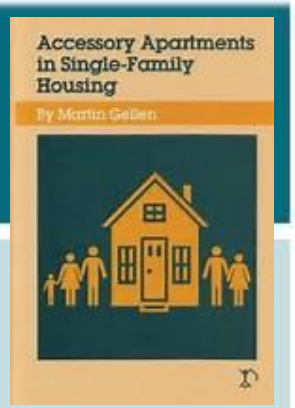
Note 1: Boundary line adjustments that were done pursuant to the prior version of this exemption (sections 1-403(a)(12) or 1-404(a)(4) of the January 1, 2005 version of these Rules) remain exempt so long as the diagram and Secretary's determination are recorded and indexed in the land records for the municipality where the lots are located.

Note 2: Case by case determinations under subdivision(A)(iv) of this exemption will require the submission of a diagram of the lots that shows the locations of all existing, and permitted but not yet built, potable water supplies and wastewater systems.

An exemption form can be found at:

http://dec.vermont.gov/sites/dec/files/dwgwp/roguidance/pdf/exemptionformboundaryline.pdf

Accessory Apartment § 1-303



Permit Required for:

(4) the construction of a new building or structure;

(5) the modification of an existing building or structure in a manner that increases the design flow or modifies other operational requirements of a potable water supply or wastewater system;

(6) the connection of an existing potable water supply or wastewater system to a new or modified structure;

(7) the change of use of a building or structure in a manner that increases the design flow or modifies other operational requirements of a potable water supply or wastewater system including the conversion of a single family residence from seasonal to year-round use;

If no increase in design flow or new building construction, there is modification to the operational requirements of the potable water supply.

- **The instantaneous peak demand changes from 5 gpm for a single family residence to 10 gpm for 2 family residence.**
- **The water source needs to be capable of supplying the maximum day demand.**
- **Storage may be required if the source is not capable of providing the average day demand and maximum day demand.**
- **Water quality analysis.**

If increase in design flow to the wastewater system or potable water supply, system or supply need to fully comply with technical standards.

Reconstruction §1-304(a)(21)

(21) a building or structure that is exempt or has a permit under these Rules that has been destroyed by fire, flooding, or other act of God or voluntarily removed, may be reconstructed without obtaining a permit or permit amendment provided that:

(A) if permitted on or after January 1, 2007, the reconstructed building or structure is in compliance with all permit conditions;

(B) the building or structure is reconstructed in approximately the same location;

(C) there is no increase in design flow;

(D) there is no change in the operational requirements of the potable water supply or the wastewater disposal system;

(E) if the building or structure is exempt it must be reconstructed within two years of its destruction or voluntary removal unless, on a case by case basis, the Secretary extends the time period based on a determination that there are unavoidable delays in reconstruction. If the building or structure is permitted, there is no time limit for the reconstruction; and

(F) there has been no other change to the building or structure, lot, potable water supply, or wastewater system that would require a permit under these Rules.

Destroyed includes the building is substantially not complete or cannot be occupied without major improvements such as there is no roof.

Clean Slate §1-304

(a) The following are exempt from the permitting requirements of this Subchapter provided the specified conditions are met (Note: more than one exemption may apply in a particular situation).

(1)

(A) All buildings or structures, campgrounds, and their associated potable water supplies and waste water systems that were substantially completed before January 1, 2007 and all improved and unimproved lots that were in existence before January 1, 2007. This exemption shall remain in effect provided:

(i) No action for which a permit is required under these Rules is taken or caused to be taken on or after January 1, 2007 unless such action is exempt under one of the other permitting exemptions listed in this section; and

(ii) If a permit has been issued under these Rules before January 1, 2007 that contained conditions that required actions to be taken on or after January 1, 2007, including, but not limited to, conditions concerning operation and maintenance and transfer of ownership, the permittee shall continue to comply with those permit conditions.

(B) If a permit or permit amendment is required under this subdivision because the potable water supply and/or wastewater system has failed, the variance provisions of section 1-806 of these Rules and the Vermont Water Supply Rules shall be available.

Clean Slate §1-304

(C) An owner of a single family residence that qualified on January 1, 2007 for this exemption shall not be subject to administrative or civil penalties under 10 V.S.A. chapters 201 and 211 title for a violation of these Rules when the owner believes the supply or system meets the definition of a failed water supply or failed system provided the owner:

(i) conducts or contracts for an inspection of the supply or system;
(ii) notifies the Secretary of the results of the inspection; and
(iii) has not taken or caused to be taken any other action on or after January 1, 2007 for which a permit would be required under these Rules.

Note 1: Some single family residences on their own lots were authorized under the prior version of these Rules to make changes to the residence, and its associated potable water supply and wastewater system, until July 1, 2007 without obtaining a permit. If those actions occurred prior to July 1, 2007, they do not terminate this exemption.

Note 2: In order to determine whether something is substantially complete or in existence for the purposes of this exemption, the design flow and/or use of a building or structure, campground, wastewater system, or potable water supply as it existed no earlier than January 1, 2006 shall be used. This year period allows consideration of the most recent seasonal use, fluctuations in business size, etc.

Note 3: For the purposes of this exemption, lots that before January 1, 2007 had a wastewater system and potable water supply used as a hook-up for a recreational vehicle that was used on a seasonal basis but not a continuous basis, ie: the vehicle comes and goes during the seasonal period, shall considered to be improved lots and therefore qualify for this exemption.

Permit Conditions – Inspections

Permits that require construction of a wastewater system and/or potable water supply include the need to submit an installation certification. The permit is not valid without the proper installation certification.

Permits approving wastewater systems that include an innovative/alternative wastewater treatment component include a condition to submit an annual inspection of the I/A component by a designer or vendor approved service provider. Does not include I/A dispersal system.

Permits approving wastewater systems that include an innovative/alternative wastewater treatment component reference the I/A approval letter to the vendor that includes the need to have a valid service contract with a vendor approved service provider or vendor approved designer.

Permit Conditions – Inspections

Disclosure for Potable Water

Act 163 Sec. 4. 27 V.S.A. § 616 was amended to read: (heard this is rarely done)

§ 616. GROUNDWATER SOURCE TESTING; DISCLOSURE OF INFORMATIONAL MATERIAL

(a) Disclosure of potable water supply informational material. For a contract for the conveyance of real property with a potable water supply, as that term is defined in 10 V.S.A. § 1972(6), that is not served by a public water system, as that term is defined in 10 V.S.A. § 1671(5), executed on or after January 1, 2013, the seller shall, within 72 hours of the execution provide the buyer with informational materials developed by the department of health regarding:

(1) the potential health effects of the consumption of contaminated groundwater; and

(2) the availability of test kits provided by the department of health.

(b) Marketability of title. Noncompliance with the requirements of this section shall not affect the marketability of title of a property. (c) Penalty; liability. Liability for failure to provide the informational materials required by this section shall be limited to a civil penalty, imposed by the department of health under 18 V.S.A., Chapter 3, of no less than $25.00 and no more than $250.00 for each violation.

NB: Act 163 may be superseded by S.103 of the 2017 legislative session if taken up next year. Will require mandatory testing of all potable water supplies.

Minor Repair or Replacement § 1-201(a)

(39) Minor Repair or Replacement – means:

(A) For wastewater systems, the repair or replacement of a pipe leading from a building or structure to the septic tank; replacement of a septic tank; repair or replacement of a pump and/or associated valves, switches and controls; the repair or replacement of a toilet; or any other repair or replacement that the Secretary, on a case by case basis, determines to be a minor repair or replacement.

(B) For potable water supplies, the repair or replacement of an individual pipe leading from a building or structure to a well; repair or replacement of a pump; repair or replacement of filters or screens; repair or replacement of a mechanical component; repair or reconstruction of a driven well point in approximately the same location; deepening or hydrofracturing a well; repair or replacement of a lavatory; or any other repair that the Secretary, on a case by case basis, determines to be a minor repair or replacement.

Note: replacement of a distribution system, or replacement of piping related to a change in use, increase in design flow, or change in operational requirements of the water system are not normally considered minor repairs or replacements.

What's New?

- **Partial delegation for municipalities who own both the sewer and water mains.**

- **Expanded use of holding tanks to include charitable, non-profit, and religious organizations with design flows up to 600 gallons per day.**

- **One single family residence may use surface water (lakes and ponds) for the potable water source.**

Where are We Headed

- **Installer licensing program.**
- **New Rules to include:**
  - **moving the design requirements for potable water supplies into the WW Rules;**
  - **allowing designers to describe soils based on texture and structure and not conduct percolation tests;**
  - **expand the types of systems to include:**
    - ❑ **“window systems”;**
    - ❑ **bottomless sand filters;**
    - ❑ **time dosing;**
    - ❑ **flow equalization; and**
    - ❑ **wastewater strength;**

  - **new waiver section for types of buildings that can be exempt from having toilet or sink; and**
  - **new exemptions for buildings to have a periodic change in use without requiring a permit.**

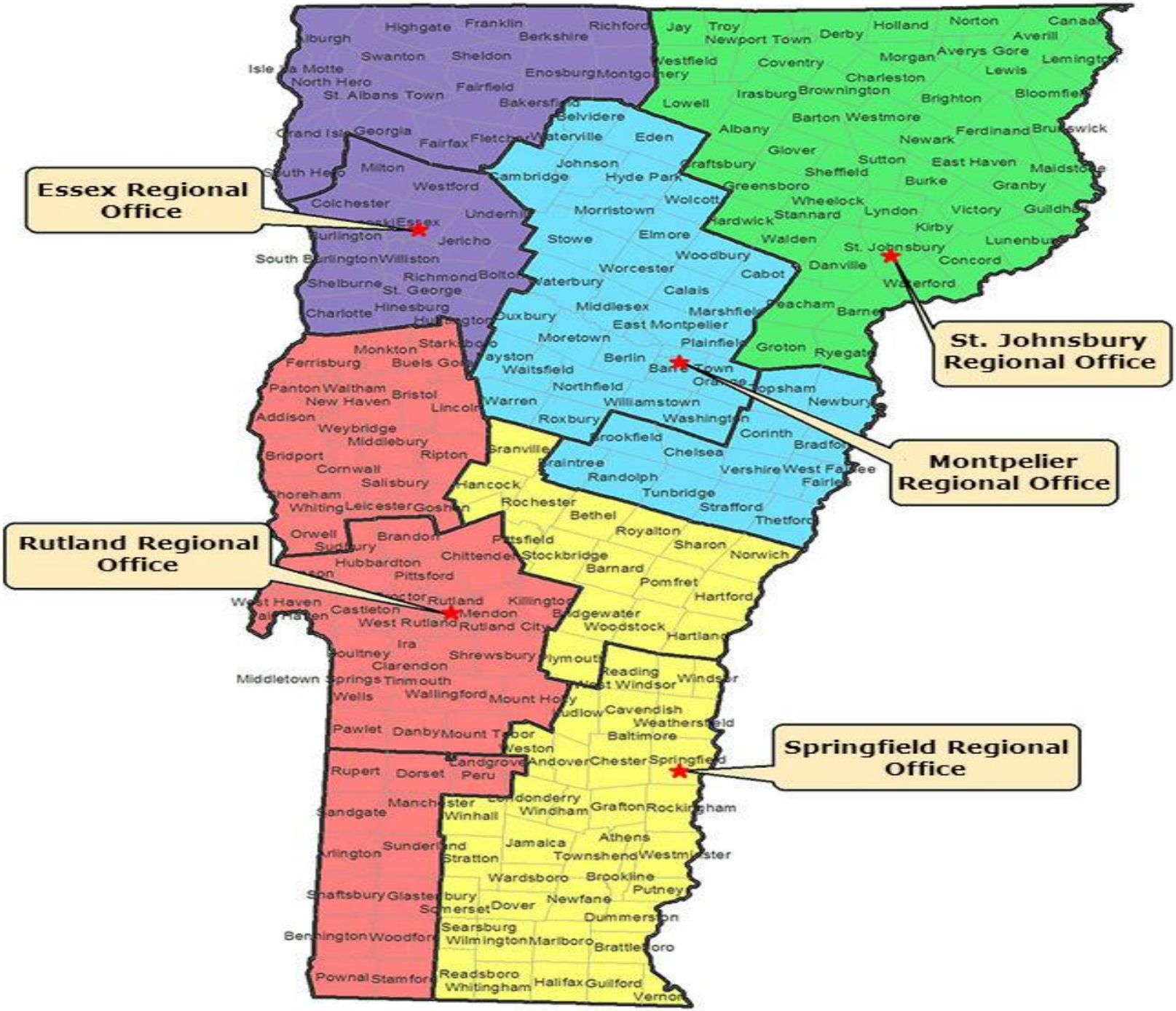
How to Find Us

Five Regional Offices:

- **Essex Junction**
- **Montpelier**
- **Rutland**
- **St. Johnsbury**
- **Springfield**

http://www.anr.state.vt.us/Dec/ead/eadstaff.htm

Permit Specialists


Essex Regional Office
St. Johnsbury Regional Office
Montpelier Regional Office
Rutland Regional Office
Springfield Regional Office

Act 249

VERMONT

State of Vermont
Department of Environmental Conservation

Agency of Natural Resources

Guidance Related to the Wastewater System and Potable Water Supply Rules
Effective September 29, 2007

Guidance Document
2008-01 Second Revision[1]

When are Single Family Residences considered to be in Year-round Use?

Issued Christine Thompson April 13, 2009

As of July 1, 2007, the conversion of a single family residence from seasonal to year-round use requires a permit. As of September 29, 2007 these conversions are subject to §1-315 of the Wastewater System and Potable Water Supply Rules.

A single family residence that was in existence as of midnight, December 31, 2006 will be considered to be a year-round residence if it has been occupied as a single family residence for at least 180 days in a one year period between December 31, 1986, and December 31, 2006.

If, after December 31, 2006, a year-round residence has been occupied for shorter periods of time, it shall maintain its status as a year-round residence unless there have been specific actions taken to limit the use to seasonal use or to convert the building to other than use as a single family residence. Examples of such limitation include, but are not limited to:

A. a deed restriction;
B. a legal agreement with the municipality in which the building is located to limit or convert the use; or
C. a building deteriorated to the point where it no longer meets the requirements for being substantially completed and which remains in such a state for a period beyond that allowed for reconstruction of buildings destroyed or voluntarily removed. When a year-round residence has been replaced subject to §1-304(a)(21) of the Rules, it will continue to be classed as a year-round residence.

Notwithstanding the preceding language, some single family residences remained exempt under §1-403(a)(1) and (2) of the January 1, 2005 version of the Rules until July 1, 2007. If such residences had been occupied for at least 180 days in a one year period between December 31, 1986 and July 1, 2007, they will be considered to be year-round residences provided that the conditions of the exemption were met between December 31, 2006 and June 30, 2007.

In addition to being considered as a year-round residence based on actual occupancy as described above, a single-family residence will be considered to be a year-round residence when:

A. The single family residence is subject to a permit under these Rules, unless:

1. the permit limits the use;
2. the application on which the permit is based states that the application is not for year-round use or
3. the supporting information submitted as part of the application specifically indicates that the residence does not qualify for year-round use.

B. The single family residence is not permitted under these Rules, and was not occupied as a year-round residence prior to January 1, 2007, provided the residence, wastewater system and potable water supply are constructed in accord with §1-304(a)(3) of the Rules, or §1-403(a)(21) of the 2005 version of the Rules, unless:

1. the municipal permit limits the use;
2. the application on which the permit is based states that the application is not for year-round use or
3. the supporting information submitted as part of the application specifically indicates that the residence does not qualify for year-round use.

