

OPINION NO. 80-029**Syllabus:**

1. 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. (1969 Op. Att'y Gen. No. 69-139 approved and followed.)
2. A county recorder may not refuse to record a deed which is by statute entitled to be recorded because he believes that the deed is legally defective, if the deed contains a description that enables the recorder to identify the property to be transferred. (1969 Op. Att'y Gen. No. 69-139 approved and followed.)
3. When a husband and wife who hold real property as tenants by the entireties convey the property by deed to themselves as tenants in common, it is unnecessary for the auditor to enter a transfer on the tax list pursuant to R.C. 319.20. It is necessary for the auditor to indorse the deed to indicate that transfer is unnecessary and to acknowledge compliance with R.C. 319.202.
4. When such a conveyance is made, the transfer fee provided for under R.C. 319.54(F)(2) is not required to be collected, as no transfer has been made.
5. When such a conveyance is made and it does not appear that any money or other consideration readily convertible into money was paid for the real estate, the conveyance fee provided for under R.C. 319.54(F)(3) is not required to be collected, as the conveyance is exempt pursuant to R.C. 319.54(F)(3)(m).
6. When property is recorded as being held by a husband and wife as tenants in common, the county auditor may not, under R.C. 319.20, upon presentment of the death certificate alone, transfer sole title on the tax list to the surviving spouse.

To: Anthony G. Pizza, Lucas County Pros. Atty., Toledo, Ohio
By: William J. Brown, Attorney General, May 13, 1980

I have before me your request for an opinion on the following questions:

1. May a County Auditor refuse to process (by whatever means) a deed because he believes that the deed is legally defective?
2. May a County Recorder refuse to record a deed because he believes that the deed is legally defective?
3. Is a deed that purports to convey real estate from a husband and wife who hold title by the entireties to themselves as tenants in common legally sufficient to accomplish that which it purports to do?
4. If the answers to the first two questions are negative, then would transfer by the County Auditor be necessary and if it was necessary would the transfer be exempt from the conveyance fee?
5. If the answers to the first two questions are negative, what should the County Auditor do if he is subsequently presented with a death certificate for one of the owners?

In regard to your first and second questions, I refer you to 1969 Op. Att'y Gen. No. 69-139. My predecessor, in that opinion, concluded: "A county auditor must accept for transfer on the tax duplicate any conveyance of real estate which enables him to identify the property to be transferred. . . . A county recorder must accept for filing any instrument which purports to transfer an interest in real estate." 1969 Op. Att'y Gen. No. 69-139 at 2-297. I concur in the opinion of my predecessor as to the duty of the county auditor to process deeds and the duty of the county recorder to record deeds.

As discussed in 1969 Op. Att'y Gen. No. 69-139, R.C. 319.20 is the controlling statute relating to the auditor's duty to enter transfers on the tax list. R.C. 319.20 provides, in part, as follows:

After complying with section 319.202 of the Revised Code 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, 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. (Emphasis added.)

The use of "shall" in setting forth the duties of an official renders such performance mandatory. Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E. 2d 834 (1971). This is especially true where the rights of the public are dependent upon the performance of the official. Heid v. Hartline, 79 Ohio App. 323, 73 N.E. 524 (Tuscarawas County 1946). The view that the auditor has the power to pass upon the validity of deeds would result in interference with the ability to protect such interests by recording, as indorsement by the auditor is a prerequisite to the recording of deeds. R.C. 317.22. Thus, the courts have generally held that the duty of the county auditor to process a deed is mandatory.

