February 8, 1999

OPINION NO. 99-014

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

Dear Prosecutor Mayberry:

We have received your request for an opinion on the question "whether the transaction or [time] stamp number controls where a series of documents is filed in a recorder's office and time and date stamped with the same minute." In communications with my staff, your representative has indicated that your interest in whether the transaction number or time stamp number "controls" relates to the issue of establishing priority among various instruments. Your representative has indicated, further, that the county recorder has raised this question for the purpose of obtaining information that could be used in establishing and operating a recording system and in advising people who present documents to be recorded.

Let us begin by considering the functions of a county recorder. The office of county recorder is established by statute, *see* R.C. 317.01, and county recorders have only the powers and duties they are given by statute, *see* R.C. Chapter 317; 1997 Op. Att'y Gen. No. 97-055; 1996 Op. Att'y Gen. No. 96-019; 1990 Op. Att'y Gen. No. 90-061. Among their duties, county recorders are responsible for recording various instruments that are presented to them. R.C. 317.12-.13. This duty is ministerial. *See, e.g., State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 173 N.E.2d 758 (1961); *Kalb v. Wise*, 5 Ohio N.P. 5 (C.P. Allen County 1897); 1990 Op. Att'y Gen. No. 90-103; 1956 Op. Att'y Gen. No. 6400, p. 275.

The county recorder has no duty "to inspect, evaluate, or investigate an instrument of writing that is presented for recording." R.C. 317.13(B); *see also, e.g., Ramsey v. Riley*, 13 Ohio 157 (1844); 1996 Op. Att'y Gen. No. 96-019; 1994 Op. Att'y Gen. No. 94-066. Further, the recorder has no duty or authority to provide those persons who present instruments for recording with legal advice concerning the consequences of their actions. The recorder has no responsibility for determining what legal effect will follow from recording instruments of a particular type or from recording instruments in a particular order. *See, e.g., State ex rel.*

Attorney Gen. v. Guilbert, 56 Ohio St. 575, 47 N.E. 551 (1897) (judicial power cannot constitutionally be conferred upon the county recorder); 1962 Op. Att'y Gen. No. 3288, p. 717; 1956 Op. Att'y Gen. No. 6400, p. 275.

A recorder's official interest in the legal consequences of recording instruments extends only to the manner in which those consequences affect the performance of the recorder's duties. The recorder must, of course, comply with relevant statutory requirements. To the extent that statutes require that something be done but do not prescribe the precise manner in which it is to be accomplished, the recorder may exercise discretion and carry out the function in any reasonable manner that is consistent with the requirements of law. *See, e.g., State ex rel. Preston v. Shaver*; *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915), *aff'd sub nom. Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); 1990 Op. Att'y Gen. No. 90-057. To achieve this end, it may be helpful for the recorder to consider the purposes and effects of transaction and time stamp numbers.

In order to address your question, let us turn now to the statutes under which the instruments in question are recorded. R.C. 317.12 provides for deeds and other instruments of writing to be presented to the county recorder to be recorded. It requires the county recorder, for each instrument, to "indorse thereon the date, the precise time of its presentation, and a file number." R.C. 317.12. The file numbering "shall be consecutive and in the order in which the instrument of writing is received for record," except that a separate file and separate numbers are mandated for financing statements. *Id*. The instrument is kept on file in the same numerical order, for easy reference, until it is recorded. "When a deed or other instrument is recorded, the recorder shall indorse on it the time when recorded, and the number or letter and page of the book in which it is recorded." *Id*.

Your question refers to R.C. 317.13, which establishes the county recorder's duty to record instruments. R.C. 317.13 states, in part:

> [T]he county recorder shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic or electronic process, all deeds, mortgages, plats, or other instruments of writing that are required or authorized by the Revised Code to be recorded and that are presented to the recorder for that purpose. The recorder shall record the instruments *in regular succession, according to the priority of presentation, and shall enter the file number at the beginning of the record*. On the record of each instrument, the recorder shall record *the date and precise time the instrument was presented for record*.

R.C. 317.13(A) (emphasis added).[1]

Thus, the recorder is directed to record instruments in regular succession, according to the priority of presentation. The recorder must also mark each instrument with a file number (commonly known as a transaction number) and with the date and time of presentation. R.C. 317.12-.13; *see also* R.C. 317.08 ("[a]ll instruments … entitled to record shall be recorded in the proper record in the order in which they are presented for record").

The statutes speak of the date and the precise time the instrument was presented for record. R.C. 317.12-.13. In a busy recorder's office, the time stamped upon an instrument may reflect some delays resulting from waiting one's turn. *See generally Maddox v. Astro Invs.*, 45 Ohio App. 2d 203, 343 N.E.2d 133 (Preble County 1975) (describing normal time lapses in filing in office of clerk of court of common pleas). The statutes require, however, that the instruments be numbered and recorded in the order in which they are presented and that they bear an accurate date and time.[2]

The term "precise time" is not defined by statute. Your request indicates that, in your county, instruments are stamped with the date, hour, and minute. Under some types of technology currently available, it is possible to note time to tiny fractions of minutes. You have informed us that the various recorders throughout the state have different kinds of systems for noting time. Some note only the minute, but some newer computerized systems mark smaller increments of time. Because the statute does not require a particular increment as the precise time, each recorder may exercise discretion in establishing a reasonable recording procedure. *See, e.g., State ex rel. Preston v. Shaver; State ex rel. Hunt v. Hildebrant*.

