

OPINION NO. 84-031

Syllabus:

Where the county recorder elects to maintain two separate sets of records as set forth in R.C. 317.08(F), he may index, keep, and record in a separate single volume or shall maintain as may otherwise be

required by statute all unemployment compensation liens, personal tax liens, mechanics' liens, notices of liens, certificates of satisfaction or partial release of estate tax liens, discharges of recognizances, excise and franchise tax liens on corporations, and the liens provided for in R.C. 1513.33, R.C. 1513.37 and R.C. 5311.18; pursuant to R.C. 317.09(B), the instruments listed in R.C. 317.09(A) which may be maintained in the federal tax lien record are to be maintained in the "official records" as described in R.C. 317.08(F).

To: James R. Unger, Stark County Prosecuting Attorney, Canton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 31, 1984

I have before me your opinion request in which you ask:

Is the county recorder required to maintain a separate book or books for the recording of unemployment compensation liens, federal tax liens, personal tax liens, mechanic's liens, notices of liens, certificates of satisfaction or partial release of estate tax liens, discharge of recognizances, excise and franchise tax liens and other specified liens where that public officer elects to keep two sets of books as is provided in Section 317.08(F) of the Ohio Revised Code[?]

Since the position of county recorder is created by statute, the recorder has only those duties prescribed by statute. State ex rel. Preston v. Shaver, 172 Ohio St. 33, 173 N.E.2d 758 (1961). Pursuant to R.C. 317.13, the 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" (emphasis added).

The manner in which the county recorder maintains certain records is governed, in part, by R.C. 317.08 which states:

Except as provided in division (F) of this section, the county recorder shall keep five separate sets of records as follows:

(A) 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; . . .

(B) A record of mortgages, in which shall be recorded:

(1) All mortgages. . . or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;

(2) All executory installment contracts for the sale of land executed after September 29, 1961, which by the terms thereof are not required to be fully performed by one or more of the parties thereto within one year of the date of the contracts;

(3) All options to purchase real estate, including supplements, modifications, and amendments thereof, but no such instrument shall be recorded if it does not state a specific day and year of expiration of its validity.

(C) A record of powers of attorney;

(D) A record of plats, in which shall be recorded all plats and maps of town lots, of the subdivision thereof, and of other divisions or surveys of lands. . . ;

(E) A record of leases, in which shall be recorded all leases, memoranda of leases, and supplements, modifications, and amendments thereof.

All instruments or memoranda of instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record. The recorder may index, keep, and record in one volume unemployment compensation liens, federal tax liens, personal tax liens, [mechanics'] liens, notices of liens, certificates of satisfaction or partial release of estate tax liens, discharges of

recognizances, excise and franchise tax liens on corporations, and liens provided for in sections 1513.33, 1513.37, and 5311.18 of the Revised Code.

The recording of an option to purchase real estate, including any supplement, modification, and amendment thereof, under this section shall serve as notice to any purchaser of an interest in the real estate covered by the option only during the period of the validity of the option as stated in the instrument.

(F) In lieu of keeping the five separate sets of records required in divisions (A) to (E) of this section, a county recorder may record all the instruments required to be recorded by this section in two separate sets of record books. One set shall be called the "official records" and shall contain the instruments listed in divisions (A), (B), (C), and (E) of this section. The second set of records shall contain the instruments listed in division (D) of this section. (Emphasis added.)

Except as provided in R.C. 317.08(F), R.C. 317.08 requires the county recorder to maintain five separate sets of records. See generally Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage").

As noted in your letter, R.C. 317.08(F) sets forth an alternative to maintaining "the five separate sets of records required in divisions (A) to (E) of [R.C. 317.08]." Using this alternate procedure, the county recorder may record "all the instruments required to be recorded by this section in two separate sets of records books." One book, known as the "official records," shall contain the instruments listed in divisions (A), (B), (C), and (E) of R.C. 317.08. The other shall contain the instruments listed in R.C. 317.08(D).

You specifically ask whether a county recorder who elects to maintain only two sets of records as prescribed by R.C. 317.08(F) must maintain a separate book or books for the recording of unemployment compensation liens, federal tax liens, personal tax liens, mechanics' liens, notices of liens, discharges of recognizances, excise and franchise tax liens and other liens specified in the paragraph following R.C. 317.08(E). It appears that because of the manner in which R.C. 317.08 is separated into various divisions, you question whether the documents listed in the paragraph following R.C. 317.08(E) are part of the instruments listed in R.C. 317.08(E) which should be maintained in the "official records" as described in R.C. 317.08(F).