Note: This exemption may cover some single family residences not yet constructed.

C. The single family residence is not permitted under these rules but was constructed in accordance with the permit exemption of §1-403(a)(3) of the Wastewater System and Potable Water Supply Rules, effective January 1, 2005.

D. The single family residence is connected to both a municipal water supply and a municipal wastewater system and owner(s) of the supply and system have not imposed any restriction against year-round use.

NOTE: The Agency will accept an affidavit from the owner of the residence that attests to the fact that the residence has been used on a year-round basis in accordance with this guidance as proof of year-round residence status unless contradictory evidence is submitted to the Agency.

[1] This second revision was to correct a Rule reference in section B on page two from the 2002 version of the Rules to the 2005 version.

VERMONT

State of Vermont
Department of Environmental Conservation

Agency of Natural Resources

Guidance Related to the Wastewater System and Potable Water Supply Rules Effective September 29, 2007

Guidance Document 2015-01

Issued Christine Thompson 9/10/2015

§ 1-201(a)(9) Determining When an RV is a Building or Structure

The Wastewater System and Potable Water Supply Rules (Rules) states that a permit is required for the construction of a building or structure; the construction, modification or replacement of a wastewater system; and the construction, modification or replacement of a potable water supply. The Rules also states that a permit is required for campground; a lot of land containing more than three campsites occupied for vacation or recreational purposes by camping units such as: tents, yurts, tepees, lean-tos, camping cabins, and recreational vehicles (RV) including motor homes, folding camping trailers, conventional travel trailers, fifth wheel travel trailers, truck campers, van campers, and conversion vehicles designed and used for travel, recreation and camping. A lot of land with three or fewer campsites that did not construct a building or structure or a wastewater system or water supply is exempt from the permitting requirements of the Rules.

The Rules makes a clear distinction between a building and structure and an RV that is self-contained. The distinction is similar to why mobile food units that are self-contained are not considered a building or structure. Without such an approach, every RV or mobile food unit would require a permit for a wastewater system and public or potable water supply.

When one of the following actions occurs, an RV becomes a building or structure whose useful occupancy requires a potable water supply and wastewater system unless the occupancy and physical features of the RV meets the primitive camp criteria:

1. providing skirting or insulation around the base;
2. placing the RV unit on a foundation or removing the wheels;
3. attaching a deck or stairs to the RV;
4. making the RV immobile in any way that inhibits the RV from being driven off the lot in order to fill the water holding tank and empty the wastewater holding tank (this include not removing snow so the RV can be driven off the lot);
5. failure to drive the RV off the lot for filling the water holding tank and emptying the wastewater holding tank;
6. the unit, although qualifying as an RV, cannot travel over Vermont roads without a special permit; or
7. occupying an RV that is not registered and inspected to travel on the roads.

Note: Connecting an RV to a wastewater system or potable water supply requires a permit. The one exception is the connection of an RV to a wastewater system or potable water supply that serves a single family residence on its own lot when the RV and residence are owned by the same person and the RV is not occupied either seasonally or year round on the lot.

To make the determination of when an RV is a building or structure, reference is made to previous decisions when an RV is considered a residence including:

- A memo from Jonathan Lash, Commissioner, to Gary V. Shultz, Director, dated May 8, 1986 regarding an appeal of a decision involving parking an RV on a lot subject to the waiver of developmental rights. In the memo, Commissioner Lash states "In interpreting this language it is important to remember that these are health based regulations designed to prevent the installation of inadequate sewage disposal facilities. The language deals with "the construction or erection of any building or structure". The temporary location of a self contained self powered recreational vehicle on the lot does not constitute construction or erection. The fact that that vehicle includes plumbing and a holding tank does not make parking the vehicle "construction or erection"[1] and does not give us jurisdiction of the subdivision regulations[2]." The memo states further "This does not mean that there are no circumstances under which placement of an RV on a deferred lot would come within the jurisdiction of the Subdivision Regulations. The critical issues are the extent to which the actions of the owner or user constitute construction or indicate permanence rather than temporary use. Such indications might include putting the vehicle on blocks, constructing steps, porches, paths or other permanent or semi-permanent facilities to serve the vehicle, leaving the vehicle in place for a period of weeks and failing to drive the vehicle off the lot to have the holding tanks pumped out and replenish other supplies. Depending on the precise situation, one or a combination of these facts, would be sufficient to subject the activity to our jurisdiction. " Commissioner Lash notes that the Attorney General's Office agreed with this decision.
  [1] Current Rules refer to the construction of a building or structure.
  [2] At the time of the memo, jurisdiction over a single family residence on its own lot was under the Subdivision Regulations.
- A memo to Regional Office Staff dated September 12, 2002, at the time the Rules closed the 10 acre exemption, described types of structures that would be considered a residence. The memo included "An established recreational vehicle being used as a primary residence, with permanent installation (i.e. enclosed around the bottom and insulated, a deck) using the complete and usable water supply and wastewater system including a functional bathroom and lavatory."
- A procedure dated September 7, 2006 was created to provide guidance on what constitutes an improved lot. Note 5 of the procedure states, in part "An RV on a lot with existing water and/or wastewater systems, all of which existed prior to being subject to State regulation, may continue to be used in the same manner."

Definitions from the Rules:

A building or structure means a building or structure whose use or useful occupancy requires the construction or modification of a potable water supply and/or wastewater system.

A campground means any lot of land containing more than three campsites occupied for vacation or recreational purposes by camping units such as tents, yurts, tepees, lean-tos, camping cabins, and

recreational vehicles including motor homes, folding camping trailers, conventional travel trailers, fifth wheel travel trailers, truck campers, van campers, and conversion vehicles designed and used for travel, recreation and camping. The Rules then defines a campsite as an area in a campground that is designed to accommodate a camping unit for which design flows will be calculated.

ACT 250

Vermont's Land Use and Development Law

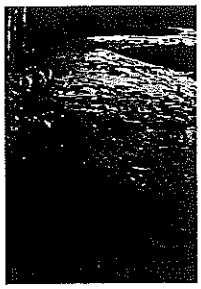
Peter Keibel,
District 4 Coordinator, Natural Resources Board;
Peter.Keibel@Vermont.gov, 879-5658

An Overview of the Act 250 Process

- History of Act 250
- Board and Administrative Structure
- Jurisdiction
- The 10 Criteria
- The Application Process
- Recent Changes to Act 250
- Questions

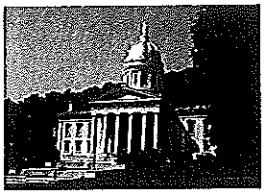
History of Act 250

In 1969 Gov. Deane Davis and others became concerned about pollution of Vermont's groundwater and streams from new development.



History of Act 250

After hearings by the Gibb Commission and statewide debate the Vermont legislature passed a law to regulate *certain kinds* of development at the state level, *in addition to* any existing local review



History of Act 250

Act No. 250 of the 1969 Adjourned Session of the Vermont Legislature became effective April 4, 1970.

Act 250 is necessary "to regulate and control the utilization and usages of lands and the environment to insure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, will promote the general welfare through orderly growth and development, and are suitable to the demands and needs of the people of the state . . ."

Findings and Declaration of Intent, 1969, No. 250 (Adj. Sess.)1.

Natural Resources Board

Structure of 9 Member Appointed Board

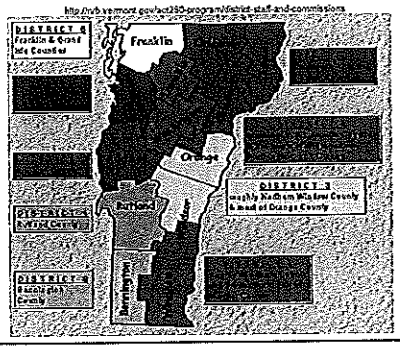
NRB Chair
Full time, appointed by Governor, also chairs both panels

Land Use Panel
(Act 250)
- Four members appointed by Governor, not full-time employees
- Administration of Act 250
- Procedural and interpretive rule making for Act 250
- Enforcement of Act 250 permits
- Intervention in the Environmental Court on appeals
- Hear appeals of Act 250 permit application fees

Water Resources Panel
- Four members, appointed by the Governor, not full time employees
- Water resource policy and rule making on a variety of water issues i.e. wetlands classification, outstanding resource waters, use of public waters, and more

Alternates
Up to four, appointed by Governor, not full-time

Act 250's 9 Environmental Districts



District Commission and Staff

District Commission
- Quasi-judicial body
- Members appointed by Governor, not full-time employees
- Three regular members, up to four alternates
- Three commissioners sit on each case

District Coordinator
- Full-time staff to District Commission
- Provides assistance to applicants, parties, and the general public
- All communications to the District Commission must be submitted to coordinator

District Office Support Staff
- Provide clerical and administrative support

Act 250 Jurisdiction

- Subdivisions of 10 lots or more, or 6 lots in towns without perm. zoning and sub. regs.
- Commercial development on >1 or >10 ac.
- State and Municipal projects >10 acres disturbance
- Housing projects with 10 or more units (except certain projects in designated smart growth areas)
- Communication towers >20 feet in height
- Commercial, industrial, or residential development above 2,500 feet
- Material or substantial changes

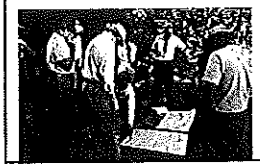
Act 250 Exemptions

- Electric generation and transmission facilities regulated by PSB
- Agricultural fairs and horse shows; no buildings; open to public for <61 days per year
- Farming and Logging below 2,500 feet
- Priority Housing Projects

Jurisdictional Opinions

- Issued by the District Coordinator - most often in the form or a Project Review Sheet - can be requested by anyone
- Binding on those who receive it if not appealed in 30 days
- Can be a "final" JO if served on all adjoiners and other parties
- Can be appealed to the Environmental Court within 30 days


Act 250 is a Citizen-Based Review Process




The 10 Criteria

1. Air and Water Pollution
2. Water Supply
3. Impact on Existing Water Supplies
4. Soil Erosion
5. Traffic Safety and Congestion
6. Impact on Schools
7. Impact on Municipal Services
8. Wildlife, Historic Sites, and Aesthetics
9. Impact of Growth
10. Conformance with Local and Regional Plans

The Act 250 Application Process

- Landowner or consultant meets with permit specialist in regional office to determine permits needed
- Permit specialist (ANR) and District Coordinator issue Project Review Sheet or written Jurisdictional Opinion
- Local review process
- Pre-application meeting with District Coordinator (optional but recommended)
- Applicant assembles necessary information, including review letters from state and local officials
- Applicant submits application - usually toward the end of the local review process
- District Coordinator reviews for completeness

The Act 250 Application Process

- District Commission determines how to process - "major" or "minor"
- Minor application: proposed permit is issued; party may request hearing within 2 - 3 week comment period
- Major application: prehearing or hearing is scheduled within 40 days

The Act 250 Hearing Process

- Applicant presents overview
- District Commission accepts petitions for party status
- Applicant presents information under the 10 Criteria, including any expert witnesses (civil engineer, traffic expert, etc.)
- District Commission asks questions
- Parties have chance to ask questions (cross-examine)
- Parties have chance to present their own evidence, including expert witnesses
- After the hearing, commission issues recess memo listing outstanding items

Act 250 Party Status

10 V.S.A. §6085

(c)(1) Party status. In proceedings before the district commissions, the following persons shall be entitled to party status:

(A) The applicant;

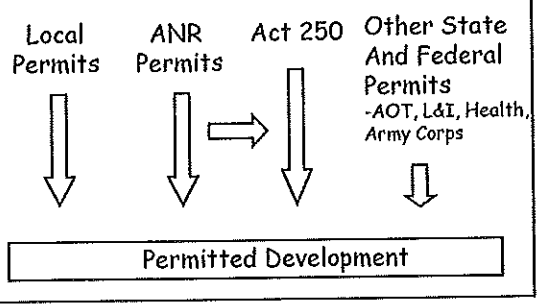
(B) The landowner, if the applicant is not the landowner;

(C) The municipality in which the project site is located, and the municipal and regional planning commissions for that municipality; if the project site is located on a boundary, any Vermont municipality adjacent to that border and the municipal and regional planning commissions for that municipality; and the solid waste management district in which the land is located, if the development or subdivision constitutes a facility pursuant to subdivision 6602(10) of this title;

(D) Any state agency affected by the proposed project;

(E) Any adjoining property owner or other person who has a particularized interest protected by this chapter that may be affected by an act or decision by a district commission.

Permit Coordination



Act 250 Statistics

- 600 - 700 applications submitted each year
- 98% of applications are approved, with conditions, by the nine district commissions
- More than 80% of applications are processed as "minors" (no hearing)
- 62% of decisions are issued within 60 days

Changes to Act 250
Permit Reform – Act 115

- Natural Resources Board replaced Environmental and Water Resources Boards as of 2/1/05
- Appeals of all municipal and state land use decisions (including Act 250 and ANR) go to expanded Environmental Court
- Jurisdictional appeals also go to Environmental Court
- Party status changes: parties must have "particularized" interest; must participate to appeal; all parties can appeal to Supreme Court
- Reorganization and updating of Chapter 117 - Municipal and Regional Planning Law

2007 Changes to Act 250
Criterion 9(B) – Primary Agricultural Soils

9(B) Primary Agricultural Soils

(B) Primary agricultural soils. A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not result in any reduction in the agricultural potential of the primary agricultural soils; or:

(i) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential; and

(ii) except in the case of an application for a project located in a designated growth center, there are no lands other than primary agricultural soils owned or controlled by the applicant which are reasonably suited to the purpose of the development or subdivision; and

(iii) except in the case of an application for a project located in a designated growth center, the subdivision or development has been planned to minimize the reduction of agricultural potential of the primary agricultural soils through innovative land use design resulting in compact development patterns, so that the remaining primary agricultural soils on the project tract are capable of supporting or contributing to an economic or commercial agricultural operation; and

(iv) suitable mitigation will be provided for any reduction in the agricultural potential of the primary agricultural soils caused by the development or subdivision, in accordance with section 6093 of this title and rules adopted by the land use panel.

Clean Slate
the Act 250 version

- Clean Slate does not apply to Act 250 projects and a Commission has no authority to waive requirements under Criteria 1(B) or 2
- Act 250 recognizes that a decision that requires a landowner to design and construct a water supply or wastewater system for construction and lots that are "clean slated" by ANR may not always make economic sense or be necessary to protect the environment. Therefore, under certain circumstances, information can be provided to the Commission that obviates the need for the construction of such systems.
- The Applicant shall provide a site plan which shows:
  - the approximate location of wastewater disposal system(s), any easements, the location of all water supply systems on the property and their isolation distances, etc.
  - a written report from a Vermont certified laboratory that the water supply system(s) used on the property provides potable water
  - an affidavit that the wastewater system(s) on the property is not a "failed system," as that term is defined in the current version of the ANR Environmental Protection Rules; and
  - the water supply system(s) provides adequate flow or volume for the current use or occupancy of the property.

For more detailed information
http://anr.vermont.gov/sites/anr/files/documents/cleanslate.pdf

Criterion 9(L)
Strip Development - 2013

- Settlement patterns. To promote Vermont's historic settlement pattern of compact village and urban centers separated by rural countryside, a permit will be granted for a development or subdivision outside an existing settlement when it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision:
- (i) will make efficient use of land, energy, roads, utilities, and other supporting infrastructure; and
- (ii) (I) will not contribute to a pattern of strip development along public highways; or
  - (II) if the development or subdivision will be confined to an area that already constitutes strip development, will incorporate infill as defined in 24 V.S.A. § 2791 and is designed to reasonably minimize the characteristics listed in the definition of strip development under subdivision 6001(36) of this title.

