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Ownership of and Access to Land Records: Private Records Intended for Public Inspection

Land Records Exist Solely To be Inspected and to Give Notice.

Rights in real estate are created by written instruments: deeds, mortgages, easements and similar grants. The conveyance of such a right occurs when the instrument is delivered to the holder. Thus, for example, title to real estate passes from seller to buyer when the seller hands the deed to the buyer. The conveyance is complete on delivery; the buyer need do nothing more to perfect his title in the property. A mortgage may be foreclosed, as between lender and borrower, if it has been delivered, even if it has never been recorded with the Register of Deeds.

Recording of real estate documents serves only one purpose: to give notice *to the rest of the world* of the rights granted in a conveyance. The sole purpose of the office of Register of Deeds (more properly termed a Recorder) is to "register" documents in one or more indices which can be examined by the public. Buyers and lenders are bound by the rights of others which are noted in the Recorder's indices. A buyer or lender that chooses not to record a conveyance may lose its rights to a subsequent buyer or lender, who has no notice of those rights. This system for giving of notice fails if the indices are incomplete or not up to date.

English recording laws were nascent when America was first colonized.[1] Massachusetts adopted the first recording act in this country in 1640, creating the vestiges of the race-notice system.[2] Under that first act, however, the sole function of the register of deeds office was to maintain an index of conveyance documents by names, legal description, type of instrument, and date and time of registration. The original documents were returned to the owner with no copy having been made.

New York, founded by Dutch immigrants, adopted the "recording" system employed in The Netherlands. A Dutch Recorder of Deeds performs two functions: maintenance of an index, and copying of the instrument being registered. This transformed the office into that of Recorder, rather than mere register. [3] As is discussed further below, conveyance instruments copied by the

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Recorder are not "public records," because they are not records created by government officers in their official capacities.

Other colonies also adopted laws based on the Dutch recording system. As territories were added to the nation, similar recording laws were adopted in the newly-formed states, including Michigan.

The certainty of real property rights is now an indispensable aspect of the economic system on which the American economic marvel rests. Businesses and individuals alike are able to obtain necessary capital only because they are able to secure their loans with real estate, not mere personal credit. By contrast, it is the *lack* of certainty to real property rights that keeps businesses and individuals in much of the rest of the world from obtaining vital capital:

If you live in the U.S. or U.K., you can take recorded deeds for granted; the notion of enforceable rights to real estate goes back to feudal times. On that foundation of ownership is built a huge edifice of capital that includes trillions of dollars in mortgage debt and trillions in real estate equity. Contrast that with the many parts of the world, from Mexico to Russia, where control of land has in the past century lurched from aristocrats to government confiscators to peasant squatters.[4]

The certainty of real estate rights is also integral to the high value of American residences:

Our land title records are among our most valuable possessions. They are essential to our security in owning our homes and our businesses, and they make possible the transfer of land assets freely from one person to another."[5]

As is often stated, the certainty of title to real estate is of paramount concern to those who invest large sums of money for its purchase, or who lend based primarily on the security of real estate rather than personal credit.[6] America's enviable situation is thus derived directly from the original colonies' adoption of good land records laws a century before the Declaration of Independence.

When the indices maintained by the Recorder are lost, so is the certainty of land titles. San Francisco felt the pandemonium of uncertain land titles when the great earthquake and fire of 1906 burned up the county land records. This literally put land up for grabs, spurring the California legislature to pass a law providing a Draconian method for quickly quieting title. The United States Supreme Court rejected a challenge to the law based on Due Process, in the name of pragmatism.

The high court said that the protection of real estate titles is an important inherent power of government:

As it is undisputed that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like [the fire]. ...*The well-being of every community requires that the title to real estate therein shall be secured, and that there be convenient and certain methods of determining any unsettled questions respecting it*.[7]

The official land records also burned in the great Chicago fire of 1871. The *Chicago Times* reported:

There has been absolute destruction of all legal evidence of titles to property in Cook County. The annoyance, calamity and actual distress that will arise from this misfortune are not yet properly appreciated. Something equal to the necessities of the case must be done quickly.[8]

Chicago was saved the San Francisco calamity of thousands of quiet-title lawsuits because three *private* sets of indices maintained by title abstractors were hauled away before their owners' buildings burned. One set was loaded on a wagon by the persuasion of a pistol. Thus, because there was no need to prove land ownership in the courts, the Illinois legislature instead adopted the Burnt Records Act of 1872, which made the records of the three companies admissible as evidence in all courts of record. To this day, all title searches in Cook County begin with those private records, now owned by Chicago Title & Trust Company.

