

REAL PROPERTY LAW SECTION
Respectfully submits the following position on:

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HB 4638 – HB 4640

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The Real Property Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Real Property Law Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Real Property Law Section is 3,184.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 17. The number who voted in favor to this position was 14. The number who voted opposed to this position was 1.

Report on Public Policy Position

Name of section:

Real Property Law Section

Contact person:

Ron Reynolds

E-Mail:

rreynolds@vmclaw.com

Bill Number:

[HB 4638](#) (Pettalia) Records; public; copy of original instrument verified by affidavit; create presumption of compliance with recording act. Amends sec. 1 of [1937 PA 103](#) (MCL [565.201](#)).

[HB 4639](#) (Lane) Records; public; recording affidavit and copy of original conveyance; allowing for indexing under names of parties to the conveyance. Amends sec. 28 of 1846 RS 65 (MCL [565.28](#)).

[HB 4640](#) (Pettalia) Records; public; recording copy of original conveyance; specify requirements for accompanying affidavit. Amends sec. 1a of [1915 PA 123](#) (MCL [565.451a](#)).

Date position was adopted:

May 8, 2013

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting

Number of members in the decision-making body:

17

Number who voted in favor and opposed to the position:

14 Voted for position

1 Voted against position

0 Abstained from vote

2 Did not vote

Position:

Support

Explanation of the position, including any recommended amendments:

These bills address the holding in the Neal case, 406 B.R. 288 (ED Mich 2009) that an affidavit of lost mortgage had no force or effect.

As only an original instrument can be recorded, the affidavit and copy of the lost mortgage at issue could neither perfect any security interest nor count as notice of any interest. The type of affidavit at issue has long been used in real estate practice, and other bankruptcy cases have reached a contrary result.

HB4638 authorizes the filing of a copy of a lost instrument, including a mortgage, if it is accompanied by an affidavit in the form prescribed in HB4640 stating that the original had been delivered to the grantee but has been lost or destroyed. HB4639 addresses the indexing of the affidavit and the instrument. HB4638 gives the copy the effect of an original, including perfection of a lien created by the instrument. Previously recorded lost instrument affidavits are given the same effect.

The legislation would restore a longstanding practice which the Neal decision refused to follow or give any effect. The bills would prescribe specific factual support in an affidavit, as well as indexing the instrument in a fashion that will ensure that the interest appears in the proper chain of title.

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

<http://legislature.mi.gov/doc.aspx?2013-HB-4638>

<http://legislature.mi.gov/doc.aspx?2013-HB-4639>

<http://legislature.mi.gov/doc.aspx?2013-HB-4640>