Upon reading R.C. 317.08, it becomes apparent that the documents about which you ask are not part of the records listed in R.C. 317.08(E). R.C. 317.08 sets forth five separate sets of records (deeds, mortgages, powers of attorney, plats, and leases) which the county recorder must generally maintain. Within each category of records are specified the types of instruments which must be recorded in that set of records. R.C. 317.08(E) requires that leases, memoranda of leases, and supplements, modifications, and amendments thereof are to be maintained in the set of lease records. The paragraph immediately following R.C. 317.08(E) begins with a general statement that all instruments or memoranda of instruments entitled to record are to be recorded in the proper record in the order in which they are presented. Such requirement clearly applies to all instruments or memoranda of instruments entitled to record, not only to leases and other documents set forth in the paragraph marked as division (E) of R.C. 317.08. The paragraph then sets forth those documents which the recorder may maintain in a single volume apart from the five sets of records required to be kept pursuant to R.C. 317.08. The maintenance of such separate volume is an alternative to the manner in which such documents are otherwise required to be recorded. See, e.g., R.C. 1311.06 (recorder is to maintain separate book for affidavits of mechanics' liens); R.C. 4141.23 (recorder is to keep a book called the "unemployment compensation lien record"); R.C. 5719.04 (personal tax lien record). If the instruments about which you ask

were to be included in one of the five sets of records set forth in R.C. 317.08(A) through (E), it appears that many of such instruments would fit more properly in the set of records set forth in R.C. 317.08(B) (mortgages) rather than R.C. 317.08(E) (leases). See 1969 Op. Att'y Gen. No. 69-001 (water utility liens which purport or attempt to encumber or affect real property should be recorded in the set of mortgage records kept pursuant to R.C. 317.08(B)(1)); 1962 Op. Att'y Gen. No. 3030, p. 409 (lien perfected under R.C. 3929.18 is an instrument in writing whereby the land to which such lien attaches is conditionally affected and should be recorded in the set of records maintained under R.C. 317.08(B)(1)). Thus, it appears that the paragraph following the paragraph designated as R.C. 317.08(E) is not part of division (E). I also note that the second paragraph following the paragraph designated as division (E) of R.C. 317.08 discusses the recording of options to purchase real estate, which are specifically enumerated in R.C. 317.08(B)(3) as included within the set of mortgage records. Such paragraph, therefore, is also clearly not part of division (E) of R.C. 317.08.

Because the paragraph following R.C. 317.08(E) clearly has no relation to lease records, I must conclude that the documents listed in such subsequent paragraph are not part of the records listed in R.C. 317.08(E), and should not, therefore, be maintained in the set of "official records" as described in R.C. 317.08(F).¹ See generally *In Re Kline*, 6 Ohio C.C. 215, 216 (Franklin County 1892) ("[t]he connection in which a statute is placed, may aid in determining its meaning where that is otherwise doubtful, but it cannot defeat a competent and clearly expressed legislative purpose"); 1982 Op. Att'y Gen. No. 82-008 at 2-29 ("the placement of a statute may serve as an aid when construing ambiguous statutory language, but is not determinative of the scope or purpose of the provision"); 1981 Op. Att'y Gen. No. 81-083. Rather, when the county recorder chooses to maintain the five separate sets of records as set forth in R.C. 317.08(A) through (E) or the two separate sets of records as described in R.C. 317.08(F), he "may" index, keep, and record the documents about which you ask in a separate volume. See 1962 Op. No. 3030. If he does not elect to keep in a single volume the documents about which you ask, the county recorder must keep, index, and record such documents in the manner otherwise prescribed by statute, whether he maintains five sets of records as prescribed by R.C. 317.08(A) to (E) or two sets of records as set forth in R.C. 317.08(F). I note, however, that R.C. 317.09(B) specifies that when the county recorder elects, pursuant to R.C. 317.08(F), to keep only two separate sets of records, those instruments which would otherwise be recorded in the federal tax lien index, pursuant to R.C. 317.09(A), are to be recorded in the "official records" as described in R.C. 317.08(F).

It is, therefore, my opinion, and you are advised, that where the county recorder elects to maintain two separate sets of records as set forth in R.C. 317.08(F), he may index, keep, and record in a separate single volume or shall maintain as may otherwise be required by statute all unemployment compensation liens, personal tax liens, mechanics' liens, notices of liens, certificates of satisfaction or partial release of estate tax liens, discharges of recognizances, excise and franchise tax liens on corporations, and the liens provided for in R.C. 1513.33, R.C. 1513.37 and R.C. 5311.18; pursuant to R.C. 317.09(B), the instruments listed in R.C. 317.09(A) which may be maintained in the federal tax lien record are to be maintained in the "official records" as described in R.C. 317.08(F).

¹ The Legislative Service Commission analysis of Sub. H.B. 128, 113th Gen. A. (1979) (eff. Jan. 1, 1980) in which division (F) was added to R.C. 317.08 supports the conclusion that where the county recorder chooses to maintain only two sets of records, the documents about which you ask need not be maintained in either of the two sets of records kept by the recorder pursuant to R.C. 317.08(F). In listing the types of records which are to be maintained in the two sets of records described in R.C. 317.08(F), the analysis makes no mention of the liens and other instruments about which you ask.