Vermont Bar Association
Seminar Materials

Property Law & Vermont Title Standards Year in Review

September 28, 2018
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Speakers:

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1	Deutsche Bank National Trust Company v. Watts, 2017 VT 57, 171 A.3d 392 (2017)	Filing Sequential Foreclosure Cases
2	Aldermann v. Camley, 2017-045 Three Justice Decision (not precedent)	Interesting Facts – Touches on Enhanced Life Estate Deeds
3	Provident Funding Associates, L.P. v. Campney, 2017 VT 120, 2016-003	Sequential Foreclosures – Remedies for Subordinate Creditors
4	People's United Bank, NA v. Alana Provencale, Inc., 2018 VT 46, 2017-250	Foreclosure by judicial sale, foreclosure not completed
5	Hayes v. Mountain View Estates Homeowners Association, 2018 VT 41, 2017-079	Developer (Estate of Developers) liability for maintenance of improvements after buildout / sellout of development.
6	Jadallah v. Town of Fairfax, 2018 VT 34, 2017-287	Quitclaim Deed to "Mortgagee" as an alternative to a mortgage deed.
7	Watson v. Village at Northshore I Association, Inc., 2018 VT 8, 2016-316	Dispute between Owner and Association. Address issues related to Common and Limited Common Elements.
8	Town of Granville and Green Crow Corporation, Inc., v Joseph Loprete	Ancient Roads Case
9	Federal National Mortgage Assocation v Johnston & Johnston	Eviction case following foreclosure; consequences of dismissal
10	Bank of America v. O'Kelly & O'Kelly and Vermont Department of Taxes 2018 VT 71 (2018)	Challenge to an order of confirmation; trial court's discretion in confirming a sale;
11	Stonewall of Woodstock Corp and Accordion, LLC v. Stardust 11TS and Oliver Block, LLC 2018 VT 79 (2018)	When is a contract a contract and when is it not
12	Alpine Haven Property Owner's Association, Inc, v Brewin 2018 VT 88 (2018)	Dispute between Owners and Association about appropriate amount for Association fees related to services provided by the Association.

Legislative Update

By: James E. Knapp, V

I. Notary Public (Act 160; H.526)

This statute substantially rewrites the process for appointing and regulating notary publics in Vermont, as well as provide new or expanded guidelines on how notaries will function. The Act is based on the Revised Uniform Law on Notarial Acts. Here is a broad outline of the statute.

- **Chapter 1.** Definitions, application, and exemptions.
- **Chapter 2.** Appointment and regulation of Notaries. The process of appointing and regulating notaries will move from the County Court System to the Secretary of State's office.
- **Chapter 3.** Sets out the qualifications for being a notary, grounds for discipline, renewals and continuing education requirements.
- **Chapter 4.** Describes acts a notary is authorized to perform and the procedures for executing the authorized acts.

There are a few key features of interest to real estate practitioners:

a. Notary commissions will be issued for TWO years, replacing the current four year term.
b. To qualify for an appointment as a notary public, applicants must take and pass an online examination prior to completing the appointment process. The statute includes an exemption from the examination requirements for licensed attorneys, but not people who work with attorneys. **This requirement will apply when a notary renews his or her commission as of February 1, 2021. Renewals due in February of 2019 will not require the taking and passing the test.**
c. Notaries will have to satisfy a continuing education requirement consisting of 2 hours of credit prior to reappointment, again starting with the renewal in February of 2019. Licensed attorneys are exempt from this requirement.
d. Complaints related to violations of the rules, procedures and requirements of the statute relating to the performance of notarial acts may result in a referral to disciplinary counsel for attorneys and to the Office of Professional Regulation for those who are not attorneys.
e. The process for performing notarial acts includes: (i) personal appearance before the notary; (ii) the notary must obtain appropriate identification for persons who are making acknowledgments; (iii) complete the notarial certification; and (iv) provide a stamp or seal. The bill included proposed forms for acknowledgements.
f. The bill specifies the actions required of the notary taking an acknowledgement, taking a verification, attesting a signature, or noting a protest of a negotiable instrument, would in each case have to have suitable evidence of the person's identity, require a personal appearance before the notary, and confirm that the signature on the document is the signature of the person making the statement.
g. The bill specifies what forms of verifying the identity of the person requesting the notarial act are acceptable.
h. The bill provides for the information that is required to appear in a certificate confirming the notarial act has been completed including (a) signature of the notary and date of the

performance of the notarial act; (b) the jurisdiction where the notarial act was performed; (c) title of the notary; (d) the date of expiration of the notary's commission; and (e) a stamp or seal (Notary name and commission number). In the absence of the stamp or seal, the notary may write in the notary's name and commission number, which must be legible.

