

OPINION NO. 94-066**Syllabus:**

A county auditor, county recorder, and regional planning commission are without authority, acting either singly or jointly, to promulgate a rule requiring the review by the county auditor, county recorder, and regional planning commission of any deed containing a metes and bounds property description prior to the transfer of the property by the county auditor and recording of the deed by the county recorder. (In light of the Ohio Supreme Court's decision in *State ex rel. Taraloca Land Co. v. Fawley*, 70 Ohio St. 3d 441, ___ N.E.2d ___ (1994), the conclusions set forth in 1986 Op. Att'y Gen. No. 86-028 (syllabus, paragraph one) and 1987 Op. Att'y Gen. No. 87-110 (syllabus, paragraph one) are overruled.)

To: William R. Swigart, Fulton County Prosecuting Attorney, Wauseon, Ohio
By: Lee Fisher, Attorney General, October 13, 1994

You have requested an opinion on the following question:

Do the County Auditor, County Recorder, and the Regional Planning Commission, either acting singly or jointly, have the authority to adopt a rule requiring all deeds containing metes-and-bounds [descriptions] to be reviewed by the County Auditor, County Recorder, and Regional Planning Commission before transfer by the County Auditor and receipt for record by the County Recorder?

In order to answer your question, it is necessary to examine the rule-making authority of the county auditor, county recorder, and a regional planning commission. Where the General Assembly has imposed a mandatory duty upon a statutory officer or entity, the officer or entity has no authority to adopt rules imposing conditions upon the performance of that duty. If, on the other hand, the General Assembly has granted an officer or entity authority to perform a particular function without specific directions as to the manner of performing that function, the officer or entity may exercise a reasonable discretion in its performance. *See State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 166 N.E.2d 365 (1960).

County Auditor

The office of county auditor is created by R.C. 319.01. As a creature of statute, the county auditor has only those powers and duties expressly granted by statute or necessarily implied from such express grants. *Schultz v. Erie County Metro. Park Dist. Bd.*, 55 Ohio Op. 2d 179, 269 N.E.2d 72 (C.P. Erie County 1971). R.C. 319.28 imposes upon the county auditor the duty to maintain the general tax list and duplicate, containing, among other things, the description and value of each tract, lot, or parcel of real estate and the name of the owner of such real estate. *See generally* R.C. 5713.09 (authorizing county commissioners to designate county engineer as preparer of tax maps, which "shall furnish the county auditor, for entering on the tax duplicate, a correct and proper description of each lot or parcel of land offered for transfer"). To assist the auditor in maintaining a current and accurate tax list, R.C. 319.20 requires:

After complying with [R.C. 319.202]¹ and on application and presentation of title, with the affidavits required by law, or the proper order of a court, bearing the last known address of the grantee, or of any one of the grantees named in the title, and a reference to the volume and page of the recording of the next preceding recorded instrument by or through which the grantor claims title, the county auditor shall transfer any land or town lot or part thereof, minerals therein, or mineral rights thereto, charged with taxes on the tax list, from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent, or otherwise....

....

The auditor shall endorse on the deed or other evidences of title presented to him that the proper transfer of the real estate described in such deed has been made in his office or that it is not entered for taxation, and sign his name to such deed. The address of the grantee, or any one of the grantees, set forth in the deed or other evidences of title shall be entered by the auditor on his transfer sheets and on the general tax list of real property prepared by him pursuant to [R.C. 319.28]. (Emphasis and footnote added.)

Your opinion request mentioned a number of prior opinions of this office that discussed the duties of the county auditor to transfer property in accordance with R.C. 319.20. You specifically mention 1980 Op. Att'y Gen. No. 80-029, which found the duty of the county auditor to process deeds, as required by R.C. 319.20, to be mandatory. The opinion reasoned that because R.C. 319.20 uses the word "shall" in describing the auditor's duty to transfer property, the General Assembly intended that such duty be mandatory, particularly "where the rights of the public are dependent upon the performance of the official." Op. No. 80-029 at 2-119. Op. No. 80-029, therefore, concluded in syllabus, paragraph one, that "[a] county auditor may not refuse to process a deed because he believes that the deed is legally defective *if the deed contains a description that enables the auditor to identify the property to be transferred.*" (Emphasis added.) See also 1969 Op. Att'y Gen. No. 69-139 (syllabus, paragraph one).