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[1] An exception applies when the county recorder refuses to record an instrument of writing, either because recording is not required or authorized or because the recorder has reasonable cause to believe that the instrument is materially false or fraudulent, but that exception may be countered by order of the court. R.C. 317.13(B), (C).

[2] The importance of the duties of the county recorder, and the extent of delays that may be expected, are reflected in the statute authorizing suit on the bond of a county recorder. R.C. 317.33. That statute provides for liability to any party harmed if the county recorder "fails to number consecutively all deeds or other instruments of writing upon receipt; or fails to index a deed or other instrument of writing, by the morning of the day next after it is filed for record; or neglects, without reasonable cause, to record a deed or other instrument of writing within twenty days after it is received for record; … or knowingly endorses on a deed or other instrument of writing a different date from that on which it was presented for record, or a different date from that on which it was recorded." *Id*.

The statutory requirements imposed upon a county recorder thus are clear. Pursuant to R.C. 317.12 and R.C. 317.13, the county recorder has the ministerial duty of recording instruments in regular succession, according to the priority of presentation, giving each instrument a file or transaction number, awarded in consecutive order, and noting the date and precise time the instrument was presented for record.

The significance of recording instruments successively, in the order in which they are presented for record, is evident from the statutory provisions governing the effective date of mortgages. R.C. 5301.23 states that mortgages take effect at the time they are delivered to the recorder for record. It goes on to state: "If two or more mortgages pertaining to the same premises are presented for record on the same day, they shall take effect in the order of their presentation. The first mortgage presented shall be the first recorded, and the first mortgage recorded shall have preference." R.C. 5301.23(A); *see also* R.C. 5301.25. *See generally* R.C. 1.15 ("[i]f priority of legal rights depends upon the order of events on the same day, such priority shall be determined by the times in the day at which they respectively occurred"). This statute protects third parties who might acquire legal interests in the property. They are bound only by mortgage liens disclosed by record at the time their rights accrue. *See, e.g., Bloom v. Noggle*, 4 Ohio St. 45 (1854).

Under the statutes, it appears that, if the date and time on two or more instruments are the same, the one with the lower transaction number will have been stamped first. As a general principle, the information indorsed by the recorder may be considered prima facie evidence of the time and order of filing. Should a controversy arise in a particular case, however, the parties may be permitted to present evidence to show that the instruments were in fact presented for filing at a different time or in a different order. *See, e.g., Kalb v. Wise*, 5 Ohio N.P. at 7 (holding that the indorsement of the date and time of presentation for record is prima facie evidence that the instrument was presented at that time, but other evidence may be presented to show the actual time of presentation). *See generally* R.C. 5301.35 (procedure for waiving priority of lien of mortgage); *L.O.F. Employees Fed. Credit Union v. Hahn*, No. L-82-258 (Ct. App. Lucas County Dec. 3, 1982) (priorities of mortgages may be controlled or subordinated by independent agreements between parties); *Glick v. Marscot*, 10 Ohio L. Abs. 250 (Ct. App. Cuyahoga County 1931).

It appears that some controversy concerning the effect of filing or transaction numbers may have arisen because of the case *Franks v. Moore*, 48 Ohio App. 403, 194 N.E. 39 (Summit County 1933). That case involved a situation in which, instead of making a single mortgage, the parties made seven "split mortgages" that were intended to be first mortgages of equal priority. Even though the instruments were presented to the recorder at the same time, they were, of necessity, numbered consecutively, and they were indorsed with times one minute apart. Therefore, it was argued that they could not be of equal priority. The court held, however, that although the time of presentation of a mortgage to the county recorder is presumptively the time shown by the indorsement, the indorsement may be contradicted and another time of delivery established by clear and convincing evidence.

The portion of *Franks v. Moore* that appears to be of concern is the discussion of the effect of file or transaction numbers. The court adopted a syllabus stating:

> The requirement of [G.C. 2758, now R.C. 317.12] that the county recorder indorse, upon mortgages presented to him, consecutive file numbers, is for convenience, and not for the purpose of having any bearing upon the priority, if any, of such mortgages.

Franks v. Moore, 48 Ohio App. at 403, 194 N.E. at 39 (syllabus, paragraph 3). The court found that priority was determined under G.C. 8542 [now R.C. 5301.23], which states that, if two or more mortgages are presented for record on the same day, they take effect in the order of presentation for record, with the first presented being the first recorded and having preference.