See NATURAL RESOURCES BOARD ACT 250 CRITERION 9(L) GUIDANCE - http://nrb.vermont.gov/sites/nrb/files/documents/criterion9L_4.pdf

Criterion 5 (a) & (b)
Traffic

- (5)(A) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

  Act 145 Fair Share 10 V.S.A. § 6184

  Question is no longer - "is there an impact that warrants mitigation?" Question now is "how many trips are added?
  1. How many trips are added? Applicants should work with VTrans, local RPC and Transportation engineers to determine
  2. Is there a capital improvement project from which the Applicant's project will benefit? - procedure or new area
  3. What is the fee per peak hour trip generated?
  4. Do the math
- (B) As appropriate, will incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services. In determining appropriateness under this subdivision (B), the District Commission shall consider whether such a strategy, access, or connection constitutes a measure that a reasonable person would take given the type, scale, and transportation impacts of the proposed development or subdivision. Fair Share Impact Fee

Energy Conservation Criterion 9(F) -

Residential Buildings

Pursuant to 10 V.S.A. § 6086(a)(9)(F) an applicant seeking an affirmative finding under criterion 9(F) shall provide evidence that the subdivision or development complies with the applicable building energy standards under 30 V.S.A. § 51. Pursuant to 30 V.S.A. § 51, substantial and reliable evidence of compliance with the Residential Building Energy Standards (RBES) and the RBES Stretch Code established under 30 V.S.A. §51, serves as a presumption of compliance with criterion 9(F).

Commercial Buildings

Pursuant to 10 V.S.A. § 6086(a)(9)(F), an applicant must demonstrate "the planning and design of the subdivision or development reflect the principles of energy conservation, including reduction of greenhouse gas emissions from the use of energy, and incorporate the best available technology for efficient use or recovery of energy." The Public Service Department has developed a CBES Stretch Guidance, which furthers the goals of criterion 9(F).

For more information see the NRB Guidance document
http://nrb.vermont.gov/sites/nrb/files/documents/9fprovider.pdf

Priority Housing Projects - 2013

- Thresholds for triggering Act 250 jurisdiction are increased for "mixed income" projects in a "Vermont Neighborhood"
- Thresholds for triggering Act 250 jurisdiction are increased for "mixed income" or "mixed use" projects in Growth Centers or Designated Downtowns (24 V.S.A. 2793c)
- The new thresholds depend on the municipality's population

Mixed Income

A housing project in which the following apply

- Owner occupied where either:
  - 15% of the housing units have a sale price that does not exceed 85 percent of the new construction, targeted area purchase price limits established and published annually by the Vermont Housing finance agency
  - At least 20% of the housing units have a purchase price which at the time of first sale does not exceed 90 percent of the new construction targeted area purchase price limits established and published annually by the Vermont Housing finance agency
- Affordable rental housing
  - At least 20% of housing that is rented by the occupants whose gross annual household income does not exceed 60 percent of the county median income, or 60 percent of the standard metropolitan statistical area income if the municipality is located in such an area....and the total annual cost of the gross annual household income as defined in Section 42(g)(2)(C) and with a duration of affordability of no less than 30 years

10 V.S.A. 6001(27)

Mixed Use

- Construction of both mixed income housing and construction of space for any combination of retail, office, services, artisan and recreational and community centers, provided at least 40 percent of the gross floor area of the building involved is mixed income housing. Mixed use does not include industrial use.

10 V.S.A. 6001(28)

New Smart Growth Thresholds

Municipal Population	# of Housing Units to trigger Act 250 review
> 15,000	No limit[1]
10,000 – 15,000	No limit[1]
6,000 – 10,000	50
3,000 – 6,000	50
< 3,000	25

[1] With Passage of S.135 scheduled this July

Non-Statutory Changes

- New and Improved Web site
- On-line database of all Act 250 permits and applications including on-line links to all important file documents - current projects only right now
- On-line map of all Act 250 permits issued since 1970
- Archive of all previous Rules and Statutes
- Policies and Guidance documents

Act 250 Resources

- Web site: http://nrb.vermont.gov/index.php
  - Staff addresses, phone #, email
  - Statute and Act 250 Rules
  - Board Decisions (1980 - Present)
  - District Commission Cases (ANR Database)
  - E-Note Index
  - Information Sheets
  - Frequently Asked Questions

Vermont Natural Resources Board
Land Use Panel

10 V.S.A. Ch. 151 (Act 250)

POLICY ON "CLEAN SLATE" ISSUES

"Clean Slate" refers to an exemption to the water supply and wastewater permitting requirements of 10 V.S.A. Ch. 64. Buildings that were substantially complete in construction before January 1, 2007 and all improved lots that were in existence before January 1, 2007 need not obtain water supply or wastewater permits, as long as their systems are not "failed" systems (as that term is defined in the current version of the ANR Environmental Protection Rules). If such systems do fail, then, even under the "clean slate" exemption, they have to obtain permits, but the Secretary of the Agency of Natural Resources (ANR) is authorized to grant variances. 10 V.S.A. §1974.

"Clean Slate," however, does not apply to 10 V.S.A. Ch. 151 (Act 250), and thus a Commission has no authority to waive requirements when it determines whether or not a project meets Criteria 1(B) or (2). Further, because ANR does not require a water supply/wastewater permit for "clean slated" projects, an Act 250 applicant cannot utilize the Act 250 Rule 19 presumption that an ANR permit provides relative to 10 V.S.A.§6086(a)(1)(B) and (2) (Criteria 1(B), (2) and (3)).

The Land Use Panel recognizes, however, that a decision that requires a landowner to design and construct a water supply or wastewater system for construction and lots that are "clean slated" by ANR may not always make economic sense or be necessary to protect the environment. The Panel therefore finds that, under certain circumstances, information can be provided to the Commissions that obviates the need for the construction of such systems, and the Panel therefore establishes the following policy to be followed in these situations.

It is the policy of the Land Use Panel that:

A. When the design flow of a property's wastewater system is 600 gallons per day or less, and the horizontal distance from a property's wastewater disposal system to a surface water is 50 feet or more, a Coordinator shall find an application or amendment application to be complete, or shall issue an opinion that a property is in compliance with 10 V.S.A. Ch. 151 (Act 250), and a Commission shall make positive findings as to 10 V.S.A. §§6086(a)(1)(B), (2) and (3), when:

1. (a) a project obtained an Act 250 permit and construction was substantially completed before January 1, 2007, or

   (b) a project did not obtain a required Act 250 permit and

construction was substantially completed before January 1, 2007; and

2. the owner of the property provides:

(a) (i) for residential properties, information as to the number of bedrooms in the residence; or

(ii) for commercial properties, the design flow of the wastewater system for the property; and

(b) a site plan which shows:

(i) the approximate location of wastewater disposal system(s) on the property and any easements on the property for any wastewater disposal systems; and

(ii) the location of all water supply systems on the property and their isolation distances from wastewater disposal systems on the property; and

(iii) to the extent that information is known or reasonably available, off-site water supply systems, if they are within the required isolation distances; and

(iv) the horizontal distance from any wastewater disposal system for the property to any surface water; and

(c) a written report from a Vermont certified laboratory that the water supply system(s) used on the property provides potable water, indicating a negative result (i.e., that the water supply system(s) has "passed") for Total Coliform Bacteria and *Escherichia coli* (*E .coli)*; and

(d) an affidavit that

(i) the wastewater system(s) on the property is not a "failed system," as that term is defined in the current version of the ANR Environmental Protection Rules; and

(ii) the water supply system(s) provides adequate flow or volume for the current use or occupancy of the property.

B. When the design flow of a property's wastewater system is more than 600 gallons per day, or the horizontal distance from a property's wastewater disposal system to a surface water is less than 50 feet, a Coordinator may find an application or amendment application to be complete, or may issue an opinion that a property is in compliance with 10 V.S.A. Ch. 151 (Act 250), and a Commission may make positive findings as to 10 V.S.A. §§6086(a)(1)(B), (2) and (3), when:

1. (a) a project obtained an Act 250 permit and construction was substantially completed before January 1, 2007, or

   (b) a project did not obtain a required Act 250 permit and construction was substantially completed before January 1, 2007; and

2. the owner of the property provides all of the information and the affidavit required by Part A(2) of this Policy.

Adopted by the Land Use Panel, this 27th day of March 2012.

Natural Resources Board
Land Use Panel

Ronald A. Shems , Chair

Vermont Land Trust

CONSERVING LAND FOR THE FUTURE OF VERMONT

WHAT VLT DOES

Rick Peterson, Project Counsel

Tracy Zschau, Conservation Director

Caitlin Cusack, RSM and Forester

VLT's Mission

The Mission of the Vermont Land Trust is to conserve land for the future of Vermont, particularly those lands that support, enhance, or contribute to the vitality of the communities and economy of Vermont.

Vermont Land Trust

- Established in 1977 as the Ottauquechee Land Trust; went statewide in mid-1980s.
- Headquarters in Montpelier; regional offices in St. Johnsbury, Brattleboro, Bennington, Richmond; over 40 staff members.
- Completed over 1,900 projects conserving 570,000 acres – about 10% of the privately owned undeveloped land in Vermont.

Who does VLT work with?

- **Individual landowners to conserve family lands, working farms, and forests.**
- **Communities and nonprofit organizations to protect locally-important land.**
- **Multiple partners in landscape level conservation initiatives such as the Chittenden County Uplands Conservation Project.**

How is land conserved? In most cases, LANDOWNERS.....

- Retain ownership of the land.
- Continue to pay property taxes on it.
- Either give or sell a conservation easement (CE) to the Vermont Land Trust.

(Occasionally, VLT purchases and resells land with CE.)

Conservation Easement—What is it?

- Generic term for a legal conveyance of development rights and imposition of use restrictions from a landowner to a "qualified holder" – a servitude that runs with the land.
- Focuses on protecting the land's key qualities: ability to produce crops or timber, soil, water, wildlife habitat and other ecological attributes, scenic values and opportunities for outdoor recreation.
- Flexibility in terms of future house sites, land-based enterprises, excluding parcels, community uses.

Conservation Easement - Enabling Statute

- Prior to1987 – an appurtenant easement, "anchor parcels" used to create a benefited estate
- 10 V.S.A. Chapters 34 and 155 – an easement in gross
- "Qualified Holder" – municipality, certain state agencies and departments, 501(c)(3) organizations certified by Tax Dept. as principally engaged in land conservation

Conservation Easements – Title Issues

- Mortgages – Partial Discharge and Subordination Agreement re: Pre-emptive Rights
- "Lease Land" Relinquishment under 24 V.S.A. Section 2406
- Oil, Gas & Mineral Rights must be released or abandoned under 29 V.S.A. Section 563
- Property tax liens do not affect CEs under 10 V.S.A. Section 6311
- Current Use liens do not affect CEs under 32 V.S.A. Section 3757(k)

Conservation Easement—Outline

- Purposes
- Restricted Uses
- Permitted Uses
- Forest Management
- Enforcement
- Pre-Emptive Right (for farm properties)

Conservation Easement Restrictions

- No residential, commercial or industrial use or development (unless otherwise provided)
- No rights-of-way, drives, roads, utility lines without VLT approval.
- No signs for off-premises activities.
- No landfills or junkyards.
- No mining or removal of sand, gravel or topsoil.
- No subdivision (though may be approved by VLT in limited circumstances).

Conservation Easements – Permitted Uses

- Farming (Act 250 definition) and re-establishment of fields
- Forestry and maple sugaring
- Construct farm/forestry structures (barns, farm labor housing) with VLT approval
- Manage water for agricultural purposes.
- Trail construction, non-commercial recreation.
- "Rural enterprises" for commercial use of property, consistent with CE purposes.
- Construction of a small camp (no improved access or utilities) and minor structures.

Farm Easements – Pre-Emptive Rights

- Right of First Refusal: The easement holder has to match an offer.
- Option to Purchase at Agricultural Value: The easement holder has opportunity to purchase the farm at a set price – either the original restricted value plus inflation or at a price determined by an appraisal when the option is triggered.
- Neither apply when farm is sold to a family member or a "qualified farmer."
- Waiver possible for new farmer with sound business plan

Conservation Easements - IncomeTax Implications

- Donations and "Bargain Sales" may qualify for a charitable deduction against federal income tax under IRC Section 170 and Treasury Reg. 170A-14.
- "Quid Pro Quo" negates donative intent.
- Must procure a qualified appraisal and submit supporting documentation with IRS Form 8283.

Types of VLT Projects

- **Farm Projects:** farms with the best soils and infrastructure, and in active operation.
- **Forest Projects:** generally large tracts > 500 acres under forest management.
- **Conservation Easement Donations:** multiple values
- **Community Projects:** locally important lands.
- **Landscape-scale Initiatives:** Chittenden County Uplands

Each project category has specific criteria relating to:

- **Conservation values (farm/forestland, wildlife habitat/ecological values, recreation, scenic character)**
- **Importance to community/local economy**
- **Farm plan/viability/ innovation**
- **Fundability/leverage**

Funding Sources

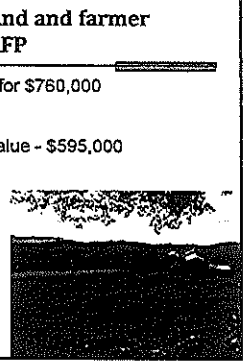
- **Vermont Housing & Conservation Board**
- **Natural Resources Conservation Service**
- **Freeman Foundation**
- **Local grassroots fund-raising**
- **Town/city conservation funds**
- **Local and national foundations and grants**
- **Landowners**

Farmland Access Program Examples

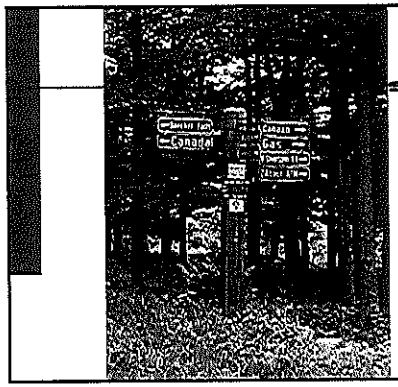
- VLT acquisition of land and a farmer identified through an RFP (Bragg Farm)
- VLT farm acquisition or interim financial assistance for a farmer (Bridge Loans)
- Technical assistance and support services to a farmer that identifies a farm with CE purchase
- VLT acquisition and long-term hold of land (Pine Island)
- Conservation easement purchase to facilitate simultaneous farm transfer (Berthiaume Farm)

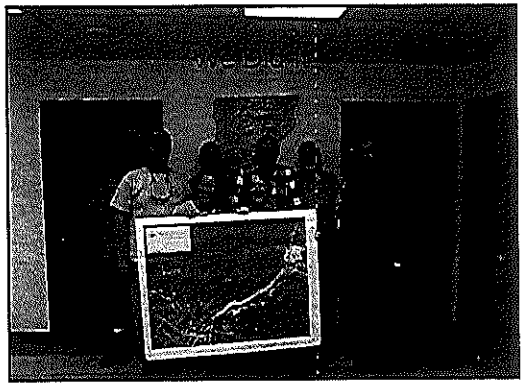
VLT acquisition of land and farmer identified through RFP