i. The bill includes forms for acknowledgements that will satisfy the requirements.
j. There are two provisions intended to minimize problems caused by defective acknowledgements. The first provision specifies that defects in the certificate of acknowledgement do not render the acknowledgement automatically void, but the efficacy of the acknowledgement may still be challenged on other grounds. The second corrective provision specifies that a defective acknowledgement can be corrected with a curative affidavit.
k. The bill acknowledges that the potential for digital transactions exist and provides guidance for how acknowledgements of digital documents will be regulated.

Effective Date: Secretary of State Powers related to creating system to renew notary commissions (July 1, 2018); Secretary of State registers notaries staring December 1, 2018; **Remaining provisions July 1, 2019**.

II. Tax Sales (Act 117; H.300)

The revisions to the addresses some of the challenges in advising clients and procuring title insurance for transactions in property that has been the subject of a tax sale. There are three changes in the tax sale process addressed in H.300.

1. The Statute of Limitations for challenging a tax sale found in (32 VSA §5263) is reduced from three years to one year after the tax collector's deed is delivered to the successful bidder at the tax sale.
2. The period during which a tax sale might be challenged as a fraudulent conveyance under 9 V.S.A. §2293 is reduced from four years to two years and will run concurrently with the provision in the Federal Bankruptcy Code regarding fraudulent conveyances.
3. The questions raised in *Hogaboom v. Jenkins v. Town of Milton*, 196 Vt. 18, 2014 VT 11 (2014) and *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L.Ed.2d 415 (2006); regarding how to handle notices to the parties interested in a tax sale that do not collect the certified mail notice of the pendency of the tax are addressed by adopting the recommendations in the two decisions for other forms of notice that might be adequate. Those alternatives, to be applied after the certified mail process fails include first class mail or an option for personal service.

III. Leaselands (Act 152; H.859)

At the beginning of the session, two different bills seeking to resolve the issues arising from the existence of leaselands were introduced. The suggestions proposed by the Real Estate Section of the Bar Association and the Title Standards Subcommittee contained in H.859 was the process selected by the legislature. The existence of leaselands in some titles in Vermont have resulted in delays in

closings while the parties obtain a deed to the reversion rights from the holder of the lease. H.859 provides that reversion in the leaselands will vest in the tenant under the lease unless a town votes to retain the leaseland prior to January 1, 2020. A town may act sooner to release the reversions in the leaselands in the municipality. H.859 only deals with leaselands where the fee/reversion is retained by a municipality and does not address leaselands where the fee/reversion is held by a college or university, the Society for the Propagation of the Gospel in Foreign Parts or individual churches.

IV. Blockchain (Act 205; S.269)

Recent developments have resulted in a new technology that might be applicable to real estate transactions in the future. One of those technologies is the blockchain, which is its simplest form is a method for accounting for transactions through a distributed record or ledger. Readers may have heard about blockchain in the context of Bitcoin and other cryptocurrencies which are regularly in the news. In theory blockchain would ultimately replace the land record recording system and provide for a mechanism by which any person who was a member of the blockchain could see all the records about the property managed in the blockchain.

The statute does not directly address the use of blockchain in real estate transactions other than to task a selection of stakeholders (State Agencies, Vermont League of Cities and Towns) with a study of how blockchain might be used in the keeping of government records, including land records.

The Blockchain statute, as presently configured, addresses four topics.

1. Personal Information Protection Company (PIPC) is authorized to do business in Vermont. A PIPC would enter into agreements with persons to collect and protect personal identifying information and would engage in transactions for the benefit of the person whose information is stored as specified in the governing agreement. For example, a customer of a PIPC might ask the PIPC to verify the customer's identity and financial history information in connection with an application for a mortgage loan. A PIPC would have a fiduciary obligation to a customer regarding the protection of the customer's identifying information in the custody of the PIPC.

