

OPINION NO. 90-068**Syllabus:**

1. Pursuant to R.C. 317.13, a county recorder may record only "deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded."
2. An instrument of writing is required or authorized to be recorded when statutory authority expressly provides for the recording of such an instrument.
3. A zoning variance is not the proper subject of an affidavit on facts relating to title to real estate under R.C. 5301.252.
4. A zoning variance, as a separate instrument of writing, is not statutorily authorized to be recorded by a county recorder.

To: Michael Miller, Franklin County Prosecuting Attorney, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 7, 1990

I have before me your request for my opinion concerning the county recorder's duty to record instruments presented. Specifically, you wish to know whether "a variance passed by a Municipal Corporation or other zoning authority, constitute[s] an instrument which a County Recorder is required to accept for recordation pursuant to R.C. 5301.252 or Chapter 317?" R.C. 5301.252 pertains to affidavits on facts that may affect title to real estate, while R.C. Chapter 317 concerns the powers and duties of the county recorder.

Recording is "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). Recording of instruments is the reason for the existence of the office of county recorder. The recorder's duty to record instruments is set forth by R.C. 317.13, which states, in pertinent part, that "[t]he county recorder shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic process, all deeds, mortgages, plats, or other instruments of writing *required or authorized to be recorded*, presented to him for that purpose." (Emphasis added).

It is apparent that R.C. 317.13 does not provide express authority for the recording of a zoning variance as a separate instrument since it is not specifically enumerated therein. Your inquiry does not raise and I have not considered the question of whether a zoning variance may be recorded as part of another instrument statutorily authorized to be recorded. I note, however, that to the extent that a zoning variance is contained within a "deed, mortgage, plat, or other instruments of writing required or authorized to be recorded," R.C. 317.13 might be read to permit the recording of a zoning variance contained within one of those written instruments.

No express statutory authority to record a zoning variance exists in the Revised Code. Whether a county recorder is empowered to record a particular instrument, absent relevant statutory direction, is a determination based on the nature of the office of county recorder. A county recorder is a ministerial officer, having only those powers expressly granted by statute or necessarily implied therefrom. See *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 173 N.E.2d 758 (1961); 1986 Op. Att'y Gen. No. 86-006; 1940 Op. Att'y Gen. No. 2857. The authority of a county recorder, while exercising the recording function, is further limited by the lack of a precedent at common law. Without some historical antecedent, the recorder's authority to record instruments must be guided solely by statutory direction. Lacking express authority to record a particular instrument, a county recorder lacks any authority to record it. See 1940 Op. 2857, at 913; Op. No. 86-006, at 2-26.

Careful scrutiny of R.C. 317.13 and application of the maxim of statutory construction *expressio unius est exclusio alterius* (the naming of specific classes implies the exclusion of any class not named), see, e.g., *Craftsman Type, Inc. v. Lindley*, 6 Ohio St. 3d 82, 451 N.E.2d 768 (1983), reasonably leads to the conclusion that a county recorder may record only "deeds, mortgages, plats, and other instruments of writing required or authorized to be recorded." An instrument is required or authorized to be recorded when statutory authority expressly provides for the recording of such an instrument. Op. No. 86-006. Therefore, the question becomes whether a zoning variance, as a separate instrument of writing, is statutorily required or authorized to be recorded.

A zoning variance is "an exemption in an individual case from the strict rule or literal enforcement of zoning provisions" and is intended to permit the "amelioration of the strict letter of the law in individual cases...relat[ing] to individual hardships peculiar to the property for which a variance is sought." *In re Appeal of Clements*, 2 Ohio App. 2d 201, 207-208, 207 N.E.2d 573, 578 (Cuyahoga County 1965); accord, *Nunamaker v. Board of Zoning Appeals of Jerusalem Twp.*, 2 Ohio St. 3d 115, 118, 443 N.E.2d 172, 175 (1982) ("[a] variance authorizes a landowner to establish or maintain a use which is prohibited by the zoning regulations [and]...results in a deviation from the literal import of the ordinance or resolution and may be granted only upon a showing of practical difficulties or unnecessary hardship"). Granting of variances is expressly authorized by various statutory provisions. See, e.g., R.C. 303.14(B) (county board of zoning appeals may grant "upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done"); R.C. 519.14(B) (township board of zoning appeals may authorize variances); R.C. 713.11 (municipal zoning board may "permit exceptions to and variations from the district regulations"); R.C. 4563.14 (airport zoning board of appeals may grant variances).