Relying in part on the case of *State ex rel. Ballard v. McKelvey*, 89 Ohio L. Abs. 407, 184 N.E.2d 124 (C.P. Monroe County 1961), *aff'd*, 89 Ohio L. Abs. 415, 186 N.E.2d 144 (Ct. App. Monroe County 1961),² 1986 Op. Att'y Gen. No. 86-028 concluded that it is within the county auditor's authority to require that all deeds and instruments of conveyance be submitted to the county engineer for determination of the adequacy of the legal description of the subject real property prior to the auditor's transfer of the property on the tax list. Similarly, 1987 Op. Att'y Gen. No. 87-110 concluded at 2-730:

¹ R.C. 319.202 requires a statement of value to be presented before the county auditor endorses any real property conveyance and requires the grantor to pay the fee required by R.C. 319.54(F)(3).

² In *State ex rel. Ballard v. McKelvey*, 89 Ohio L. Abs. 407, 410, 184 N.E.2d 124, 126 (C.P. Monroe County 1961), *aff'd*, 89 Ohio L. Abs. 415, 186 N.E.2d 144 (Ct. App. Monroe County 1961), the court stated that a deed's description "must be such that a competent engineer can locate the property conveyed." The court went on to hold that there is "no question but that a County Auditor may require the approval of the County Engineer or his assistant before a deed can be transferred and recorded. Such rule may be necessary and apparently is necessary to enable the County Auditor to make up the required tax maps." *Id.* at 411-12, 184 N.E.2d at 126.

[A] county auditor may, *by rule*, require that a deed contain an accurate description of the land to be transferred, and ... the auditor may submit any deeds to the county engineer for approval. If the county engineer concludes that a deed does not contain an accurate description of the land to be conveyed, the county auditor is under no obligation to transfer the property upon the tax list until the appropriate parties submit a deed that meets with the county engineer's approval. (Emphasis added.)

The conclusion that the auditor may condition his duty to transfer property under R.C. 319.20 upon prior review of the legal description of the property contained in the deed must be reconsidered, however, in light of the Ohio Supreme Court's recent decision in *State ex rel. Taraloca Land Co. v. Fawley*, 70 Ohio St. 3d 441, ___ N.E.2d ___ (1994). In that case, the court found the county auditor's duty to transfer property under R.C. 319.20 to be mandatory, stating: "the auditor has a duty to transfer land on the tax list 'when rendered necessary by a conveyance,' provided that 'the affidavits required by law' are submitted and R.C. 319.202 has been complied with." *Id.* at 442, ___ N.E.2d at ___. The court recognized only failure to comply with either or both of these statutory prerequisites as a basis for the auditor's refusal to transfer the property,³ reasoning as follows:

[T]he auditor claims implied authority to require that a deed presented for transfer accurately describe the land conveyed, and to refuse to make the transfer if the deed's description is inaccurate. Such authority, he argues, is essential if he is to execute his statutory duties. See *Ballard, supra*, 89 Ohio Law Abs. at 411-412, 20 O.O.2d at 467, 184 N.E.2d at 126.

We do not doubt that the auditor needs accurate descriptions of real property to do his job. As "the assessor of all the real estate in his county," R.C. 5713.01(A), the auditor "appraises each lot or parcel and places the correct value of each property on his tax list and on the county treasurer's duplicate." *State ex rel. Rolling Hills Local School Dist. Bd. of Edn. v. Brown* (1992), 63 Ohio St.3d 520, 521, 589 N.E.2d 1265, 1266. To appraise each parcel "at its true value," R.C. 5713.01(B), the auditor needs to know its precise description. He also needs accurate descriptions of real property to carry out his recordkeeping duties under R.C. 5713.01(D), R.C. 5713.09, and R.C. 5713.19.

