

February 6, 2023

The Honorable Michael T. Gmoser
Butler County Prosecuting Attorney
Government Services Center, 11th Floor
P.O. Box 515, 315 High Street
Hamilton, Ohio 45012-0515

SYLLABUS:

2023-002

No statute directly mandates or authorizes the recording of a memorandum of contract between a real-estate broker and homeowner in which the homeowner agrees that the broker will be the listing agent if the homeowner sells his home within the next forty years. Therefore, it is within the county recorder's discretion to determine if the memorandum of contract is a type of instrument required or authorized by the Revised Code to be recorded and/or whether the submitted memorandum of contract is materially false or fraudulent. *See* R.C. 317.13(B).



DAVE YOST

OHIO ATTORNEY GENERAL

Opinions Section
Office (614) 752-6417
Fax (614) 466-0013

30 East Broad Street, 25th Floor
Columbus, Ohio 43215
www.ohioattorneygeneral.gov

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OPINION NO. 2023-002

The Honorable Michael T. Gmoser
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P.O. Box 515, 315 High Street
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Dear Prosecutor Gmoser:

You have requested an opinion regarding the recording of memoranda of contracts between a real-estate broker and various homeowners. I have framed your question as follows:

In recent years, homeowners have entered into memoranda of contracts with real-estate brokers, specifying that the brokers will serve as the listing agents if the homeowner sells within a forty-year period. Is a county recorder required to record these memoranda of contracts?

For the reasons that follow, I find that a county recorder must make the ultimate decision as to whether or not the memoranda of contracts at issue are recordable.

I

Your request notes that the particular memoranda of contracts at issue are representations of contracts entered into by a real-estate broker and various homeowners within your county. The real-estate broker offers to pay a homeowner a sum of money in exchange for the exclusive right to sell the homeowner's home if he sells within the next forty years. So, the contracts at issue are, essentially, exclusive-agent agreements between a real-estate broker and homeowners that the real-estate broker seeks to perfect by recording the memoranda with your county recorder. There is no indication that the contracts themselves are being recorded.

II

Prior to addressing your question, I must state my limitations. I cannot use the opinion rendering function to make findings of fact, determine the validity of a particular contract, or set forth the rights of individuals to a contract. *E.g.*, 2008 Op. Att'y Gen. No. 2008-025, at 2-260. As such, this opinion addresses only whether a county recorder *must* or *may* record the memoranda of contracts at issue.

A

“A county recorder is a creature of statute and may therefore exercise only those powers and duties expressly conferred upon her by statute or necessarily implied thereby.” *E.g.*, 2017 Op. Att'y Gen. No. 2017-010, Slip Op. at 1; 2-79; *see* R.C. 317.01. And though

the county recorder is a ministerial officer, he or she does have discretion in effectuating the duties of the office. *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 114, 173 N.E.2d 758 (1961); *see also* 1999 Op. Att’y Gen. No. 99-014, at 2-109. “The instruments subject to recording by a county recorder are set forth in R.C. 317.08(A)(1)–(28) and various other provisions in the Revised Code.” 2017 Op. Att’y Gen. No. 2017-010, Slip Op. at 1; 2-80; *see* R.C. 317.13(A).

R.C. 317.13(A) states in relevant part: “[T]he county recorder shall record in the official records ... all deeds, mortgages, plats, or other instruments of writing that are required or authorized by the Revised Code to be recorded and that are presented to the county recorder for that purpose.” But if the presented instrument of writing “is not required or authorized by the Revised Code to be recorded or the county recorder has reasonable cause to believe the instrument is materially false or fraudulent,” the county recorder “*may* refuse to record” the presented instrument of writing. *Id.* at (B) (Emphasis added); 2021 Op. Att’y Gen. No. 2021-006, Slip Op. at 8; 2-27 (“The use of the word ‘may’ in a statute denotes the granting of discretion”).

