

# VERMONT BAR ASSOCIATION REAL ESTATE LAW DAY

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NOVEMBER 7, 2018

# WHAT IS TITLE INSURANCE?

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- CONTRACT
- PREMIUM PAYMENT EXCHANGED FOR COVERAGE AGAINST LOSS RESULTING FROM COVERED DEFECTS.

# HOW DOES TITLE INSURANCE PROTECT THE INSURED?

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- PROTECTS THE INSURED FROM FINANCIAL LOSS
- DUTY TO DEFEND

# WHO DOES TITLE INSURANCE PROTECT?

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- LENDERS POLICY
- OWNERS POLICY

# WHEN DOES TITLE INSURANCE BEGIN AND END?

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- CLAIMS THAT AROSE PRIOR TO THE DATE OF THE POLICY
- EXCEPTIONS

# HOW LONG DOES TITLE INSURANCE PROTECT THE INSURED?

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- AS LONG AS OWNER OWNS PROPERTY
- HEIRS
- SPOUSE IN A DIVORCE
- TRUSTEE OR SUCCESSOR TRUSTEE OF A TRUST
- BENEFICIARIES OF TRUST

# DOES COVERAGE RISE WITH INCREASES IN PROPERTY VALUES?

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- 10% PER YEAR FOR FIRST 5 YEARS UP TO 150% OF THE INITIAL VALUE.

# NOTICE OF CLAIMS

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- CONTACT INFORMATION ON POLICY
- PROMPT NOTICE IS CRITICAL



# THE POLICY

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- PRE-PRINTED POLICY JACKET – ALTA FILED FORM
- SCHEDULE A
- EXHIBIT A
- SCHEDULE B, PARTS 1 & 2

# THE POLICY JACKET

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- COVERED RISKS
- EXCLUSIONS
- CONDITIONS

# SCHEDULE A

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- WHO IS BEING INSURED
- POLICY NUMBER
- DATE OF POLICY
- ADDRESS
- AMOUNT OF THE INSURANCE

# EXHIBIT A

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- WHAT IS BEING INSURED
- DESCRIPTION
- ACREAGE DISCOURAGED
- APPURTENANT RIGHTS ONLY IF THOSE RIGHTS HAVE BEEN SEARCHED
- ENCUMBRANCES DISCOURAGED
- TITLE REFERENCES
- PERMITS
- QUOTATIONS?

# IN OR OUT?

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Being all in the same land and premises conveyed to **Ike Insured** by deed of Sarah Seller dated October 1, 2018 and of record in Book 495, Page 212 of the land records and described therein as follows:

Being all in the same land and premises conveyed to Sarah Seller by deed of Former Owner dated June 3, 2015 and of record in Book 482, Page 712 of the land records and described therein as follows:

Being a portion of the land and premises conveyed to Former Owner by deed of Daniel Boone dated August 4, 1945 and of record in Book 211, Page 51 of the land records and described therein as follows:

Being a parcel of land, with all buildings thereon, located off of Wilson Road and bounded on the north by lands now or formerly of Johnson; on the east by lands now or formerly of McCoy; on the south by lands now or formerly of McDonald; on the west by Town Highway #9. Said parcel contains 4.3 acres, more or less.

The property may be subject to spring rights described in Book 49, Page 32.

Subject to, and with the benefit of, a right-of-way for ingress and egress depicted on a Plat recorded in Map Slide 17 A of the land records.

The property may be leaseland, so called.

Subject to all easements, covenants, conditions and restrictions of record.

Subject to, and benefited by the following permits: State Wastewater Permits WW-6-7231; Zoning permit 1978-4.

# SCHEDULE B

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- GENERAL EXCEPTIONS
  - MATTERS THAT A CUSTOMARY SEARCH WOULD NOT UNCOVER
  - PARTIES IN POSSESSION
  - SURVEY
  - MECHANICS LIEN
  - MUNICIPAL TAX LIEN
  - IF CONDOMINIUM, COVENANTS, RESTRICTIONS, ASSESSMENTS SET FORTH IN DECLARATION.

# CAN GENERAL EXCEPTIONS BE REMOVED?

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- MAYBE
- SURVEY WITHIN 10 YEARS
- AFFIDAVITS

# SCHEDULE B

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- SPECIAL EXCEPTIONS
- MATTERS THAT A CUSTOMARY SEARCH WOULD UNCOVER.
- ACCEPTABLE VS. OBJECTIONABLE ENCUMBRANCES
- TYPICAL ENCUMBRANCES INCLUDE:
  - EASEMENTS, RIGHTS OF WAY, AGREEMENTS, MORTGAGES AND OTHER LIENS, ROFR'S, JUDGMENTS, MUNICIPAL DECISIONS, MINERAL RIGHTS, ROADWAYS AND ENCROACHMENTS SHOWN ON RECORDED PLANS/SURVEYS; COVENANTS, RESTRICTIONS, LEASES, AND LICENSES.



