

***Updating The Michigan Recording Statutes:
An Analysis Of House Bills 5022-5025
And The Draft Land Records Act***

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A core value of the Michigan Land Title Association is to ensure the preservation of an effective system of public land records. Any land title professional knows that our industry could not exist without adequate access to functioning county land records. Yet, county Registers of Deeds are facing challenges unprecedented in their history.

First, tax reform has placed tremendous burdens on municipal governments and, within those governments, the maintenance of land records is often seen as a low priority. Second, exploding technology has changed the face of how, and the speed with which, land conveyancing takes place. Many counties are battling to keep pace with technology overload. Finally, in our business, as work increases so do available revenues. Within government, however, increased fees from recordings go into the county general fund to be allocated back much later, if at all. As such, Registers constantly struggle to meet increasing work demands without sufficient increased revenue to hire needed personnel or purchase adequate equipment. If these challenges were not enough, our Registers are expected to operate within a legal framework conceived and drafted in the mid-1800s when 20th Century, let alone 21st Century society was unimaginable.

For all of these reasons, it is no wonder that our industry occasionally encounters problems in relying upon certain county's land records. In order for us to help Registers address these issues, however, it became evident that we needed to define our areas of concern. They are essentially four: 1) the timeliness of recording and indexing; 2) the integrity of the recording process; 3) effective access to the land records; and 4) uniformity and predictability of recording requirements. The first is self-explanatory. Many counties have experienced significant gaps between the time documents are first presented for recording and the time they are finally indexed and available for examination. This "gap" period is often insured against by our industry and, increasingly, gap insurance is creating significant claims. The second concern relates to the manner in which documents are recorded. It is obvious to us that documents should be recorded in the exact order in which they were first presented for recording. Unhappily, we know that the rule of "first in line, first it time" is not being followed in many counties. Effective access is also becoming an increasing concern. Most notably, we sometimes have problems purchasing copies of the record in the media we

desire. Alternatively, Registers seem to want to place copyright restrictions on what we believe is an open public record. Finally, we have all experienced frustration at receiving seemingly completely opposite recording requirements in differing counties despite the fact that we all operate within the same statutory framework.

House Bills 5022-5025

To begin to deal with these problems, the MLTA decided to draft legislation which would help simplify and standardize recording requirements. After long analysis and debate, it was agreed that we should advocate the elimination of required witnesses from real property documents. This safeguard was the product of a time when the only means of verifying the identity of a document's creator was to have the testimony, or attestation, of witnesses. In modern times, that function has been performed by a Notary Public who typically requires some form of photo identification before executing a jurat or acknowledgment. Witnesses almost never have personal knowledge of a signer's identity. Accordingly, their function adds no value to the conveyancing system.

Former Representative, now Senator, Alan Sandborn introduced House Bills 5022, 5024 and 5025 to eliminate witness requirements on Deeds and Mortgages, Land Contracts and Plat Proprietor Certificates, respectively. In addition, he introduced House Bill 5023 to amend certain recording requirements contained within Michigan Compiled Laws Section 565.201. The Bill eliminates the witness requirement. It also deletes that provision which requires a Register to proofread an actual signature back against the typed names contained under it; in the body of the instrument; and in the acknowledgment or jurat. The Bill simply requires that the name as printed under the signature agree with the name contained in the notary block. Finally, 5023 establishes that no document which meets the recording requirements may be rejected for recording due to its content. This will clarify that Registers are not obligated to review a document drafter's work to determine that it complies with laws or statutes that do not relate to the act of recording.

These Bills passed the House on October 24th of this year and have been introduced into the Senate. They will surely help to simplify recordings by eliminating witnesses. Perhaps most importantly, they may help to standardize recording requirements by clarifying those matters which do not fall within a Register's list of responsibilities. They do little, however, to speed up the time of recording, improve the integrity of the process or guarantee effective access to the

record. For these reasons, we participated in the drafting of a Michigan Land Records Act.

