March 14, 1996

OPINION NO. 96-019

The Honorable Dean Holman
Medina County Prosecuting Attorney
Bank One Building
60 Public Square
Medina, Ohio 44256

Dear Prosecutor Holman:

I have before me your request for an opinion concerning the county recorder's duty to file several unusual documents submitted to him for filing. Included with your opinion request are copies of three documents which were presented to the Medina County Recorder for recording. Your letter briefly describes the documents as follows:

1.A "Claim of Lien," in which the individual filing the lien claims an interest on his own property for work that he performed under a contract with himself and his wife.

2.A "Revocation of Power of Attorney" which proposed to withdraw consent to certain governmental licensing and certification functions and rescinds any know[n] or unknown powers of attorney.

3.An "Affidavit" which proposes to declare the affiant's "freedom from the corporate United States, and its oppressive rules, regulations and statutes...." Attached to the affidavit are twelve (12) pages of documents issued by "our one supreme court," in the "country of Ohio."

As a creature of statute, a county recorder has those powers and duties that are prescribed by statute. *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 173 N.E.2d 758 (1961). The county recorder's duty with respect to the recording of documents generally is set forth in R.C. 317.13, which states in pertinent part: "The county recorder shall record in the proper record,...all deeds, mortgages, plats, or other *instruments of writing required or authorized to be recorded*, presented to him for that purpose." (Emphasis added.) Based upon this duty, it is well settled that a county recorder may record only those documents that are entitled by statute to be recorded. 1990 Op. Att'y

Gen. No. 90-061 (syllabus, paragraph two) ("[a]n instrument of writing is required or authorized to be recorded when statutory authority expressly provides for the recording of such an instrument"); 1990 Op. Att'y Gen. No. 90-068. *See, e.g.*, R.C. 317.08 (listing sets of records to be kept by county recorder); R.C. 317.09 (record of federal liens); R.C. 1311.06 (affidavit of mechanic's lien); R.C. 2923.36 (corrupt activity lien); R.C. 2937.27 (recognizance lien); R.C. 5301.252 (affidavit on facts relating to title);[1] R.C. 5719.04 (personal tax lien record). Thus, absent a statute authorizing the county recorder to record the documents you describe, the recorder may not record such documents.[2]

In the early case of *Ramsey v. Riley*, 13 Ohio 157, 166 (1844), the court explained the county recorder's duties as follows:

> It is the duty of the recorder to enter of record all deeds, mortgages, and other *instruments of writing, required by law to be recorded*, and which are presented to him for that purpose. It is not his duty to determine the validity of such instruments as may be presented for record, or to ascertain whether they be genuine or forged. (Citation omitted; emphasis added.)

See generally Green v. Garrington, 16 Ohio St. 549, 550-51 (1866) ("[o]rdinarily, the recording of an instrument means the copying of it into the public records kept for the purpose, by or under the direction or authority of the proper public officer"). Thus, even though the county recorder has no duty or authority to determine the validity or legal effect of written instruments presented to him for recording, he is required by statute to record those instruments that are authorized by statute to be recorded. *See* 1980 Op. Att'y Gen. No. 80-029. At the same time, however, "if there is no statutory provision for the recording of a particular *type of instrument*, then the instrument is not entitled to be recorded, and consequently, the recorder has no authority to record such instrument." 1986 Op. Att'y Gen. No. 86-006, p. 2-26 (emphasis added).

Thus, when an instrument is presented for recording, the county recorder must first examine the document to ascertain what type of instrument it purports to be. *See Ramsey v. Riley*; 1962 Op. Att'y Gen. No. 3289, p. 723 (syllabus, paragraph one) ("[a] county recorder is not required to determine whether a financing statement submitted to him for filing under [R.C. 1309.40] is legally sufficient and binding upon the parties thereto, but need only determine whether the form submitted to him for filing as a financial statement appears to be what it is purported to be"); 1962 Op. Att'y

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[1] Pursuant to R.C. 5301.252(E), "[a]ny person who knowingly makes any false statement in [an affidavit on facts relating to title] is guilty of perjury under [R.C. 2917.25]."

[2] With respect to the specific documents attached to your opinion request, I note that it is not the function of an Attorney General's opinion to make determinations as to the validity or legal effect of particular documents. *See* 1990 Op. Att'y Gen. No. 90-111 at 2-502. Thus, it is not possible to determine the county recorder's duty with respect to these particular documents. Rather, this opinion will attempt to outline generally the county recorder's duties when presented with an unusual written instrument for recordation.

