*Real Estate: Title Search 101

March 30-31, 2017
Equinox Resort & Spa
Manchester Center, VT

Speakers:
Benjamin H. Deppman, Esq.
James E. Knapp, Esq.
Harland L. Miller, III, Esq.

*Course Approved & Certified to Satisfy Rule 12(a)(1) and Rule 15(c)
Title Searching 101

A Presentation at the Vermont Bar Association Meeting on March 31, 2017

A word of warning, a disclaimer, and all that – This is a very superficial treatment of the title examination process. It is intended to familiarize those with limited experience with the general aspects of title examination. Before you begin examining titles in connection with representing clients, you should find someone to help you learn the details of the process.

Part I. What is a Title Search

The title search is the process of examining the public records to determine who owns a parcel of land and what claims or encumbrances exist against that parcel of land. The title search provides assurances to the person buying the property that they will acquire good title to the property free and clear of claims of others or at the very least, they will understand the potential problems with the title and can make an informed decision about how to proceed. In addition, if the acquisition is being financed by a regulated lender, the lender must have proof that the title is marketable, or at least insurable to satisfy the regulatory requirements imposed on most lenders. Finally, to get a title insurance policy, the owner or purchaser must have a title search completed as part of the process of having the title insurance policy issued.

Title examination is an art form. Everyone develops his or her own style for searching titles. The title examiner’s style must cover the myriad of details involved in each title, follow a pattern so that the title examiner is comfortable that every step is completed in each title search, identify problems and defective instruments, and keep detailed, accurate records of the entire process.
A. The Scope of the Title Search

With the decision in the matter of *Estate of Fleming v. Nicholson*, 168 Vt 495, 1998, the Supreme Court settled the question of the obligation of the title examiner. The key element in the Fleming case related to searching titles is this:

> In conducting a title search for a client, an attorney has a duty to inform and explain to the client the implications of any clouds on the title that would influence a reasonably prudent purchaser not to purchase the property. See *North Bay Council, Inc. v. Bruckner*, 131 N.H. 538, 563 A.2d 428, 431 (1989).
Part II - The Process of Searching a Title

A. Building the Chain of Title.

The first step in searching the title is to establish a chain of title. The chain of title is the name title searchers give to the sequence of instruments that establish transfers of a particular interest in land from one owner to another. To begin a title search, the title examiner must determine who owns the interest being searched at the time the search is done. Generally, the title examiner will have access to the most recent deed in the chain of title. If not, then the title examiner must use a combination of tax records and the index to the land records to determine who is the current owner of the property.

The title examiner begins to build the chain of title by looking carefully at the property description contained in the first deed which the title examiner finds. After reading and abstracting (making notes about the important information in the deed) the first deed, the title searcher uses the reference typically found in the property description contained in the deed to find the next prior deed. The chain of title builds by comparing the grantor(s) names in the deed being examined with the grantee(s) named in the next prior deed or instrument effecting a conveyance or a transfer. That process continues back in time until reaching a point where the chain of title is sufficiently complete.

B. Considerations in reviewing the instruments in the chain of title

1. Are the parties in each instrument consistent with the parties in the prior and following instruments?
If there are persons listed as a party in an instrument, who not identified in the prior or following instrument or if there are additional persons in the instrument, the title examiner must find a legal basis for the change, or flag the issue as a potential problem with the title.

2. Is the property description adequate?

A key part of the process of reviewing the documents appearing in the chain of title is a careful reading of the property description. The description is the part of the deed that identifies the property that is affected by the terms of the instrument. The title examiner should know what constitutes a valid property description, as generally described in Title Standard 10.1. The description in each deed in the chain of title must be the same as (or at least substantially consistent with) the descriptions in the other instruments in the chain of title, or there must be an explanation for the difference.

3. Verify each instrument forming the chain of title is a valid conveyance.

Is the document complete – are all the pages in the records?

➢ Is the document properly executed – did all the necessary parties sign, and are all the signatures acknowledged?
   o Title examiners should know the key requirements for all the typical documents that may appear in the chain of title, for example, the special requirements for powers of attorney.

➢ Are the signatures on the documents validly authorized?
   o A signature by an executor or administrator of an estate requires a license to sell from the probate court.
- A guardian’s signature conveying property of the ward requires a license to sell from a probate court
- A general partner is the authorized party to sign for a partnership
- Documents executed by a corporation must be signed by a person who is duly authorized to sign for the corporation
- Documents executed by a limited liability company must be signed by either a manager or a member, depending the organization of the limited liability company.

- How did the parties take title?
  - Tenants in common
  - Joint tenants with a right of survivorship
  - Tenancy by the entirety
  - Partners can hold partnership property in individual names.
  - As Trustees under a trust arrangement
  - As a nominee for someone else

  Each of these tenancies requires specific elements for a valid conveyance, and the title examiner must be aware of all those specific elements.

- Are all the elements of a valid contract present in deeds and other voluntary instruments? If the document is a court order or decree, is the order apparently sufficient on its face to effect the appropriate transfer to maintain the chain of title.
D. Typical Documents Found in A Chain of Title.

Warranty Deeds

A warranty deed is the common form of instrument to transfer title to real property in Vermont. The distinguishing characteristic of a Warranty Deed is the collection of extensive promises made by the Grantor to the Grantee in the deed. The common covenants contained in the typical warranty deed are the: covenant of seisin\(^1\); covenant of title, covenant against encumbrances; and the covenant to defend.