Land Records Act

The Recent passage of the Uniform Electronic Transactions Act (UETA) caused concern for a number of real estate professionals. In brief, UETA allows parties to transact with each other “electronically” with the same force of law as if their transactions were documented with pen and paper. While UETA does not mandate the recording of electronic documents, it certainly allows it. As such, a number of entities, including the State Department of Treasury, have begun to consider electronic recording. One can imagine the concern our industry might feel towards the “automatic” recording of electronic state tax liens, for example, which might then take priority over presented but unrecorded paper documents. To address these concerns, the Real Property Section of the State Bar of Michigan convened an Electronic Recording Joint Task Force. Many interested parties were represented including the State Bar, the State Department of Treasury, the Secretary of State’s office, the Michigan Association of Registers of Deeds, the Michigan Association of Realtors, the Michigan Bankers’ Association and the MLTA. It was quickly determined that to safeguard the integrity of the public record in the light of electronic recordings, we needed a comprehensive update and codification of the Michigan recording statutes. Thus, a draft Land Records Act was undertaken and completed.

The Act is organized into four Articles. Article 1 covers the Act’s scope, effect and definitions. Article 2 specifies recording requirements. Article 3 details the duties and obligations of the various Registers of Deeds. Finally, Article 4 provides for access to the record.

Article 1

The heart of this Article is Section 1-103 which defines the effect of the Act. It provides that conveyances of interests in real estate are void as against subsequent good faith purchasers of the same interest whose conveyances are first recorded. This is essentially a restatement of current law. What is often debated in our existing statute, however, is what constitutes “recording.” That question, in turn, comprises two others: 1) what steps need to be completed to constitute recording; and 2) once completed, what is the effective date of recording? The first issue

could be resolved a number of ways. Many feel the mere presentment to a Register of a “recordable” document should constitute recording. This result squares with the “race to the Courthouse” aspect of the recording statutes. In other words, if one has done everything necessary and within his or her control to establish his or her interest, then that interest should be protected. There are certainly cases which support this analysis, although they do so by comparing relative fault rather than by clearly defining “recording.” A contrary view is that a document should not be considered recorded until it has been copied into a permanent record and correctly indexed. This result is based upon the theory that the act of recording has no value until the document can be found. Some cases support this position but, again, do so by comparing fault. Finally, there is an argument that “recording” should mean just what it says: the transcription or copying of a document into a permanent record. For what it is worth, the joint task force has adopted that definition in its final draft. Certainly our industry should give considered thought as to whether such a definition matches the effect of the Act appropriately to our Policy obligations.

Regardless of what constitutes the act of recording, one must also define the time at which recording is deemed to have taken place. This is critical because many statutes, including the federal Bankruptcy Code, place strict requirements on recording real property interests within specified time-frames. Such prescriptions are fine if recording takes place upon a document’s presentment to a Register. If recording is deemed to occur, however, at some arbitrary point in the future which is outside of the presenter’s control, then problems can and do result. For this reason, the Act declares that an instrument “shall be deemed to have been recorded as of the time of its presentment.” This provision also cures concerns we may have about instruments’ relative priority. That priority will now be fixed when the document is presented regardless of the manner in which the Register ultimately transcribes or copies it into the record.

As described then, Article 1 solves several questions we might have about the integrity of the recording process. Article 2 goes on to delineate recording requirements.

Article 2

This Article adopts all of the changes which are contained in the House Bills previously discussed. No witnesses are required. A Register will no longer be obligated to proofread signatures back against the names contained in the

instrument. Moreover, while a document must still be titled, it may now evidence multiple conveyances or “recordable events.” Finally, it clarifies that if a document meets these requirements it must be recorded. Of course, other statutes which may allow recording with less stringent requirements will continue to remain in effect. All these changes resolve a number of problems we have encountered in recording instruments.

Article 2 also introduces a new concept described as a “recording information summary.” This summary or “cover sheet” as it is sometimes referred to, is an additional page which will now precede all recorded instruments and will summarize all the indexable information contained within the attached document. These items cover: 1) names and addresses of first and second parties; 2) instrument dates; 3) instrument types; 4) considerations, if included; 5) transfer taxes as applicable; 6) legal descriptions for instruments other than full assignments and discharges; 7) reference lines and pages for assignments and discharges; 8) “return to” names and addresses along with the names and addresses of “presenters;” and 9) the intended priority order for related instruments which are simultaneously presented.

Naturally, the creation of this additional sheet will place an added burden on those who present documents for recording, including members of our industry. The sheet serves three very beneficial purposes, however. First, it will facilitate electronic recording. An electronic cover sheet can act as a template for the automatic indexing of the included information. As such, the attached electronic document can then simply be a verified image to be stored in a permanent medium. It need not be “read and indexed.”