2. The Department of Financial Regulation is directed to prepare a report on how blockchain might be implemented in insurance and banking areas.

3. The Agency of Commerce and Community Development is directed to incorporate the promotion of blockchain and fintech economic development into its marketing, business support and business development programs, including educational and workforce training opportunities.

4. A new type of limited liability company is authorized – a Blockchain Based Limited Liability Company (BBLLC). The special characteristics of the BBLLC include the allowance of special roles for participants (the nodes and miners that make a blockchain based system function) inside the umbrella of the limited liability protections created by the LLC structure.

4. Standard 2.2 – new text added to Comment 4
5. Standard 2.2 – new text added to Comment 5
6. Standard 2.3 – new Comment added
7. Standard 6.4 – Comment 5 revised
8. Standard 6.5 – new Comment added
9. Standard 7.1 – new Comment added
10. Standard 12.1 – new Standard added
11. Standard 13. 1 – Comment 4 – material revision
12. Standard 14.1 – Comment 2 – minor revision
13. Standard 16.2 – Comment 8 – minor revision
14. Standard 16.2 – new Comment added
15. Standard 19.1 – new Comment added

Changes were made and approved <<TBD>>

1. Standard 2.2 – new text added to Comment 8
2. Standard 3.1 – new Standard added
3. Standard 6.4 – Comment 6 added
4. Standard 14.1 – Comment 8 removed, new Comments added, Comments renumbered
5. Standard 16.2 – Comment 14 added
6. Standard 17.3 – new Standard added
7. Standard 17.4 – new Standard added
8. Standard 17.5 – new Standard added
9. Standard 18.1 – Comment 9 added
10. Standard 18.6 – new Standard added
11. Standard 18.7 – new Standard added
12. Standard 19.1 – Comment 8 revised, Comment 9 added
13. Standard 23.1 – Comment 6 added

2014 Editor: Andy Mikell, Chair – Title Standards Subcommittee (2007-2014)

2016, 2018 Editor: Jim Knapp, Recorder of Title Standards – (1990-2013 and 2015-current)

one or more other persons. See, Act 003 2009-2010 Session, Vermont Legislature; *"An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage."*

Comment 5. The failure to identify or state the marital relationship of plural grantees in a conveyance does not impair marketability if such identity or relationship is otherwise established by, or can be readily inferred from, other recorded instruments, acknowledgments or affidavits, it is good practice, however, to recite the marital or civil union relationship in the deed; ie:

> "A & B, spouses [or a married couple] as tenants by the
>
> entirety" "A& B, parties to a civil union as tenants by the
>
> entirety"

Moynihan's Introduction to the Law of Real Property, 229-235 , (West, 1962), traces and discusses the common law roots of the tenancy by the entirety. Moynihan writes that :

> At common law a conveyance to grantees who were husband and wife created in them an estate by the entireties. It was not necessary that they be described as husband and wife or that the conveyance manifest an intention that they take as tenants by the entirety. (230).

The failure to identify or state the marital or civil union relationship of plural grantees in a conveyance does not impair marketability if such identity or relationship is otherwise established by, or can be readily inferred from, other recorded instruments, acknowledgments or affidavits. For some Vermont cases addressing the nature of interest held by plural grantees, see: *Brownson v. Hull*, 16, Vt. 309 (1844); *Davis v. Davis*, 30 Vt. 440, 441 (1875); *Town of Corinth V. Emery*, 63 Vt. 505 (1891).

Comment 6. A creditor cannot attach property owned jointly by a debtor and a nondebtor when they hold title as tenants by the entirety. *RBS Citizens, N.A. v. Ouhrabka*, 30 A.3d 1266, 190 Vt. 251, 2011 VT 86 (2011). However, upon termination of a tenancy by the entirety, by death or dissolution of the marriage, the attachment or judgment lien may spring onto the interest of the spouse subject to the encumbrance. See Standard 2.2, Comment 5.