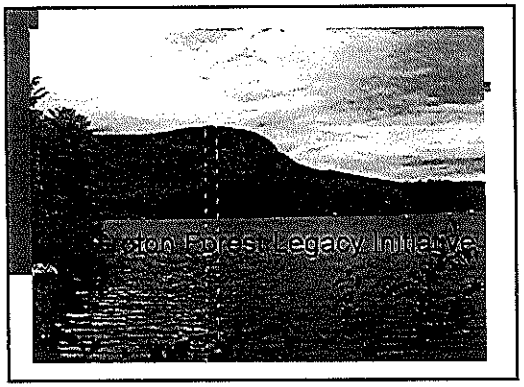
- VLT acquired Bragg Farm for $760,000
- Sale to farmer - $165,000
- Conservation Easement Value - $595,000
- 20 months from start to finish for the entire project
- 17-month holding period for the 48-acre farm parcel



Canaan Community Forest

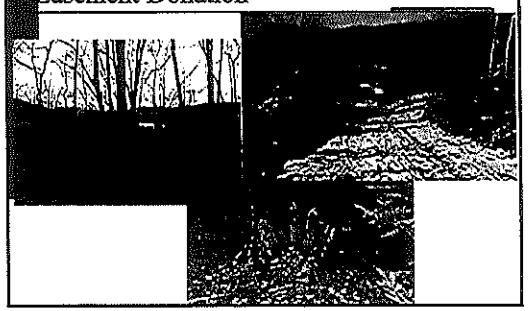




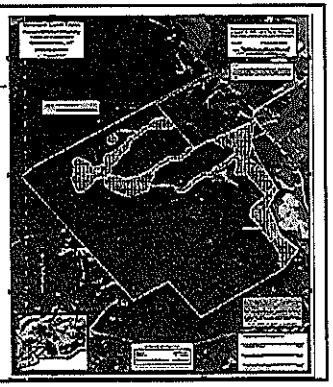


- 8 Landowners
- ~~9,700+ Acres~~
- 11 miles shared GSF boundary
- >45,000 ft of lake & pond frontage
- 15 miles streams
- ~ Estimated cost $6 million

Rankin-O'Brien
Easement Donation



51 acres Wetlands
Surface Water
Buffer Zones along
13,000 feet of Chandler Brook and associated tributaries
the summit of Chamberlain Mountain
Northern Hardwood Talus Woodland Community
- Well developed trail system – dispersed recreation



Benefits of Conservation Easement Donations

- Meets conservation goals of landowner.
- Keeps land in private ownership; landowner retains right to sell, pass on to heirs.
- Easements can be tailored to family's needs and to the character of the land.
- Conservation easements are permanent; remain in force when land is transferred.
- Potential income and estate tax benefits.
- Long-term stewardship of easement by VLT.

Other Implications of Conservation Easements:

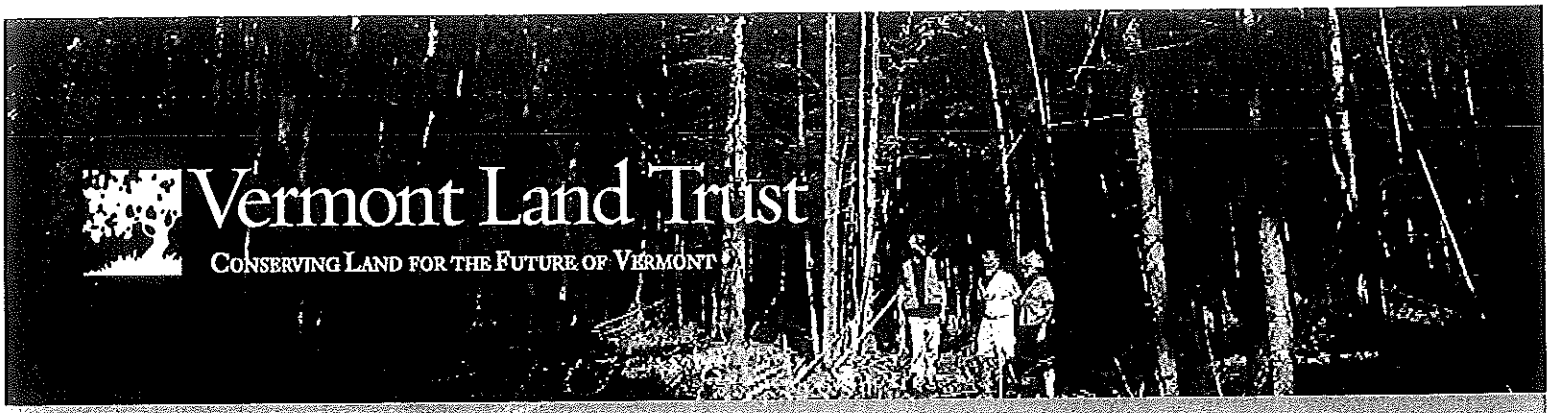
- **May or may not affect local property taxes.**
- **Owner of property has regular contact with VLT Stewardship staff; some actions do require VLT approval.**
- **Harvesting forest products requires a forest management plan approved by VLT.**
- **Potential buyers of conserved land can be favorably inclined – or they can express reservations.**
- **May enhance surrounding property values.**
- **Public access is not required (except in special circumstances).**

VLT'S STEWARDSHIP PROGRAM

- We don't see ourselves as "Conservation Police"; we like to think of it as a partnership, doing things together for the land and community; provide information and assistance.
- 10 Regional Stewardship Managers and Foresters
- Annual Monitoring
- Approvals
- Amendments are rare and generally for technical corrections or to add land or to enhance conservation outcomes (eg. OPAV, River Corridor Protection)

Closing Comments

- Lawyers: to effectively represent the seller or buyer of land with a conservation easement, it requires clear understanding of CE knowing what the easement permits/doesn't permit, the impact of ROFR and OPAV, and tax implications.
- VLT is happy to answer questions about how an easement provision is interpreted; if a buyer has plans to build new structures or change the use of the land, get an opinion from us first.
- 10 V.S.A. 823 – Reference CE in deeds



When to Call the Vermont Land Trust

A variety of land use activities require VLT consultation and approval ahead of time, so call us as soon as you think you might want to do any of these activities. We evaluate requests for approval based on the activity's consistency with the purposes of your conservation easement.

Examples of Activities or Changes that Require VLT Approval

- Siting, building, or relocating a reserved house right
- Converting a single-family house to a multi-family house
- Constructing barns, sugarhouses, or other agricultural and forestry structures
- Building any structure that is not for agriculture or forestry
- Building or siting a driveway, utilities, septic systems or a water supply
- Building or enlarging ponds or reservoirs
- Harvesting timber (except for your own firewood)
- Creating or amending a forest management plan
- Converting woodland to agricultural use
- Granting a right of way (ROW) or any easement on your land
- Changing any boundary
- Giving or selling a deed on your land, or on an approved lot excluded from the easement
- Changing who owns the corporation, trust, partnership or other entity that owns your land
- Requesting to waive VLT's Right of First Refusal or Option to Purchase at Agricultural Value
- Any lease exceeding 15 years, including renewals or extensions
- Any accessory business on your land or in a home on your land
- Any conflicts with or changes to public access that is protected by your easement
- Any changes to designated historic buildings
- Any activity in a special zone (this could be an ecological protection/habitat zone, a riparian buffer along water bodies, or an archaeological area)

Vermont Land Trust 8 Bailey Ave. Montpelier, VT 05602 (802) 223-5234 www.vlt.org info@vlt.org

USE OF CONSERVATION EASEMENTS
IN TRANSFERRING FARMLAND
Case Study: 329-Acre Organic Dairy
Fairfax, Vermont

October 2014: VLT enters into 3 Agreements with Retiring Farmers:

- Purchase and Sale Agreement for Fee Title on 329-Acre Farm - $310,000.00 Assignable by VLT to a qualified farm buyer
- Purchase and Sale Agreement for Co-Held (VLT, VHCB, VAAFM) NRCS-funded Farm Conservation Easement on 206 Acres - $435,000.00
- Pledge Agreement for Donated Woodland Conservation Easement on 123 Acres

October 2014 – March 2015: VLT undertakes public Request for Proposals process

March 2015: VLT assigns Purchase and Sale Agreement for Fee Title to New Farmers subject to June 30, 2015 financing contingency

VLT applies to VHCB for funding to purchase Farm Conservation Easement

April 2015: Retiring Farmers and New Farmers enter into Lease Agreement for the Farm until closing on conservation and fee transfer

May 2015: VHCB approves grant to purchase Farm Conservation Easement subject to conditions, including compliance with NRCS requirements

December 2015: Closing:

- Retiring Farmers sell Farm Conservation Easement to VLT, VHCB and VAAFM with NRCS contingent right to enforce for $435,000.00
- Retiring Farmers donate Woodland Conservation Easement to VLT
- Farmland and Woodland Conservation Easements are "linked" as to non-subdivision and OPAV
- Retiring Farmers sell conserved Farmland and Woodland to New Farmers for $310,000.00 financed by FSA

Conservation Easements: Guide to the Legal Document

This guide summarizes the standard legal document used by the Vermont Land Trust (VLT) for donated conservation easements. VLT can be flexible about some terms of each conservation easement, and VLT staff can assist landowners by preparing a document that meets each landowner's specific needs. This guide only summarizes the conservation easement. Before donating an easement, each landowner must be familiar with the terms of the legal document itself and should seek the advice of an attorney. Each conservation easement includes the following sections:

A: Introduction

The easement begins with a series of "whereas" clauses that summarize the public benefit that comes from permanently conserving land in Vermont. All easements held by VLT are perpetual and "run with the land," meaning that the easement remains, no matter how the property is transferred or who the future owners are. While an easement can, in theory, be amended with the consent of VLT, such changes are extremely rare and only occur where the amendment does not reduce the protection of conservation values. A "schedule" attached to the easement describes the "protected property" conserved by the document.

B: Statement of Purposes

This section states that the document's primary purpose is to "conserve productive agricultural and forestry uses, wildlife habitats, non-commercial recreational opportunities and activities, and other natural resource and scenic values of the Protected Property for present and future generations." This clause in each easement is tailored to identify the unique attributes of each property. This statement of purposes provides the basis for interpreting the easement.

C: Restricted Uses of the Property

This section identifies the following limitations on the landowner's use of the conserved property:

1. **General**: A conserved property may be used for agricultural, forestry, educational, non-commercial recreation, and open space purposes only. Unless specified in the easement, no residential, commercial, industrial, or mining activities are permitted.

2. **Rights of Way and Easements:** The easement prohibits rights of way and access easements, including driveways, roads, and utility lines, unless specifically permitted in the document or unless permission for new easements is obtained from VLT. Existing rights of way and easements are unaffected.
3. **Signs:** Signs are generally prohibited. However, exceptions to this rule include property identification signs, boundary markers, directional signs, signs posting the property against trespass, memorial plaques, and temporary signs indicating that the property is for sale or lease. Signs informing the public that farm or timber products are for sale or are being grown are also permitted. VLT, with the permission of the landowner, may erect signs indicating that the property has been conserved by VLT.
4. **Trash:** The storage of trash, human waste, or unsightly material on the property is prohibited unless VLT approves such storage in advance. The storing and spreading of manure, lime and other fertilizer for agricultural purposes is permitted without such approval.
5. **Excavation**: The easement prohibits filling, excavation, removal of topsoil, sand, gravel, rocks, or minerals, or any change to topography unless the change is necessary to carry out the uses otherwise permitted by the conservation easement. Because one purpose of the easement is to encourage agricultural uses, tiling and drainage improvement are permitted *(see paragraph D(5)* below). Surface mining is expressly prohibited. In rare cases and under specific conditions, sand and gravel extraction for forestry or agricultural use on the property may be permitted.
6. **Subdivision:** Subdivision of the property is prohibited unless the owner first secures VLT's written permission, or unless the easement includes a clause such as that described in *paragraph D(9)* below. VLT may allow a subdivision if the transfer would not hinder farm or forestry activity on the retained land. Any subdivided parcel remains protected by the conservation easement.
7. **General Clause:** The easement includes a general clause which ensures that no uses will be made of the property that are inconsistent with the purposes of the conservation easement, as described in *Section B*, above.

D: Permitted Uses of the Property

This section of each easement identifies the following permitted activities on, and uses of, the conserved property:

1. **Agriculture:** The landowner may establish, re-establish, maintain, and use fields, orchards and pastures in accordance with generally accepted agricultural practices and sound husbandry principles; however, the landowner must obtain written permission from VLT prior to clearing forestland. Construction and maintenance of farm roads are also permitted by this clause. If a question arises concerning what are "sound agricultural and husbandry practices," VLT will seek the advice of professionals in those fields such as the Soil Conservation Service, UVM Extension System, or the Vermont Agency of Agriculture, Food & Markets.

2. **Maple Sugaring and Firewood Cutting:** The landowner may conduct maple sugaring operations and harvest firewood for heating residences and other buildings on the property.
3. **Forest Management:** VLT requires the development of a forest management plan to promote the long-term health and sustainability of forestland. The landowner may harvest timber and construct and maintain logging roads in accordance with a forest management plan which has been approved by VLT. Please see the VLT bulletin entitled "Managing and Harvesting Woodland" for a detailed explanation of forest management plan requirements. The easement may allow "heavy cutting" if consistent with the purposes of the easement or for silvicultural reasons identified in the forest management plan, or required because of the natural occurrence of fire, wind or insect damage.
4. **Farm Buildings:** The landowner may construct and maintain barns, sugar houses and similar structures on the property (and associated drives and utilities) provided they are used for agricultural or forestry purposes. The owner must obtain prior written approval from VLT, and permission will be granted if the location of new structures is consistent with the easement's purposes as described in *Section B.*
5. **Water Resources:** The landowner may improve and establish sources, courses and bodies of water for uses permitted under the conservation easement. The easement requires that the natural course of existing surface water drainage and runoff not be unnecessarily disturbed, except where required to improve the drainage of agricultural lands. The construction of ponds and reservoirs is permitted with the prior written consent of VLT. Water resources are required to be protected during and after timber harvesting operations by applying Acceptable Management Practices (AMPs) as defined by the Department of Forests, Parks and Recreation.
6. **Trails:** The landowner may clear, construct, and maintain trails for non-motorized recreational activities. Snowmobiling, hunting, and trapping are left to the discretion of the landowner. Unless the easement specifically provides otherwise [see *Section G(1)* below], the owner is not required to permit public use of the property.
7. **Existing Homestead:** Any existing homestead is generally excluded from the "protected property" unless it makes a significant contribution to the conservation goals of the easement. When the homestead is included, the easement normally identifies a "Homestead Complex" area, within which the owner is entitled to maintain, repair, renovate, enlarge, or rebuild the existing dwelling and associated improvements without VLT's prior approval. However, no new dwellings can be constructed nor can the Homestead Complex be conveyed separate from the protected property [except as may be provided in *paragraph D(9)* below].
8. **Additional House Sites:** The easement may allow the construction of one or more additional residences with associated improvements, provided the landowner first obtains VLT's approval for the location of each dwelling. The location of new homes must be consistent with the easement's purposes as described in *Section B.*
9. **Subdivision:** The easement may allow subdivision of the property to create a parcel for each house site permitted under *paragraph D(8)* above. The location of subdivision boundaries must be consistent with the easement's purposes as described in *Section B.*

10. **Rural Enterprises:** With VLT's prior approval, the landowner may conduct a variety of rural enterprises or non-agricultural/forestry business activities as long as they are consistent with the conservation easement, subordinate to any agricultural and forestry business, and they are located in a way that minimizes negative impact on existing and future agricultural and forestry uses. New buildings for rural enterprises must also be approved in advance and certain restrictions on size, location, and appearance would apply.