Secondly, even a paper cover sheet will dramatically simplify the recording process. For those with the appropriate technology, a standardized sheet could be scanned and automatically indexed using optical character recognition software. This would eliminate the time needed for, and inherent errors caused by, manual indexing. Moreover, even with fully manual systems, standard forms are much easier to process. Recording officers need not search and interpret documents in order to index them.

Most significantly, standardized cover sheets will truly standardize recording requirements. Many of us wrongly believe that when documents are improperly returned it is simply because a Register wants to be meddlesome. In fact, Registers often have legitimate questions about how an instrument should be properly indexed. What may seem clear and unambiguous to us may not appear so

to a third party. By using information summaries we can eliminate guesswork from the recording process.

Accordingly, Article 2 simplifies and standardizes recording requirements. Its implementation should improve both the timeliness and the predictability of the entire recording system. That process is described in detail within the next Article.

Article 3

This Article establishes the duties and obligations of the various county Registers. While it updates some of the concepts from existing law, the basic functions remain the same. One change, however, is significant to our industry. Registers will no longer be required to maintain reception books. That practice has already been abandoned in many counties. Instead, they will be required to stamp the time of presentment on all documents accepted for recording. This step will work in concert with the definitions in Article 1 which establish that the time of recording is deemed to be the time of presentment.

Article 3 also introduces the idea of performance standards into the Act. Section 3-106 authorizes any court of competent jurisdiction to appoint a special master to receive all recording revenue and conduct the functions of a specific Register provided the court finds any of the following to be true: 1) that a Register has failed to record and index more than 10% of all presented documents within 30 days from the time of their presentment; 2) that a Register has failed to maintain the general index or record instruments for more than 10 consecutive business days; or 3) that a Register has failed within a reasonable time to implement those systems or processes necessary to comply with the Act. Proceedings for the appointment of a special master may be brought by any party injured by an act or omission of a Register of Deeds within one year from said act or omission.

Despite its appearances, this Section is not designed to sanction a Register. The appropriate method to deal with elected officials who fail to meet public approval is through the ballot box, either with a recall or general election. In many instances, however, our elected Registers are unable to meet their statutory obligations because of their inability to obtain necessary funding. For this reason, Section 3-106 allows the court to transfer all recording revenue to the special master who may, in fact, be the elected Register.

We believe this provision will force county supervisors to consider the importance of Registers' offices when making budget allocations. In this way, we anticipate that Article 3 will further our interest in ensuring the timeliness of the recording process. Finally, Article 4 addresses our need to gain open access to the public record.

Article 4

This Article amends Section 565.551 of the Michigan Compiled Laws. That provision currently mandates that a Register must provide proper and reasonable facilities for the inspection of land records. It also requires a Register to provide copies of the record but allows the Register to select the media used. The new Article would require a Register to deliver the media requested provided the record is maintained in that format. Of course, the Register would still be entitled to establish such reasonable rules and regulations as are necessary to protect the record and to prevent interference with the regular discharge of his or her duties.

This change to the allowed media for reproduction is a very important one. Many of our members fear that Registers will select the media to be provided arbitrarily or, worse yet, based upon the perceived fees that can be charged for its particular use. This Article would end that practice.

What Article 4 does not do, however, is attempt to define a fee structure for access. That subject has already become the source of great controversy and potential litigation. Solving that problem is not within the scope of this statute. An effective Act, however, must at a minimum guarantee the public's fundamental right to gain access to and reproduce these critical public records.

Conclusion

As has been discussed, a re-examination of our system of land title recording is long overdue. The convergence of emerging technologies within a framework of exploding workloads and limited resources, has placed our Registers of Deeds in an untenable position. We need to explore methods of improving the timeliness, efficiency and predictability of the recording process while retaining its integrity and ensuring open access to the data preserved. House Bills 5022-5025 make a worthy start at that effort. By eliminating witness requirements they help to

streamline the recording system. Just as importantly, HB 5023 also clarifies that Registers need not evaluate an instrument's content when determining its recordability.

The draft Land Records Act makes an even more dramatic attempt to update our recording procedures. It clarifies what constitutes recording and when that event occurs. It standardizes the process and, by adding a recording information summary, simplifies the indexing system. It establishes reasonable performance standards. Finally, it guarantees fair and open access to the public record. Our industry should make a thorough examination of this proposed legislation and consider adding its support to the draft's eventual enactment.

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