Quit Claim Deeds

The quit claim\(^2\) deed differs from the warranty deed in one significant respect. The quit claim deed promises to pass only the title the grantor has at the time of the making of the deed. A quit claim deed is a valid deed and is effective to transfer whatever property the grantor has at the time. Some title examiners interpret a quit claim deed as an automatic signal that there is problem with title, because the grantor was unwilling to make the common warranties of title that are generally expected in a transfer. Other title examiners recognize the quit claim deed for what it is, just another form of deed used for the purpose of limiting the grantor’s liability to those who will own the property in the future. Quit claim deeds are also commonly used to release claims or interests in property when the grantor has less than a complete title or is unsure of the quality or quantity of title.

\(^1\) Note, this is the Covenant of Seisin not Seized or sized as computer spell checkers wish you to write.

\(^2\) Note, it is not a Quick Claim Deed. There is some debate as to whether it is a Quitclaim Deed.
Limited Warranty Deeds

The limited warranty deed or special warranty deed is a relatively recent development in Vermont. The form of the deed often looks like a warranty deed until the clause which customarily contains the warranty language. In a limited warranty deed, the grantor will only covenant that the grantor has done nothing to encumber the title and takes no responsibility for the state of the title prior to the time the grantor acquired the title.

Divorce Decree

Some divorce decrees are effective to convey title. The preferred format is for the decree to include words that effect the transfer, such as (the marital residence is hereby decreed to the plaintiff and defendant shall have no further interest therein). The description of the property to be transferred by the divorce decree may be very minimal, even to the point of being generally ineffective.

Probate Court Decrees

A decree of distribution from a Probate Court is the evidence of the finality of a transfer of property from a deceased person to the persons entitled by law or by the terms of the will to have the property. Under Vermont law, as it is presently interpreted, the real property (but not the personal property) passes from the deceased to the heirs or the persons entitled to the property under the will, immediately upon death. The property transferred, however, is also burdened with a claim for the amount of the debts of the deceased person. The executor or administrator may be required to sell the property to pay the expenses of the estate. If the property is not sold to pay the debts (but the property may be sold for other reasons) the probate
court issues its decree confirming that the debts of the deceased were paid, and the property was transferred to the persons who were to receive it. The decree may also include limitations on the transfer of the property including, time limits (the devisee has the property only for his or her life), or that all of the heirs who obtained the property took the property as tenants in common or as joint tenants.

Proceedings in Foreclosure Cases

A substantial number of chains of title may have a foreclosure in the sequence. A title examiner should understand the procedures related to each of the three principal forms of foreclosures. Prior to the mid-2000s the most common form of foreclosure was a strict foreclosure. In a strict foreclosure the holder of the mortgage filed a civil action in Superior Court or Federal District Court. When the foreclosing lender prevailed in the case, the Court would issue a Judgment Order and Decree of Foreclosure. Part of that order allowed the defaulting property owner a period of time to redeem (pay off) the amount due the lender. If the borrower did not redeem, title to the property was awarded to the foreclosing lender free of the claims of the defaulting borrower and any subordinate claimants. Following a Federal Bankruptcy Court decision in the mid-2000’s raising the issue that strict foreclosures might result in voidable fraudulent conveyances, most lenders switched to judicial sale foreclosures. In a judicial sale foreclosure, at the end of the process the foreclosing lender arranges for an auction of the foreclosed property where the property is sold to the highest bidder. The highest bidder is often the lender. When the Court that is processing the foreclosure confirms the sale through a confirmation order, the title transfers to the highest bidder. Vermont recognizes a third form of foreclosure for properties that are not farms or owner occupied residences. A foreclosing lender
may initiate a public sale of the property without court oversite. The process is described in statute and the title examiner must review all the documentation to verify that the statutory procedure was followed precisely.

**Deed in Lieu of Foreclosure**

A deed in lieu of foreclosure is a special form of deed that transfers the mortgagor’s equity of redemption to the mortgagee, eliminating the rights of the mortgagor in the property. Deeds in lieu of foreclosure in the chain of title raise special problems and the title examiner must be knowledgeable about the potential issues that may render a deed in lieu of foreclosure defective or inoperative. A full discussion of the requirements for a deed in lieu of foreclosure is beyond this scope of these materials, there are three key points to bear in mind. A deed in lieu of foreclosure may be classified as a fraudulent conveyance under Federal Bankruptcy law and Vermont statutes. The deed in lieu of foreclosure may be ineffective if the deed or collateral documents prepared at the time of the delivery of the deed do not clearly establish that the mortgagor was in default when the deed was executed, that the purpose of the deed is to terminate and interest of the mortgagor, and that the deed was delivered voluntarily for the purpose of terminating the mortgagor’s interest. Finally, a deed in lieu of foreclosure has no effect on subordinate liens, claims or interests and all subordinate liens, claims and interests remain in effect.

**Corrective Deed**

A corrective deed is not a special type of deed. A corrective deed is issued to fix a problem of some sort. Corrective deeds may be of almost any type of deed, however, they are
most commonly quit claim deeds. The reason being, that the person granting the quit claim deed, having once tried to deed away their interest, does not want to restart the statute of limitations on any warranties. In addition, parties to the quit claim deed who are signing only for the purpose of releasing claims they have, if any, will not wish to become liable for the warranties included in warranty deeds, particularly when the third party may not fully understand why they are being asked to give the corrective deed in the first place. When a title examiner finds a corrective deed in the chain of title, it is important to determine why the corrective deed was executed and what defect is being corrected. The title examiner must determine whether the corrective deed was effective to fix the problem.