E: Enforcement of the Easement

Under this section of the easement, VLT accepts the responsibility of monitoring the property and, if necessary, enforcing the terms of the easement. If a violation occurs, VLT will attempt to contact the landowner personally to secure voluntary compliance. VLT is required to notify the landowner by certified mail of the action required to correct the violation. VLT may enforce the easement in court if the violation is not corrected. VLT will work with the landowner to voluntarily correct any violation of the conservation easement to avoid court enforcement. However, when voluntary efforts fail and a significant violation has occurred, it may be necessary to seek injunctive relief (an order requiring correction of the violation) or an award of monetary damages. The owner may be required to reimburse VLT for its enforcement expenses.

F: Miscellaneous Provisions

Each easement includes the following additional "miscellaneous" clauses:

1. VLT may request reimbursement from the landowner for extraordinary staff and other costs when the owner seeks prior written approval from the VLT for new structures, ponds, etc., should the review process become unreasonably time consuming or complicated. If a landowner requests written approval as part of the periodic monitoring process and provides VLT with all information necessary to review the request, reimbursement will not be sought.
2. The easement requires the landowner to comply with any state or local regulations which govern uses of, or construction on, the conserved property.
3. VLT may only transfer the conservation easement to a state agency, town, or a qualified conservation organization which agrees to enforce the easement.
4. In the unlikely event the easement is extinguished by eminent domain or other legal proceedings, VLT is entitled to any extinguishment payment for the value of the conservation easement.
5. Any future deed or lease conveying an interest in the property must refer to the conservation easement. The landowner must also notify VLT of the names and addresses of any new landowner. This ensures that new owners are aware of the conservation easement and provides VLT with the opportunity to contact new owners to discuss the easement.

F: Other Special Provisions

Depending on the special circumstances of each conservation property, one or more of the following provisions may be included:

1. **Public access:** A clause may be included permitting public access to the property, often confined to an identified trail, for such purposes as walking, skiing, or gaining access to a water body or other feature of public interest.
2. **Historic preservation easement:** When structures or sites with rare historical or archeological value are present, special provisions protecting those structures and sites may be included in the easement.
3. **Habitat or significant natural features protection:** When specialized habitats or natural features are located on the property, such as a deer wintering area, bear habitat, clayplain or floodplain forest, vernal pools, or riparian features, easement language can be added to protect the habitat or feature from intrusive activities.

F: Other Important Information

1. **Encumbrances:** All mortgages, liens, or similar encumbrances on title to the property must either be discharged or subordinated to the conservation easement. This prevents termination of the easement in the unlikely event of a foreclosure.
2. **Tax Deduction:** A landowner who seeks a charitable income tax deduction for the gift of a conservation easement must comply with a variety of Internal Revenue Code and regulatory requirements. Please refer to VLT's bulletin entitled "Tax Benefits of Donating Conservation Easements."
3. **Independent Advice**: The donation of a conservation easement can involve a variety of legal, tax, estate, and family issues. Donors should obtain the advice of qualified legal and financial advisors before making such an easement donation.

For more information on our land conservation, visit:
www.vlt.org/land-protection

Vermont Land Trust
8 Bailey Ave. Montpelier, VT 05602
(802) 223-5234

Updated: April 2011

Attorney Trust Accounts Terminology

The **bank balance** or *balance per bank statement* refers to the ending balance appearing on a bank statement. For example, when the firm receives its April account bank statement, the April 30 balance is the ending bank balance for that month. This bank balance will typically ***not*** agree with the amount in the firm's records since some checks written by the firm will not have cleared the checking account by April 30. In addition, some monies received by the firm on April 30 may not have been deposited in time for the amount to appear on the April bank statement.[1] (See "Deposit in Transit" below.)

The **book balance** or *balance per books*, or *checkbook balance*, is the amount shown in the firm's records. For example, the April 30 book balance refers to the balance appearing in the checking account register. This April 30 book balance may not be the *true* amount until all bank statement charges are recorded, such as bank fees withdrawn at the end of the month.[2]

A **deposit in transit** (DIT) is a check or electronic transfer (wire) that a firm has received and is (correctly) reported as a deposit in the checkbook register, but which does not appear on the *bank statement* until a later date. This may be a deposit made at month end which will appear on the next bank statement.[3] Verification of deposit date for any deposits in transit will typically be required during any Escrow Trust Account audit. All DIT should clear by the 3rd business day.

The **reconciled bank balance** is achieved by taking the ending bank balance and subtracting bank service charges that appear on the bank statement, but are not yet entered on the firm's records, deducting outstanding checks written by the firm, but which have not yet cleared the bank, (They are already recorded on the firm's books, but they are not on the bank statement.) and adding deposits in transit which are already on the books, but which do not appear on the bank statement.[4] **Reconciled Bank Balance** is achieved when the:
Ending Bank Balance + Deposits in Transit – Bank Service Charges – Outstanding Checks = Book Balance.

The **trial balance** is a list of all open, individual, escrow ledger balances at the end of the reconciliation period – normally the end of every month.[5] This list should include the client name or transaction number, amount of escrow and date of last activity. The total of all escrows at month end should equal both the book balance and reconciled bank balance. Firm funds should also be included as part of the trial balance.

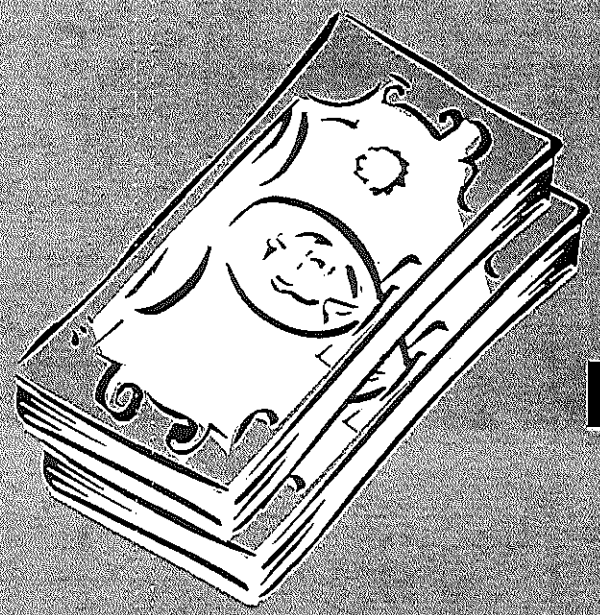
Three-Way Reconciliation is a method for discovering shortages, charges to be reimbursed or any errors or omissions that must be corrected relative to an Escrow Trust Account. This requires comparison of the escrow trial balance, the book balance and the reconciled bank balance. If all three parts **do not agree**, any differences need to be investigated and *corrected.* [6] This will typically be a requirement of any Escrow Trust Account audit. **Three-Way Reconciliation** is achieved when the: (1) Book Balance = (2) Reconciled Bank Balance = (3) Trial Balance.

1. www.accountingcoach.com; 2. Id.; 3. Id.; 4. Id.; 5. www.attcls.com; 6. Id.

For More Information,
Call Us Toll Free at (800) 842-2216

CATIC

Requirements for keeping clients' money



Rule of Prof. Conduct 1.15

(Safekeeping Property)

CATIC 2017

CATIC
AGENT DRIVEN. INSURING RESULTS.

Compliance is a non-delegable duty

- Compliance is a non-delegable duty
  - Hiring a bookkeeper or office manager to maintain billing and/or financial records does not absolve the lawyer of the responsibility to comply with the Rule.
  - Many title insurance companies audit their agents' accounts for compliance with their requirements. This does not mean the records are compliant with the rule.

CATIC

IOLTA Accounts

- An IOLTA account is a pooled trust account where an attorney holds funds for multiple client matters for a short period of time.
- Separate records of funds for each client matter must be kept within the IOLTA account.
  - Each real estate transaction is a separate client matter.

CATIC

IOLTA Accounts (cont'd)

- Trust funds held for a longer time period must be deposited into an individual trust account.
- Client funds are NOT fungible. Client funds can be used ONLY for the client matter for which the attorney is holding the funds.

CATIC

Client Funds v. Non-Client Funds

- Any funds that a client or a third party has a claim to are client funds.
- Client funds
  - Funding received from a lender for a real estate transaction
  - Retainers
  - Settlement checks

CATIC

Rule 1.15 / Central Requirements

- Segregation of trust funds from lawyer's funds
  - No commingling
  - Commingling = depositing personal / firm funds into the IOLTA account
  - Commingling = leaving earned fees in an IOLTA account
- Documentation of amounts currently held for each client matter and of amounts received and disbursed
- Regular reconciliation

CATIC

Operational requirements

- Must use an IOLTA account with interest to the IOLTA committee or an individual trust account that has interest paid to client or third party
  - IOLTA accounts are generally for small amounts of money OR funds the lawyer will have for a short period of time
- All IOLTA accounts must be in an approved bank
  - Most major banks are approved. A list of all approved banks is available on the IOLTA committee's website www.maiolta.org (other examples: CT www.ctbarfdn.org, VT https://vtbarfoundation.org/programs/iolta)
- Account title must identify it as a trust / IOLTA account
  - A lawyer should also have the trust account title printed on the checks

CATIC

Operational Requirements (cont'd)

- **For each trust account opened:
  - Lawyer must submit written notice to the bank confirming that the account will hold trust funds.
  - The lawyer shall retain a copy of the notice.
  - Notice shall identify the bank, account, and type of account (IOLTA or individual trust account).
  - **New in Mass. July 1, 2015
    - See also Mass. R. Prof. c. 1.15, Comment #7

CATIC

Operational requirements (cont'd)

- No withdrawals from trust accounts via ATM and no checks payable to "Cash"
  - All withdrawals must identify the recipient of the funds
- Use pre-numbered checks only
  - starter checks are just for starters
- Fee withdrawals must be by check payable to lawyer or the lawyer's firm*
  - A lawyer cannot pay personal / business expenses directly from an IOLTA account

CATIC

*Fee withdrawals made via online transfer

- A fee withdrawal made by online transfer to the firm operating account is permissible
  - An online transfer DOES identify the recipient of the funds (the monthly bank statement will show the account number the funds are transferred into)

CATIC

Operational Requirements (cont'd)

- Dissolution of a Law Firm.
  - The partners shall make reasonable efforts to ensure the maintenance of client trust account records specified in this Rule.
  - **New in Mass. July 1, 2015
    - See also Mass. R. Prof. c. 1.15, Comment #13

CATIC

All Funds Must be held in a trust account

- Client Funds
- Advances for costs and expenses
  "A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or as expenses incurred."
  - **New in Mass. July 1, 2015

CATIC

Accounting to the Client

- Lawyer must render full written account to the client upon:
  - Demand
  - Final distribution
  - Withdrawing fees
    - These are your client's funds in the account
    - You should always be able to tell clients exactly how much of their money you are holding at any time

CATIC

Withdrawing fees - notification to the client

- On or before the date of withdrawing funds to pay fees from a trust account, the lawyer must mail or deliver to the client:
  - Written itemized bill accounting for services rendered
  - Written notice of the date of withdrawal
  - Statement of the amount withdrawn and the balance in the client's account after the withdrawal

CATIC

Withdrawing fees - notification to the client

- The definition of "trust property" includes funds held in a fiduciary capacity; lawyers who represent themselves as fiduciaries (e.g. personal representatives, executors, conservators, guardians or trustees) must comply with all notification requirements.

CATIC

Account documentation

- All documents, in any data format, recording transactions that the bank returns to the lawyer must be kept by the lawyer
  - Hard copy, email, electronic records, etc.
  - Examples:
    - Statements
    - Cancelled checks
    - Records of electronic transactions
    - Deposit receipts
- Requirement of the lawyer to record:
  - name and address of the bank
  - account number
  - account title
  - opening and closing dates, and
  - type of account
    - Check your statement when you open the account and verify the information is correct – most of this information is printed on the statement

CATIC

Account documentation

- Verify the account has been set up correctly
  - Make sure the IOLTA committee tax id number is on the account.
    - If the account has the lawyer's or the client's tax id number, it was not set up correctly as an IOLTA account
  - Make sure the interest gets transferred to the IOLTA committee.

CATIC

Records created by the lawyer

- Four types of accounting records must be created and kept by the lawyer:
  - Account/Check register
  - Ledger for each client matter
  - Ledger for all bank fees
  - Reconciliation Reports

**All records that are required to be created by the lawyer must be created contemporaneously with each transaction

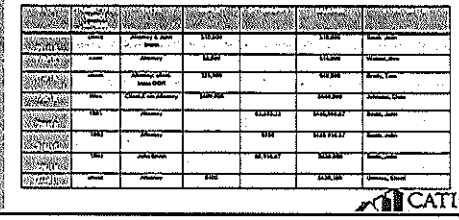
CATIC

Account/check register

- All transactions must be recorded in chronological order
  - Date and amount of every deposit and withdrawal
  - Includes all types of transactions (check, wire, EFT)
  - Specific client identifier
  - running balance *after each transaction*

CATIC

check register: example



CATIC

Ledgers for each client matter

- A lawyer is required to keep individual client records for each separate client matter in which the lawyer holds funds for the client
- Each individual client ledger must:
  - Name the client matter
  - Detail all the funds received or disbursed
    - (date and source/payee)
  - Maintain a running balance following every receipt or payment of funds for the client matter

CATIC

Ledgers for each client matter (cont'd)

- No individual client ledger should ever have a negative balance

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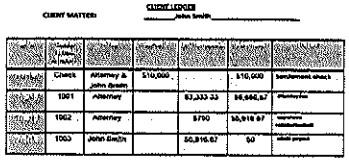
Funds must clear before they are disbursed

- A lawyer must verify that funds have cleared before disbursing funds.
  - It is not sufficient to verify funds have been sent – funds must have been received and cleared.
  - Available and cleared are different. The lawyer must verify the funds have CLEARED before authorizing any disbursement.

CATIC

Individual client ledger



CATIC

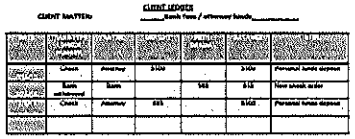
Ledger for bank fees and charges

- A lawyer is required to keep a separate ledger for bank fees and expenses. Must detail:
  - Every deposit of the lawyer's funds for bank fees
  - Every disbursement of funds for bank fees
  - Maintain a running balance after each transaction

  The funds for bank fees are the *only* personal funds a lawyer is allowed to have in an IOLTA account

CATIC

Bank fees ledger



CATIC

Account Reconciliation

- Lawyers must perform a "three way" reconciliation of the account at least monthly.
  - Mass. R. Prof. C. 1.15 requires at least every 60 days and recommends high volume accounts are reconciled more frequently
  - CT requires quarterly 1.15(j)(9)
  - VT requires monthly 1.15(a)(4)
  - ALTA Best Practices requires monthly

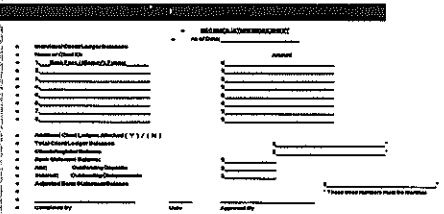
CATIC

"Three-Way" reconciliation (cont'd)

- Three-way reconciliation requires that the following three numbers must be identical:
  - The total of all individual client ledgers plus the bank fees ledger
  - The account register balance
  - The adjusted bank statement balance
    - The adjusted bank statement balance is: the bank statement balance plus (+) any outstanding deposits, minus (-) any outstanding disbursements

CATIC

Reconciliation report



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Reconciliation Report

- An attorney must REVIEW the reconciliation report.
- Reconciliation should identify inconsistencies between what the bank records show and what the lawyer's records show.
- Errors and inconsistencies identified in the reconciliation report must be corrected immediately.

