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# **What's Wrong With H.772?**

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# H. 772 has wrong goals for Vermont

- ❑ Reduces tenant protections, increase faster evictions, making Vermont's housing and homeless problems **worse**.
- ❑ Other states = other data, other resources, other problems.
  
- ❑ Doesn't do what landlords say they want. Why were other options like these not explored?
  - **Reduce** landlord financial disincentive: **Why not tax relief?**
  - Court process to **protect** other tenants from bad tenants: **Why not a restraining order process?**
  - **Predictable** timelines: **Why not more court resources for eviction diversion and mediation?**

# What's Wrong With H.772?

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It **risks erroneous deprivation** of due process rights.

It **injects a lot of ambiguity** into the eviction process that was not there before.

It **doesn't achieve any of the goals** stated by landlords.

It is **unfairly balanced** toward landlords.

# Agenda

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- Legal background
  - Law regarding tenancy; history of due process regarding one's home
  - Meaning of due process
  - Current process due for tenants and how H. 772 changes that
- Details Termination of Tenancy
  - Actual notice now made unreliable
  - Eviction reasons made uncertain by conflict/interpretation/ambiguity
- Court Process
  - Procedural background
  - Ambiguity, chaos, deprivation of due process, burden shifts, unfairness, flaws, landlord say-so favored over court discretion
- Unconstitutional trespass; ineffective and unconstitutional

# Tenancy is more than a contract.

Conveyance of part of the “bundle of rights” of ownership:

**Landlord/owner:** retains control, transfer/sell

**Tenant:** is granted possession, use, enjoyment, exclusion of others

Agreement or contract (lease) can set agreed conditions to terminate conveyance.

Common law rules about conveyance/contract evolved into RRAA enacted  
**40 years ago!**

**Note about Vermont leases:** There is no legal requirement that a Vermont lease must have of a **period of time** with **no change** in agreements **during the tenancy**. Most leases in Vermont don't guarantee a tenancy from a date certain to a date certain; Most leases don't guarantee no increase in rent for certain time

# A Home Cannot Be Taken Away Without *Due Process*

Due process **started** with protection of home

***Magna Carta***, 1354 edition: “No man of what state or condition he be, **shall be put out of his lands** or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer **by due process of law.**”

The same due process as all other Vermonters

**Vermont Constitution, Article 4. [Remedy at law secured to all]**

“**Every person within this state** ought to find a certain remedy, **by having recourse to the laws**, for all injuries or wrongs which one may receive in person, **property** or character; every person ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.”

Elements of due process **Notice and opportunity to be heard**

The Court considers “the private interest that will be affected by the official action,” “the risk of an **erroneous deprivation** of such interest through the procedures used, and probable value, if any, of additional procedural safeguards,” and “the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.” [Mathews v. Eldridge, 424 U.S. 319, 321, 96 S.Ct. 893, 47 L.Ed.2d 18 \(1976\).](#)

# H. 772 and Due Process

- **Process due for 40 years:**
  - RRAA 9 VSA § 4451 *et seq*, and
  - Ejectment 12 VSA, chapter 169 subchapter 3
- H. 772 risks **erroneous deprivation of protected interest** by changing:
  - Unreliable actual notice, shortened notice times, undefined, conflicting or unfair grounds for termination of tenancy
  - Ejectment sets a “toxic time-clock” on court process, **potentially violating Art. 4** of VT Const.
  - In effective and unconstitutional Notice against trespass by landlord

# Termination of Tenancy

## H. 772 “Actual notice” is now *less reliable*.

- Landlord to tenant: Notice of rent increase and termination of tenancy.
- Tenant to Landlord: Notice of habitability problems to landlord.
  
- **Reliable method for 40 years:** put writing on paper, in hand, or mail with rebuttable presumption of receipt.
- H. 772 list of ***less reliable*** options:
  - Post on door (**also violation of VCPA CP 104.03 unreasonable publication by creditor**)\*
  - Email (buried in spam, tech issues, unreliable internet change of email address)

# Termination of Tenancy

H.772 “grounds for termination” are *more ambiguous* and open to interpretation.

## RRAA 9 VSA §4476 known for 40 years:

- (a) non-payment tenant has a “right to cure” by payment
- (b)(1) Breach of rental agreement or duty in RRAA
- (c) For “no cause” no written lease 60/90 days
- (d) When contracted to sell
- (e) “No cause” under terms of written lease

## H. 772 *too many* interpretations:

- (a) Inserts “provided . . .” (meaning to change “right to cure”?)
- (b) (1) Breach can include, tenant breach of 9 VSA §4460 (no penalty for LL breach) late payment (conflicts with 9 VSA §4455)
- (c) Termination for tenant (conflicts with 9 VSA 4456(d)) or government notice (not defined) to vacate
- (d) When contracted to sell or (landlord intent) repurposed...immediate family, withdraw from rental market, demolished, renovated
- (e) (1) At expiration of a written rental agreement and,  
(2) in absence of written rental agreement (allows no cause but removes the words “no cause”)

## Termination of Tenancy

**H. 772 “other activity” could be not a crime nor breach of lease, and doesn’t need to occur on the premises!**

RRAA

9 VSA § 4467(b)(2):

Criminal activity, illegal drug activity or acts of violence, any of which threaten the health and safety of other residents.