Gen. No. 3072, p. 473 (syllabus, paragraph four); 1956 Op. Att'y Gen. No. 6400, p. 275. As described in 1940 Op. Att'y Gen. No. 2857, vol. II, p. 911 (syllabus, paragraph three):

> When an instrument is presented to the county recorder for record and the recorder upon examining the same, in good faith determines that it is not a recordable instrument, either by reason of the purpose sought to be accomplished or its defective execution or both, he is justified in refusing to accept the instrument and thereby incurs no liability upon himself and his bond.

In making such determinations, a county recorder is, of course, required to act in good faith. *See* 1986 Op. Att'y Gen. No. 86-006, p. 2-26 ("[a] county recorder may not be held liable in a suit on his bond under R.C. 317.33 for his good faith refusal to record an instrument that is not entitled by statute to be recorded"); *see generally State ex rel. Stine v. Atkinson*, 138 Ohio St. 217, 219, 34 N.E.2d 207, 208 (1941) ("[p]ublic officials are presumed to perform the duties of their offices in good faith").

Circumstances like those you have described may arise, however, where the county recorder is unable to determine the precise nature of a document that has been presented to him for record. While the county recorder's duties have been characterized for the most part as ministerial in nature, leaving little room for the exercise of personal judgment, the courts have recognized that a county recorder may exercise a certain discretion in the performance of those duties. For example, in *State ex rel. Preston v. Shaver*, the court found that because the property description in a document presented for record was not "sufficiently definite, accurate and detailed," 172 Ohio St. at 114, 173 N.E.2d at 760, the recorder had no duty to record the instrument. The *Preston* court stated: "We think that, in the performance of those duties, [the county recorder], as a ministerial officer, may exercise some discretion and is not absolutely required to accept, record and index every instrument presented to him." *Id*.

Thus, when the county recorder is presented with a document, he must attempt to ascertain the nature of the instrument. If the instrument appears to be of a type that is authorized to be recorded by the county recorder, the county recorder has a duty to record the instrument. The county recorder may, however, refuse to record an instrument that does not comply with any statutory requirements applicable to such instruments, *see, e.g.*, R.C. 317.11 (requiring written instruments affecting title to real estate to contain legible signatures or printed, typewritten or stamped names to identify signatories); R.C. 317.111 (name of preparer on documents); R.C. 317.22 (auditor's endorsement required). *State ex rel. Puthoff v. Cullen*, 5 Ohio App. 2d 13, 213 N.E.2d 201 (Lucas County 1966). In addition, the county recorder need not record any instrument conveying an interest in real property if the legal description of the property is insufficient to identify the property being conveyed. *State ex rel. Preston v. Ferguson*. If, on the other hand, the document does not appear to fall within one of the categories of instruments that is entitled by statute to be recorded, the county recorder may not record the instrument. *See* 1990 Op. Att'y Gen. No. 90-068 (no authority to record a zoning variance as a separate instrument); 1990 Op. Att'y Gen. No. 90-061 (no authority to record notice of common law lien); 1986 Op. Att'y Gen. No. 86-006 (no authority to record a declaration of land patent that does not fall within the provisions of R.C. 5301.38).

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. The county recorder has a duty to record a written instrument presented to him for recording if the instrument is a type of instrument authorized by statute to be recorded, so long as the instrument conforms to any statutory requirements applicable to that type of instrument, and so long as the instrument, if conveying an interest in real property, sufficiently identifies the property being conveyed.

2. If a written instrument is presented to the county recorder for recording and the county recorder determines in good faith that the instrument is not a type of instrument that is entitled by statute to be recorded, he has no duty to accept such instrument for recording. (1940 Op. Att'y Gen. No. 2857, vol. II, p. 911 (syllabus, paragraph three), approved and followed.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 14, 1996

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Medina County Prosecuting Attorney
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SYLLABUS: 96-019

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2. If a written instrument is presented to the county recorder for recording and the county recorder determines in good faith that the instrument is not a type of instrument that is entitled by statute to be recorded, he has no duty to accept such instrument for recording. (1940 Op. Att'y Gen. No. 2857, vol. II, p. 911 (syllabus, paragraph three), approved and followed.)