

February 25, 2016

The Honorable Nicholas A. Iarocci
Ashtabula County Prosecuting Attorney
25 West Jefferson Street
Jefferson, Ohio 44047-1092

SYLLABUS:

2016-006

The phrase “deed of absolute conveyance of land,” as it is used in R.C. 317.22, includes a deed transferring an easement. R.C. 317.22 requires the stamp and indorsement of the county auditor referred to in R.C. 319.202 upon a deed of absolute conveyance of land that transfers an easement before the deed may be recorded. R.C. 317.22 does not authorize a county recorder to record a deed of absolute conveyance of land that transfers an easement that does not have thereon the stamp and indorsement of the county auditor referred to in R.C. 319.202.



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OPINION NO. 2016-006

The Honorable Nicholas A. Iarocci
Ashtabula County Prosecuting Attorney
25 West Jefferson Street
Jefferson, Ohio 44047-1092

Dear Prosecutor Iarocci:

You have requested an opinion whether R.C. 317.22 authorizes a county recorder to record an instrument creating or conveying an easement or right-of-way that does not have thereon the stamp and indorsement of the county auditor referred to in R.C. 319.202 and R.C. 322.02(A).

A county recorder is a creature of statute and she may exercise only those powers expressly conferred upon her by statute or necessarily implied in order to effect the exercise of an express power. 2011 Op. Att’y Gen. No. 2011-036, at 2-289; 2000 Op. Att’y Gen. No. 2000-046, at 2-281; 1989 Op. Att’y Gen. No. 89-051, at 2-216; 1936 Op. Att’y Gen. No. 5383, vol. I, p. 451, at 452; *see State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 114, 173 N.E.2d 758 (1961). Likewise, a county auditor is a creature of statute, and he is bound by the authority granted his office by the General Assembly. 2012 Op. Att’y Gen. No. 2012-035, at 2-311 (quoting 1984 Op. Att’y Gen. No. 84-005, at 2-15); *see State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84 (syllabus, paragraph 1), 197 N.E. 112 (1935) (a county auditor may “exercise only such powers as are expressly delegated by statute, together with such implied powers as are necessary to carry into effect the powers expressly delegated”).

Requirements of R.C. 317.22, R.C. 319.202, and R.C. 319.54

We now turn to the statutes that are relevant to your question. Pursuant to R.C. 317.22, a county recorder shall not record a

deed of absolute conveyance of land or any conveyance, absolute or otherwise, of minerals or mineral rights ... until:

(A) The conveyance presented to the county recorder bears the stamp of the county auditor stating the conveyance has been examined and the grantor has complied with [R.C. 319.202];

(B) Such conveyance has been presented to the county auditor, and by the county auditor indorsed “transferred,” or “transfer not necessary.”

R.C. 317.22 (emphasis added). Further, a conveyance shall not be recorded “if the indorsement, indorsements, or stamps of indorsement of a county auditor indicating compliance with [R.C. 319.202] on the conveyance are in whole or in part defaced, illegible, or incomplete.” R.C. 317.22(D).

R.C. 317.22 prohibits a county recorder from recording a “deed of absolute conveyance of land” until the county auditor and the grantor have complied with the terms of R.C. 319.202. R.C. 319.202 requires that,

[b]efore the county auditor indorses any real property conveyance ... presented to the auditor pursuant to [R.C. 319.20] ..., the grantee or the grantee’s representative shall submit in triplicate a statement, prescribed by the tax commissioner, and other information as the county auditor may require, declaring the value of real property ... conveyed, except that when the transfer is exempt under [R.C. 319.54(G)(3)] only a statement of the reason for the exemption shall be required.

R.C. 319.54(G)(3) provides for the fees a county auditor shall charge and receive “[f]or receiving statements of value and administering [R.C. 319.202]” and sets forth a list of property transfers for which no fee shall be charged. These exempted transfers include, *inter alia*, several situations where little or no money is exchanged or where the transfer is made within a family or necessitated by an owner’s death. The exemption pertinent to your question is R.C. 319.54(G)(3)(p), which applies to the transfer “[o]f an easement or right-of-way when the value of the interest conveyed does not exceed one thousand dollars.” Thus, no fee is charged by the county auditor for the transfer of an easement valued at \$1,000 or less. R.C. 319.54(G)(3)(p).

You also reference R.C. 322.02 in your request letter. R.C. 322.02(A) sets forth the general authority for a county to levy and collect a “real property transfer tax on each deed conveying real property or any interest in real property” located wholly or partly within the county. This section further requires that the tax shall be paid to the county auditor at the time the deed is presented to the county auditor pursuant to R.C. 319.202 and prior to presenting the deed to the county recorder to be recorded. R.C. 322.02(A).