E. **Read each instrument that forms the chain of title carefully.**

Some instruments in the chain of title will include easements that may benefit or burden the property, covenants that may restrict the use of the property or require the owner of the property to do or refrain from doing something. Instruments in the chain of title may include references to other instruments that bear on the title or may point to an additional line of inquiry. When the title examiner finds a reference to another instrument in a chain deed or instrument, that referenced document should be examined. Knowing what restrictions and encumbrances are built into the chain of title is part of that obligation to identify and disclose potential clouds on the title discussed above.

F. **How do you know when the chain of title is sufficient?**

The title searcher follows the sequence of deeds (checking the same information in each deed) back to the point specified in the Vermont Marketable Title Act (27 V.S.A. §601-612).
Generally people believe that period of time is forty years. The statute requires that the chain of title be traced back to a deed or other instrument recorded *more* than forty years in the past. The period of the search and the length of the chain of title is important because without the presumption that the title is valid provided by the Marketable Title Act, no one would be sure that they had a marketable title. There would be no limit on how far back a search would have to be followed, because until you reached the original grant, there might always be a break in the chain of title, a defective instrument or an encumbrance or claim that affected the rights of the current owner.
Part III. Out-conveyances/Encumbrances

The first key element in looking for out-conveyances and encumbrances is to develop a system that creates a high level of assurance that the title examiner will find everything that must be found and rigorously apply that system to every search the examiner conducts. There are no shortcuts in this process. The second key element in looking for out-conveyances and encumbrances is creating an efficient system for documenting each item the examiner finds. Today, most examiners will make a photocopy of each instrument or the key elements of each instrument that appears to have some impact on the title to the property being examined.

A. Running the Indexes

When the chain of title is complete the title examiner will have the names of every person who has owned an interest in that property during the period of the search. The process of identifying out-conveyances (transfers in which an owner divests themselves of an interest or creates rights in a third party) and encumbrances (interests in the subject property created by out-conveyances which are voluntary transfers or involuntary events like the imposition of liens).

The process of running the indexes involves taking the name of each owner and searching the indexing system for that name. The title examiner builds a list of all the documents indexed under the name of each person in the chain of title. Each municipality has its own system for indexing land records. A title examiner may find a database of names on a computer in the office, or a card catalog like index with drawers of index cards, or a general index book with nothing but lists of names and the books and pages where the documents are recorded. It is up to the title examiner to diligently inquire about the indexing system. It is unwise to make
assumptions about how the index works. In most smaller towns, and some larger ones, the indexing systems will have changed over time. In a single municipality the “index” may consist of general indexes from the founding of the town to the mid-80’s or 90’s, a card index after that, and a new digital index.³

B. Researching the documents

The second step in the title search process is to take the list of instruments identified through running the index and READ EACH ONE CAREFULLY! The title examiner must look at each document to see if the particular document affects the title to the property under review. Typical encumbrances a title searcher will find are easements for driveways, shared roads, utilities, water supplies and sewage disposal systems. There are also covenants (an agreement by a land owner to do or refrain from doing something with the property encumbered by the covenant) and conditions (an agreement by the grantee that if something happens or does

³Each form of index has its own challenges.

A general index book is difficult to use because the names are indexed only under the first letter of the last name. Each clerk through history had their own means of choosing how to index and there were few universal rules. The key to running a book based general index is focusing on the specific name and being careful not to skip entries.

A card index is built with one (or sometimes more than one) card for each document. The parties names, the type of instrument, the location of the record (book and page) and the type of instrument may appear on the card and sometimes the property address is also included. Cards are generally clustered together based on the last name / corporate name of the grantor. Caution is warranted as cards can be misfiled.

A digital index managed in a computer system generally contains the same information as the card. The utility of the digital index is directly proportional to the efficiency of the search feature. When using a digital index, keep the basic rules of digital information in mind. Most search features are literal. The entries for Smith, sMIth, Smyth, smith, smth are all different to a search engine even though a human searcher may see through the errors. When using digital indexes it is very important to print the index as you found it on the day you were in the records or if the index is a printed version of a digital index, then copy the index that you saw. That way, if a problem arises in the future, it is clear what the index showed when you searched.
not happen, the title to the property would revert to the grantor); mortgages, liens, judgments and many other kinds of agreements.

C. A short and incomplete guide to things one might find running an index

All the instruments listed in the section above on chains of title. Owners of property sell parts off, buy new property to add to their existing holdings, get a divorce, die and pass their property on to heirs and others. AND MORE

Mortgage Deeds

The purpose of a mortgage deed is to create a conditional conveyance of the property to secure some promise by the owner of the property (the “mortgagor”) to another person (the “mortgagee”). Vermont's law on mortgages, as it is presently understood, is somewhat unusual because the law treats the mortgage deed as a conveyance of the title to the property by the mortgagor to the mortgagee. In most States, a mortgage creates a lien on the property, not a transfer of the actual title. The mortgagor conveys the mortgaged property to the mortgagee with the expectation that the mortgagee will release the mortgagee’s interest in the property when the promise that is secured by the mortgage is performed. The conveyance is conditional because the mortgage is void and has no effect if the Mortgagor performs the promise or promises that are secured by the Mortgage. One of the provisions in the mortgage, known as the condition clause, describes the circumstances under which the property encumbered by the mortgage will be returned to the mortgagor if the condition is satisfied. If the mortgagor does not perform all the promises described in the condition clause, then the property remains in the hands of the
mortgagee, subject to the requirement that the mortgagee foreclose the remainder of the mortgagor’s interest either by a foreclosure action filed in court or a non-judicial foreclosure by sale of the property.