The United States Supreme Court emphasized anew the importance of settled real estate titles, in striking down an interpretation of the old Bankruptcy Act that would have permitted a deed on foreclosure to be overturned even after the property had been sold to a third party.[9] Analogizing to its decision on the San Francisco fire case, the court said *Durrett's* interpretation of the law "would have a profound effect" on settled real estate titles, saying that "[t]he title to every piece of realty purchased at foreclosure would be under a federally created cloud."[10]

Thus, American society depends on "convenient and certain methods of determining" title to real estate. The importance of the office of Recorder is evidenced by the fact that many states declare in their state constitutions that such an office shall be created and maintained by the state legislature.[11]

The Land Records Are Owned by Private Citizens and the Register of Deeds is a Custodian of Copies of Those Records.

The Recorder does not own the copies of documents given to him or her for indexing and copying. A conveyance such as a deed is "owned" by the grantee. The grantee delivers it to the Recorder solely for the purpose of causing it to be indexed, and thus to impart constructive notice to the rest of the world. The mere delivery to the Recorder does not transfer ownership of the instrument to the Recorder. When the Recorder has performed the indexing task, he or she returns the original to the owner.

Delivery of an instrument to the Recorder implicitly gives the Recorder permission to make a copy. However, delivery for recording does not transform a conveyance into a public record, which it is not. A public record is one created by a government officer in his or her official capacity.[12] Rather, the copies made by the Recorder are, at most, quasi-public in nature.[13] Only a few of the records housed by the Recorder are properly considered to be public, such as government patents.[14]

Over time, there have been changes in the means by which Recorders have made copies of recorded documents:

Originally the register of deeds hand copied the documents to make the courthouse record; later the information was typed on forms. With the development of copy processes, courthouses began making a photocopy of the documents for reproduction on heavy paper and binding into volumes. Currently, in the more populated areas, the register of deeds may be keeping a hard copy of the document but instead may microfilm the documents.[15]

Since the above article was written, some Recorders have begun to make electronic images of the instruments.

Some registers of deeds claim a copyright on documents, and create access agreements that purport to prohibit the further sale or distribution of the copies of copies which are being sold. A Michigan court recently found that such a resale prohibition violates the Sherman Act.[16]

This type of copyright claim was also rejected in Florida, in a case which drew national attention and a number of *amici* briefs. In that case, *Microdecisions v.*

Skinner, the county land records officer sought to claim a copyright in the GIS maps he created as his official duties. He proposed a license agreement which would have prohibited resale or distribution of the maps. The license agreement, based on a copyright claim, was found invalid.[17]

Privacy Laws Concerning Public Records Do Not Apply to Land Records Given to the Register of Deeds as Custodian.

The Recorders' new premise that they own the records for which they are mere custodians would not make good public policy. It has already led to an irreconcilable clash with privacy concerns. Some recorders now militate for the redaction of "personally-identifiable information" such as social security numbers from the record copies they hold, in order to protect the privacy of the property owners. In February, 2007, at the request of the state's registers of deeds, Texas Attorney General Greg Abbott issued an opinion that it is a violation of law for County Clerks or Recorders to permit the viewing of any real estate record containing the Social Security number of a living person.[18] This opinion was premised on his assertion that conveyance documents are "government records."

Following the Texas opinion, the furor spilled over to Florida, Washington, Ohio, California, New Mexico and New York, where Recorders began currently "scrambling to remove documents from the Internet," according to a series of articles.[19] However, one Florida lawmaker said the state would seek to exempt county clerks from redaction of data, saying that the cost would be prohibitive: "If we were required to ensure that every exemption to the statute were not in documents, it would break the state. The cost would be exorbitant."[20]

Similarly, in North Carolina, there was a recent movement to adopt a law allowing homeowners to cross off racial restrictions from the Recorder's copies of old recorded documents. However, critics pointed out that such restrictions have long since been struck down by federal law, and that alteration of a recorded document is legally meaningless and contrary to the purpose of public viewing of those records.[21]

These misguided notions about ownership and control over the indices and recorded documents are contrary to the purpose of the office of Recorder as it was first created almost four hundred years ago. The Recorder is a custodian of copies of private records that have been delivered *voluntarily* by private persons

for the specific purpose of having them inspected by the public. The Recorder's statutory duty is to create and maintain indices to be made available to the public for free for the express purpose of searching title and locating the relevant documents for review. The Recorder does not own the copies of recorded documents. The indices are not products, and no charge may be made to inspect them.