The only exception which the courts have recognized to the mandatory nature of the county auditor's duty to process a deed is that a county auditor may refuse to transfer a conveyance of real estate upon the tax list if the description of the land to be conveyed is legally insufficient. State ex rel. Ballard v. McKelvey, 89 Ohio L. Abs. 407 (C.P. Monroe County 1961), aff'd, 89 Ohio L. Abs. 415 (Ct. App. Monroe County 1961). The county auditor is required to compile a general tax list and duplicate which includes the names of the persons listed as holding title to the property and which describes the property itself. R.C. 319.28. As long as the description in the instrument is sufficient to identify the property conveyed, the auditor is able to compile the required tax list and duplicate. 1969 Op. Att'y Gen. No. 69-139. I conclude, therefore, that the auditor has no authority to pass upon the validity or legal sufficiency of instruments purporting to transfer an interest in real estate, provided that there is no question about the location of the real estate to be conveyed. See 1942 Op. Att'y Gen. No. 5142, p. 351, 353; 1936 Op. Att'y Gen. No. 6120, p. 1460.

In response to your first question, then, it is my opinion that the auditor has no authority to refuse to process a deed which contains a description that enables him or her to identify the property to be transferred.

With respect to your second question, R.C. 317.33 provides:

If a county recorder refuses to receive a deed or other instrument of writing presented to him for record, the legal fee for recording it being paid or tendered; or refuses to give a receipt therefor, when required; or fails to number consecutively all deeds or other instruments of writing upon receipt thereof; 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 good excuse, to record a deed or other instrument of writing within twenty days after it is received for record; . . . he shall be liable to a suit on his bond, at the instance and for the use of the party injured by such improper conduct. (Emphasis added.)

R.C. 317.08 further provides in part:

The county recorder shall keep five separate sets of records as follows:

(A) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements, and hereditaments, (Emphasis added.)

The legislature in prescribing the duties of the recorder has again used the word "shall." Hence, it must be concluded, in the absence of authority to the contrary, that the duty to record instruments is mandatory. 1940 Op. Att'y Gen. No. 2857, p. 911 (the recorder is a ministerial officer with only such powers as are expressly granted by statute or implied therefrom). Generally, it has been held 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). See 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. R.C. 317.08 designates the types of instruments entitled to be recorded. It should be noted that such instruments are not entitled, by statute, to recording in certain instances. 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 such 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).

The courts, however, have recognized two additional exceptions to the mandatory nature of the recorder's duty to record instruments. The first exception involves the relationship between R.C. 317.08, which designates the types of instruments entitled to record, and R.C. 5301.01, which requires that instruments conveying interests in land be executed in a particular manner. Applying these two statutes, the courts have held that a recorder may refuse to record an instrument which is improperly executed as such an instrument is not one entitled to recording pursuant to R.C. 317.08. State ex rel. Puthoff v. Cullen, 5 Ohio App. 2d 13, 213 N.E. 2d 201 (Lucas County 1966); 1940 Op. Att'y Gen. No. 2857, vol. II, p. 911.

The second exception recognized, arises where the legal description in the instrument is not sufficiently definite to enable the recorder to identify the property to be conveyed. State ex rel. Preston v. Shaver, 172 Ohio St. 111, 173 N.E. 2d 758 (1961); State ex rel. Ballard v. McKelvey, supra. Since the recorder is required pursuant to R.C. 317.18 and 317.20 to compile an index of recorded instruments, which index includes a legal description of the property conveyed, the legal description in the instrument necessarily must be sufficiently definite to enable the property conveyed to be identified. Under such an analysis, the courts have held that a recorder may properly refuse to record an instrument containing a legal description which is not sufficiently definite to enable identification of the property concerned.

Thus, in response to your second question, it is my opinion that the county recorder may not refuse to record a deed which is properly executed and in all other respects entitled by statute to be recorded, unless the deed contains a description which is not sufficient to enable the recorder to identify the property to be transferred.

In light of my answer to your first two questions, it is unnecessary for me to answer your third question. Whether a deed that purports to convey real estate

from a husband and wife who hold title by the entirety to themselves as tenants in common is legally sufficient to accomplish that which it purports to do is not relevant to a determination of the duties of the county auditor or county recorder. My responsibilities under R.C. 109.14 to advise the prosecuting attorneys of Ohio counties are limited to advising the attorneys "respecting their duties in all complaints, suits and controversies in which the state is or may be a party." I am not authorized to utilize this opinion function to resolve purely private disputes. Since, as discussed above, the county auditor and recorder have no authority to refuse to accept a deed on the grounds that the deed is legally defective if the deed complies with statutory requirements and contains a description that enables them to identify the property concerned, and since you have not indicated that the state or county has particular interest in the resolution of this question, I will refrain from rendering an opinion on the question at this time.¹

I will turn now to your fourth question, in which you inquire whether transfer by the county auditor would be necessary in the situation you pose and, if so, whether a conveyance fee must be paid.