Leases

A lease is a temporary right to occupy the property of another person. The defining factor between a lease and a deed is that the lease ends at some point and all rights in the property return to the land owner. Leases range from simple one page documents (perhaps in very small type) for an apartment for a student, to tens or even hundreds of pages for large commercial projects. Leases transfer the right to occupy a particular space (an apartment, store in a mall), or an entire parcel of land from the owner of the property to the tenant. The Lease creates a new interest in property which will have its own chain of title. The lease defines the rights of each of the parties (the landlord gets rent, the tenant gets the property) and describes the duties and obligations of each party (maintenance, insurance, paying the expenses of the property such as taxes). In some cases, the temporary right to occupy the property may be “as long as grass grows and water runs” or for “999 years”. If the Lease agreement does not prohibit transfers, the Lease may be transferred by the tenant just as any other interest in real property. The recording statute specifies that all leases with a term of more than one year must be recorded to protect the tenant’s interests against claims of third parties against the landlord. In lieu of recording the entire lease, a memorandum of lease containing information about key provisions of the lease may be recorded to satisfy the recording requirement.
Easements

Public Easements

Access to property is a key component of value. The title examiner must be familiar with the requirements for creating public roads and the classifications of roads to be able to assess whether there is legal access to property and with the process for abandoning public easements to understand when there is no longer a public road providing access to the property being examined.

Private Easements

An easement is the right of one person to use another person’s property. An easement may include the right to use or to restrict the use of land. There are many types of easements and rights in land. State, municipal and private roads, power lines, public and private sewer and water lines, railroad rights of way, view corridors, bicycle routes and scenic roads may all involve the principles of easement law. There are two major classifications of easements. The first is the appurtenant easement and the second is an easement in gross. The distinguishing feature of the appurtenant easement is that the benefit of the easement attaches to a specific parcel of land and remains with that parcel of land until the easement is terminated. The appurtenant easement burdens one parcel of land and benefits another. The express easement is the most common form of appurtenant easement. The express easement may be created by a grant of the easement in a deed or other writing or by the reservation of the easement to the grantor in a deed or other written easement.

The title examiner is concerned with multiple facets of easements. The title examination should identify what property is burdened by the easement and what property is
benefited by the easement. In addition, the title examiner should attempt to locate the easement to determine what impact the easement might have on the use the burdened property.

In addition to the express easement contained in a document, title examiners should be aware of the circumstances that would give rise to an easement implied by law, easements created by recording a subdivision plat, and easements that arise by necessity from a subdivision that would otherwise leave a property landlocked.

Covenants

A covenant is a binding obligation imposed on land to do something affirmative (maintain the fences on the property) or refrain from doing something (not use the property for any use other than a single family residence). A covenant may be created in a deed in which the grantor agrees that the remaining lands of the grantor will be burdened by a particular arrangement. For example, a seller of real estate may agree with the buyer that “no more than one house will be built on each of the remaining lots created by the seller.” If that agreement is contained in a deed executed by the seller, then the covenant is generally effective. A covenant may also be created if the covenant is in the form of a limitation on the use of the property sold. If the seller includes a statement in the deed that “no structure other than a single family house may be constructed on the property described in this deed”, the seller may enforce that covenant. The benefits and burdens of covenants flow with the title to land so persons who acquire the title to the property will be bound by covenants back in the chain of title.

Covenants are also often created by the recording of a Declaration of Covenants describing the land to be affected. Declarations of Covenants are common in residential and commercial subdivisions. Until January 1, 1999, there was no statutory basis for imposing
covenants on real property by a Declaration, although the practice was recognized under the common law. After January 1, 1999, the recording of a Declaration raises the issue of compliance with the Vermont Common Interest Ownership Act.

Covenants may be personal to certain parties or may run with the land. That means that the covenants are binding on the transferees, heirs, successors and assigns of the original parties to the covenants. For a covenant to run with the land, the covenant must - touch and concern the land, must be in writing, must be created with the intent that the covenant run with the land, and finally there must be a benefited and burdened property. It is clear that most covenants found in the land records meet the requirement of “touch and concern the land” just by the fact that they are memorialized in the land records. The requirement of a writing is also generally satisfied. The issue of the intent of the parties that the covenant be “binding on the heirs, successors and assigns” of the parties, or similar language is enough to meet that test. If the covenant has a specific term of years, then that should also satisfy the “running” requirement.

**Federal and State Tax Liens**

The State of Vermont and the United States Internal Revenue Service have the ability to place liens on property pursuant to statutory authority. Generally tax liens, whether federal or state, arise when the agency files a Notice of Lien in the land records. There is one type of federal tax lien that arises without the filing of a lien. There is a special tax lien for Federal Estate Taxes and Federal Gift Taxes that arises (i) on death for Estate Taxes; and (ii) when the gift is made for Gift Taxes.
Federal Tax Liens

A Federal Tax lien is valid for ten years from the date of the assessment of the taxes. The lien can be renewed by the IRS for an additional ten year period by filing the notice of extension before the original lien expires. Once filed, a Federal Tax Lien encumbers all of the property of the person against whom the lien is filed. Federal Tax liens have one unusual property. A tax lien may be filed at a time when the taxpayer does not own property in that town. If the taxpayer against whom the lien is filed then acquires property in that Town, the lien attaches to the property at the time the taxpayer acquires the property. This is called a “springing” lien. Because of this principle, it is important to review the land records for each person who has owned the property for the last ten years, FOR THE PERIOD BEFORE THEY OWNED THE LAND.