No Revised Code section, however, requires or authorizes the recording of an instrument constituting a zoning variance. Instead, the record of a zoning variance is included in the minutes of the appropriate variance granting authority. *See, e.g.*, R.C. 303.15 (the county "board of zoning appeals shall keep minutes of its proceedings showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall be immediately filed in the office of the board of county commissioners and be a public record"); R.C. 519.15 (the township board of zoning appeals shall keep minutes of its official action on file in the office of the board of township trustees as a public record). I find, accordingly, that the recording of the variance in the minutes of the zoning body that granted it is the only recording authorized.

Your question also inquires whether a zoning variance may be recorded as an "affidavit on facts relating to title" under R.C. 5301.252. R.C. 5301.252(A) states:

An affidavit stating facts relating to the matters set forth under division (B) of this section *that may affect the title to real estate* in this state, made by any person having knowledge of the facts or competent to testify concerning them in open court, may be recorded in the office of the county recorder in the county in which the real estate is situated. When so recorded, such affidavit, or a certified copy thereof, shall be evidence of the facts therein stated, insofar as such facts affect title to real estate. (Emphasis added).

Subdivision (B) of R.C. 5301.252 enumerates the five types of information that are the proper subject of such an affidavit, by stating:

The affidavits provided for under this section may relate to the following matters:

- (1) Age, sex, birth, death, capacity, relationship, family history, heirship, names, identity of parties, marriage, residence, or service in the armed forces;
- (2) Possession;
- (3) The happening of any condition or event that may create or terminate an estate or interest;
- (4) The existence and location of monuments and physical boundaries, such as fences, streams, roads, and rights of way;
- (5) In an affidavit of a registered surveyor, facts reconciling conflicts and ambiguities in descriptions of land in recorded instruments.

R.C. 5301.252(A), by its express terms, thus, authorizes only those matters specified in R.C. 5301.252(B) to be included as the subject of an affidavit under R.C. 5301.252.

The only category in R.C. 5301.252(B) that might plausibly include zoning variances is R.C. 5301.252(B)(3). To be brought within that description, a zoning variance would have to be "the happening of [a] condition or event that may create or terminate an estate or interest." Zoning, however, does not create an estate or interest under Ohio law. Rather, its function is limited to regulating the use of land. *See generally, Gibson v. City of Oberlin*, 171 Ohio St. 1, 5, 167 N.E.2d 651, 653 (1960) ("[i]t is, of course, fundamental that the state and municipalities may...regulate the use of land...and may from time to time change or amend such regulations. Therefore, it is true that an owner of property has no vested right to use that property in any particular manner"). Since a zoning variance does not relate to an estate or interest in real property, a variance is not a matter that may affect title to real estate.

Further, the purpose of R.C. 5301.252 "is to permit sworn statements, *as to facts which affect title to real estate*, to become part of the recorded documentary evidence of title without the necessity of having the statements made as testimony in court in the course of an action to quiet title." Ohio Legislative Service Comm'n analysis of Am. S.B. 205 (109th Gen. A. 1971) (emphasis added). A zoning variance, not being listed in R.C. 5301.252, and not affecting title to real estate, is, therefore, not a proper subject of an affidavit on facts relating to title.

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

1. Pursuant to R.C. 317.13, a county recorder may record only "deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded."
2. An instrument of writing is required or authorized to be recorded when statutory authority expressly provides for the recording of such an instrument.
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