These debates did not exist before Recorders began purchasing expensive electronic record systems. Recorders began to take the position that real estate records are public or "government" records and are "owned" by the Recorder solely for the sake of garnering income to pay for these systems, and to grant exclusive licenses to vendors for online access to the records. The unexpected, serious and expensive consequence of this new position is that Recorders cannot rationally refuse to redact information from "content" documents they also claim to own. In earlier times, Recorders would have rejected all such demands, and avoided the huge cost of such operations, by correctly reasoning that they do not have the power to alter documents delivered to them as custodians, and that any such tampering with private documents would be antithetical to the purpose of their offices, which is to allow free inspection of those records.

The charging of a fee for inspection of the statutory indices is also contrary to the settled notion that indices maintained by law are available for inspection by the public for free.[22] The charging of a fee for inspection of the indices could only be justified by the vendor's theory that their electronic database is *not* the statutory index, but a search "product." If this is true, however, the Recorder has abandoned the statutory indices on adoption of the electronic database.

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[1] The race-notice recording system and its roots in English common law is thoroughly analyzed in Francis S. Philbrick, *Limits of Record Search and Therefor of Notice—Part I*, 93 U.Pa.L.Rev. 125 (1944), recognized as the seminal modern study of the subject. Professor Philbrick noted that recording of deeds was "vastly promoted" in England by the 1536 Statute of Uses, and almost completely displaced the ritual of feoffment by the 1600's, and that the race-notice concept had been adopted rather uniformly in American colonies by the Declaration of Independence. Recording systems are also discussed at length in Ray E. Sweat, *Race, Race-Notice and Notice Statutes: The American Recording System*, 3-AUG Prob. & Prop. 27 (May/June 1989) (hereafter *Sweat*); Harry M. Cross, *The Record "Chain of Title" Hypocrisy*, 57 Columbia L.Rev. 787 (1957); Corwin W. Johnson, *Purpose and Scope of Recording Statutes*, 47 Iowa L.Rev. 231 1962); and William E. Ryckman, Jr.,

Notice and the "Deeds Out" Problem, 64 Mich.L.Rev. 421 (1965).

[2] See *Sweat*, p. 27.

[3] Joyce Palomar, *Patton and Palomar on Land Titles*, §4 (3d Ed. 2003) (hereafter *Patton*).

[4] Kerry A. Dolan, *Waking Dead Capital*, Forbes magazine, May 15, 2001, http://www.forbes.com/forbes/2000/0515/6511098a.html.

[5] Basye, *Clearing Land Titles* § 9, p. 62 (1970) (hereafter *Basye*).

[6] *Waicker v. Banegura*, 357 Md. 450, 745 A.2d 419 (Md. 2000).

[7] *American Land Co. v. Zeiss*, 219 U.S. 47, 60, 31 S.Ct. 200, 204, 55 L.Ed. 82 (1911) (emphasis added) (quoting from *Arndt v. Griggs*, 134 U.S. 316, 33 L.Ed. 918, 10 Sup.Ct. 557 (1878)).

[8] See https://www.ctic.com/history2.asp.

[9] *Durrett v. Washington Nat. Ins. Co.*, 621 F.2d 201 (5th Cir. 1980).

[10] *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 114 S.Ct. 1757, 1764-5, 128 L.Ed.2d 556 (1994).

[11] See, for example, Michigan Constitution, Art. 4; Wisconsin Constitution, Art. VI, § 4.

[12] "Public records are written memorials made by a public officer, pursuant to authority granted by law or necessary to be kept in discharging a duty imposed by law." *Coleman v. Commonwealth*, 66 Va. 865 (1874) (overruled on other grounds).

[13] See *Patton*, § 6, p. 16, and footnote 56.

[14] *Patton*, § 4, p. 15.

[15] Vance, *Titles to Real Estate*, University of Wisconsin Law School Press, p. 2-1.

[16] See my article on the case, *Recorder Restriction on Resale of Images Violates Sherman Act*, The Title Insurance Law Newsletter, April, 2007, p. 10.

[17] *Microdecisions v. Skinner*, 889 So.2d 871 (Fla. 2004).

[18] Attorney General of Texas Opinion No. GA-0519, issued February 28, 2007. Abbott suspended his own opinion after a firestorm of criticism from across the

country, and pleas that he would bankrupt local government with the obligation to redact information from millions of records. See: http://www.themonitor.com/onset?id=414&template=article.html.

[19] http://www.davickservices.com/Governments_Furiously_Removing.htm .

[20] *Id.*

[21] *Deeds: Records Preserve Prejudice*, Greensboro News Record, March 5, 2006, p. A1.

[22] See *Public Records Photo Ban Not Just About Privacy; Counties Make Money Charging for Copies*, Milwaukee Journal Sentinel, March 17, 2007, p. B1, in which a ban on cameras in several Wisconsin Recorders' offices was denounced as a means of forcing people to pay for copies of documents. However, the Recorders interviewed confirmed that it is still "free to look" at the indices.