H. 772

9 VSA § 4467(b)(2):

Acts of violence, damage to the unit...or **other activity**, any of which threaten the health and safety of other residents, landlord, landlord’s agent or **neighbors**.

- **invites discriminatory eviction;**
- tenant has *no notice* of what “other activities” would lead to eviction; and
- many *legal*, unprohibited activities could be included:
  - ❖ Tenant has a **contagious disease**.
  - ❖ **Parking dispute**. Where snowbanks decrease available space, tenant parks in a way that prevents another disabled tenant from reaching their car or being able to leave in an emergency.
  - ❖ Tenant has permitted outdoor fires, to burn incense and make other sacrifices according to their religion, and the **smoke triggers neighbor’s asthma**.
  - ❖ The **way a tenant dresses**, (mostly as the grim reaper) frightens other tenants.
  - ❖ Insisting of gathering recycling

[if] **act** of domestic abuse . . . [only if] **act poses an actual and imminent threat** . . . and there is no other action taken to reduce the threat...

# Court Process

## *Due Process of Law*

**Due Process upheld by Rules of Civil Procedure and courts:** “the risk of an erroneous deprivation of such interest **through the procedures used**, and probable value, if any, of additional procedural safeguards,” and “the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.” *Mathews v. Eldridge*.

**Common Structure of Court case:** Complaint by Personal service, Answer, [Default] right to discovery, pre-trial motions, pre-trial conference, merits hearing, judgment, post judgment motions, executions of judgment.

**Special to ejectment:** Rent Into Court, Unlawful occupant, “Pay and Stay”

**Judge’s job:** To find whether facts presented by **preponderance of evidence** meet requirements of claim or defense in an eviction case.

**Landlord** shows: Ownership, tenancy, legitimate reason to terminate tenancy, proper termination of tenancy = possession and damages

**Tenant** shows: Defenses to possession: discrimination, retaliation, payment = tenant keeps possession

Defenses to damages: diminution of value, payment, betterments

# Court Process

## H. 772 creates second concurrent(?) process

- Adds a new, (subchapter 4) time-clocked, **separate process** for non-payment and breach evictions.
  - Adds Motion for Expedited Hearing into a new, shorter time-clocked separate process
- “No cause,” sale, repurpose, government notice, tenant notice stay in current (subchapter 3)(no time-clock) process.

# Court Process Chaos!

## H.772 *two different processes but no answer for multiple notices*

RRAA allows multiple notices. H. 772 has processes based on type of notice

9 VSA § 4467(i) Multiple notices. All actual notices that are in compliance with this section shall not invalidate any other actual notice and shall be a valid basis for commencing and maintaining an action for possession pursuant to this chapter, 10 V.S.A. chapter 153, 11 V.S.A. chapter 14, or 12 V.S.A. chapter 169, notwithstanding that the notices may be based on different or unrelated grounds, dates of termination, or that the notices are sent at different times prior to or during an ejectment action. A landlord may maintain an ejectment action and rely on as many grounds for ejectment as are allowed by law at any time during the eviction process.

**It is common practice in Vermont to send BOTH non-payment and “no cause” notices.**

Which procedure? Can landlord file two cases? Can tenant request the process not picked by the landlord?

## Court Process Chaos!

### **H. 772 Requires a hearing within 90 days from Complaint filing. This deprives tenants of procedures necessary for a defense!**

H. 772: 12 VSA 4863 (b)(1) **Upon** receipt of an **answer** to a complaint based on a termination under 9 V.S.A. § 4467(a) or (b), the court shall set a final hearing date **not later than 90 days** after the **filing** of the complaint absent good cause. *Why reference receipt of Answer if trigger is date of filing?*

**Under Article 4 of the Vermont Constitution, Tenants should get at least same court processes as other civil defendants, which guarantees a **Remedy at law secured to all.****

#### **H. 772 creates a “toxic time-clock”:**

- Reduces opportunity for pretrial order under VRCP 16.2;
- Reduces opportunity to discover all the facts through Discovery under VRCP 33, 34, 36 (Interrogatories, Requests to Produce, Requests to Admit). Rules give landlord/Plaintiff 30 days to respond to discovery, and there is no deadline for court to grant or deny VRCP 37 Motions for Orders Compelling response.
- Timeclock on final hearing date, but no timeclock on decisions for Motions pursuant to VRCP 12 and 56. This could mean that a final hearing date could happen before dispositive motions are decided!

# Court Process Chaos!

## H. 772's unfair Answer requirements risk **Erroneous Deprivation** of a protected right!

(for 90-day “toxic time-clock” case)

H. 772 12 VSA § 4863. ANSWER; HEARING

- (a) An answer to a complaint filed under this subchapter shall be **accompanied by an affidavit** setting forth particular facts in opposition to the complaint.