Federal Estate Tax and Gift Tax Liens

A title examiner will not find a Federal Estate or Gift Tax Lien filed in the land records. By law a lien on all assets of an Estate arises on the date of death of the decedent, if there is a liability for Federal Estate Taxes. A similar lien arises on the property which is transferred by a gift, if the Donor of the Gift is liable for Gift Tax. The IRS is not required to file a notice of lien for these two special taxes. This means that title examiners much be conscious of the fact that a sale of property from an estate has occurred and inquire about the status of the Federal Estate Tax liability. In some cases (e.g. non-probate property transferred by the recipient thereof for full consideration) the Federal Estate Tax lien may be removed from the property transferred but it attaches to the funds that were paid for the property. If the property is included in the probate
estate, the lien is not released from the property unless the sales proceeds are used to pay the expenses of the estate, which may include the estate tax.

**State of Vermont Tax Liens**

A lien is created for the failure to pay taxes due the State when a notice of lien is filed in the Land Records. There is no specific statute that clearly defines the period of time during which a State Tax Lien is effective. According to the Tax Department there are a number of off-record events that may extend the term of a tax lien. Caution is warranted for tax liens on record for less than 15 years.

**Mechanic’s or Contractors’ Liens**

A contractor's lien is a temporary lien allowed to a person who provides labor or materials that are incorporated into an improvement on real property. A mechanic’s lien may be created by the filing of notice within 180 days after payment is due. However, such lien will survive only for 180 days after its filing unless an attachment is obtained from a court pursuant to the civil rules.

**Attachments and Judgments**

Federal and State Courts issue attachments on property while litigation is proceeding to freeze assets that may be used to satisfy a judgment. The requirements for valid attachments are found in the civil rules. A final judgment in a civil case, and a restitution order are liens on the property of the person that owes the money when filed in the town where that person has property or subsequently acquires property while the judgment is valid. Attachments and
judgments are encumbrances on the title and must be resolved and discharged before the title is clear. A valid attachment continues in effect for 60 days from the final judgment in the case for the party holding the attachment. A judgment lien, created by filing a judgment that meets the statutory criteria in the land records continues for 8 years from the date of judgment and may be renewed by following the statutory process for renewal.

AND THEN THERE ARE ALL THE OTHER MYRIAD OF ENCUMBRANCES ONE CAN IMAGINE.
Part III. Property Taxes and Assessments

The third step in the search process is to gather information about status of property tax payments, municipal charges, municipal utility payments for those municipalities that operate their own utility companies, homeowners’ association dues and other payments that may be required to be made.

The title examination process involves checking on the status of the current years property taxes and verifying that there are no property tax delinquencies for prior years. The process of checking for delinquent taxes may require an inquiry of the delinquent tax collector in those towns that have appointed or elected a person to that office. The town treasurer may only have information on the current year’s taxes, and in the worst case scenario a hazy recollection about prior years.
Part IV. **Land Use Regulations**

The next step in the title search process is to verify that there is no evidence in the public record (and that term is hard to define) that the property fails to comply with the requirements of the municipal and state land use regulations which affect the use, development and occupancy of the Property. Creating a definitive scope of examination for the title examiner is extremely challenging. There was a flurry of cases in the late 1990s culminating with *Fleming v. Nicholson* cited above which appeared to create a significant burden on title examiners to assess the impact of State and Municipal permits or the lack of permits on title to real property. Since those decisions, there have not been other cases helping to understand the boundaries of title examiners obligation regarding land use permits.

In very broad terms, the title examiner should be familiar with the jurisdictional triggers for the municipal land use regulations in effect in the municipality where the property being examined is located. That means being aware of the nature of regulations, the dates when the regulations became effective and scope of the regulations.

At the State level, at a minimum the title examiner should be familiar with the jurisdictional triggers that would suggest a property would require a Potable Water Supply and Wastewater Disposal Permit, a State Land Use and Development Permit (Act 250), a Stormwater Discharge Permit at the construction phase and for operational purposes, and a Public Building Permit. Bear in mind that there are many other permits that may affect the development and use of a particular property for a particular purpose, and the title examiner should know the current
and intended use of the property being searched in order to assess the need for permits and whether the proper permits have been issued.

**A. Zoning and Municipal Land Use Regulation**

Many, but not all towns regulate various kinds of development within the town through zoning, planning and subdivision regulations. Subject to certain statutory limitations, those regulations affect the rights of the owners of land, but are not considered defects in title or encumbrances for the purposes of the warranty against encumbrances in a deed. The fact that zoning and municipal land use matters are not defects in title does not mean that a title examiner is permitted to ignore the impact of the regulations.

Municipal land use matters apply to the property being searched. Because the title examiner’s duty is to find and disclose every matter which is or could be an encumbrance on title (and by extension) may affect a person’s decision whether or not to acquire the title to real property, finding and disclosing information related to zoning and other municipal land use regulations is an important part of the title search.

The process of examining the municipal land use regulations begins with gathering information about the nature of the improvements on and the current and planned use of the property. Information about the existing improvements on the property comes from the real estate listing and the tax assessor’s cards. It is important to compare the nature and size of the existing improvements (including the number of bedrooms - which is important for both municipal and state permits) with the improvements described in the permits that have been issued to the property by the town land use planning regulators, including the zoning board / planning commission / development review board. It is also important to review the permits and approvals for conditions and requirements, particularly conditions or requirements that may be satisfied by filing post-construction inspection report or plans.
If those conditions exist, it is also important to verify that the reports were filed and the post-construction inspections completed.