History

March 29, 2000 Restated the language defining "knowledge" as being actual knowledge or constructive notice derived from properly indexed instruments in the chain of title. This concept is used in the first clause of Standards 6.2, 6.3, 6.4 and 6.5 Insert clause re leading phrase.

CHAPTER 3
STANDARD 3.1

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Perpetual Lease Land

A conveyance of a durable or perpetual lease creates a leasehold interest and not a fee interest. The relationship between parties to a durable lease is that of lessor and lessee. The character of land governed by a perpetual lease may not be treated as irrelevant by a title examiner if such character is discovered in the search.

Unless the governing instrument provides otherwise, the lessor retains title to mineral rights in the leasehold property. A lessee is not entitled to extract minerals from the leasehold property; to do so constitutes voluntary waste for which the tenant is answerable. *Galkin v. Town of Chester*, 716 A.2d 25, 168 Vt. 82 (Vt. 1998).

Comment 1: Reference is made to Act 152 of the Adjourned Legislative Session of 2017-2018 concerning only those lease lands owned by municipal corporations. Inter alia, the Act provides that unless municipalities affirmatively vote to retain owned lease lands prior to January 1, 2020, fee ownership of such lands becomes vested in the current lessees of record as of that date.

Comment 2: Lease land is a form of real property interest that originates from certain lands being set aside in the original town charters, to be held in trust for the benefit of various public institutions. In charters issued by provincial New Hampshire Governor Benning Wentworth, the beneficiaries were typically a town school, the Church of England, and the Society for the Preservation (Propagation) of the Gospel in Foreign Parts (SPG), an Anglican missionary society. Post-Revolutionary Vermont charter beneficiaries were typically a town school, a county grammar school, seminary or college (UVM, Dartmouth, Middlebury) and the social worship of God – local churches.

Not all town charters provided lease lands for all of these purposes, but all charters set aside land as sources of income for the various public or pious uses.

The lease term typically ran “as long as water runs and grass grows” and provided a fixed annual rent. The proprietors leased the land by perpetual lease to encourage use of the property that could not be purchased in fee.

Such lease lands, other than those dedicated to the Ministry of the Church of England, remain as leaseholds, unless the lessor has conveyed the fee to a present leaseholder, and should be conveyed exclusively by quitclaim deed or portion thereof.

Comment 3: In order to determine who owns the fee interest in a parcel identified as lease land, a title examiner may be required to extend the search well beyond the statutory 40 year period.

Comment 4: The definitive treatise on Vermont lease land is *The Vermont Leaselands*, Walter Thompson Bogart (1950).

Comment 5: Lease lands, other than those dedicated to the Ministry of the Church of England, remain as leaseholds, unless the holder of the fee (lessor) has conveyed the fee to a present leaseholder. For a grant to the Ministry of the Church of England see the U.S. Supreme Court holding in *Town of Pawlet v. D. Clark & Others*, 9 Cranch 292 (1815).

Comment 6: Towns rarely collect rents, as perpetual leaseholds are now taxed as land owned in fee. 32 V.S.A. § 3610.

Comment 7. Educational, ecclesiastical or municipal corporations may convey by deed the fee simple in lands the title to or use of which is held by such corporations under state or colonial grant for purposes defined in such grants. Such conveyance may be made to the owner and holder of leasehold rights in such land if such lands are then held under lease, but shall not be made to other than such holders of leasehold interests except subject to such leasehold interest, if any, or simultaneously with the extinguishment thereof. 24 V.S.A. § 2406.

Before 1937, town selectmen were precluded from conveying public lands in fee. See, *Trustees of Caledonia County Grammar Sch. v. Kent*, 86 Vt. 151, 156, 84 A. 26, 28 (1912). In 1935 the Legislature enacted a statute permitting the Town of Belvidere to convey certain public lands. See 1935, No. 239, § 1; see also *Jones v. Vermont Asbestos Corp.*, 108 Vt. 79, 102, 182 A. 291, 302 (1936) (upholding statute). In 1937 the statute was amended to remove the prohibition altogether. See 1937, No. 56, § 1. *Galkin v. Town of Chester*, 716 A.2d 25, 168 Vt. 82 (Vt. 1998)

Comment 8. The successor in interest to the Incorporated Society for the Propagation of the Gospel in Foreign Parts is the Trustees of the Episcopal Diocese of Vermont. *Mikell v. Town of Williston,* 129 Vt. at 588. In 1927, the SPG conveyed, through a quit claim deed the right to collect the annual lease payments to the Trustees of the Diocese. The Trustee initiated a procedure through which a lease obligation could be set aside through a quit claim deed. Contact information for the Diocese is Five Rock Point Road, Burlington, Vermont. www.diovermont.org. For UVM, contact the General Counsel's office at UVM.