It would appear that where real property has been conveyed by deed from a husband and wife who hold the property as tenants by the entirety, to themselves, as tenants in common, no transfer by the county auditor would be necessary. R.C. 319.20 and R.C. 317.22 are controlling as to transfers upon the tax lists by the county auditor. R.C. 319.20 provides that after complying with R.C. 319.20, the county auditor shall transfer property "charged with taxes on the tax list, from the name in which it stands to the name of the owner, when rendered necessary by a conveyance, partition, devise, descent or otherwise." (Emphasis added.) R.C. 317.22(B) provides that no deed shall be recorded by the county recorder until "[s]uch conveyance has been presented to the county auditor and by him indorsed 'transferred' or 'transfer not necessary'." (Emphasis added.)

The Revised Code does not define the term "necessary." The term, however, is defined in Webster's New World Dictionary 950 (2d college ed.) to mean "unavoidable; that cannot be dispensed with; essential; indispensable." Since title to the property herein in question will remain in the same two persons after the conveyance, transfer on the tax list is not "necessary," as the word is commonly defined. Furthermore, no practical purpose would be accomplished by making a new entry upon the tax list. The information as to ownership currently entered upon the tax list satisfies the provisions of R.C. 319.28, which require that the auditor compile a tax list naming the owners of taxable property within the county. There is no requirement that the nature or form of ownership appear on the tax list.

Consequently, it is my opinion that, when presented with the deed, the auditor need not make any transfer upon the tax list, but must, pursuant to R.C. 317.22(B) and R.C. 319.20, indorse the deed to indicate that transfer is unnecessary, so that the deed may be recorded.

Under these circumstances, the transfer fee provided by R.C. 319.54(F)(2) would not be collected. R.C. 319.54(F)(2) requires a fee to be collected only "[f] or the transfer or entry of land." (Emphasis added.) As discussed above, no transfer upon the tax list would need to be made in this instance.

The conveyance fee provided by R.C. 319.54(F)(3), however, is "applicable to any conveyance of real property presented to the county auditor on or after January 1, 1969." See 1972 Op. Att'y Gen. No. 72-075; 1968 Op. Att'y Gen. No. 68-068, No. 68-069, No. 68-165. Such fee is collected by the auditor "[f] or receiving statements of value and administering section 319.202 of the Revised Code." R.C. 319.54(F)(3). Since the auditor is required to indorse all deeds to indicate compliance with the provisions of R.C. 319.202 (R.C. 317.22(A); 319.202(B)), the fee

¹In regard to such conveyances, see Am. S.B. No. 73, now pending in the legislature, which would permit conveyances from persons to themselves.

provided by R.C. 319.54(F)(3) must be collected in this instance, unless the conveyance herein is exempt under R.C. 319.54(F)(3)(a) through (v).

It is well settled that the exemptions provided in division (F)(3) of R.C. 319.54 must be strictly, but reasonably, construed in favor of the fee and against the exemption. 1970 Op. Att'y Gen. No. 70-124; 1969 Op. Att'y Gen. No. 69-087; 1968 Op. Att'y Gen. No. 68-165. See also National Tube Co. v. Glander, 157 Ohio St. 407, 105 N.E. 2d 648 (1952); State ex rel. Keller v. Forney, 108 Ohio St. 463, 141 N.E. 16 (1923). Even when such principles of construction are adhered to, it appears that the conveyance herein would be exempt from the conveyance fee under R.C. 319.54(F)(3)(m).