The second step in the review of municipal land use permits is to determine what permits are required by the local zoning and subdivision ordinances. Prior to searching the title to property, the title examiner should determine which permits are required in a particular town for subdivision and for development. Within the guidelines of the enabling acts (the state statutes that allow municipalities to adopt land use regulations) various municipalities have designed ordinances covering those issues which are most important to the town residents.

Typical municipal regulations include:

**Subdivision.** Many towns regulate the subdivision of property. The level of regulation may vary, however, so that in some towns, the creation of one lot or even two lots does not require a permit. In other towns, the division of a single lot may require a permit. A municipal subdivision permit generally requires at least one public hearing before the planning commission or development review board. There will be minutes of the decision granting or denying the permit. The decision may have conditions imposed on the approval. The title examination includes the review of the permits to determine what conditions there may be, and whether those conditions require proof of compliance with the conditions by filing documents. Title examiners must generally determine whether conditions in permits that require the filing of further documents have been satisfied. There is always one document that is required. Subdivision permits or approvals always include a map showing the boundaries of the newly created parcel. Usually the approved plan has a legend on it that indicates this was the map reviewed by the planning commission and the date of the approval. The approved map must be recorded in the land records within the statutory period.

**Zoning Permits.** Most construction and any change in use of an existing structure other than very simple projects require the approval of the municipal zoning administrative officer or the zoning board or development review board. Zoning permits may be very simple documents, with just check boxes or they may be complex documents with findings, conclusions and conditions. It is important to read the permits to determine what conditions may have been imposed on the project and whether further research may be required.

**Building Permits** In some municipalities, there may be a requirement for a building permit in addition to or in place of the zoning permit. In those municipalities that require both, the building permit may be more technical and related to building codes rather than zoning ordinances.
Health Permits. Prior to 2007, some municipalities had health or sewage disposal permits which were an additional layer of regulation over and above the State water supply and wastewater permits described in the next section. Since the State adopted universal jurisdiction over water supplies and wastewater disposal, the municipal regulations have been superseded.

Driveway Cut. A few towns require that driveways be approved before being constructed. The towns most likely to have such regulations are those towns where the possible runoff from poorly constructed driveways would damage town roads.

The final step in the process of analyzing the material is the comparison of the existing improvements on the property with the permits that have been issued with regard to the property. Where there are improvements for which there are no permits the title examiner must find an exemption, if there are any, or the title to the property has a defect.

The astute student of the statutory law will point to the provisions of 27 V.S.A. §612 and inquire why the statute which specifically provides that the absence of a municipal land use permit or the non-compliance with a permit does not create an encumbrance on the title does not resolve the situation. The answer can be found in the rule of Estate of Fleming v. Nicholson, stated at the beginning of these materials. That obligation must be considered in the light of the potential penalty for pending municipal land use violations is often a fine of Fifty Dollars ($50.00) to One Hundred Dollars ($100.00) per day and the additional remedy of injunctive relief requiring remediation of the violation. Together those remedies coupled with the fact that enforcement actions are brought against the current owner of the property and not necessarily the person who created the violation leads to the conclusion that a purchaser would want to know that the property he or she is about to acquire may be subject to a municipal land use violation because of the significant potential financial burden. That is generally true whether the absence of a permit is deemed an encumbrance under the law or not.

Some ordinances provide for a certificate of occupancy that is a binding determination by the municipal officials that the property to which a certificate of occupancy was issued is in compliance with the requirements of the ordinance. In those municipalities, the title examiner may be able to
resolve questions about potential violations and risk by finding a certificate of occupancy that applies to the present configuration of improvements on the property being searched. It is important to verify that the applicable ordinance confirms that the existence of the certificate of occupancy is an agreement by the municipality that as of the date of the certificate, there are no violations.

B. Wastewater Disposal and Potable Water Supply – the Environmental Protection Rules.

The program for regulating water supplies and wastewater disposal (EPRs) presently exists under the Environmental Protection Rules adopted in 2007. The title examiner should be familiar with the concept of “clean slate”; the jurisdictional triggers creating the requirement for a permit and the 20+ exemptions that may eliminate the need for a permit.

Clean slate was the State’s way of making the concept of universal jurisdiction over water supplies and wastewater disposal systems more palatable. Essentially, the State agreed to accept the water supplies and wastewater systems that existed in the State as they existed on January 1, 2007, provided the systems had not failed, as those terms were defined in the 2007 EPRs. Prior to 2007 there existed a complex regime of regulations and a confusing set of exemptions which created a crazy quilt of regulations with numerous compliance issues and problems. Clean slate fixed those issues as long as the system had not failed, and no activities were undertaken after January 1, 2017 that would require a permit under the new regulatory programs.

In very brief terms, a permit would be required if, after January 1, 2007, the owner of the property did any of the following:

- Subdivided the property
- Constructed a water supply or sewage disposal system
- Modified an existing water supply or sewage disposal system
○ Constructed a new building

○ Modified a building to increase design flows, for example by adding new bedrooms in a house, more seats in a restaurant, more space in a retail store

○ Connected a building to an existing water supply/wastewater system

○ Changed the use of a building that changed design flows (Conversion of commercial to residential) or (residential from seasonal to year round)

○ Created or modified a campground

○ Used or operated a failed system

○ Altered a site layout approved in a permit.