Comment 9. Under the current statutory framework, lease lands are fully taxable subject to a credit for the annual rent 32 V.S.A. §3610. For rents supervised by towns, the rents are collected as part of the property taxes and, in theory, turned over by the town to the beneficiaries from time to time.

In 1971, the Vermont Supreme Court declared the statute requiring ratable distribution of fees generated by school lease lands to the existing religious organizations in town a violation of Article 3 of the Vermont Constitution and the First and Fourteenth Amendments of the U.S. Constitution in *Mikell v. Town of Williston,* 129 Vt. 586 (1971). The fees are not paid to the town.

When collected, rents payable to non-municipal lessors are collected directly from the lessees.

Comment 10. In connection with mortgages to financial institutions, 8 VSA §14302 provides in part: "a mortgage upon lands impressed with a public use, sometimes known as lease, society or glebe lands, but held under a durable lease, shall not be deemed to be subordinate to such lease or public use." A similar provision for mortgages to Credit Unions is found at 8 VSA §32302.

History

September, 2018: This standard was added.

one or more other persons. See, Act 003 2009-2010 Session, Vermont Legislature; *"An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage."*

Comment 5. The failure to identify or state the marital relationship of plural grantees in a conveyance does not impair marketability if such identity or relationship is otherwise established by, or can be readily inferred from, other recorded instruments, acknowledgments or affidavits, it is good practice, however, to recite the marital or civil union relationship in the deed; ie:

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CHAPTER XVII

STANDARD 17.3

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TITLE DERIVED FROM A FORECLOSURE

A party acquires title through foreclosure if the foreclosure was completed in conformance with the foreclosure statutes in effect on the date the foreclosure complaint was filed.

Judicial Sale

Title transfers upon the recording of a certified copy of the court order confirming the sale. 12 VSA §4954.

Strict Foreclosure

Title vests in the foreclosing mortgagee upon the issuance of the foreclosure judgment, subject only to the equity of redemption. [1] Record title is perfected:

a. For foreclosure actions filed prior to July 1, 2012, by the recording of a certified copy of the judgment order; and,

b. For foreclosure actions filed on or after July 1, 2012, a certified copy of the judgment order and a certified copy of the certificate of non-redemption. The judgment order must contain the finding of no substantial value required by 12 VSA §4941(c).

Non-Judicial Sale

Title vests in the grantee named in the deed issued by the foreclosing lender to the high bidder at auction.

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[1] From In re: John R. Canney, III, U.S. Court of Appeals for the Second Circuit
March 7, 2002
http://www.vtb.uscourts.gov/sites/vtb/files/opinions/9811881_316.pdf

A foreclosure judgment vests full legal and equitable title to the property with the mortgagee, subject only to the mortgagor's "equity of redemption," which is a contingent equitable interest in the property …" See *Stowe Ctr., Inc v. Burlington Sav. Bank*, 451 A.2d 1114, 1115 (Vt. 1982) ("Under Vermont law if no one redeems foreclosed property within the prescribed period, the foreclosing mortgagee, pursuant to Vermont strict foreclosure procedure, 12 V.S.A. chapter 163, subchapter 6, obtains full and complete title and has the right to sell the property and retain the surplus, if any.") additional citations omitted.

"Footnote 11: We disagree with the district court's suggestion that title does not pass until a certificate of non—redemption is recorded. Merchants Bank, 253 B. R. at 517-18 (relying on 12 Vt. Stat. Ann. Section 4530). This procedural requirement allows the mortgagee to perfect title with respect to "subsequent purchasers, mortgagee's or attaching creditors" but has no effect whatsoever on the mortgagor. Citations omitted."