# DRAFTING SPECIAL EXCEPTIONS

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- CHARACTERIZE THE INTEREST
- IDENTIFY THE INSTRUMENT AND PARTIES TO THE INSTRUMENT
- DATES OF INSTRUMENT, DATES OF RECORDING, VOLUME AND PAGE OF RECORDING AND LOCATION OF INSTRUMENT.

# EXAMPLES

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- Utility Easement between Jill Spinelli and Andy Mikell dated August 13, 2018 and recorded on August 24, 2018 in Volume 123 at Page 456 of the Town of Williston Land Records.
- Restrictions set forth in the Warranty Deed from Jill Spinelli to Andy Mikell dated August 13, 2018 and recorded on August 24, 2018 in Volume 123 at Page 456 of the Town of Williston Land Records.
- The rights of others in and to the Right of Way for Access as more particularly described in the Warranty Deed from Jill Spinelli to Andy Mikell dated August 13, 2018 and recorded on August 24, 2018 in Volume 123 at Page 456 of the Town of Williston Land Records.
- Terms and conditions of State of Vermont Wastewater and Water Supply Permit No. WW-4-1475 dated August 13, 2018 and recorded on August 24, 2018 in Volume 123 at Page 456 of the Town of Williston Land Records.
- Encroachment of a shed onto the northerly boundary of the Insured Property as shown and depicted on a Survey entitled, “Survey of the Lands of Jill Spinelli, 111 Williston Road, Williston VT”, prepared by Excellent Surveyors, Inc., dated August 13, 2018 and recorded in Map Slide 44 of the Town of Williston Land Records.

# COMMON QUESTIONS RE: SPECIAL EXCEPTIONS

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- Question: What if the matter “may” impact title, but it cannot be determined by the searcher.
- Response: Include the matter in the schedule B exceptions.
- Question: Do I need to include the words, “subject to” before the matter?
- Response: No. The listed matter is a continuation of the clause “This Policy does not insure against loss or damage arising by reason of the following:”

# AFFIRMATIVE COVERAGE

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- WHEN EXCEPTED MATTER IS AN UNACCEPTABLE RISK TO BUYER/LENDER AND CANNOT BE ELIMINATED.
- Affirmative Coverage and Loan Policies – Closing the Deal: Underwriters typically have less exposure or risk when issuing a loan policy (coverage reduces with the balance of the insured mortgage, and it ends when the mortgage is discharged). Accordingly, it is often easier to negotiate affirmative coverages for a loan policy and lenders either are unaware of or are okay with the limits of affirmative coverage. The affirmative coverage can be limited to only the loan policy and with adequate disclosure and consultation with the buyer, the encumbrance can be excepted from coverage in the owner's policy.

# DRAFTING AFFIRMATIVE COVERAGE

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The special exception should be drafted as usual, followed by a note that sets forth the affirmative coverage.

This affirmative coverage should be drafted as clearly as possible to avoid ambiguities in interpretation.

## EXAMPLES:

Terms and Conditions of Oil and Gas Lease by and between Ohio Oil & Gas Company and Andy Mikell dated August 13, 2018 and recorded in Volume 123 at Page 456 of the Town of Williston Land Records. NOTE: This policy affirmatively insures against any loss or damage actually incurred by the insured as a result of the assertion of rights in and to the subject premises by the Ohio Oil & Gas Company, its successors and assigns, pursuant to the Lease agreement dated August 13, 2018 and recorded in Volume 123 at Page 456 of the Town of Williston Land Records.

Setback encroachment of the attached deck as shown on a Survey entitled, "Survey of the Lands of Jill Spinelli, 111 Williston Road, Williston VT", prepared by Excellent Surveyors, Inc., dated August 13, 2018 and recorded in Map Slide 44 of the Town of Williston Land Records. NOTE: This policy affirmatively insures against any loss or damage resulting from the forced or attempted removal of said deck from the municipal setback.

In these examples, the underwriter has narrowed the scope of the coverage. There is no specific duty to defend and there is no coverage for diminished value of the property due to the defects.