However, the auditor can obtain accurate descriptions without refusing to perform his duty under R.C. 319.20. R.C. 5713.02 provides that, when an assessor (*i.e.*, the auditor or his delegate) "deems it necessary to obtain an accurate description of any separate tract or lot in his district, he may require the owner or occupier thereof to furnish such description ***." If the owner or occupier does not comply, the assessor may have the property surveyed at the owner's expense. Thus, the auditor can get an accurate description of a given

³ It is necessary to bear in mind, however, that there are other statutory prerequisites to the transfer of property by the county auditor in addition to those set forth in R.C. 319.20 and R.C. 319.202. See, *e.g.*, R.C. 711.121 (discussed *infra*); R.C. 1777.02 (conveyance of property to or from partnerships). Those other statutory prerequisites were not at issue in *State ex rel. Taraloca Land Co. v. Fawley*, 70 Ohio St. 3d 441, ___ N.E.2d ___ (1994).

parcel whenever he needs one. He has no need -- and hence no implied power -- to condition his performance of a duty on the making of a survey.

Id. at 443-444, ___ N.E.2d at ____.

The county auditor may not, therefore, refuse to transfer property under R.C. 319.20 for any reason other than failure to comply with a statutory prerequisite to the transfer of property. In this instance, the Revised Code does not require that a deed containing a metes and bounds description be reviewed by the county recorder or a regional planning commission before the county auditor transfers the property described in the deed pursuant to R.C. 319.20. Accordingly, the county auditor has no authority to promulgate a rule that would require review by the county recorder and regional planning commission of a deed containing a metes and bounds property description prior to the transfer of such property under R.C. 319.20.⁴

County Recorder

The office of county recorder is provided for in R.C. 317.01. The nature of the office of county recorder was addressed in 1990 Op. Att'y Gen. No. 90-103 at 2-456, which stated:

The county recorder is a ministerial officer, having only those duties granted by statute, either expressly or necessarily implied therefrom. 1990 Op. Att'y Gen. No. 90-068.... The office of county recorder exists to record instruments, Op. No. 90-068, with "recording" being "the copying of [an instrument] into the public records kept for that purpose, by or under the direction or authority of the proper public officer." *Green v. Garrington*, 16 Ohio St. 548, 550 (1866). The ministerial nature of the office of recorder is further reinforced by the lack of precedent for the office or its duties in the common law. A county recorder may, therefore, not exercise any powers unless statutorily authorized to do so. (Various citations omitted.)

R.C. 317.08 requires the county recorder to maintain five sets of records, including a record of deeds. Pursuant to R.C. 317.13,

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.* Such instruments shall be recorded in regular succession, according to the priority of presentation, entering the file number at the beginning of such record. On the record of each instrument he shall record the date and precise time such instrument was presented for record. (Emphasis added.)

See also R.C. 317.12 (procedure followed by county recorder when a deed or other instrument of writing is presented for record).

⁴ In light of the rejection of *State ex rel. Ballard v. McKelvey* by the court in *State ex rel. Taraloca Land Co. v. Fawley*, the conclusions set forth in 1986 Op. Att'y Gen. No. 86-028 (syllabus, paragraph one) and 1987 Op. Att'y Gen. No. 87-110 (syllabus, paragraph one) are overruled.

The county recorder's duty to record instruments and the exceptions to that duty were discussed in Op. No. 80-029 at 2-120, which set forth the general rule that "the recorder has no authority to determine the validity or legal effect of an instrument, but rather must record all instruments which may, by statute, be recorded. *Ramsey v. Riley*, 13 Ohio St. 157 (1944)." Op. No. 80-029 also noted the numerous statutory exceptions to this duty. *See, e.g.*, R.C. 317.11 (an instrument may not be recorded if a signature is illegible, unless the name is legibly printed below the signature); R.C. 317.111 (an instrument may not be recorded unless the name of the person who prepared the instrument appears at the conclusion of such instrument); R.C. 317.22 (an instrument may not be recorded if the indorsement of the county auditor indicating compliance with R.C. 319.202 is defaced, illegible, or incomplete). Also discussed in the opinion were two judicially recognized exceptions to the recorder's duty to record deeds -- first, where an instrument is improperly executed, and second, where the legal description is insufficient to enable the recorder to identify the property to be conveyed. Op. No. 80-029 at 2-120.