Comment 1. Effective July 1, 2012 Vermont's foreclosure statutes were amended creating, among other things, new requirements for actions commenced on and after that date.

Comment 2. A mortgage on farmland and a dwelling house owned by a natural person cannot be foreclosed by the non-judicial sale process. 12 VSA §4961

Comment 3. Title to a foreclosed property acquired pursuant to a non-judicial sale or strict foreclosure may be subject to possible fraudulent conveyance issues as discussed in Comment No. 6, Standard 17.2. During the period May 5, 2006 to July 1, 2012, a judgment in a strict foreclosure action must include the findings that there is no substantial value in the property in excess of the mortgage as specified in 12 VSA 4528(b). After July 1, 2012, the requirement for findings regarding findings that there is no substantial value in the property in excess of the mortgage is specified in 12 VSA §4941.

Comment 4. For foreclosures filed prior to July 1, 2012, the recording of the certificate of non-redemption was not required but was customary.

Comment 5. The final judgment in a foreclosure action may be captioned Order or Judgment Order and Decree of Foreclosure or any other variant of the same.

Comment 6. See VRCP 80.1 (k) for contents of an Order of Confirmation and 12 VSA §4954 for the effect of the confirmation order.

Comment 7. The procedure and limitations on application of the non-judicial sale foreclosure are set out in 12 VSA §4961.

History

September 2018: This standard was added.

STANDARD 17.4

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THE EFFECT OF RECORDING A COMPLAINT ON SUBSEQUENTLY RECORDED INTERESTS

Upon the recording of a copy of a Complaint for Foreclosure in the land records, any party who thereafter acquires a record interest in the property is foreclosed provided that:

a) in an action commenced prior to July 1, 2012, a certified copy of the Judgment Order and Decree of Foreclosure was recorded in the land records within 30 days after the expiration of the last day for redemption set forth in the Judgment Order;

b) in an action commenced on or after July 1, 2012, certified copies of the Judgment Order and Decree of Foreclosure and Certificate of Non-Redemption are recorded in the land records, regardless of when the recording occurs.

Comment 1: Notwithstanding the foregoing, the Vermont Department of Taxes claims that, even when subordinated, a Current Use Lien survives a foreclosure, citing Merchants Bank v. Darling, J et. al. Chittenden Superior Court, Docket No. S 00277-95 CnC Entry Order (Leavitt, July 24, 1995).

Comment 2: Compare 12 V. S.A §4530 (repealed effective 7/1/2012) against 12 VSA §4947.

September 2018: This standard was added.

STANDARD 17.5

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DISCHARGE OF MORTGAGE OR OTHER INTERESTS FOLLOWING A FORECLOSURE ACTION

Marketability of a title derived through foreclosure of a mortgage is not impaired by failure to record a release of the instrument which created the interest foreclosed, or any instrument which created a subsequent lien or interest which was extinguished by the foreclosure.

Comment 1: Upon the execution and delivery of a mortgage deed, all the mortgagor retains is the equity of redemption. Any subordinate interest attached only to the equity of redemption. When the equity of redemption is terminated by foreclosure, all the subordinate interests are terminated.

a) Requiring a release of the mortgage foreclosed, or of liens and other interests which were extinguished by the foreclosure judgment, is unnecessary because the foreclosure judgment extinguishes the equity of redemption in the interest foreclosed and in any subordinate interests attached to such equity of redemption.

b) If a foreclosed mortgage is discharged after the title has transferred, title is not adversely affected because the foreclosure merged the legal and equitable title and the mortgage was no longer in effect.

Comment 2: Any mortgage or lien filed after the issuance of a final judgment order and decree of foreclosure is of no force or effect.

History

September 2018: This standard was added.

STANDARD 18.6

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EFFECT OF FAILURE TO RELEASE A MULTI-TOWN MORTGAGE IN ALL TOWNS WHERE IT WAS RECORDED

Absent an expressed intent to the contrary, a mortgage recorded in more than one town against (a) a single parcel of land lying in more than one town, or (b) a condominium unit located in a development which is located in more than one town, but which was discharged in fewer than all such towns shall be deemed to discharge the mortgage in all towns.

