H.290
AN ACT CLARIFYING AMBIGUITIES TO REAL ESTATE TITLES AND CONVEYANCES

TESTIMONY OF ANDREW MIKELL, STATE MANAGER
VERMONT ATTORNEYS TITLE COPORATION
Phone: 802.876.6800 amikell@catic.com

Introduction. Vermont Attorneys Title Corporation (VATC) is a regional office for Connecticut Attorneys Title Insurance Corporation (CATIC), a Vermont domiciled title insurer. VATC is the proponent of H.290. I live and work in Williston.

I am a member of the Vermont Bar Association's Real Property Committee and served as chair for 7 or so years). I am currently, and have been, a member of the VBA Title Standards subcommittee for 20 years and also served as chair for 7 or so years. As the State Manager and Title Counsel at VATC I am a "problem solver" to nearly 200 Vermont real estate attorneys and their support staffs

Being in the trenches on a daily basis exposes me to glitches and technical errors in real estate statutes. H.290 is drafted to remedy, simplify or clarify certain glitches which tend to unnecessarily slow down closings and which result in increased fees and expenses to buyers and sellers of real estate in Vermont. Though not a glamorous bill, if passed, H.290 will facilitate the ability of real estate attorneys to certify marketable title and it will save property owners money.

The changes made by the bill, and the reasons supporting those changes, are as follows:

Section 1. This section would amend 27 V.S.A. sec. 464a which established a process for an attorney to discharge a mortgage. The statute was enacted in 1996 because, even after receiving full payment, certain mortgage lenders (predominantly large, national lenders) failed to record mortgage discharges in the land records. Failure to record a mortgage discharge creates a cloud on title and causes title problems for buyers and their lender.

Section 464a was enacted to by-pass the problem. It allows an attorney to discharge a mortgage by recording an affidavit, along with supporting information, that the mortgage was paid. The statute works well but in today's business world more and more mortgages are paid off by wire transfers and currently the statute only addresses mortgages paid off by check. Section 1 of H.290 would amend section 464a to allow an attorney to record a discharge affidavit when the payoff proceeds were made by check or via wire transfer.

Section 2. Decades ago oil and gas companies obtained leases on large tracts of land (predominantly in the Champlain Valley). Those leases are recorded in the land records. While all of the leases have expired based on their stated term of years, these leases also contain a clause to the effect that they continue "so long thereafter as oil or gas may be produced on the land." These leases present title problems for a buyer who wants to buy free and clear of the lease or for a lender who wants to lend without being subject to a possible lease.

29 V.S.A. sec. 563 creates a statutory period for abandonment. Unfortunately, 29 V.S.A. sec. 563(b)(1) contains a double-negative. It provides that "[a]n interest in oil and gas is deemed abandoned at any time that . . . it has *not been unused* for a continuous period of 10 years after July 1, 1973." Section 2 of H.290 would eliminate the "double negative" in section 563(b)(1) and better define when an interest in an oil and gas lease is deemed abandoned.

Section 3. The need for witnesses on deeds and mortgages was eliminated many years ago. However, section 27 V.S.A. sec. 341(c) still contains a requirement that a Memorandum of Lease be witnessed. There is no rational reason why a witness is necessary on a Memorandum of Lease when one is not required on a deed or mortgage.

Section 3 of H.290 would make 27 V.S.A. sec. 341(c) consistent with existing law by eliminating the need for a witness on a Memorandum of Lease.

Section 4. The Vermont Common Interest Ownership Act (VCIOA) in Title 27A became effective on 1/1/99 and applies to regimes created on and after that date.

Condominiums created prior to 1/1/99 are controlled by Title 27, Chapter 15. Some property owners are encountering problems selling their very old condominium units because the original builder forgot to file floor plans for the condominium regime as required by sec. 1313. When the "problem" is discovered (often 25 or more years after the condominium unit was built), it is raised as a "title issue". Property owners typically have to postpone their closing, retain the services of an architect to come to the property and create floor plans for recording in the land records. The process is time consuming and expensive.

Section 3 of H.290 would amend 27 V.S.A sec. 1313 (e.g. the old statute) to provide that the failure to record floor plans for the condominium development does not constitute a defect in marketable title if more than fifteen years have passed since the Declaration of Condominium was recorded.

Section 5. This section would add a statutory provision, 14 V.S.A. sec. 3184, to clarify an ambiguity in existing probate/real estate law. Specifically, 14 V.S.A. sec. 2654 provides that a guardian appointed by a Vermont Probate Court has power and authority to take possession of, manage, sell and convey real estate of the ward situated in a foreign jurisdiction in the same fashion as he or she has over like property situated in this state. However, there is no reciprocal statute clarifying that a guardian appointed by a Probate Court of a foreign jurisdiction can undertake the same activity. The proposed new 14 VSA sec. 3184 provides clarity by enabling a guardian who has obtained a valid foreign court order, and who registers that order with the Probate Division of a Vermont Superior Court Vermont pursuant to 14 V.S.A. Chapter 111, subchapter 4, to carry out the provisions of the foreign order on behalf of the ward.

In order not to cause title problems for some home owners who may have already purchased or sold real property prior to the enactment of this statute and who may not have registered with the Vermont Court, the section clarifies that failure to register prior to the effective date of the statute does not impair their title.

Section 6. Vermont's current Powers of Attorney statutory framework in Title 14, Chapter 123 became effective on after 7/1/2002. Subsection (d) of 3502 is the so-called "real estate carve out" section. It provides that if certain requirements in (d) are met, the full set of requirements set forth in sec. 3503 need not be met. Real estate attorneys use this "carve out" provision extensively.

While the statutory "concepts" are relatively understandable, the wording of sec. 3502(d) is just confusing enough that even seasoned real estate attorneys are uncertain of how the section works. Without altering the intent or the meaning of the statute, Section 6 would amend 14 V.S.A. sec. 3502 to better clarify the requirements of the "real estate carveout."