The Meaning of “Easement” and “Deed of Absolute Conveyance of Land”

In order to answer your question, we must understand what an easement is and whether an easement may be included in the phrase “deed of absolute conveyance of land” for purposes

of R.C. 317.22.¹ “Easement” is not defined by statute for purposes of R.C. 317.22 or R.C. 319.54 or otherwise. R.C. 1.42 provides that words not given a technical or particular meaning shall be construed according to their common usage. The dictionary defines an “easement” as “[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road).” *Black’s Law Dictionary* 622 (10th ed. 2014); *see also Merriam-Webster’s Collegiate Dictionary* 392 (11th ed. 2007) (an easement is “an interest in land owned by another that entitles its holder to a specific limited use or enjoyment”); *State ex rel. Butler Twp. Bd. of Trs. v. Montgomery Cnty. Bd. of Cnty. Comm’rs*, 162 Ohio App. 3d 394, 2005-Ohio-3872, 833 N.E.2d 788, at ¶28 (an easement is “a property interest in the land of another which entitles the owner of the easement to a limited use of the land in which the interest exists” (quoting Ohio Jurisprudence 3d, Easements and Licenses §1 (2005))).

An easement is created by express grant, implication, prescription, or estoppel. 1998 Op. Att’y Gen. No. 98-036, at 2-218. Easements by implication, prescription, and estoppel are easements that are recognized by the courts in situations where there is no express grant. *Id.* When an easement is created by express grant, the grant must “be included in the language of a deed, lease, or the like” and “meet the statutory requirements of R.C. 5301.01.” *Id.*; *Kamenar R.R. Salvage v. Ohio Edison Co.*, 79 Ohio App. 3d 685, 689, 607 N.E.2d 1108 (Union County 1992); *see also* R.C. 1335.04 (providing that no interest in land “shall be assigned or granted except by deed, or note in writing”); R.C. 5301.25 (instruments conveying or encumbering land must be recorded). “It follows that the recording of a transaction that affects an easement created by express grant will be governed by the statutes applicable to the type of instrument in which the express grant appears.” 1998 Op. Att’y Gen. No. 98-036, at 2-219.

¹ You have asked about “an instrument creating or conveying an easement or right-of-way.” A “right-of-way” is “[t]he right to pass through property owned by another. • A right-of-way may be established by contract, by longstanding usage, or by public authority (as with a highway). Cf. EASEMENT.” *Black’s Law Dictionary* 1522 (10th ed. 2014); *cf. State ex rel. Butler Twp. Bd. of Trs. v. Montgomery Cnty. Bd. of Cnty. Comm’rs*, 162 Ohio App. 3d 394, 2005-Ohio-3872, 833 N.E.2d 788, at ¶28 (“while ‘easement’ refers to the right to use land in a particular way, the term ‘right of way’ may refer to either the land itself *or* the right to use the land for the purpose of a transportation right of way”).

A right-of-way is a type of easement. *Black’s Law Dictionary* 622 (10th ed. 2014) (stating in the definition of “easement” that “[t]he primary recognized easements are (1) a right-of-way, (2) a right of entry for any purpose relating to the dominant estate, (3) a right to the support of land and buildings, (4) a right of light and air, (5) a right to water, (6) a right to do some act that would otherwise amount to a nuisance, and (7) a right to place or keep something on the servient estate”). For ease of discussion, and because a right-of-way is a type of easement, we will use only the term “easement” in this discussion and analysis.

The phrase “deed of absolute conveyance of land” also is not defined by statute for purposes of R.C. Chapter 317. We thus turn to the common legal definitions of these words. *See* R.C. 1.42. A “deed” is a “written instrument by which land is conveyed” and, “[a]t common law, any written instrument that is signed, sealed, and delivered and that conveys some interest in property.” *Black’s Law Dictionary* 501 (10th ed. 2014); *see generally Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St. 3d 49, 2015-Ohio-4551, at ¶38 (“an ‘interest in land’ is far broader than ownership of property and encompasses an interest in using the land, such as an easement”). “Conveyance” means “[t]he voluntary transfer of a right or of property” and an “absolute conveyance” is one “in which a right or property is transferred to another free of conditions or qualifications (i.e., not as a security). Cf. *conditional conveyance*.”² *Black’s Law Dictionary* 407 (10th ed. 2014). And “land” is “[a]n immovable and indestructible three-dimensional area consisting of a portion of the earth’s surface, the space above and below the surface, and everything growing on or permanently affixed to it.” *Id.* at 1008. Thus, a deed of absolute conveyance of land is a written instrument transferring without condition or qualification a right to a three-dimensional area consisting of a portion of the earth’s surface. Turning again to the definition of an easement—an interest in land consisting in the right to use or control the land for a specific purpose—it follows that a deed transferring an easement is included in the phrase “deed of absolute conveyance of land.”³