Comment 1. A title examiner need not inquire regarding an undischarged mortgage unless the record affirmatively discloses an intention that the mortgage continue to remain of force or effect. It is recommended that a copy of the recorded discharge be obtained and recorded in the town where no discharge is recorded but failure to do so does not impair marketability.

Comment 2. If the undischarged mortgage is a "blanket" mortgage affecting multiple parcels of land, whether contiguous or noncontiguous, then it must be discharged of record in every town in which a parcel is located.

Comment 3. When a unit in a condominium is located in one town, but the common elements allocated to the unit are located in an adjacent town, a discharge of a mortgage recorded only in the town in which the unit itself is located does not impair marketability. If the discharge is only recorded in the town where the common elements are located and not in the town where the unit is located, then it is recommended that a copy of the discharge so recorded be obtained and recorded in the town in which the unit is located but failure to do so does not impair marketability.

Comment 4. Provided the discharge is recorded in one town where the mortgage is recorded, the situs of the substantial part of the land does not alter the effect of the discharge of the mortgage.

History

September 2018: This standard was added.

STANDARD 18.7

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HOME EQUITY CONVERSION (REVERSE) MORTGAGE LOANS
UNRELEASED HUD SECOND MORTGAGE

The Home Equity Conversion Mortgage (HECM) loan program is administered by the U.S. Department of Housing and Urban Development (HUD). Typical HECM loan closing documentation includes a first mortgage in favor of the HUD–approved first mortgage lender and a second mortgage in favor of HUD. The HUD Mortgage (second mortgage) cannot be considered satisfied by the release of the first mortgage. Title remains unmarketable until the second mortgage on the subject property is released of record.

Comment 1. HECM loans are one form of reverse mortgages. This Standard addresses only HECM mortgages.

Comment 2. The two mortgages may secure separate notes, one to the primary lender and one to HUD. Therefore, it is necessary to obtain a discharge of both mortgages**.** It is rare that HUD advances any funds under its second note. However, under the HECM program HUD may advance funds to the borrower under its note if the first mortgage lender fails to perform its obligations under its loan documents and fully advance funds due to the borrower. It is this possibility that leaves title unmarketable until the second mortgage is released.

Comment 3. The second mortgage in favor of HUD recites that it is given to secure payments which the Secretary may make to, or on behalf of, the Borrower pursuant to Section 255 of the National Housing Act (42 USC 1715z–20) and the underlying loan agreements between the parties. That Section provides that these advances, as made by HUD, shall not be included in the debt due under the first note unless either (a) the first note has been assigned to HUD or (b) HUD accepts reimbursement from the first lender. Thus, where HUD has advanced funds to the Borrower under the terms of the HECM program those funds are secured by the second mortgage unless there has been either: (i) and assignment of the first mortgage to HUD or (ii) reimbursement for those advances by the first mortgage holder to HUD.

Comment 4. Pursuant to its agreement with HUD, the institutional first mortgage lender is obligated to notify HUD'S national servicer when the first note and mortgage have been satisfied. The servicer then normally processes the cancellation of the second note and issues a release for the HUD mortgage. Unfortunately, as with mortgage releases in general, the system breaks down if the release of the HUD mortgage is not recorded. A title examiner may seek assistance in obtaining the necessary release of the HUD mortgage by contacting either the first mortgage lender or HUD through its national program servicer at the HUD website. So long as HUD can verify that: (a) the first mortgage note and mortgage have been paid in full, and (b) HUD has not expended any funds under its second note, as described in comment 1 above, HUD will issue a satisfaction of the HUD note and release the HUD mortgage.

Comment 5. Practitioners should also be aware that in the context of a foreclosure of the first institutional mortgage, or any other senior lien, the existence of the HUD second mortgage, as a lien in favor of the United States, will require that the United States be made a defendant and mandate a foreclosure by sale pursuant to 28 U.S.C. 2410(c). However, there will be no statutory redemption in favor of HUD as 12 U.S.C. 1701k provides that there shall be no right of redemption in favor of the United States where its interest derives from the issuance of insurance under the National Housing Act, as amended, 12 U.S.C. 1701 et seq.

