

OPINION NO. 82-072

Syllabus:

A county recorder may not require that, prior to recording, deeds conveying property outside of municipalities be marked by a regional planning commission with a stamp stating "no plat required," unless such requirement is imposed by a rule or regulation promulgated under R.C. 711.05 or R.C. 711.10.

To: Arthur M. Elk, Ashland County Prosecuting Attorney, Ashland, Ohio
By: William J. Brown, Attorney General, September 28, 1982

I have before me your request for my opinion as to whether a county recorder may require that deeds conveying property outside of municipalities be marked by a regional planning commission with a stamp stating "no plat required" before he records such deeds. You state in your letter of request that the regulations adopted by the Ashland County Regional Planning Commission, pursuant to R.C. Chapter 711, do not require its approval of such deeds.

In absence of authority to the contrary, a county recorder has a mandatory duty to record deeds presented to him for such purposes. R.C. 317.08(A) provides that "[t]he county recorder shall keep. . .[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. . . ." R.C. 317.13 provides, in part, that "[t]he 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." The use of the imperative verb "shall" in a statute setting forth the duties of a public officer generally 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 officer's performance of his duty. Heid v. Hartline, 79 Ohio App. 323, 73 N.E. 524 (Tuscarawas County 1946). The conclusion that the duty imposed upon a county recorder by these statutes is a mandatory duty is also compelled by R.C. 317.33, which provides, in part:

If a county recorder refuses to receive a deed or other instrument of writing presented to him for record. . .or neglects, without good excuse, to record a deed or other instrument in 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.

As you note in your letter, I recently had occasion to consider an issue similar to the one you raise. Asked to consider whether a county recorder could refuse to record a deed because he believes it to be legally defective, I noted in 1980 Op. Att'y Gen. No. 80-029 that there are several exceptions to a county recorder's duty to record instruments required or authorized to be recorded and presented to him for such purposes. 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); State ex rel. Puthoff v. Cullen, 5 Ohio App. 2d 13, 213 N.E.2d 201 (Lucas County 1966) (a recorder has no duty to record a deed that is improperly executed); State ex rel. Preston v. Shaver, 172 Ohio St. 111, 173 N.E.2d 758 (1961) (a recorder may refuse to record a deed if the legal description is not sufficiently definite). None of the exceptions noted in Op. No. 80-029 would, however, permit a recorder to refuse to record a deed because it has not been marked by a regional planning commission with a stamp stating "no plat required." It is, therefore, necessary to determine if there is any other exception applicable in this instance.

R.C. Chapter 711 establishes the authority for the regulation of subdivisions of land. The term "subdivision" is broadly defined in R.C. 711.001(B)(1) to include

[t]he division of any parcel of land shown as a unit or as contiguous units on the last preceding tax roll, into two or more parcels, sites, or lots, any one of which is less than five acres for the purpose, whether immediate or future, of transfer of ownership. . .[exemptions omitted].

R.C. 711.01 imposes a mandatory duty on an owner of land who desires to lay out a subdivision to cause the territory to be surveyed and to have a plat made by a competent surveyor. R.C. 711.041 provides that no plat of lands outside a municipal corporation may be recorded without the approval of the board of county commissioners. Similar authority to approve plats is vested in municipal planning commissions or county or regional planning commissions by R.C. 711.09 and R.C.

711.10, respectively. In addition, R.C. 711.05, R.C. 711.09 and R.C. 711.10 empower these local authorities to adopt general rules and regulations governing plats and subdivisions of land falling within their respective jurisdictions.

Of particular significance to your question is R.C. 711.121, which provides that

[t]he county auditor and the county recorder shall not transfer property or record deeds or leases which attempt to convey property contrary to the provisions of Chapter 711. of the Revised Code. In case of doubt, the county auditor or county recorder may require the person presenting such deed or lease to give evidence of the legality of a conveyance by metes and bounds by an affidavit as to the facts which exempt such conveyance from the provisions of Chapter 711. of the Revised Code.

Pursuant to this statute, a county recorder must refuse to record a deed which attempts to convey property contrary to the provisions of R.C. Chapter 711. Since R.C. 711.121 is a special provision limiting the authority of a county recorder to record deeds, it must prevail as another exception to the general provisions, set forth in R.C. Chapter 317, which require a recorder to record all instruments presented to him. R.C. 1.51.

Since a county recorder's duty to refuse to record a deed under R.C. 711.121 is limited, however, to deeds which attempt to convey property contrary to the provisions of R.C. Chapter 711, it is necessary to determine the circumstances under which the division of property by an instrument of conveyance is subject to regulation under R.C. Chapter 711. In 1953 Op. Att'y Gen. No. 3285, p. 654, one of my predecessors had occasion to consider this issue. It is noted therein that

[a] "subdivision," as defined in Section 711.001, Revised Code, may be created either (1) by a conveyance of a part of a single parcel of land whereby either the part conveyed or the part remaining is less than five acres, or (2) by a survey and plat thereof by an owner who elects to "lay out a village, or subdivision or addition to a municipal corporation" as provided in Section 711.01, Revised Code.

1953 Op. No. 3285 (syllabus one). After an exhaustive analysis of each of the provisions set forth in R.C. 711.001 through R.C. 711.14, my predecessor concluded that the provisions of R.C. Chapter 711 are directly applicable only in those instances in which an owner of land elects to "lay out" a subdivision in the historical sense of that term, see R.C. 711.01, and that such provisions were not intended to be applicable to other "subdivisions," as defined in R.C. 711.001, however created, unless made applicable thereto by rules or regulations promulgated under R.C. 711.05, R.C. 711.09 or R.C. 711.10. 1953 Op. No. 3285 (syllabi two and three). My predecessor's analysis of this issue was subsequently confirmed by the enactment of R.C. 711.40, which provides that

[u]nless required by rules and regulations adopted pursuant to the provisions of sections 711.05, 711.09 and 711.10 of the Revised Code, the provisions of sections 711.01 to 711.39, inclusive, of the Revised Code, shall not apply to the division of any parcel of land by an instrument of conveyance.

Accordingly, an attempted conveyance of real property by deed can be contrary to the provisions of Chapter 711 of the Revised Code for the purposes of R.C. 711.121 only if the attempted conveyance would create a subdivision, as defined in R.C. 711.001, and the grantor has failed to comply with a rule promulgated under R.C. 711.05, R.C. 711.09 or R.C. 711.10. 1953 Op. No. 3285 (syllabus four). Thus, R.C. 711.121 permits a county recorder to refuse to record a deed that has not been stamped by a regional planning commission with a stamp stating "no plat required" only if such requirement is imposed by a rule or regulation promulgated under R.C. 711.05, R.C. 711.09 or R.C. 711.10. Of course, any such rule or regulation may impose this requirement only with respect to deeds that would effect divisions of land resulting in the creation of a "subdivision" as defined in R.C. 711.001. See 1963 Op. Att'y Gen. No. 358, p. 404.

In specific response to your question, it is, therefore, my opinion, and you are advised, that a county recorder may not require that, prior to recording, deeds conveying property outside of municipalities be marked by a regional planning commission with a stamp stating "no plat required," unless such requirement is imposed by a rule or regulation promulgated under R.C. 711.05 or R.C. 711.10.