CATIC

"Three-Way" reconciliation (cont'd)

- Reports should identify outstanding checks and aged funds yet to be distributed
  - Title insurance, recording fees, discharge fees, and other checks associated with real estate transactions need to be cashed in a reasonable amount of time
- Keep lawyers updated on the amounts of funds they are holding and what client matter the funds are for

CATIC

Record retention

- MA - Rule 1.15 (f) requires keeping trust account records for ***six years*** after termination of the representation and the funds are paid out.
- CT - Rule 1.15 (j) requires keeping trust account records for ***seven years*** after termination of the representation and the funds are paid out.
- VT - Rule 1.15 (a)(1) requires keeping trust account records for ***six years*** after termination of the representation and the funds are paid out.

CATIC

Record retention (cont' d)

- What records?
  - All bank records
  - All records created by the lawyer
    - Individual client ledger
    - Bank fees ledger
    - Account/Check register
    - Reconciliation Reports

CATIC

Keeping records by computer (cont'd)

A lawyer is responsible for creating and maintaining all records required by Rule 1.15 regardless of what computer program is used.

A lawyer is required to be able to produce a copy of all required records in hard copy. BACK UP YOUR FILES!

CATIC

attorney to represent the city's interests only. Though the charter of Winooski, Vermont, designates the city attorney as legal advisor to the city manager, it is settled in Vermont and other states that the actual client of the city attorney is the municipality. Handverger v. City of Winooski, 2011 VT 134, 191 Vt. 84, 38 A.3d 1158.

Rule 1.15. SAFEKEEPING PROPERTY

(a)(1) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rules 1.15A and B. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(2) For purposes of these rules, property held "in connection with a representation" means funds or property of a client or third party that is in the lawyer's possession as a result of a representation in a lawyer-client relationship or as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment. "Fiduciary relationship" includes, but is not limited to, agent, attorney-in-fact, conservator, guardian, executor, administrator, personal representative, special administrator, or trustee.

(b) A lawyer may deposit the lawyer's own funds in an account in which client funds are held for the sole purpose of paying service charges or fees on that account, but only in an amount reasonably necessary for that purpose.

(c) Unless a lawyer has entered into a nonrefundable fee agreement that complies with Rule 1.5(f), a lawyer shall deposit legal fees and expenses that have been paid in advance into an account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship. Such funds are to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the

dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Except as provided in paragraph (g):

(1) a lawyer shall not disburse funds held for a client or third person unless the funds are "collected funds." For purposes of this rule, "collected funds" means funds that a lawyer reasonably believes have been deposited, finally settled, and credited to the lawyer's trust account.

(2) a lawyer shall not use, endanger, or encumber money held in trust for a client or third person for purposes of carrying out the business of another client or person without the permission of the owner given after full disclosure of the circumstances.

(g) In the following circumstances, a lawyer may disburse trust account funds deposited for or on behalf of a client or third person in reliance on that deposit even though the deposit does not constitute collected funds if the lawyer reasonably believes that the instrument or instruments deposited will clear and will constitute collected funds in the lawyer's trust account within a reasonable period of time:

(1) When the deposit is either a certified check, cashier's check, money order, official check, treasurer's check, or other such check issued by, or drawn on, a federally insured bank, savings bank, savings and loan association, or credit union, or of any holding company or wholly owned subsidiary of any of the foregoing; or

(2) When the deposit is a check drawn on the IOLTA account of an attorney licensed to practice law in the State of Vermont or on the IORTA account of a real estate broker licensed under 26 V.S.A. Chapter 41; or

(3) When the deposit is a check issued by the United States of America or any agency thereof, or by the State of Vermont or any agency or political subdivision thereof; or

(4) When the deposit is a personal check or checks in an aggregate amount that does not exceed $1,000 per transaction; or

(5) When the deposit is a check or draft issued by an insurance company, title insurance company, or title insurance agency, licensed to do business in Vermont.

(h) If an uncollected deposit in reliance upon which a lawyer has disbursed trust account funds fails, the lawyer, upon obtaining knowledge of the failure, shall immediately act to protect the funds or other property of the lawyer's other clients or third persons held by the lawyer in accordance with this rule.

Historical Citation

Amended Dec. 21, 2004, eff. March 1, 2005; June 17, 2009, eff. Sept. 1, 2009; Mar. 7, 2016, eff. May 9, 2016.

REPORTER'S NOTES—2016 AMENDMENT

ıle 1.15(b) is amended to provide that the funds that a lawyer may keep in a client trust ınt to cover service charges is that amount "reasonably" necessary for that purpose, ing clear that the rules do not provide a fixed amount or percentage but will be applied case-by-case basis.

ıle 1.15(c) is amended for consistency with the simultaneous addition of Rules 1.5(f) and

ANNOTATIONS

. **Admonition.** When respondent held trust account checks payable to her firm for miums owed to the firm without cashing the checks, thereby improperly commingling her ds with those of third parties, an admonition by Disciplinary Counsel was appropriate. No ds belonging to clients or third parties were improperly used; there were mitigating factors ack of selfish or dishonest motive, no prior disciplinary record, a good faith effort to rectify : consequences of the violation, a full and free disclosure to disciplinary counsel, coopera- n, and remorse; and the only aggravating factor was respondent's substantial experience in e practice of law. In re PRB Docket No. 2013.160, 2015 VT 54, 199 Vt. —, 118 A.3d 523. Sanction for commingling personal and client funds in respondent's client trust account was duced from a public reprimand to a private admonition when respondent went beyond what is required of him, including hiring an accountant at his own expense and disclosing far more formation than was required, when other mitigating factors included absence of a prior sciplinary record, lack of selfish or dishonest motive, presence of personal problems, positive aracter and reputation, presence of physical disability, and remorse, and when the only ggravating factor was respondent's 30 years of experience. In re PRB Docket No. 2012.155,)15 VT 57, 199 Vt. 143, 121 A.3d 675.

Respondent violated the professional conduct rules regarding client funds and trust ccounting systems by not fully documenting each transaction in her trust account on her heck register, not having a single source to which she could go to identify all transactions, lacing earned fees into her trust account, and having no documentation for a $3,000 electronic ransfer from her trust account. Admonition was a proper sanction, as respondent's egligence in the management of her trust account arose out of ignorance of the rules, no lient or third party was injured, and there was little potential for injury; furthermore, there were several mitigating factors and no aggravating factors. In re PRB Docket No. 2014.168, 2015 VT 9, 198 Vt. 632, 114 A.3d 480 (mem.).

Admonition was appropriate when respondent failed to regularly reconcile his trust accounts, failed to maintain a central trust accounting system, and placed unearned fees in his operating account. His mental state was one of negligence and no client had been injured; there were mitigating factors in that he lacked dishonest or selfish motive, immediately took steps to revise his trust accounting system, and had cooperated with disciplinary proceedings; and in aggravation, he had substantial experience in the practice of law and three prior disciplinary offenses that were remote in time and unrelated to the present charges. In re PRB Docket No. 2013.153, 2014 VT 35, 196 Vt. 633, 96 A.3d 468 (mem.).

2. Bank fees. Rule allowing a lawyer to deposit his own funds into a trust account to cover bank fees provides neither an appropriate dollar amount nor a method for its calculation; before attorneys are disciplined under this rule for holding small amounts of money in their trust accounts, they need specific standards. This lack of guidance is better remedied by rule change than by panel decision. In re PRB Docket No. 2014.133, 2015 VT 63, 199 Vt. —, 136 A.3d 564 (mem.).

Respondent had not violated the rule allowing a lawyer to deposit his own funds into a trust account to cover bank fees, as the rule provided no guidance as to what amount was proper and the panel was not prepared to find that the $157.57 deposited here violated the rule. In re PRB Docket No. 2014.133, 2015 VT 63, 199 Vt. —, 136 A.3d 564 (mem.).

3. Reprimand. Based on respondent's negligent mental state, the lack of actual injury, and the low potential for injury, a public reprimand was the presumptive sanction when respondent commingled personal and client funds in his client trust account. In re PRB Docket No. 2012.155, 2015 VT 57, 199 Vt. 143, 121 A.3d 675.

Rule 1.15A. TRUST ACCOUNTING SYSTEM

(a) Every lawyer or law firm holding funds of clients or third persons in connection with a representation as defined in Rule 1.15(a)(2) shall hold such funds in one or more accounts in a financial institution or, in appropriate circumstances, a pooled interest-bearing trust account pursuant to Rule 1.15B. An account in which funds are held that are in the lawyer's possession as a result of a representation in a lawyer-client relationship or a fiduciary relationship shall be clearly identified as a "trust" account or shall be identified as a fiduciary account, such as an estate, trust, or escrow account, to distinguish such funds from the lawyer's own funds. An account in which funds are held that are in the lawyer's possession as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment shall be clearly identified as a "fiduciary" account. The lawyer shall take all steps necessary to inform the financial institution of the purpose and identity of all accounts maintained as required in this rule. The lawyer or law firm shall maintain an accounting system for all such accounts that shall include, at a minimum, the following features:

(1) a system showing all receipts and disbursements from the account or accounts with appropriate entries identifying the source of the receipts and the nature of the disbursements;

(2) a record for each client or person for whom property is held, which shall show all receipts and disbursements and carry a running account balance;

(3) records documenting timely notice to each client or person of all receipts and disbursements from the account or accounts; and

(4) records documenting timely reconciliation of all accounts maintained as required by this rule and a single source for identification of all accounts maintained as required in this rule. "Timely reconciliation" means, at a minimum, monthly reconciliation of such accounts.

(b) A lawyer or law firm shall submit to a confidential compliance review of financial records, including trust and fiduciary accounts, by the Profes-

sional Responsibility Program's Disciplinary Counsel. The information derived from such compliance reviews shall not be disclosed by anyone in such a way as to violate the evidentiary, statutory, or constitutional privileges of a lawyer, law firm, client, or other person, or any obligation of confidentiality imposed by these rules, except in accordance with Administrative Order No. 9. A copy of any final report shall be provided to the lawyer or law firm.

(c) The Supreme Court may at any time order an audit of financial records, including trust and fiduciary accounts, of a lawyer or law firm and take such other action as it deems necessary to protect the public.

(d) For purposes of this rule and Rule 1.15B, "financial institution" includes banks, savings and loans associations, credit unions, savings banks and any other businesses or persons that accept and hold funds held by lawyers or law firms as required in this rule.

Historical Citation

Amended June 17, 2009, eff. Sept. 1, 2009; Mar. 7, 2016, eff. May 9, 2016.

REPORTER'S NOTES—2016 AMENDMENT

Rule 1.15A(a) is amended to make clear that funds held by a lawyer in a "fiduciary account" as further defined by the amendment may be held in an IOLTA account created pursuant to Rule 1.15B "in appropriate circumstances"—that is, when the funds meet the standard of Rule 1.15B(a)(1) that they "are not reasonably expected to earn net interest or dividends" as defined in Rule 1.15B(a)(2)(i). The amendment benefits both the lawyer through saving management costs and the beneficiaries of the interest distributed to the Vermont Bar Foundation pursuant to Rule 1.15B(b)-(c).

Rule 1.15A(a)(4) is amended to require a lawyer to maintain records documenting at least monthly reconciliation of all accounts maintained pursuant to Rule 1.15A. The rule is intended to establish a bright-line meaning for "timely reconciliation."

ANNOTATIONS

1. Admonition. Admonition with a year's probation was appropriate when respondent was negligent in failing to maintain complete records of trust account funds, there was no injury and little potential for injury to any client, there were no aggravating factors, and there were mitigating factors of no prior disciplinary record, no dishonest or selfish motive, respondent's effort to improve his recordkeeping, his cooperation, and his physical disability. In re PRB Docket No. 2014.133, 2015 VT 63, 199 Vt. —, 136 A.3d 564 (mem.).

Respondent violated the professional conduct rules regarding client funds and trust accounting systems by not fully documenting each transaction in her trust account on her check register, not having a single source to which she could go to identify all transactions, placing earned fees into her trust account, and having no documentation for a $3,000 electronic transfer from her trust account. Admonition was a proper sanction, as respondent's negligence in the management of her trust account arose out of ignorance of the rules, no client or third party was injured, and there was little potential for injury; furthermore, there were several mitigating factors and no aggravating factors. In re PRB Docket No. 2014.168, 2015 VT 9, 198 Vt. 632, 114 A.3d 480 (mem.).

2. Violation. Respondent had violated the rule requiring him to maintain complete records of trust account funds when he did not maintain a record for each client for whom he was holding property showing all receipts and disbursements and a running account balance, and when he failed to reconcile his trust account to bank and client balances. In re PRB Docket No. 2014.133, 2015 VT 63, 199 Vt. —, 136 A.3d 564 (mem.).

Rule 1.15B. POOLED INTEREST-BEARING TRUST ACCOUNTS

(a)(1) Every lawyer or law firm holding funds in one or more trust accounts in accordance with Rule 1.15A(a) shall create and maintain a pooled interest-bearing trust account in a financial institution in Vermont that has been approved by the Professional Responsibility Board. Funds so held that are not reasonably expected to earn net interest or dividends, as defined in paragraph (2) of this subdivision, for the client or other person for whom they are held shall be deposited in that account. The interest or dividends accruing on this account, net of any transaction costs, as defined in paragraph (2) of this subdivision, shall be paid over to the Vermont Bar Foundation by the financial institution. No earnings of the account shall be made available to the lawyer or law firm. No lawyer may be disciplined for placing client funds in the pooled interest-bearing account if the lawyer made a good faith determination that the funds fit the provisions of this rule.

(2) For purposes of this rule,

(i) "Net interest or dividends" means the net of interest and dividends earned on a particular amount of one client's or other person's funds over the administrative costs, as defined in subparagraph (ii), allocable to that amount. In estimating the gross amount of interest or dividends to be earned on a particular amount of the funds of a client or other person, the lawyer or law firm shall consider the principal amount involved; available interest or dividend rates; and the time the funds are likely to be held, taking into account the likelihood of delay in any relevant proceeding or transaction.

(ii) "Administrative costs" means the portion of the following costs properly allocable to a particular amount of one client's or other person's funds paid to a lawyer or law firm:

(A) Financial institution service charges for opening, maintaining, or closing an account, or accounting for the deposit and withdrawal of funds and payment of interest.

(B) Reasonable charges of the lawyer or law firm for opening, maintaining, or closing an account; accounting for the deposit and withdrawal of funds and payment of interest; and obtaining information and preparing or forwarding any returns or reports that may be

required by a revenue taxing agency as to the interest and dividends earned on the funds of a client or other person.

(iii) "Transaction costs" means the following costs incident on opening and maintaining a pooled interest-bearing trust account created in accordance with paragraph (1) of this subdivision: Financial institution charges for opening and maintaining the account, or accounting for the deposit and withdrawal of funds and payment of interest or dividends to the Vermont Bar Foundation.

(b) A lawyer or law firm maintaining a pooled interest-bearing trust account created and maintained as required in this rule shall direct the financial institution:

(1) to remit interest or dividends, as the case may be, to the Vermont Bar Foundation; and

(2) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent; and

(3) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation.

(c) The preponderance of the interest or dividends received by the Foundation shall be used by the Foundation to support legal services for the disadvantaged. Remaining funds may be used for public education relating to the courts and legal matters.

