



Report on Public Policy Position

Name of Section:

Real Property Law Section

Contact Person:

Lawrence Shoffner

Email:

lshoffner@comcast.net

Bill Number:

SB 947 (Birkholz) Counties; other; alienation by deed, proof and recording of conveyances, and the canceling of mortgages; eliminate. Repeals sec. 24 of 1846 RS 65 (MCL 565.24).

Date position was adopted:

February 8, 2006

Process used to take the ideological position:

Vote of the Council of the Section

Number of members in the decision-making body:

19

Number who voted in favor and opposed to the position:

The 17 voting members who attended the meeting all voted in favor of the position.

FOR SECTIONS ONLY:

- ✓ This subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section's bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position:

THE SECTION OPPOSES SB 947 (COUNTIES; RECORDING): Repeals current statute which requires that entry books be maintained by the register of deeds. Repeals sec. 24 of 1846 RS 65 (MCL 565.24).

Reasons for opposition: The Section opposes Senate Bill 947, which would repeal the statutory requirement for the maintenance of entry books by the registers of deeds. Although entry books are required by statute, some registers of deeds have failed to comply with this requirement. This failure has resulted in the problems identified in the following discussion. A repeal of the requirement would only make the identified problems worse.

The key concerns for the Section are the establishment of constructive notice, priority and the perfection of interests in real property. Because Michigan is a "race-notice" state, timing is a critical element of the statutory process for establishing the priority of interests in real property. The proposed legislation would significantly harm the established process for providing notice of existing interests, determining priority and perfecting such interests.

With respect to notice, compilation of an entry book is an important first step in the recording process. The complete recording process includes the receipt of documents by the register of deeds, verifying recording requirements, processing payment, copying the documents into the books and finally indexing. This complete process currently takes a considerable period of time to accomplish, sometimes several months. The entry books are the only means to search and obtain notice of instruments received by the register of deeds while the remainder of the recording process is taking place. The entry books therefore provide public notice of recorded instruments before they are finally indexed.

Timing is obviously of great importance in a “race notice” state. The precise time of the receipt of the document by the register of deeds constitutes that point in the process when the party recording an instrument has done what it needs to do to provide constructive notice to all third parties. Without an entry book there is no proof of the time of receipt by the register and therefore no proof of the order of receipt of the instruments. It is this time that must be noted in an entry book for certainty as to the time of receipt, and thus the time of official notice. This time establishes when notice is provided as a matter of law, and therefore who won the “race” and obtained legal priority over subsequently recorded interests. It is this time that must be certified on every instrument under MCL 565.27.

Failure to maintain entry books creates an ideal environment for real estate fraud. A “gap” in the time within which someone can search the public records allows an individual to obtain multiple mortgage loans within a short period of time without a subsequent lender having knowledge of a prior interest. Additionally, it allows fraudulent sellers to convey deeds to several different parties without any mechanism to discover the fraud. Title companies and real estate practitioners have been experiencing an increased number of fraud related claims that could have been prevented if there was no recording “gap”.

There has also been an increase in litigation among lenders regarding the priority of mortgages. This increase results from the inability to search the public records to a current date and time. Mortgage lenders must be able to establish the priority of their mortgages with certainty to assure their loans are adequately secured. Repealing the requirement for entry books would only make existing problems worse.

Another widespread problem caused by a lack of entry books involves proof of timely “perfection”. To perfect an interest in real estate, if required under other laws, such as the construction lien act and the Bankruptcy Code, the time of recording is critical. Without entry books there is no certainty as to when an interest has been perfected. There have been numerous challenges by bankruptcy trustees and others to timely “perfection”, based upon the incorrect “day, hour and minute” being certified by registers. Mortgages are being set aside as preferences in adversary proceedings filed by bankruptcy trustees because a lender is unable to establish when a mortgage was actually presented to a register of deeds. Lenders and title companies are helpless to protect themselves against such adversary proceedings since they are unable to prove when a mortgage was presented to a register of deeds.

The losses incurred by lenders and title insurance companies resulting from fraud, bankruptcy preference actions and lien priority litigation will be passed on to the consumer in the form of higher title insurance premiums. Moreover, failure by certain registers of deeds to comply with the existing statute creates unnecessary risks, costs and administrative burdens for businesses and individuals who want to invest in and purchase real estate within Michigan. A repeal of the requirement for entry books would only make the identified problems worse. The current statute should be embraced and effectuated in accord with its terms. SB 947 would cripple the statutory recording system and exacerbate the existing problems arising out of noncompliance with its terms. The Section believes that the proposed legislation would significantly harm the existing process for providing notice of existing interests, determining priority and perfecting such interests.

The text (may be provided by hyperlink) of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report:

<http://www.legislature.mi.gov/documents/2005-2006/billintroduced/Senate/htm/2006-SIB-0947.htm>