If the examination of the records disclosed any activities that would have required a permit after the January 1, 2007 date, a title examiner would have to determine if the property potable water supply and wastewater disposal permit had been issued. There are also a series of exemptions that may obviate the need for a permit. The exemptions are found in the Environmental Protection Rules.

C. State Land Use and Development (Act 250)

The creation of a subdivision or development of land may be subject to approval by the State Land Use Law and the conditions of an Act 250 Permit. Act 250 was adopted to provide for a uniform method of reviewing larger projects with impact outside of a particular town or municipality.

A title examiner must understand when an Act 250 Permit is required. Looking at the principles announced by the Supreme Court, it is likely that the Court will find title examiners liable to their clients for failing to disclose that the property under review required a permit but did not have one. There are circumstances, however, where it will not be apparent from the typical title search that an Act 250 permit is required, but in fact, a permit will be required.
Although there are many jurisdictional triggers for Act 250, the title examiner is likely to encounter a limited set of those triggers. In general, title examiners should be alert to the fact that an Act 250 Permit may be required after June 1, 1970 if:

1. A person (the term is defined by statute) was involved in creating 10 lots within 5 years within a district (defined by statute) or within 5 miles of any other lots (which means the subdivisions may be in other towns).

2. After 2000, person (the term is defined by statute) was involved in creating 6 lots within 5 years within a town that does not have permanent zoning and subdivision regulations.

3. A person (the term is defined by statute) was involved in creating 10 units of housing (apartments, common interest community units, hotel rooms, etc.), within 5 years within 5 miles of any other units (which means the developments may be in other towns).

4. New Roads were constructed prior to 2000.

5. Improvements for Commercial or Industrial Uses were constructed.

6. An existing project was altered in a material or substantial way.

The regulatory scheme of Act 250 is driven by the statute itself found at 10 V.S.A. Chap. 151, and by the Environmental Board Regulations (EBR’s). There is also a rich history of decisions from the Environmental Board and Courts dealing with many of the essential elements of Act 250. The key statutory provision for a title examiner is the prohibition on selling or offering to sell a lot in a subdivision that required an Act 250 Permit but did not have one. The other key element of this section is the definition of what subdivisions are exempt from Act 250.
D. Public Building Permits

The term Public Building is now applied to the Certificate of Occupancy issued by the Department of Public Safety – Fire Safety Division to establish compliance with the safety codes (fire, electric, plumbing, etc.). A title examiner should be aware of the definition of a public building for the purpose of determining whether the property may be subject to inspection and review under the Department regulatory programs. In general terms – a building subject to the Department’s jurisdiction means any building that may be occupied and that is not an owner occupied single family detached dwelling on its own lot.

E. Stormwater Discharge Permits

The most recent regulatory scheme to come to the attention of title examiners are the Stormwater discharge permits and stormwater discharge regulations. The State has regulated stormwater discharge from certain project since the 1980’s, however, the regulatory effort was principally directed a reviewing new projects and issuing permits for the new projects.

There has not been a case decided yet that would define the scope of the title examiner’s obligation regarding stormwater discharge permits, however, it is possible to project the likely outcome of such a case. At present, a cautious title examiner will look for evidence of the existence of a prior stormwater discharge permit (the state maintains a website with some relevant information, or the reference to a stormwater permit should appear in the Act 250 files – being that properties that are likely to need a stormwater permit are the same projects that are likely to have been reviewed under Act 250.

If the property discharges to a non-impaired stream, (one not on the list of streams published by the State) then the title examiner must determine whether the process for bringing the property under the umbrella of the General Permit (No. 3-9010) has been accomplished. Instead of issuing a series of renewals of existing permits or trying to re-permit individual properties, the State developed a system
of General Permits and a procedure for demonstrating that a particular property qualified for treatment under the General Permit. For those properties that have an existing expired permit and drain to a non-impaired stream, the owner of the property or if it is a subdivision then the owner’s association should have filed a Notice of Intent to be covered, and a report of an engineer detailing the state of the existing stormwater discharge system and its maintenance. The State reviews the application for coverage under the General Permit and if the property qualifies issues confirmation that the property is covered by the General Permit. That confirmation will appear in the Land Records. If the determination does not appear in the land records, and in particular, if the owner cannot prove that the application and report were filed, the property may not be in compliance with the current stormwater regulatory programs. For properties that do not qualify for inclusion in the General Permit, there will be a site specific stormwater permit for the property.
Part V. Special Topics

The final step in the title search process is to address special areas of interest that may affect the title to a particular property. There are a number of issues that may require special handling in the title search and the following are a dangerously incomplete list.

A. Common Interest Ownership Projects.

When a title examiner finds that the property being searched is part of a common interest community (planned community or condominium), the title examiner must determine whether the common interest community was validly formed and determine how the constituent documents regulate the community.

Condominiums (pre-VCIOA) and All VCIOA Common Interest Communities

- Confirm that the Declaration and the Bylaws include all of the required elements from the applicable statute.
- Confirm that the necessary plans are recorded WITH the appropriate certifications and that the plans that were recorded with the declaration conform to the plans approved during the permitting process.
- Note that the pre-VCIOA condominium statute required certain elements be included in deeds of condominium units. If there is a deed in the chain of title that does not include the required elements, the deed may be defective.
- If the project was phased, determine how the phasing was accomplished and whether the necessary subdivision permits were obtained.