(d) A financial institution shall be approved by the Professional Responsibility Board as a depository for pooled interest-bearing trust accounts created and maintained as required in this rule if it shall file with the Board an agreement, in a form provided by the Board, to notify Disciplinary Counsel whenever (1) any properly payable instrument is presented against such a trust account containing insufficient funds, irrespective of whether or not the instrument is honored; and (2) whenever any transaction, no matter the type, causes such an account to be overdrawn. The Supreme Court may establish rules governing approval and termination of approved status for financial institutions, and the Board shall annually publish a list of approved financial institutions. No pooled interest-bearing trust account shall be created or maintained under this rule in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days' notice in writing to the Board.

(e) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the format described below. If an instrument presented against insufficient funds is dishonored, the report shall be made simultaneously with, and within the time provided by

law, for notice of dishonor. If an instrument presented against insufficient funds is honored, the report shall be made within five banking days of the date of presentation for payment against insufficient funds. If any other transaction causes an account to be overdrawn, the report shall be made simultaneously with the forwarding of the financial institution's customary overdraft notice to the depositor.

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

(3) In the case of an overdraft caused by any other transaction, the report shall be a copy of the overdraft notice sent to the depositor by the financial institution.

(f) Every lawyer practicing or admitted to practice in Vermont shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(g) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(h) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of Vermont.

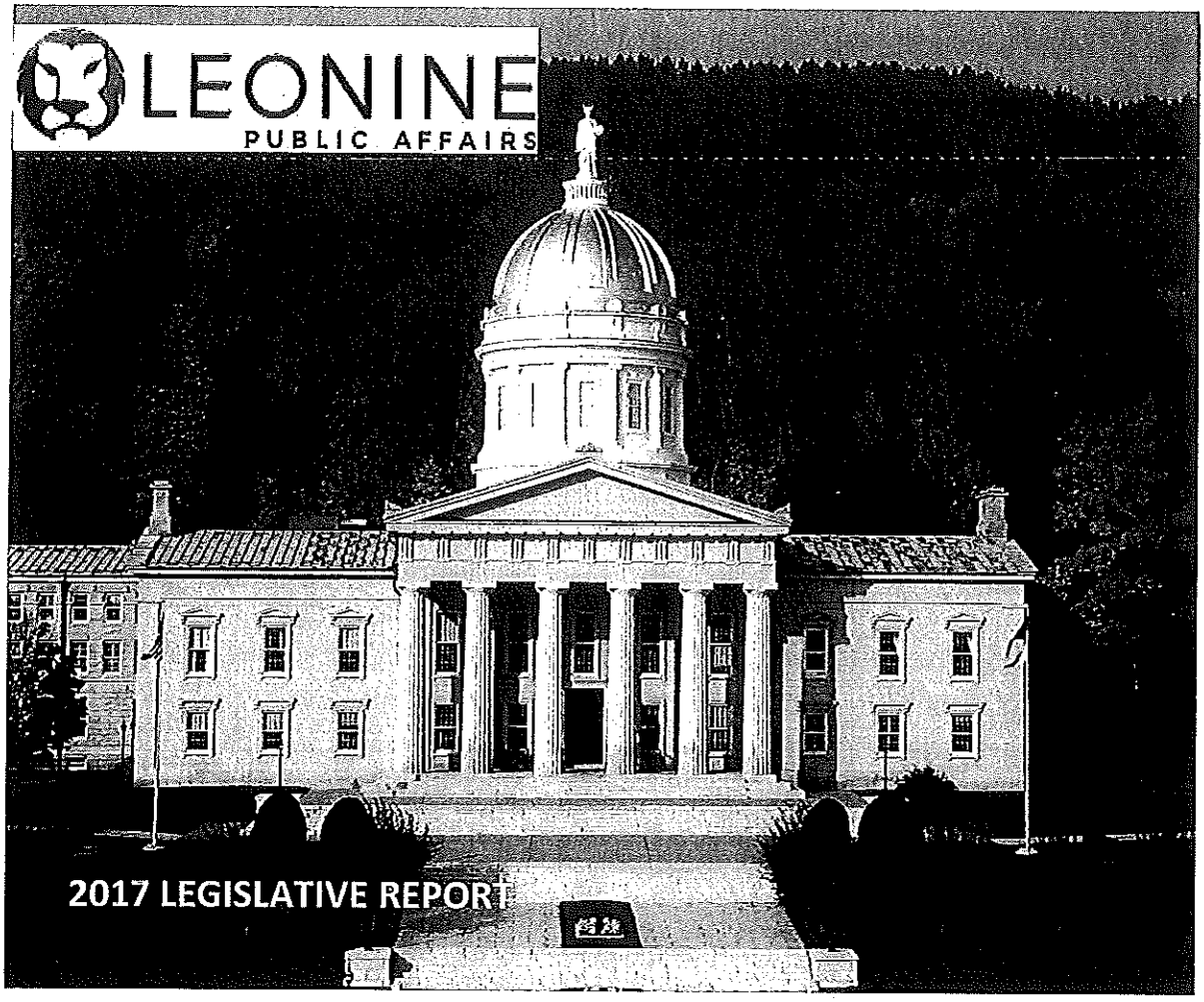
(i) "Notice of dishonor" refers to the notice which a financial institution is required to give, under the laws of Vermont, upon presentation of an instrument which the institution dishonors.

Historical Citation

Amended June 17, 2009, eff. Sept. 1, 2009; Dec. 21, 2010, eff. Feb. 21, 2011.

REPORTER'S NOTES—2011 AMENDMENT

Rule 1.15B(d) is amended at the request of the Professional Responsibility Board to modernize and clarify the operation of the rule. The amendment makes clear that institutions must notify Disciplinary Counsel, rather than the Board, not only when an instrument presented against insufficient funds is honored or dishonored, but whenever any transaction—whether electronic, paper, wire, or other—causes an overdraft to an attorney trust account. The amendment reflects the evolving nature of banking practices and the fact that some newer types of transactions do not involve an instrument being presented against an account: for example, Automated Clearing House (ACH) transactions.



Political Overview

The 2017 legislative session will be remembered for what happened during the last four weeks and probably not much else. It's not to say that nothing else happened during the year, it did. However, the debate at the end of the session regarding teachers' health insurance benefits and Governor Scott's threat to veto the budget largely defines the first year of the biennium.

Most Statehouse observers expected there to be an adjustment period given the state has a new Governor and a new House Speaker and new Senate President Pro tem. For the first 14 weeks, that appeared to be the correct read. Bills were introduced and passing but with little fanfare and little to no controversy between the parties or the branches of state government.

The pace of the session allowed for each of the new leaders to get their feet underneath them and gain a stronger understanding of their new roles.

As is typical with politics, just when one thinks it has become predictable the unexpected happens. Governor Scott and his team began advocating in earnest to implement his plan to shift negotiation of teachers' health benefits from the local level to the state level. With the upcoming implementation of the Obamacare "Cadillac tax" on high end employer provided health insurance benefits, teachers' health care benefits needed to be pared back. This created an opportunity to achieve savings and mandate where those savings would be utilized. Governor Scott argued that his plan could save as much as $13 million in FY18 and $26 million annually for the next four years. However, in order for his plan to be implemented it would mean the end of collective bargaining at the local school district level. That is a non-starter for the Vermont chapter of the National Education Association, for the state's unions in general and for many within the Democratic and Progressive Parties. After several attempts to negotiate a solution it was clear that the governor and legislature were at an impasse.

The disagreement became contentious at times and divided Montpelier in a way that had been avoided for most of the legislative session. After extensive negotiations with the Governor reached an impasse legislative leadership decided to move on and send the budget and a property tax bill, as passed by both chambers, to Governor Scott and await the all but certain veto. Both bills are now on their way to the governor's desk and he has made it very clear that he will in fact veto them.

This sets up a two-day veto session scheduled for June 21 and 22. Legislative leaders have recently stated their desire to reach an agreement with Governor Scott prior to the veto session. If they are successful it could be a relatively short veto session. That is all the more likely as Governor Scott recently stated that he will not allow state government to shut down for want of a budget that has to take effect on July 1. With that "nuclear option" off the table there should be some sort of resolution by the end of the second day of the veto session.

The question remains whether that resolution will further divide the legislature and the governor and thus set up a very contentious second year of the biennium, or whether the commonly accepted notion that Vermont is different in terms of civic discourse is validated. With 2018 being an election year, everyone's patience and political aspirations will be on full display.

Specific Bills of Interest

Enacted Bills

The following bills passed both chambers of the legislature. Unless otherwise indicated below as of the date of this report the bills have not yet been sent to Governor Scott for his signature. It is likely he will sign all of them into law.

H.35 *(Amendments to the Uniform Voidable Transaction Act).* H.35 amends 9 V.S.A. ch. 57, which is based on the Uniform Law Commission's Uniform Fraudulent Transfer Act. That model law has been renamed the Uniform Voidable Transactions Act (UFTA), and H.35 reflects the Uniform Law Commission's 2014 amendments to the UFTA. Governor Scott signed H.35 into law as Act 20 of the 2017 session on May 4, 2017. The bill took effect on that date.

H.111 *(Vital Records).* H.111 is a 73 page bill that makes substantial changes to Vermont's vital records system. Per a summary of the bill by legislative counsel it does the following:

1) Creates the position of the State Registrar of Vital Records (State Registrar) within the Department of Health to operate statewide vital records registration system, which as of July 1, 2018 will be the sole official repository of data from birth and death certificates registered on or after January 1, 1909.

2) As of July 1, 2018, eliminate the role of town clerks in registering birth and death certificates and designate the State Registrar as the entity responsible for registering birth and death certificates in the Statewide Registration System. However, towns will continue to issue marriage licenses and register marriage certificates, and will continue to be required to maintain original birth and death certificates registered prior to July 1, 2018. Such originals will be replaced in cases of a correction, completion, amendment, or replacement of a certificate in the System.

3) Provide that only town clerks (unless they opt out) and duly authorized representatives of the State Registrar (collectively, "issuing agents") are authorized to issue certified and noncertified copies of birth and death certificates registered on or after July 1, 2018, and certified copies of birth and death certificates registered prior to July 1, 2018, and that such copies may only be issued from the Statewide Registration System, unless an exception applies.

4) Direct the State Registrar to operate a Vital Records Alert System in order to track and prevent fraud; direct the State Registrar to match birth and death records; and confer rulemaking and other authority on the State Registrar.

5) Limit the issuance of certified copies of birth and death certificates to specific persons.

6) Require that all requests for a certified copy of a birth or death certificate be made upon application accompanied by a reliable type of identification, and that the State Registrar and issuing agents record such applications in a central database maintained by the State Registrar.

7) Transfer responsibilities from the Probate Division to the State Registrar for initial applications to:
   a. Amend birth and death certificates.
   b. Issue new birth certificates in the event of a change of sex or due to formerly nongender-neutral nomenclature for parents on reports of birth.
   c. Issue a delayed birth certificate.

8) Authorize the Commissioner of Health to impose administrative penalties for violations of vital records laws.

The bill limits significantly limits who can obtain a certified copy of a birth or death certificate. However, it provides that non-certified copies can be recorded in the land records to establish the date or birth or death of a person with an interest in real property. *See* new 18 V.S.A. § 5016(c)(3) in bill section 17.

On May 17 H.111 was delivered to the Governor for his signature.

H.265 *(New Cause of Action for Claims of Exploitation of Vulnerable Adults).* As introduced, H.265 merely updates the state's Long-Term Care Ombudsman statutes to conform to the federal Older Americans Act and related federal regulations. However, at the behest of Vermont Legal Aid the bill was amended in the Senate to create a new cause of action for a vulnerable adult who has been the victim of financial exploitation. Much of the effort by Legal Aid was directed at the transfer of real estate by a vulnerable adult in situations where the adult is being exploited. The Senate Health & Welfare Committee initially contemplated adding the language in H.283 to H.265. H.283 would have allowed claims against bona fide, good faith purchasers of real estate transferred by an exploited, vulnerable adult. After extensive testimony from representatives of VATC, the Vermont Bankers Association and others, the new language was pared back to only allow claims against the exploitative wrongdoer, and to provide that no relief can be granted against a good faith purchaser or mortgagee. Governor Scott signed H.265 into law as Act 23 of the 2017 session on May 4 and the section of the bill creating the new cause of action became effective on that date.

H.290 *(Miscellaneous Changes to Statutes Affecting Real Estate Conveyancing).* VATC was the proponent of H.290, which makes changes to various statutes that affect the conveyance of real estate. Specifically, the bill provides as follows:

- Sec. 1 amends 27 V.S.A. § 464a to allow an attorney to discharge a mortgage that was paid off a wire transfer.

- Sec. 2 amends 29 V.S.A. § 563 to clarify an ambiguity relating to the requirements for considering whether a lease to explore for oil and gas deposits is deemed abandoned.

- Sec. 3 amends 27 V.S.A. § 341(c) to eliminate the need for a notice or memorandum of lease to be witnessed.

- Sec. 4 amends 27 V.S.A. § 1313 to provide that the failure to record a floor plan under the State's previous statutory scheme for condominiums does not constitute a defect in marketable title if more than 15 years has passed since the declaration of condominium for the condominium development was recorded.

- Sec. 5 adds 14 V.S.A. § 3184 to clarify an ambiguity in existing probate law to allow a guardian appointed by a probate court of a foreign jurisdiction to have the power and authority to convey an interest in Vermont real property by a person 18 years or older if he or she has obtained a valid foreign court order and registers that order with the Probate Division of a Vermont Superior Court.

- Sec. 6 amends 14 V.S.A. § 3502(e) to exempt certain powers of attorney from the requirement that an agent accept appointment.

Governor Scott signed H.290 into law as Act 24 of the 2017 session on May 4, 2017. The bill took effect on that date.

Pending Bills

The following bills of potential interest did not advance completely through the legislative process during the 2017 session. However, they will carry over to the 2018 session.

H.526 *(Notaries Public).* H.526 would significantly revise Vermont law concerning Notaries Public. It repeals 24 V.S.A. chapter 5, subchapter 9 (and other existing statutes relevant to notaries) and creates a new chapter in Title 26 (26 V.S.A. chapter 103). Under the bill notaries would be commissioned for two year terms and regulated by the Secretary of State's Office of Professional Regulation (OPR). To become a notary one would have to pass an examination, although attorneys would be exempt from that requirement. Notaries would be required to complete two hours of continuing education every two years, although attorneys would also be exempt from that requirement. While OPR would have regulatory authority over notaries, in the case of attorneys OPR is to refer any complaint to the Professional Conduct Board. The bill requires that a notary sufficiently verify the identity of a person for whom the notary is to perform a notarial act, and it specifies the forms of identity that can be relied on for that purpose. The bill requires that a notary complete a notarial certificate in connection with

performing a notarial act, and it specifies the forms of that certificate relative to the different types of notarial acts a notary can perform. H.526 passed the House in late April and is in the Senate Rules Committee pending its assignment to the relevant Senate policy committee (Senate Committee on Government Operations).

S.29 *(Decedent's Estates).* S.29 is a 126 page bill sponsored by Sen. Peg Flory that would restructure and modernize existing law concerning the administration of decedent's estates. It was not the subject of any activity during the 2017 session and is pending in the Senate Judiciary Committee.

No. 24. An act relating to clarifying ambiguities relating to real estate titles and conveyances.