While a county recorder is not obligated to inspect, evaluate, investigate, or determine the validity or legal effect of presented instruments of writing, *see* R.C. 317.13(B), a county recorder *is required* to examine a submitted instrument of writing “to ascertain what type of instrument it purports to be.” 1996 Op. Att’y Gen. No. 96-019, at 2-71. Accordingly, if a county recorder finds that the instrument is “not required or authorized by the Revised Code” or the county recorder

“has reasonable cause to believe that the instrument is materially false or fraudulent,” the county recorder may refuse to record it. R.C. 317.13(B); 1997 Op. Att’y Gen. No. 97-055, at 2-335 (“the county recorder is expressly empowered to refuse to record an instrument of writing that is not of a type required or authorized to be recorded”); *Hutchins v. Baker*, 2020-Ohio-1108, 153 N.E.3d 140, ¶ 40 (7th Dist.); *Williams v. McClain*, 2nd Dist. Montgomery No. 28475, 2019-Ohio-4802, ¶ 12; *Kirk Excavating & Constr., Inc. v RKJ Ents., LLC.*, 2018-Ohio-23735, 108 N.E.3d 1278, ¶ 25 (7th Dist.).

As previously stated, R.C. 317.08(A)(1)–(28) sets forth instruments of writing that are subject to recording by the county recorder. And R.C. 317.08(D) states in relevant part:

“[T]he county recorder shall keep a separate set of records containing all transfers, conveyances, or assignments of any type of tangible or intangible personal property or any rights or interests in that property if and to the extent that any person wishes to record that personal property transaction and if the applicable instrument is acknowledged before a notary public.”

Whether or not the memoranda of contracts at issue fit within a category of instrument set forth in R.C. 317.08(A)(1)–(28) or fall under R.C. 317.08(D), and thus are authorized or required to be recorded, is a contract-specific question on which I cannot opine. *E.g.*, 2008 Op. Att’y Gen. No. 2008-025, at 2-260; *see also*

2013 Op. Att’y Gen. No. 2013-016, 2-155 (“the Attorney General is not authorized to interpret the terms of a particular contract or agreement”); 2005 Op. Att’y Gen. No. 2005-002, at 2-12 (“[w]e are not able, by means of this opinion, to make findings of fact”). Instead, the county recorder must decide whether or not the memoranda of contracts are recordable or not. *See, e.g., Wiley v. Triad Hunter Gathering LLC*, S.D. Ohio No. 2:12-cv-605, 2012 U.S. Dist. LEXIS 179354, at *30-33 (Nov. 29, 2012); R.C. 317.13(A) and (B). If the county recorder concludes that the memoranda of contracts are not recordable, the party seeking to record the memoranda of contracts has judicial recourse available under R.C. 317.13(C).

B

As just explained, no Revised Code section directly requires the recording of the memoranda of contracts at issue, or their underlying contracts. Before concluding, however, I pause to address R.C. 1311.85, *et seq.* Those provisions relate to broker liens, which allow a broker to “enter into a written contract for services related to selling, leasing, or conveying any interest in commercial real estate,” resulting in the broker having a lien on commercial real estate. R.C.1311.86(A). To effectuate these liens, the Revised Code specifically requires the broker to record a lien affidavit in the county recorder’s office of the county in which the commercial real estate is located. R.C. 1311.87(B)(1). But this broker’s lien attaches *only* to “commercial real estate.” *See* R.C. 1311.86. The definition of “commercial real estate” excludes the type of real estate at issue here. R.C. 1311.85(B) (stating that “commercial real estate”

“means any parcel of real estate in this state other than real estate containing one to four residential units...[it] does not include single-family residential units”). Based on the background facts provided, it seems that the memoranda of contracts at issue, despite involving residential properties, are extremely similar to broker liens under R.C. 1311.85, *et seq.* But they are *not* broker liens insofar as they relate to non-commercial property, meaning these statutes are largely irrelevant to the question you ask.

I must make clear that a broker who attempts to circumvent limits set forth in R.C. 1311.85 *et seq.* by recording a R.C. 1311.87(B) lien affidavit under a different name and different section of the Revised Code may incur liability. Though there is a presumption that information provided to the county recorder is accurate, making a false statement in an affidavit relating to title is considered falsification under R.C. 2921.13(A)(6). R.C. 5301.252(E).

Whether a memorandum of contract is, in fact, a cloaked broker’s lien requires the interpretation of a contract, which is a question solely for the courts.

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

No statute directly mandates or authorizes the recording of a memorandum of contract between a real-estate broker and homeowner in which the

homeowner agrees that the broker will be the listing agent if the homeowner sells his home within the next forty years. Therefore, it is within the county recorder's discretion to determine if the memorandum of contract is a type of instrument required or authorized by the Revised Code to be recorded and/or whether the submitted memorandum of contract is materially false or fraudulent. *See* R.C. 317.13(B).

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping "D" and "Y".

DAVE YOST
Ohio Attorney General