In *Franks v. Moore* the court noted that, because written instruments must be numbered consecutively, they cannot receive the same number even if they are presented at the same time. The court considered a situation in which there was an intent to have instruments recorded simultaneously and took the position that the recorder should not have power to fix priorities or affect the rights of parties by the chance numbering of instruments received at the same time. The court thus stated: "We … hold that the priority of mortgages is not determined by the file numbers placed upon them by the recorder." *Franks v. Moore*, 48 Ohio App. at 409, 194 N.E. at 42. The court went on to state:

> We find that the great weight of authority in this and other states is to the effect that the certificate of the recording officer showing the exact time of filing and a consecutive number in the order in which the instrument was filed, placed upon the instrument as required by statute, is not conclusive as to the accuracy of such representations, but that such certificate is to be considered only as evidence which may be rebutted or contradicted; and in some states the statute itself provides that the certificate shall be considered evidence, or only prima facie evidence.
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> We are therefore of the opinion, both upon principle and authority, that, *while the time of filing indorsed by the recorder upon a mortgage is presumptive and perhaps strong evidence of its truth and the time of its delivery to him, it may be contradicted* and the true time of delivery shown. We are also of the opinion that, to successfully show that the recorder's certificate is untrue, such untruthfulness and some other time of delivery to the recorder must be shown by clear and convincing evidence.

Franks v. Moore, 48 Ohio App. at 409-411, 194 N.E. at 42 (emphasis added).

Franks v. Moore has commonly been cited for the proposition that file numbers are for convenience only and have no bearing upon the priority of recorded instruments. *See* Hausser & Van Aken, *Ohio Real Estate Law and Practice* § T 5.21 (2d ed. 1993 & Cum. Serv. 1998) (file number does not determine priority; rather, time of presentation determines priority and file numbers are merely for convenience); 69 Ohio Jur. 3d *Mortgages* § 119, at 162 n.56 (1986) (citing *Franks v. Moore* in support of the proposition that "the serial number does not determine priority"). Nonetheless, under R.C. 317.12 and R.C. 317.13, the file numbers must be consecutive, they must be placed on instruments in the order in which the instruments are presented for record, and the instruments must be recorded in the order in which they are presented. Therefore, it is evident that the file numbers do provide an indication of the order in which instruments were presented for recording. On specific facts, it might be shown, as in *Franks v. Moore*, that particular instruments were presented at the same time and were intended to take effect simultaneously,[3] or that for some other reason the file numbers do not accurately represent the order of presentation. On other facts, however, it might be shown that consecutive file or transaction numbers given by the recorder pursuant to R.C. 317.12 and R.C. 317.13 indicate the order in which the instruments were presented for filing.

Franks v. Moore concerned a situation in which a person presented a number of instruments simultaneously. In other situations, the intent will be that a number of instruments be presented in consecutive order. Your question relates to the ability of a county recorder to establish a recording procedure that can effectively manage either type of situation.

The statutes cited above require that instruments be recorded in the order of presentation and that they be marked with consecutive file numbers and with the precise time of presentation. The requirement of consecutive numbers by its nature provides a sense of priority – that is, of which came first. The time stamp requirement may or may not provide the same sense of order, depending upon whether the particular procedure allows more than one instrument to be stamped with the same time, be that a minute or an increment of a minute. The statutes do not require that no two documents be stamped with the same time. They require only that the time stamped be the "precise" time of presentation.

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[3] The same result was reached in *Himelright v. Franks*, 16 Ohio L. Abs. 103 (Ct. App. Summit County 1933). That case involved four mortgages that were marked with the identical time of the same day, month, and year but given consecutive filing numbers. The court found it apparent from a reading of the mortgages that the intent was that they be of equal priority. The court held that the mortgages were filed simultaneously and were of equal priority. A similar result was reached in *Curtis v. J. L. Shunk Rubber Co.*, 9 Ohio L. Abs. 375 (Ct. App. Summit County 1931).

As discussed above, a recorder may establish the recording procedure in any reasonable manner that complies with the statutory requirements. Thus, a county recorder may use reasonable discretion in adopting a system for recording instruments, awarding them file or transaction numbers, and stamping them with the precise time of presentation for record, provided that the system meets statutory requirements

Ohio law does not make either the time stamp or the file or transaction number placed on an instrument presented for record pursuant to R.C. 317.12 and R.C. 317.13 conclusive for purposes of determining priorities among recorded instruments, and no action by a county recorder can change the law in that respect. Rather, should a controversy arise, persons who are interested in particular recorded instruments may present evidence to show that the instruments were in fact presented for filing at a different time or in a different order than is reflected in the date and time stamps or the file or transaction numbers given the instruments by the county recorder pursuant to R.C. 317.12 and R.C. 317.13.

In response to your questions, therefore, it is my opinion, and you are advised as follows:

1. Pursuant to R.C. 317.12 and R.C. 317.13, the county recorder has the ministerial duty of recording instruments in regular succession, according to the priority of presentation, giving each instrument a file or transaction number, awarded in consecutive order, and noting the date and precise time the instrument was presented for record.

2. A county recorder may use reasonable discretion in adopting a system for recording instruments, awarding them file or transaction numbers, and stamping them with the precise time of presentation for record, provided that the system meets statutory requirements.

3. Ohio law does not make either the time stamp or the file or transaction number placed on an instrument presented for record pursuant to R.C. 317.12 and R.C. 317.13 conclusive for purposes of determining priorities among recorded instruments.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

February 8, 1999

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

SYLLABUS: 99-014

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