(H.290)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 27 V.S.A. § 464a is amended to read:

§ 464a. DISCHARGE BY LICENSED ATTORNEY

* * *

(d) The affiant shall attach to the affidavit the following, certifying that each copy is a true copy of the original document:

(1) photocopies of the documentary evidence that payment has been received by the ~~purported~~ mortgagee, ~~including the purported mortgagee's endorsement of the payoff check,~~ provided that the payor's account number may be redacted ~~from the copy of the payoff check~~; and

(A) if paid by check, a photocopy of the mortgagee's endorsement of the payoff check; or

(B) if paid by wire, written confirmation that the monies wired left the sender's account; and

(2) a photocopy of the payoff statement received from the ~~purported~~ mortgagee or servicer.

* * *

Sec. 2. 29 V.S.A. § 563 is amended to read:

§ 563. ABANDONMENT OF OIL AND GAS INTERESTS; PRESERVATION

* * *

(b) An interest in oil and gas is deemed abandoned at any time that:

(1) it has ~~not~~ been unused for a continuous period of 10 years after July 1, 1973; and

(2) no statement of interest under subsection (e) of this section has been filed at any time within the preceding five years.

* * *

Sec. 3. 27 V.S.A. § 341(c) is amended to read:

(c) A lease of real property that has a term of more than one year from the making of the lease need not be recorded at length if a notice or memorandum of lease, which is executed~~, witnessed,~~ and acknowledged as provided in subsection (a) of this section, is recorded in the land records of the town in which the leased property is situated. The notice 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.

Sec. 4. 27 V.S.A. § 1313 is amended to read:

§ 1313. COPY OF THE FLOOR PLANS TO BE FILED

(a) Simultaneously with the recording of the declaration there shall be filed in the office of the recording officer a lot plan and, in the case of an apartment building, a set of the floor plans of the building showing the layout, location, apartment or site numbers, and dimensions of the apartments or sites, stating the name of the building or that it has no name. In the case of a mobile home park, there shall be filed in the office of the recording officer a site plan showing the layout, location, site numbers, and dimensions of the sites, and the layout, location, and materials of all utilities, including underground utilities. Each set of building or site plans shall bear the verified statement of a licensed architect, licensed professional engineer, or licensed land surveyor certifying that it is an accurate copy of portions of the plans of the building or site as filed with and approved by the municipal or other governmental subdivision having jurisdiction over the issuance of permits for the construction of buildings or

mobile home parks. If the plans do not include a verified statement by the licensed architect, licensed professional engineer, or licensed land surveyor that they fully and accurately depict the layout, location, apartment or site numbers, and dimensions of the apartments or sites as built, there shall be recorded before the first conveyance of any apartment or site an amendment to the declaration, to which shall be attached a verified statement of a licensed architect, licensed professional engineer, or licensed land surveyor certifying that the plans previously filed, or being filed simultaneously with the amendment, fully and accurately depict the layout, location, apartment or site numbers, and dimensions of the apartments or sites as built. Plans shall be kept by the recording officer in a separate file for each building or park, indexed in the same manner as conveyance entitled to record, numbered serially in the order of receipt, each designated "apartment ownership;" or "site ownership," with the name of the building or park, if any, each containing a reference to the book, page, and date of recording of the declaration. Correspondingly, the record of the declaration shall contain a reference to the file number of the floor plans of the building or of the site plans of the parks affected ~~thereby~~.

(b) If the declaration has been of record for 15 or more years, no effect on marketability of title shall be created by failure to file or record floor plans.

Sec. 5. 14 V.S.A. § 3184 is added to read:

§ 3184. CONVEYANCE BY GUARDIAN APPOINTED BY FOREIGN JURISDICTION

(a) A conveyance of an interest in Vermont real property by a guardian appointed by a foreign court for a person 18 years of age or older is valid, provided that:

(1) the conveyance is authorized by a foreign court order; and

(2) the foreign order is registered in Vermont pursuant to this subchapter.

(b) For conveyances made prior to the effective date of this section, no effect on marketability of title shall be created by either the failure to register the foreign order or the registration of the foreign order.

Sec. 6. 14 V.S.A. § 3502 is amended to read:

§ 3502. CREATION OF A POWER OF ATTORNEY

* * *

(d) Subsection 3503(e) of this title that requires that an agent accept appointment, and ~~the provision in~~ subsection 3503(a) of this title that requires the witness and the notary to be different persons, shall not be applicable to:

(1) a power of attorney for the sale, transfer, or mortgage of real estate executed in conformance with 27 V.S.A. § 305, provided the real estate is specifically identified in the power of attorney and the duration of the power of attorney is no more than 90 days; or

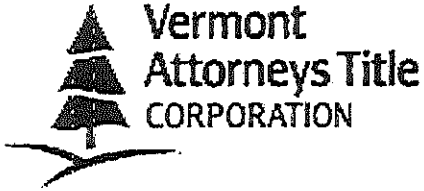
(2) a power of attorney for a commercial transaction, provided the transaction is specifically described in the power of attorney and the duration of the power of attorney is no more than 90 days.

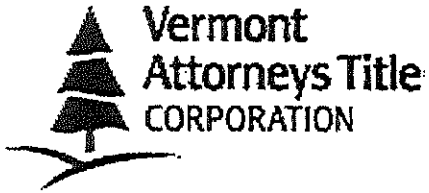
* * *

Sec. 7. EFFECTIVE DATE

This act shall take effect on passage.

Date Governor signed bill: May 4, 2017





"The Industry Leader in Attorney Education"

Hot Topics

Andy Mikell and Liz Smith

Vermont Attorneys Title

June 13, 2017

Capitol Plaza, Montpelier

2017 Legislation

Special thanks to Leonine Public Affairs, LLP
& our lobbyist Chuck Storrow

- H.290 The VATC Bill
- H.35 Uniform Voidable Transaction Act
- H.111 Vital Records
- H.265 Vulnerable Adults

H.290 (Act 24)

- Section 1: Amends 27 VSA §464a
  - Attorney discharge statute
  - Amendment allows attorney discharge for mortgage paid by wire (IF anyone is still wiring!)

H.290

- Section 2: Amends 29 VSA §563
  - Abandonment of oil & gas leases
  - Amended the statute to "make sense" by removing the double negative that has existed "forever".

H.290

- Section 3: Amends 27 VSA §341(c)
  - Memorandum of Lease
  - Eliminates the need for a witness (which is not needed for any other instrument involving conveyancing)

H.290

- Section 4: Amends 27 VSA §1313
  - The "Old Condo Statute" - Title 27
  - The Title Problem?
    - No floor plans
  - Voila: Missing floor plans does not impair marketable title.

H.290

- Section 5: Adds 14 VSA §3184
  - The problem?
    - Foreign (CT, MA, NH) Probate Order authorizing guardian to sell ward's VT property.
    - Ancillary in VT or no ancillary in VT?
  - Voila. Take valid foreign order; register it with Probate Division (____); record _____

H.290

- Section 6: Amends 14 VSA 3502(d)
  - "Intricacies" of the "real estate carve-out" subsection.
  - Voila: clean up subsection (d)
  - Components of "real estate carve-out"
    1. Specifically identify the property;
    2. Duration is no more than 90 days.
    3. Does NOT require acceptance by Agent

For consideration ... General POAs every time!

Benefits

- You can't get the math (dates) wrong.
  - Expired
  - Ambiguous ("expires on the 91st day")
  - No date, BUT executed within 90 day days
- Can't forget the address or insert a "bad address"
- Uniformity of preparation and instruction for execution.

Hardships

- Witness and Notary must be 2 different people.

H.111

- Creates State Registrar (SR) of Vital Records
- 7/1/18: SR responsible birth/death
  - TC still issue marriage & maintain pre-7/1/18
- Limit issuance of birth/death certificates to specific persons
- Requests made by application (with ID)
- Non-certified copies can be recorded to establish the date of birth/death of a person!

H.265

New cause of action for claims of Exploitation of Vulnerable Adults

Issue:
- AGs office reports 1-2 cases a year of abuse.
- AGs office seeking to void real estate transactions if they thought "Grandpa was duped".

Problem:
- Definition of Vulnerable too broad.
- To close a sale you almost need a letter from a doctor and a lawyer that the seller was NOT vulnerable!

Status
- VATC has joined the VBA, the "other VBA" and others to oppose.
- Defeated for now – However, AGs office still trying to come after real estate.

Legislation

- **H.526 Uniform Law on Notarial Acts**
  - **29 pages**
  - **2 year terms**
  - **Regulated by Sec of State**
  - **Attys exempt from exam & continuing education.**
  - **Must**
    - **complete notarial certificate**
    - **Affix stamp to tangible record**
- **S.29 Decedent's Estate**

Title Standards

pretty new & helpful

- Standard 10.1 = Property Descriptions
- Standard 18.1 = Discharges of Mortgages
  Comment 8: *Where a non-resident mortgagee dies out of state, the mortgagee's fiduciary can discharge the mortgage without ancillary administration in Vermont.*

Recent SCOVT cases

- Cramer v. Billado 2017 VT 38
  - Foreclosure in divorce context.
  - 2007 Decree ordered Defendant to pay $50k
  - On its face, the case is about service.
    - Plaintiff got a tack order; default jmt.
    - Defendant appealed re: service!
    - Defendant loses
  - TAKE AWAY: Overturn the Sumner v. Sumner (2004) decision?

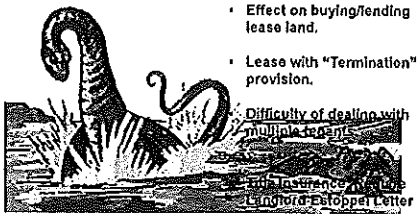
Cramer v. Billado

- Sumner court:

"We cannot agree that the statute [15/754] provides husband an encumbrance on wife's title where the 1998 divorce decree does not. §754 creates an encumbrance only "in accordance with the terms of the judgment," and, as we held above, the terms of the divorce decree in this case do not create an encumbrance."

Cramer court:
"Plaintiff recorded a certified copy of the judgment in the ... land records to perfect her judgment lien on defendant's property."

Mongeon Bay
(the ugly aftermath & takeaways)



- Effect on buying/lending lease land.
- Lease with "Termination" provision.
- Difficulty of dealing with multiple tenants
- Title Insurance & the Landlord Estoppel Letter

Elements of Landlord Estoppel

- Valid lease between LL & T
- Memorandum of Lease
  - recorded or to be recorded
- Acknowledges that Tenant will execute leasehold mortgage;
- Lease in full force & effect; no default; no breach; no legal proceedings pending or threatened; no termination notices given or received; no defenses, offsets, claims, etc.
- Call Liz or Andy for the form

North Country Sportsman's Club v. Town of Williston

- Enforceability of town noise ordinance vs. range's historically established operations.
- 2004 Noise Control Ordin. barring excessive or unreasonably loud noise that disturbs the peace of neighbors.

North Country Sportsman's Club v. Town of Williston

- State law unquestionably limits a Town's authority to reduce permissible use or discharge of firearms below historic use prior to enactment of Ordinance
  24 VSA 2291(18)
- Court: Both sides would benefit from an agreement establishing their mutual understanding of the historic levels of shooting circa May 2006.

Davis v. Maxwell & Town of Charleston

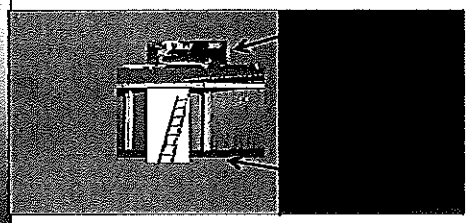
SCOVT Entry Order April, 2017

- Favorite flavors in boundary dispute e.g. tractor driving on lawn; boulders to block cars
- Discontinued Town Highway
  Presumption in 19/775 (ownership to center line of discontinued road) overcome
- Adverse Possession not met
- TAKEAWAY: Continue to be wary of discontinued town roads in your searches.

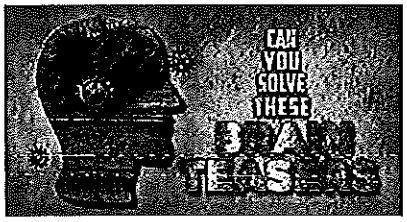
Town of Lyndon v. Brink

a/k/a the spite pool

E-court 4/26/2017



Title Teaser Time



Title Teasers

1. Title search for current foreclosure presents the following recording dates:

   - July 6, 2005: Deed for condo to Mark and Mary, as husband and wife
   - July 1, 2014: Refi mortgage from Mark and Mary to ABC Bank
   - February 1, 2015: Divorce decree awarding property to Mark
   - August 1, 2015: Foreclosure Complaint filed by ABC Bank (naming Mark and XYZ Bank as the only defendants).
   - March 1, 2016: Assignment of mortgage from ABC Bank to LLL Bank

Which of the following, if any, pose title problems requiring that you provide seller with notice of title clearing objections?

a. Undischarged HELOC from Mark and Mary to XYZ Bank recorded January 2, 2010
b. HOA lien for $4,200 filed December 24, 2015. Re-Sale Certificate seeks $8,500 in fees. How much is owed?
c. Mechanic's lien recorded November 12, 2013.
d. Judgment Lien filed against Mark & Mary on April 25, 2016.
e. Writ of Attachment against prior owner filed November 4, 2002. No discharge or release of record.
f. Child Support order filed by State of VT (Mark was the Obligor) recorded March 7, 2008.
g. Federal Tax Lien against Mary recorded December 8, 2008 (not renewed).
h. Judgment Lien against Mary recorded August 8, 2013.
i. Divorce decree requires Mark to pay Mary $20,000.
j. 1999 foreclosure decree against prior owner - no recorded Certificate of Non-Redemption
k. Judgment and Decree of Foreclosure granted to ABC Bank dated April 1, 2016.
l. Confirmation Order recorded 1/23/2017 in favor of plaintiff, LLL Bank, confirming that TTT Bank, Series 9834-45678 acting solely as Trustee for PPP Servicing Company formerly known as GGG Servicing Company, successor by merger to WWW Mortgage Operation under Debt Servicing Agreement dated October 4, 1879, by and through its attorney in fact, for YYY (yeah, "Y" you?) was the high bidder.
m. The mortgage from Mark & Mary to ABC Bank references a Schedule A attached but there is none attached. The Complaint, however, does contain a Schedule A.

2. Declaration for 6 lot development recorded on July 1, 2015. Declaration creates 5 residential lots (Lots 1-5) and 1 lot for Common Area (Lot #6). No reserved Development Rights. The annual common expense fee is $1,100. Development has a WW permit. The DRB approved a 6 lot Planned Unit Development. There is no recorded plat with the Declaration.

   The description if the deed in to the Seller provides:

   Being all of Lot 4. Also including a 1/5 interest in Lot #6 to be held as tenants in common with Unit Owners 1, 2, 3 and 5.

   You check in with Andy or Liz about this development and ask if there is a title problem? They tell you:

   a. Not a problem. This is a CIC but it is exempt from UCIOA under Section 2-103 because it was created after 1/1/1999, it has 24 or fewer units and it is not subject to reserved development rights.

   b. Yes it is a problem. The Declaration created a CIC that is not exempt from UCIOA.

   c. Not a problem. This is a standard PUD development and Andy or Liz say to insure the property and to attach a PUD Endorsement to the loan policy.

   d. Yes it is a problem. This is a planned community and because the average annual common expenses (adjusted per statute) exceed the amount allowed under Section 1-203(a)(2), it is no longer exempt from UCIOA.

3. Mother conveys ELE deed to her three children: A, B & C. C dies. Later, mother dies. Neither Andy nor Liz are available for underwriting help. You certify title, issue title insurance for buyer and request a deed from:

   a. A & B

   b. Mother's Estate

   c. A, B, and C's Estate

   d. A, B, Mother's Estate and C's Estate