# AFFIRMATIVE COVERAGE V. CLEAN POLICY

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- OFTEN AFFIRMATIVE COVERAGE IS MORE LIMITED THAN A CLEAN POLICY (NO EXCEPTION FOR THE MATTER).
- EVIDENCE OF DISCLOSURE TO THE UNDERWRITER IS CRITICAL

# COMMON QUESTIONS

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- Question: My clients have an OP and want to convey title to: (a) neighbor; (b) Trust; (c) LLC; or (d) other. Are the grantees insured under the policy?
- Response: See Conditions 2 of the Homeowner's Policy, Continuation of Coverage.
- Question: Lender wants me to remove the Survey Exception from Expanded Loan Policy? Can I do that, what is the extra charge?
- Response: There is no Survey Exception on an Expanded Loan Policy. In fact, Covered Risk 2(c) provides against loss from "any encroachment, encumbrance, violation, variance, or adverse circumstances affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments on to the Land of existing improvements located on adjoining land."
- Question: I'm issuing an Expanded Protection Loan Policy and the lender wants the following endorsements: Condo (4.1), PUD (5.1), Variable Rate (6.1), Environmental Protection (8.1) and Comprehensive (9.10) – can I issue them?
- Response: They are already part of the policy by incorporation, so you don't need to issue them. Of course, the lender won't understand that so you can print hard copies and attach them to the policy.

**HAVE YOU BEEN PAYING ATTENTION?**

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## WHICH IS THE PREFERABLE SCHEDULE B EXCEPTION:

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A

Terms and conditions of Private Roadway Agreement by and between A and B dated 1/1/18 and recorded in Volume 123 at Page 345 of the Town of Williston Land Records.

B

Subject to a Private Roadway Agreement dated 1/1/18 and recorded in Volume 123 at Page 345.

## WHICH IS THE PREFERABLE SCHEDULE B EXCEPTION:

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### A

Subject to the following restrictive covenants:

- a. No more than one pet per household;
- b. Only Residential use;
- c. No accessory structures;
- d. Energy Efficient Appliances only.

### B

Restrictive Covenants set forth in the Warranty Deed from Hurt to Mills dated 1/1/18 and recorded in Volume 555 at Page 888 of the Town of Brattleboro Land Records.

# WHICH IS THE PREFERABLE SCHEDULE B EXCEPTION:

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## A

The following matters shown on a Survey Plan entitled, “Plan of Lands of Jim Knapp, 123 South Street, South Burlington, VT”, prepared by Excellent Surveyor, dated 1/1/18 and recorded in map slide 789 of the City of South Burlington Land Records:

- a. Utility easement to Green Mountain Power;
- b. Rights of the Public in and to South Street;
- c. Minor encroachment of rear shed onto neighbors property boundary.

## B

Subject to a Survey Plan entitled, “Plan of Lands of Jim Knapp, 123 South Street, South Burlington, VT”, prepared by Excellent Surveyor, dated 1/1/18 and recorded in map slide 789 of the City of South Burlington Land Records.

## WHICH IS THE PREFERABLE SCHEDULE B EXCEPTION:

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### A

Subject to an Agreement between Urban and Lovell that Urban has the right to take water from a private spring located on the lot now or formerly owned by Lovell. Said rights allow for Urban to receive a year-round water supply for the referenced Lot. Further, Urban and Lovell agree that Urban has to maintain the water line extending from the Urban lot to the lot now or formerly owned by Lovell and has a temporary easement for construction and maintenance in order to secure the continued viability of said water right.

### B

Rights and easement to take water from a spring, along with maintenance and repair obligations as set forth in the WD from Urban to Lovell dated January 9, 1970 and recorded in Volume 333 at Page 444 of the Town of Cabot Land Records.

## WHICH POLICY OFFERS MORE COVERAGE?

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A

Private mortgage from Smith to Hill dated 1/1/66 and recorded in Volume 123 at Page 345 of the Town of Cambridge Land Records. This policy affirmatively insures the insured lender against loss or damage occasioned by the enforcement of the lien of the excepted mortgage against the insured premises by means of a regularly conducted foreclosure sale, which results in the subordination of the insured mortgage and in the exhaustion of the equity in the insured premises leaving insufficient value to result in a bid high enough to generate sufficient proceeds to pay off all outstanding indebtedness under the insured mortgage.

B

No exception in the policy for the undischarged private mortgage.

## WHICH POLICY OFFERS MORE COVERAGE?

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A

Encroachment of a garage bay into zoning setback as shown and depicted on a Survey entitled, “Survey of Allen, 123 Main Street, West Barnet VT”, prepared by Qualified Surveyor, dated 1/1/18 and recorded in map slide 55 of the Barnet Land Records. This policy insures the insured lender against actual monetary loss expended by the lender to move or remove the encroaching shed in the event of an order from the local zoning enforcement authority directed to the lender and compelling said movement or removal of the garage bay because of said zoning setback violation.

B

Encroachment of a garage bay into zoning setback as shown and depicted on a Survey entitled, “Survey of Allen, 123 Main Street, West Barnet VT”, prepared by Qualified Surveyor, dated 1/1/18 and recorded in map slide 55 of the Barnet Land Records. This policy affirmatively insures against loss or damage occasioned by the forced removal or alteration of the garage bay resulting from the enforcement of the zoning set-back requirements by the local zoning enforcement authority against the insured.

QUESTIONS?

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