This conclusion is supported by previous opinions of the Attorney General. In 1928 Op. Att’y Gen. No. 3001, vol. IV, p. 2808 (syllabus), the Attorney General determined that

[a]n instrument of writing in which it is stated that the grantor grants, bargains, sells, conveys and warrants to the grantee, its successors and assigns forever, a right of way and easement with the right, privilege and authority to said grantee, its successors, assigns, lessees and tenants, to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires in, on, along, over, through or

² A “conditional conveyance” is a “conveyance that is based on the happening of an event, usu. payment for the property; a mortgage. Cf. *absolute conveyance*.” *Black’s Law Dictionary* 407 (10th ed. 2014).

³ You describe the documents being presented for recording in your county as labeled, simply, “Easement” and not “Deed” or “Deed of Easement.” The law does not recognize an instrument or document as an easement; rather, an easement is a right or interest that is expressed or conveyed by another legal document or instrument, such as a deed. While a document conveying an easement may be labeled “Easement,” it is nonetheless an instrument of writing for the absolute conveyance of an interest in land and, thus, a deed as contemplated by R.C. 317.22. We acknowledge, however, that form books concerning Ohio real property law practice contain examples of forms labeled as easement forms. *See, e.g.,* 2 Robert M. Curry and James Geoffery Durham, *Ohio Real Property Law and Practice* § 1100-3, -5 (6th ed. 2009).

across properly described lands for a consideration stated, and containing the statement that the grantee is to have and to hold an interest in said land unto said grantee, its successors and assigns, properly signed and acknowledged in the presence of witnesses, and duly acknowledged before an officer authorized in the premises, *is an instrument of writing for the absolute and unconditional sale and conveyance of an interest in lands, tenements or hereditaments and should under the provisions of [G.C. 2757 (now R.C. 317.08)] be recorded in the record of deeds.*

(Emphasis added.) This opinion’s conclusion relied heavily upon a specific set of facts. Nonetheless, the opinion considered the proper way to record a “deed of easement” and found that an instrument of writing granting an easement is an “absolute and unconditional sale and conveyance of an interest in lands” and should be recorded accordingly in the deed records.⁴

Returning to your question, we conclude that R.C. 317.22 requires the stamp and indorsement of the county auditor referred to in R.C. 319.202 upon a deed of absolute conveyance of land before such a deed may be recorded. *See* 1939 Op. Att’y Gen. No. 958, vol. II, p. 1354 (syllabus, paragraph 1) (“[i]f a deed of absolute conveyance of land which does not bear the endorsement of a county auditor is presented to the county recorder with the proper filing fee, the latter is without authority to accept such deed for filing and recording”). The phrase “deed of absolute conveyance of land,” as it is used in R.C. 317.22, includes a deed transferring an easement. Thus, R.C. 317.22 does not authorize a county recorder to record a deed of absolute conveyance of land that creates or conveys an easement and does not have thereon the stamp and indorsement of the county auditor referred to in R.C. 319.202.

Conclusion

The phrase “deed of absolute conveyance of land,” as it is used in R.C. 317.22, includes a deed transferring an easement. R.C. 317.22 requires the stamp and indorsement of the county auditor referred to in R.C. 319.202 upon a deed of absolute conveyance of land that transfers an

⁴ Several subsequent Attorney General opinions set forth similar conclusions. *See* 1933 Op. Att’y Gen. No. 312, vol. I, p. 344 (syllabus, paragraph 2) (“[e]asements may be created by instruments in writing for the absolute and unconditional sale or conveyance of lands, tenements and hereditaments. Under [G.C. 2757 (now R.C. 317.08)], it is the county recorder’s duty to record such instruments in the record of deeds”); 1929 Op. Att’y Gen. No. 329, vol. I, p. 515, at 517 (“[t]he conveyance here in question is a right of way or easement in and over the lands of the grantor, and the same is an interest in real estate which the township trustees are authorized to take by purchase and by deed”); 1929 Op. Att’y Gen. No. 306, vol. I, p. 481, at 482 (confirming the conclusion of 1928 Op. Att’y Gen. No. 3001, vol. IV, p. 2808). *But see* 1934 Op. Att’y Gen. No. 2633, vol. I, p. 600, at 602 (“[t]he factor of perpetuality [of the easement] was important in the rendition of the 1928 [and 1933] opinion”).

easement before the deed may be recorded. R.C. 317.22 does not authorize a county recorder to record a deed of absolute conveyance of land that transfers an easement that does not have thereon the stamp and indorsement of the county auditor referred to in R.C. 319.202.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

MICHAEL DEWINE
Ohio Attorney General