In addition to verifying that the common interest community was properly formed, the title examiner should review the documents for the purpose of being able to identify and explain any significant or unusual requirements or restrictions that may apply to the member of the common interest community. For example, some common interest communities require each unit owner to
contribute money to various accounts for capital improvements, or stormwater maintenance or rehabilitation funds, or a common interest community might prohibit storing boats or recreational vehicles on the property which may present problems for a person wanting to store their boat or camper at their property.

B. Current Use Program and the Land Use Change Tax Lien

Lands used for active agricultural purposes and managed forest land may be enrolled in the Agricultural and Managed Forest Land Use Value Program, sometimes called “current use.” Enrollment provides a benefit to the landowner by reducing the taxable value of the property to its agricultural or forest use value rather than its fair market value. The title examiner will find either a copy of the enrollment application or a Notice of Land Use Change Tax Lien in the land records indicating enrollment. The two most important but not exclusive issues affecting enrolled land are the lien running with the title for the potential Land Use Change Tax and in the case of managed forest land, the obligations related to keeping the required forest management plan up-to-date.

C. Glebe Land and Leaseland

The Vermont Lease Lands are an interesting legal oddity that title examiners still find on occasion. In most of the grants made by Governor Wentworth specified that a certain portion of each grant had to be set aside as land that could never be sold. The shares set aside were allocated to support a school, the first minister to settle in town, the Church of England and the Society for the Propagation of the Gospel in Foreign Parts. In some towns Governor Wentworth also set aside one right for himself. The terms of these special grants prohibited the sale of the property set aside for these “public” or “charitable” purposes. As a result of this directive, those lands were often rented to a tenant. The rents were applied to the purpose for which the land was reserved. The leases often ran for very long terms, often expressed as “for as long as grass grows and water runs” or for 200 or 999 years. The
rents, which were undoubtedly quite reasonable when the leases were entered into were set at prices like twenty-five cents per acre.

Leaselands occasionally appear in the title. When they do, most people are confused about the nature of the legal rights in Leaselands. For most purposes, Leaselands are treated as though the person with record title owns the land, although that is not technically correct. If the rents are due for schools or town purposes (for instance for the first settled minister) the Town collects the rents as part of the taxes. The rents set aside for the Church of England were assigned to the Town. Rents due the Society are collected by the Episcopal Church. Land set aside for church purposes is referred to as Glebe Land. Lands set aside for other purposes should not be referred to as Glebe Land, but may be referred to as Leaselands. Leaselands continued after the original Wentworth Grants. When the Vermont legislature made grants of the remaining lands within Vermont that had not been previously granted, the Legislature continued the practice of setting aside lands for school purposes. Some of the funding for the University of Vermont came from land grants of this type.

D. Conservation Easements.

Various open lands, farm lands, and forest lands may be subject to conservation easements granted to various trustees or custodians. The conservation easements typically have significant restrictions in the nature of covenants on the uses that are permitted on conserved land. In addition, conservation easements may have provisions allowing certain entities the right to purchase the property at a substantially reduced value which should be treated as a material encumbrance on the title for title examination purposes.
E. Access to the property being searched is by private right of way

When access to the property being examined is through an easement or other non-public road, the title examiner must examine the title to the easement using the same procedures as used for the examination of the title to the parcel of land.

F. Tax Sales.

Tax sales require additional research to verify that the tax sale was properly completed. The process for conducting a tax sale is specified in the statute, and consists of a series of pre-sale notices that must be delivered to and received by the delinquent tax payer. Failure to give notice, or failure to maintain adequate proof that the pre-sale notices were actually received by the delinquent tax payer leaves the tax sale subject to challenge on constitutional due process grounds. The title examiner will have to research what notices were given, when the notices were given, the documents issued in connection with the tax sale including the report of sale and if there was no redemption, the tax collectors deed. All the documents and proceedings should be compared to the statutory and common law requirements regulating the tax sale process. Any defect in the tax sale should be assessed for the risk that it might lead to the tax sale and the title of the tax sale purchaser being voided.
Part VI. Closing Words of Wisdom

Before venturing into the land records to begin title searching as a profession, a title examiner should spend some time becoming familiar with the various resources that help to identify when a factual situation may present a legal problem. Although it is no possible to review all the resources, here are a few key ones:

- Title 27 and Title 27A, for statutes relating to real estate transactions
- Title 1, for key definitions
- Title 9, for mobile homes, mechanic’s liens
- Title 11, for the provisions that relate to how entities can hold and sell real estate
- Title 12, for foreclosures and judgment liens
- Title 14, for Estates, Guardianships and Powers of Attorney
- Title 19, for highways and roads
- Title 32 for property taxes, tax liens and current use.
- The Vermont Title Standards, published on the Vermont Bar Association Website
- Key common law principles regarding all the topics found in these materials and all the issues these materials did not cover.
- Underwriting guidelines and materials published by title insurance underwriters.

The key skill a title examiner can develop is respecting the intuition that something is wrong with the documents, facts, chain of title, that the title examiner is reviewing. Once there is sense that something is wrong, follow that intuition until reaching a comfort level that resolves the concern.
Abstract Sheet

<table>
<thead>
<tr>
<th>Document</th>
<th>Book</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grantor Names</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grantee Names</td>
<td></td>
<td>Estate</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Recording Date</th>
<th>Document Date</th>
<th>Transfer Tax</th>
<th>Consideration</th>
<th>Acknowledgment</th>
<th>Entity Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Prior Deed Reference</th>
<th>Plan Recording</th>
<th>POA</th>
<th>POA Recording</th>
<th>POA Acknowledgement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Description:

Notes: