OPINION NO. 86-006

Syllabus:

A county recorder does not have the authority to record a declaration of land patent that does not fall within the provisions of R.C. 5301.38.

To: James L. Flannery, Warren County Prosecuting Attorney, Lebanon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 20, 1986

I have before me your request for my opinion concerning whether the county recorder has authority to record a declaration of land patent that is not a land patent granted by the United States government or a certified copy thereof, as contemplated by R.C. 5301.38.

I begin my analysis of the question presented with a discussion of the duties of a county recorder. A county recorder is a ministerial officer, who has only those powers which are expressly set forth by statute, or which may be necessarily implied therefrom. See State ex rel. Preston v. Shaver, 172 Ohio St. 111, 173 N.E.2d 758 (1961); 1940 Op. Att'y Gen. No. 2857, vol. II, p. 911. State law sets forth certain documents or instruments which are required to be or which may be recorded in the office of the county recorder. See, e.g., R.C. 317.09 (notices of liens in favor of the United States may be filed in the office of the county recorder); R.C. 317.10 (county recorder shall record any certified copy of any matter in reference to bankruptcy); R.C. 5301.23 (all mortgages,

properly executed, shall be recorded with the county recorder); R.C. 5301.25 (deeds, land contracts, and instruments of conveyance or encumbrance, properly executed, shall be recorded in the office of the county recorder). 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." See R.C. 317.08 (requiring the county recorder generally to keep five separate sets of records, as set forth therein, and providing that all instruments entitled to record shall be recorded in the proper record). Thus, a county recorder is required to record all instruments of writing required or authorized by law to be recorded, and which are presented to him for that purpose. See Ramsey v. Riley, 13 Ohio 157 (1844). If a recorder refuses to do so, he may be held liable on his bond. R.C. 317.33.[1] The recorder has no authority or duty to determine the legal sufficiency or validity of an instrument presented for record, see Ramsey v. Riley; 1969 Op. Att'y Gen. No. 69-139; 1965 Op. Att'y Gen. No. 65-113; 1962 Op. Att'y Gen. No. 3289, p. 723, but must record all instruments entitled by statute to be recorded. See 1980 Op. Att'y Gen. No. 80-029.

It is well established, however, that 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. See Ramsey v. Riley, 13 Ohio at 167 ("if the instrument is not such as the law authorizes to be recorded, the act of recording is a nullity"); State ex rel. Puthoff v. Cullen, 5 Ohio App. 2d 13, 16, 213 N.E.2d 201, 203 (Lucas County 1966) (executory contracts for the sale of land were not entitled to be recorded prior to time statutes made provision for recording such instruments; (citations omitted); 1940 Op. No. 2857 at 913 ("[t]he recording of written instruments having been unknown at common law, there must be a statutory authority before any instrument may be recorded"). See also R.C. 317.13 ("[t]he county recorder shall record...instruments of writing required or authorized to be recorded" (emphasis added)); Op. No. 80-029 at 2-120 (the county recorder "must record all instruments which may, by statute, be recorded"). 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, 1940 Op. No.

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[1] In certain instances the county recorder has no duty to accept instruments presented to him for recording. See generally 1980 Op. Att'y Gen. No. 80-029. For example, a recorder is not required to record an instrument where the legal description in the instrument is not sufficiently definite to enable the recorder to identify the subject property. See State ex rel. Preston v. Shaver, 172 Ohio St. 111, 173 N.E.2d 758 (1961). Further, instruments need not be recorded if they are not executed in conformity with R.C. 5301.01. See State ex rel. Puthoff v. Cullen, 5 Ohio App 2d 13, 213 N.E.2d 201 (Lucas County 1966). Finally, various statutes provide that an instrument may not be recorded if it does not meet a particular requirement. 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).

2857, and, further, will not be liable for recording such instrument if he acted in good faith,[2] Ramsey v. Riley.

I turn now to a consideration of the nature of land patents. As explained in Magee, Land Patents: A Misconception, 58 Ohio State Bar Association Report 1376, 1376-78 (1985):

> Early acts of Congress provided for the public sale of lands [owned by the United States government] within the Northwest Territory. The territory was divided into several districts and a land office was established in each district for the sale of these public lands. The law also authorized the registrars to sell land at private sale which remained unsold at the public sales....
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> ....
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> In order to appropriate and acquire perfect title to these public lands, a settler (or locator) had to go through certain steps and comply with certain requirements:
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> ....
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> [As the last step], a grant was made through the issuance of a patent by the government to the grantee. (Footnotes omitted.)

Land patents may still be granted by the United States government, see 43 U.S.C. §6 (duties of the Bureau of Land Management with regard to certifying, recording, indexing, and preparing copies and exemplifications of patents for public lands); 43 U.S.C. §15 ("[a]ll patents for public lands shall be issued and signed by the Secretary of the Interior in the name of the United States"). "After a patent has been issued, the entryman has full legal title and may sell, give away or otherwise deal with the lands as he sees fit. The issuance of a patent divests the government of all authority and control over the land" (footnote omitted). Magee at 1378. See Hilgeford v. Peoples Bank, 607 F. Supp. 536 (N.D. Ind. 1985) (the governmental apparatus for disposing of public land is by way of the issuance of land patents; statutory provisions allow the United States to grant title to public land to private individuals, creating title in the patent holder and extinguishing title in the United States).

R.C. 5301.38 provides for recording land patents issued by the United States, and reads:

> Patents for lands lying within this state, granted to any person by the president of the United States, and copies of such patents, certified under the official seal of the commissioner of the general land office of the United States, and exemplifications of the record of the general land office of any patent recorded there, may be recorded in the office of the county recorder of the county in which such lands, or a part thereof, are situated.

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[2] In State ex rel. Puthoff v. Cullen, 5 Ohio App. 2d 13, 213 N.E.2d 201 (Lucas County 1966), the court held that, where a county recorder had recorded an instrument not entitled to record, a writ of mandamus would be allowed, ordering the recorder to cancel and remove such instruments from the records where the recording materially affects a private interest.

> The recorder shall be paid the fees for recording such patents as provided in section 317.32 of the Revised Code for recording deeds.

Thus, land patents issued by the United States are entitled to record, and the county recorder has a duty to record such land patents presented to him for that purpose. See R.C. 317.13.

The declaration of land patent which is the subject of your request, an example of which was attached to your letter, is not a patent which has been issued by the United States. As was explained in Magee at 1378, those early acts of Congress providing for the sale of public lands often provided "that no lands acquired by individuals under the land sale acts should become liable to the satisfaction of any debt contracted prior to the issuance of the patent for it" (footnote omitted). Recently, individuals have been attempting to file declarations of land patents, "asserting that they are the assignee, through various conveyances, of the original patentee.... They all claim that by filing their declaration, their land should not be held liable for the satisfaction of any debt contracted prior to the filing of their declaration." Magee at 1378-79. Magee concludes at 1379:

> [W]hile a land patent emanating from the United States may be the highest evidence of title, in order for it to be valid it must issue from the United States as to land which the United States presently owns. A refiling of prior patent, issued during the late 1700's or early 1800's, coupled with a "declaration" by present titleholders that such refiling creates a new chain of title has no basis either in law or in equity in Ohio. (Footnote omitted.)

See Hilgeford v. Peoples Bank, 607 F. Supp. at 539 (landowners' attempt to improve their title by granting patent to themselves after bank had foreclosed on their property was held to be a bad faith attempt to interfere with the bank's property and contractual rights and a "blatant attempt by private landowners to improve title by personal fiat"). Accord, Nixon v. Individual Head of St. Joseph Mortgage Co., Inc., 612 F. Supp. 253, 254 (N.D. Ind. 1985) ("an action based upon a land patent drafted by a party in order to give that party rights within property is a legal nullity").

The declaration of land patent enclosed with your request was executed by landowners in favor of themselves, and was not granted by the United States. Ohio law makes no provision for these instruments and there is no statute authorizing or requiring these documents to be recorded. Thus, I conclude that a county recorder is not authorized to accept for record a declaration of land patent not granted by the United States for filing.

In conclusion, it is my opinion, and you are advised, that a county recorder does not have the authority to record a declaration of land patent that does not fall within the provisions of R.C. 5301.38.