R.C. 319.54(F)(3)(m) provides that no fee shall be charged when the transfer is made "[t]o or from a person when no money or other valuable and tangible consideration readily convertible into money is paid or to be paid for the real estate and the transaction is not a gift."

It does not appear from the facts presented in your inquiry that any "money or other valuable and tangible consideration readily convertible into money," R.C. 319.54(F)(3)(m), was paid for the real estate. Although the husband and wife may have, in making such a conveyance, relinquished certain rights which they held as tenants by the entireties, such a relinquishment of rights does not constitute "money or other valuable and tangible consideration readily convertible into money." R.C. 319.54(F)(3)(m).

Furthermore, the conveyance would not appear to constitute a gift. In City National Bank v. Kelly, 19 Ohio Op. 231, 235 (P. Ct. Franklin County 1939), a "gift" was defined as follows:

a transfer of property to a donee during the life of the donor, for no consideration, with the intention on the part of the donor to divest himself of control or dominion over the subject of the gift, and with no condition imposed thereon to be met by the donee.

In the present instance, there is no evidence that the husband and wife intended to make a gift of the property or to divest themselves of dominion and control over the property.

Thus, I am of the opinion that a conveyance of real property, held by a husband and wife as tenants by the entireties, to themselves, as tenants in common, when no money or other consideration readily convertible into money is paid for the real estate, is exempt from the conveyance fee provided by R.C. 319.54(F)(3). When presented with such a conveyance, the auditor need only indorse the deed to indicate that no transfer is necessary and to acknowledge compliance with R.C. 319.202. Such an indorsement satisfies the provisions of R.C. 319.20 ("The auditor shall indorse on the deed. . .that the proper transfer of the real estate. . .has been made."), R.C. 319.202(B) ("The auditor shall indorse each conveyance. . .to indicate the amount of the conveyance fee and compliance with this section."), and R.C. 317.22(B) (No deed shall be recorded until "[s]uch conveyance has been presented to the county auditor, and by him indorsed 'transferred,' or 'transfer not necessary' ").

Turning now to your fifth question, I assume that you are inquiring whether the auditor may transfer title to property on the tax list upon presentation of a death certificate by the surviving spouse.

R.C. 319.20 provides that "on application and presentation of title, with the affidavits required by law, or the proper order of the court" (emphasis added), the county auditor shall transfer any land on the tax list from the name of the grantor to the name of the grantee. Thus, the county auditor may transfer title on the tax list upon receipt of a death certificate only if, under the circumstances, the death certificate is the only affidavit or order required by law.

R.C. 5302.17, which speaks to estates by the entireties, provides, in pertinent part, as follows:

When an estate by the entireties vests in a surviving spouse, the transfer of the interest of the decedent spouse may be recorded by presenting to the county auditor, and filing with the county recorder either a certificate of transfer as provided in section 2113.61 of the Revised Code, or an affidavit or certificate of death, reciting the names of the spouses, the residence of the surviving spouse, the date of death of the decedent spouse, and a description of the property. The county recorder shall make index reference to any certificate or affidavit so filed in the record of deeds.

This section authorizes the auditor to transfer title on the tax list upon presentment of the death certificate by the surviving spouse, if the property was held by the entireties. When entireties property is involved, the death certificate is the only affidavit or order which is required by law to be presented to the auditor, in order for the auditor to transfer title on the tax list. The death certificate presented, however, must recite "the names of the spouses, the residence of the surviving spouse, the date of death of the decedent spouse, and a description of the property" in order to satisfy the requirements of R.C. 5302.17. The presentment of a death certificate attesting only to the time, place and cause of death would not be sufficient to authorize the auditor to transfer title on the tax list, unless the death certificate were accompanied by supporting affidavits that contained the required information.

The provisions of R.C. 5302.17, discussed above, are applicable only to estates held by the entireties, and have no application to other forms of land ownership. Since the property which is the subject of your inquiry has been conveyed to the husband and wife as tenants in common, the auditor no longer may transfer title upon presentment of the death certificate alone under R.C. 5302.17.

When property is not held by entireties, R.C. 2113.61 governs the passage of title upon death of the owner. R.C. 2113.61 reads, in pertinent part, as follows:

When real estate passes by the laws of intestate succession or under a will, the administrator or executor shall, prior to the filing of his final account, file in the probate court an application requesting of the court a certificate of transfer as to such real estate. Real estate sold by an executor or administrator or land registered under sections 5309.01 to 5309.98, inclusive, and 5310.01 to 5310.21, inclusive, of the Revised Code, are excepted from the above requirement. Also excepted are cases in which an order has been made relieving an estate from administration, wherein the order directing transfer of real estate to the person entitled thereto may be substituted for the certificate of transfer.

Under R.C. 2113.61(A), a certificate of transfer must be obtained from the probate court in order for real property to pass upon the death of the owner, unless the passing of the property has been specifically excepted from this requirement. Thus, a certificate of transfer is an "affidavit required by law, or proper order of the court," which must be presented to the auditor in order for him to transfer title under R.C. 319.20, unless the transfer has been specifically excepted from the requirements of R.C. 2113.61(A).

Three exceptions to acquiring a certificate of transfer are enumerated in R.C. 2113.61(A): (1) sale by the executor or administrator; (2) inheritance of registered land, and (3) estates relieved from administration where an order directing transfer has been issued by the court. A fourth exception to the requirement of obtaining a certificate of transfer is found in R.C. 317.22(B), and is applicable where the estate has been relieved from administration and the property owner has died intestate. See 1935 Op. Att'y Gen. No. 4793, p. 1344; 1933 Op. Att'y Gen. No. 910, p. 846.

Although no certificate of transfer need be presented to the auditor in the aforementioned cases, presentment of the death certificate alone would not satisfy the requirements of R.C. 319.20 and authorize the auditor to transfer title to the surviving spouse. Under the first exception to R.C. 2113.61, the real estate is required to be sold by the executor or administrator, not transferred to the surviving spouse. Under the exception for registered land, application must be made to the probate court or court of common pleas for registration of the title in the heirs. R.C. 5309.45. Where an estate has been relieved from administration, a court order transferring the property is required under R.C. 2113.61, or, if the owner died intestate, an affidavit, acknowledging enumerated facts, is necessary under R.C. 317.22(B).

Thus, unless the property is held by the entireties, upon the death of the owner, affidavits or court orders in addition to the death certificate must be presented to the auditor in order for him or her to transfer title pursuant to R.C. 319.20.

In specific answer to your fifth question, then, it is my opinion that, when property is recorded as being owned by tenants in common, the auditor may not transfer such property upon the presentment of the death certificate of one of the owners, unless accompanying orders or affidavits are also presented.

In conclusion, it is my opinion, and you are advised, that:

1. 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. (1969 Op. Att'y Gen. No. 69-139 approved and followed.)
2. A county recorder may not refuse to record a deed which is by statute entitled to be recorded because he believes that the deed is legally defective, if the deed contains a description that enables the recorder to identify the property to be transferred. (1969 Op. Att'y Gen. No. 69-139 approved and followed.)
3. When a husband and wife who hold real property as tenants by the entireties convey the property by deed to themselves as tenants in common, it is unnecessary for the auditor to enter a transfer on the tax list pursuant to R.C. 319.20. It is necessary for the auditor to indorse the deed to indicate that transfer is unnecessary and to acknowledge compliance with R.C. 319.202.
4. When such a conveyance is made, the transfer fee provided for under R.C. 319.54(F)(2) is not required to be collected, as no transfer has been made.
5. When such a conveyance is made and it does not appear that any money or other consideration readily convertible into money was paid for the real estate, the conveyance fee provided for under R.C. 319.54(F)(3) is not required to be collected, as the conveyance is exempt pursuant to R.C. 319.54(F)(3)(m).
6. When property is recorded as being held by a husband and wife as tenants in common, the county auditor may not, under R.C. 319.20, upon presentment of the death certificate alone, transfer sole title on the tax list to the surviving spouse.