History

September 2018 : This standard was added.

CHAPTER XIX

STANDARD 19.1

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TAX COLLECTOR'S DEED

A tax collector's deed supported by a report of sale meeting the requirements of 32 V.S.A. §5255 operates as a conveyance of legal title to the interest in the land sold at tax sale when the tax collector's deed has been properly executed and recorded after the time for redemption has passed. Marketable title will require that: (i) the title examiner make additional inquiry to determine that notice of the tax sale was given consistent with the requirements of 32 V.S.A. §5252 and §5253 and constitutional due process; and, (ii) the one year statute of limitations has passed (32 V.S.A. §5263). In the case of a potential or actual defect in the tax sale, a title examiner may also rely upon a final court order confirming title.

Comment 1. Adequate statutory notice may nonetheless violate constitutional due process, in that Vermont Statutes do not require proof of actual receipt of notice. See, *Jones v. Flowers,* 547 U.S. 220 (2006); See also *Turner v. Spera,* 140 Vt. 19 (1980). See also *Hogaboom v. Jenkins v. Town of Milton,* 2014 VT 11.

Comment 2. The tax collector's deed conveys title against the taxpayer and anyone claiming under the taxpayer. 32 V.S.A. §5261. However, the State of Vermont Tax Department has expressed a position that tax sales do not extinguish State Tax liens recorded against the property. The Committee takes no position on the State's asserted rights. The United States may take the same position with respect to Federal Tax liens.

Comment 3. The statutes of limitations applicable to the tax sale titles include:

(a) 32 V.S.A. §5294(4) and §5295(3).
(b) 32 V.S.A. §5263.
(c) 12 V.S.A. §501.

Comment 4. Another area of judicial inquiry, also with a constitutional due process element, has been the disparity between tax sale price and property value, *Bogie v. Town of Barnet,* 129 Vt. 46 (1970); *Price v. Leland,* 149 Vt. 518 (1988). However, in

response to *Bogie* and its progeny, current best tax sale practices incorporate a method for determining whether the premises are divisible (so that less than the whole can satisfy the obligation), and for protecting the excess proceeds for the taxpayer. The 1995 amendment to 32 V.S.A. §5254 adding subsection (b) is also clearly directed towards the "divisibility" issue. The Vermont Supreme Court has not had this issue before it since the amendment was enacted.

Comment 5. A notice of tax sale should inform the taxpayers that they may seek an abatement of the taxes. *Windsor v. Blanchard*, Windsor Superior Court, April 4, 2000. S528-11-99 Wrcv.

Comment 6. Marketable title may be established when the grantee named in the tax collector's deed and such grantee's successors in title have held continuous, open, and notorious possession of the property described in the tax collector's deed for a period of at least fifteen years.

Comment 7. The issue of distribution of excess proceeds from a tax sale is unsettled. See *In Re Estate of Mary Lee Settle-Tazewell*, District of Orange Probate Court, Docket No. OeP 025-09 ET.

Comment 8. An examiner may wish to consider whether the tax sale could be a fraudulent transfer. See *In Re: Lauren Jo Chase*, United States Bankruptcy Court, District of Vermont, Case #02-10582, Adversary Proceeding #03-1058. 9 VSA 2293(2) Act 117 amended 9 VSA §2293 by reducing the statute of limitations relating to fraudulent transfers from four years (prior to 7/1/18) to two years (on and after 7/1/18).

Comment 9. Subsection (ii) of the Standard was amended to change the statute of limitations from three years to one year per Act 117 of the 2017-2018 Legislative Session.

History

September 24, 2010	This Standard was added.
September 20, 2012	Standard revised by adding last sentence; original last sentence moved to Comment 6. Citation was added to the *Flowers* decision in Comment 1.
September 18, 2014	Standard revised to add the *Hogaboom* case citation to Comment 1 and to add Comment 7.
September 2016	Comment 8 was added.
September 2018	Standard was revised as follows: Comment 8 was revised to reflect the statutory changes in Act No.117 of the 2017 – 2018 Legislative Session. Comment 9 was added to reflect the statutory changes in Act 117 of the 2017-2018 Legislative Session.