The rule described in your request would require any deed containing a metes and bounds property description to be reviewed by the county auditor, county recorder, and regional planning commission prior to the transfer of such property by the auditor and the recording of the deed by the county recorder. The fact that a deed contains a metes and bounds property description does not, however, create an exception to the mandatory duty imposed upon the county recorder by R.C. 317.13 to record all deeds presented to him for recording. Absent the existence of one of the statutory or judicially recognized exceptions to the recorder's duty to record, the county recorder has no authority to refuse to record a deed on the basis that the property description contained therein has not been reviewed by the county auditor or regional planning commission. The county recorder, therefore, has no authority to adopt the rule about which you ask.

Regional Planning Commission

A regional planning commission is created in accordance with R.C. 713.21⁵ and has those powers and duties set forth in R.C. 713.23. R.C. 711.10 confers certain rule-making powers upon a regional planning commission, as follows:

⁵ R.C. 713.21 states in pertinent part:

The regional planning commission may purchase, lease with option to purchase, or receive as a gift property and buildings within which it is housed and carries out its responsibilities, provided that the *rules of the commission* provide for the disposition of the property and buildings in the event that the commission is dissolved or otherwise terminated.

The regional planning commission may establish such committees with such powers as it finds necessary to carry on its work, including an executive committee to make such final determinations, decisions, findings, recommendations, and orders as the *rules of the regional planning commissions* provide. (Emphasis added.)

The rule-making authority of a regional planning commission that is mentioned in R.C. 713.21, however, relates only to the internal operation of the commission itself.

Any such ... regional planning commission shall adopt general rules, of uniform application, governing *plats and subdivisions* of land falling within its jurisdiction, to secure and provide for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the ... regional plan, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light, air, and for the avoidance of congestion of population....

.... After a ... regional street or highway plan has been adopted as provided in this section, the approval of plats and subdivisions provided for in this section shall be in lieu of any approvals provided for in other sections of the Revised Code, so far as the territory within the approving jurisdiction of the ... regional planning commission, as provided in this section, is concerned. (Emphasis added.)

For purposes of R.C. 711.01-.38, "[p]lat" means "a map of a tract or parcel of land." R.C. 711.001(A). As used in R.C. 711.01-.38, "subdivision" means:

(1) The division of any parcel of land shown as a unit or as contiguous units on the last preceding tax roll, into two or more parcels, sites, or lots, any one of which is *less than five acres* for the purpose, whether immediate or future, of transfer of ownership, provided, however, that the division or partition of land into parcels of more than five acres not involving any new streets or easements of access, and the sale or exchange of parcels between adjoining lot owners, where such sale or exchange does not create additional building sites, shall be exempted; or

(2) The improvement of one or more parcels of land for residential, commercial or industrial structures or groups of structures involving the division or allocation of land for the opening, widening or extension of any street or streets, except private streets serving industrial structures; the division or allocation of land as open spaces for common use by owners, occupants or lease holders or as easements for the extension and maintenance of public sewer, water, storm drainage or other public facilities. (Emphasis added.)

R.C. 711.001(B).

The rule-making authority conferred upon a regional planning commission by R.C. 711.10 is limited to rules concerning platting and subdivisions. R.C. 711.10 does not confer authority upon a regional planning commission to adopt rules that address the review of deeds that contain metes and bounds property descriptions. Accordingly, a regional planning commission may not adopt a rule that either permits or requires the commission or the county auditor or the county recorder to review deeds that contain metes and bounds property descriptions.

Statutory Restriction on Conveyances Contrary to R.C. Chapter 711

Particularly relevant to the proposed rule that you have described is R.C. 711.121, which prohibits the county auditor and county recorder from processing or recording a deed that attempts to convey property contrary to the provisions of R.C. Chapter 711, governing platting and subdivisions. If there is doubt as to whether an attempted conveyance by metes and bounds description is contrary to R.C. Chapter 711, R.C. 711.121 empowers the auditor and recorder to "require the person presenting such deed ... to give evidence of the legality of a conveyance

by metes and bounds by an *affidavit* as to the facts which exempt such conveyance from the provisions of [R.C. Chapter 711]." (Emphasis added.) The General Assembly has, therefore, addressed the duty of the auditor and recorder when presented with a deed that either officer believes attempts to convey property contrary to R.C. Chapter 711. In such case, should the deed contain a metes and bounds property description, either officer may require the presenter of the deed to provide an affidavit as to the facts which exempt such conveyance from the provisions of R.C. Chapter 711.

A statutory exemption from the requirements of R.C. Chapter 711 is expressly provided by R.C. 711.40, which states, "[u]nless required by rules and regulations adopted pursuant to the provisions of [R.C. 711.05, .09, and .10], the provisions of [R.C. 711.01-.39] shall *not* apply to the division of any parcel of land by an *instrument of conveyance*." (Emphasis added.) Pursuant to R.C. 711.40, if a parcel of land is divided by an instrument of conveyance, including a deed, the provisions of R.C. 711.01-.39 do not apply, unless required by rules and regulations adopted under R.C. 711.05 (adoption of platting and subdivision rules by board of county commissioners), R.C. 711.09 (adoption of rules by municipal planning commissions, platting commissions, or legislative authorities), or R.C. 711.10 (adoption of platting and subdivision rules by regional planning commission).

The operation of R.C. 711.121 in conjunction with the exception created by R.C. 711.40 was summarized in 1982 Op. Att'y Gen. No. 82-072 at 2-204, as follows:

[A]n attempted conveyance of real property by deed can be contrary to the provisions of Chapter 711 of the Revised Code for the purposes of R.C. 711.121 *only if the attempted conveyance would create a subdivision*, as defined in R.C. 711.001, and the *grantor has failed to comply with a rule promulgated under R.C. 711.05, R.C. 711.09 or R.C. 711.10*. [1953 Op. Att'y Gen. No. 3285, p.654 (syllabus, paragraph four)]. Thus, R.C. 711.121 permits a county recorder to refuse to record a deed that has not been stamped by a regional planning commission with a stamp stating "no plat required" only if such requirement is imposed by a rule or regulation promulgated under R.C. 711.05, R.C. 711.09 or R.C. 711.10. Of course, any such rule or regulation may impose this requirement only with respect to deeds that would effect divisions of land resulting in the creation of a "subdivision" as defined in R.C. 711.001. See 1963 Op. Att'y Gen. No. 358, p. 404. (Emphasis added.)

Thus, R.C. 711.121 requires a county auditor or county recorder to refuse to process or record a deed only if the attempted conveyance would create a subdivision, *and* the grantor has failed to comply with a rule promulgated under R.C. 711.05, .09, or .10.

Unless a deed creates a subdivision, as defined in R.C. 711.001(B), R.C. 711.121 does not permit the county auditor or county recorder to refuse to process or record such deed. The prohibition against the processing and recording of deeds contained in the rule described in your opinion request is not limited, however, only to those deeds that create subdivisions. R.C. 711.121 does not, therefore, serve as the basis for a rule permitting the county auditor and county recorder to refuse to process or record a deed on the basis that it contains a metes and bounds property description that has not been reviewed by the county auditor, county recorder, and the regional planning commission.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that a county auditor, county recorder, and regional planning commission are without authority, acting either singly or jointly, to promulgate a rule requiring the review by the county auditor, county recorder, and regional planning commission of any deed containing a metes and bounds property description prior to the transfer of the property by the county auditor and recording of the deed by the county recorder. (In light of the Ohio Supreme Court's decision in *State ex rel. Taraloca Land Co. v. Fawley*, 70 Ohio St. 3d 441, ___ N.E.2d ___ (1994), the conclusions set forth in 1986 Op. Att'y Gen. No. 86-028 (syllabus, paragraph one) and 1987 Op. Att'y Gen. No. 87-110 (syllabus, paragraph one) are overruled.)