### Burdens shifted to tenant/defendant

- **More crucial paperwork for tenant** What if tenant/defendant Answers, but doesn't include an affidavit? Could an Answer without an affidavit give the Landlord/Plaintiff grounds to file a Motion for Default Judgment? **Landlord not required to attach their own affidavit with their Complaint**
- Complaints allege facts to be proven at trial. Answers admit or deny knowledge and agreement with those facts. **But the landlord/plaintiff still must prove the alleged facts to evict a tenant.**
- **Answer affidavit requirement means Tenant must submit evidence before landlord submits evidence** H. 772's requirement that the tenant/defendant provide an Answer and an “affidavit in opposition with facts” with their Answer shifts the burden to the tenant/defendant, who must prove landlord/plaintiff allegations as untrue. **This impermissibly shifts the burden of proof of claims from the plaintiff/landlord to the defendant/tenant.**

## Court Process Chaos!

### 5 ways H.772's a Motion for Immediate possession risks an **erroneous deprivation** of a protected right:

Tenant can lose their home on a Motion; without the right to disclosure of all relevant facts, live testimony, cross examination, or ability to present evidence.

- 1) **Too broad a standard:** landlord/plaintiff needs only allegation of “other activity that risks health and safety. . .” and court needs to find “continued occupation is a threat health and safety . . .”
- 2) **No judicial review** of whether “toxic time-clock” process is warranted by allegations in the complaint;
- 3) **Automatic default** Landlord/plaintiff does not need to file a motion for default **if tenant defendant can't produce all the listed paperwork required in time**
- 4) **Burden shift** to tenant; opposition to motion must show “genuine dispute of fact,” **but if none shown, does landlord win?** (Motion for Summary Judgment language: “the court shall grant summary judgment if the movant shows no **genuine issue as to any material fact** and movant is entitled to judgment as a matter of law” VRCP 56(a));
- 5) **No live evidence in court** unless tenant can demonstrate in written opposition need for live evidence pursuant to VRCP 7(b)(6). **Because it is a motion hearing, not a trial.**

# Court Process Chaos!

## H. 772 “Expedited Process” has serious flaws

More ambiguity! Landlord/Plaintiff files **two** affidavits under H.772?

**Which one? Both?**

H.772: The actual **notice** required under this subsection (b) shall be accompanied by an affidavit setting forth particular facts and the basis thereof in support of the termination with sufficient details to inform the tenant of the reasoning behind the termination. 9 VSA § 4467(b)(3).

H.772: The **motion** shall be accompanied by an affidavit setting forth particular facts in support of the motion and a copy of the lease agreement. 12 VSA § 4865(a)(2).

Neither requires description of acts that is the “other activity” tenant is being evicted for. These “particular facts” would meet the requirements of these affidavits “violated lease paragraph 2” “engaged in drug activity” “the behavior of your offspring leaves me no choice.”

**Without description of acts in landlord/plaintiff affidavit, tenant/defendant would not know what genuine disputed facts to put in their opposition affidavit**

## Court Process Chaos!

H. 772 takes away court discretion and gives it to the Landlord!

- H. 772's 12 VSA 4853a(d) **takes away court discretion** to order **partial** payment of rent into court; regardless of when tenant receives income or whether tenant or subsidizing agency is responsible for portion of rent.
- H. 772's 12 VSA 4865 Motion for Immediate Possession requires court to schedule motion with **no court review** of whether Motion for Immediate Possession makes out required standard for an Expedited hearing.

# H.772's Trespass provision is *ineffective* and *unconstitutional*.

Trespass law: 13 VSA 3705(a)(1)(A) [enters or remains after] (A) actual communication **by the person in lawful possession** or the person's agent or by a law enforcement officer acting on behalf of such person or the person's agent;

*State v. Dixon* found that **tenant** was in lawful possession.

H. 772 says: 13 VSA 3705(g)(1) Notwithstanding subsection (a) of this section or any provision of law to the contrary, **a landlord** of a dwelling unit **may cause to be served an order against trespass** that prohibits a tenant's invitees or licensees from trespassing in the dwelling unit or any of the dwelling unit's common areas if [A) tenant consents B) invitee violates lease C) invitee violates law.]

**Ineffective**: a landlord may serve a notice against trespass, but the notice doesn't take away the tenant's possession, so the notice can't be used to prosecute an invitee for trespass.

**Unconstitutional**: Landlord cannot, without due process, deprive a tenant of right to tenant's invitees, which are a protected *liberty* interest.

# H. 772 is Wrong for Everyone!

H.772 violates Due Process, Civil Rules, Vermont's Consumer Protection Act, and the Vermont Constitution.

H. 772 intends to reduce tenant protections

H. 772 pays lip service to empty tenant benefits

H. 772 injects uncertainty into court process

**This is a bad bill.** It's bad for landlords, tenants, the courts, and the communities of Vermont.