



STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL

No. 17-001
DEPARTMENT OF JUSTICE
Official
JAN 10 2017

STATE OF NEBRASKA

SUBJECT: Authority of a Register of Deeds to Refuse to Record an Instrument or to Withdraw an Instrument After Recording

REQUESTED BY: Senator John Stinner
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

You have requested an opinion from this office on four questions relating to the authority of a register of deeds to refuse to record a document or to require certain changes to be made to a document prior to filing. You informed us that you are considering a bill for the 2017 legislative session that relates to the statutory authority of a register of deeds and have attached a draft of the legislation which would amend Neb. Rev. Stat. §§ 23-1503.01, 23-1506 and 23-1311(2012). You have posed the following questions:

- (1) Whether a register of deeds has the authority to refuse to record a document or to withdraw documents from record which meet the statutory formatting and signature requirements and for which the correct fee will be paid.
- (2) Whether a register of deeds has the authority, before filing a document, to require legally valid changes to be made to such document.

- (3) Whether the county is liable for expenses incurred as a result of rerecording documents which were recorded in error (e.g. filed in the improper index or alphabetized improperly).
- (4) Whether the refusal by a register of deeds to file a document that meets the statutory requirements for filing, and the withdrawal of a document that is already of the record, are misdemeanors under Neb. Rev. Stat. §§ 84-1213 (2014) and 23-1507 (2012).

BACKGROUND

At the outset, we note it is our long-standing policy not to provide opinions to members of the Legislature on the interpretation or constitutionality of existing statutes. Op. Att'y Gen. No. 157 (Dec. 24, 1985). Accordingly, we normally would decline to provide an opinion on the questions presented. As you have proposed legislation which could be impacted by our conclusions, we will proceed to respond to your questions.

Neb. Rev. Stat. §§ 23-1501 to 23-1528 (2012) set out the various duties of a county register of deeds with regard to the recordation and indexing of instruments affecting real estate. The general duties of a register of deeds in Nebraska are set out at Neb. Rev. Stat. § 23-1506 (2012), which provides, in pertinent part, that a register of deeds "shall also record or cause to be recorded all deeds, mortgages, instruments, and writings presented to him or her for recording and left with him or her for that purpose." Neb. Rev. Stat. § 23-1507 (2012) provides that a "register of deeds who shall neglect to perform any of the duties described in section 23-1506 shall be guilty of a Class IV misdemeanor."

There are also statutes in Chapter 76, Article 2 of the Nebraska statutes which pertain to the execution and recording of real estate conveyances and which will be discussed below to the extent they impact the duties of a register of deeds.

DISCUSSION

1. Authority to refuse to record a document or to withdraw documents

Your first question is whether a register of deeds has the authority to refuse to record a document or to withdraw documents from record which meet the statutory formatting and signature requirements and for which the correct fee will be paid. In other words, you are inquiring about what appears to be a mandatory duty to record all instruments pursuant to Neb. Rev. Stat. § 23-1506. For the reasons set forth below, we conclude that, under current statutes, a register of deeds should refuse to record a document and may withdraw documents from record in limited circumstances in which the instruments are not entitled to be recorded under Nebraska law. While, as a general rule, the duties of a register of deeds under Nebraska statutes are ministerial, our office has issued several prior opinions in which we stated that a register of deeds should refuse to record certain instruments presented to him or her.

In an opinion found at 1945-46 Rep. Att'y Gen. at page 35 (dated February 27, 1946) we opined that a register of deeds should refuse to accept for recording a mortgage which was not acknowledged. Our opinion was based, in part, on Neb. Rev. Stat. § 76-211, which requires that deeds and other instruments conveying an interest in real estate must be signed and acknowledged by the grantor. We also noted Neb. Rev. Stat. § 76-241, which states that deeds and other instruments shall not be deemed lawfully recorded unless previously acknowledged or proved. We then concluded that a register of deeds should refuse to record an instrument which shows upon its face that it is not entitled to be recorded. With regard to the authority to withdraw a document from the record, we stated "there would seem to be no good reason why the public official should not expunge the mortgage from the record voluntarily where it is obvious on the face of the instrument itself that it should not have been recorded."

That 1946 opinion was readopted in 1979-80 Rep. Att'y Gen. 231 (Opinion No. 164, dated October 30, 1979).¹ The issue presented was whether an instrument which is obviously a copy is entitled to be recorded. However, we first discussed our earlier opinion and stated that:

It could be argued that the foregoing statute (Neb. Rev. Stat. § 23-1506) makes it the duty of a register of deeds to record all instruments purporting to affect title to real estate or purporting to convey real estate, even though such instruments are wholly unacknowledged. However, we believe such an interpretation is manifestly too broad. We do not construe Neb. Rev. Stat. § 23-1506 as making it the duty of a register of deeds to record improperly executed or unacknowledged instruments. Until such instruments are properly executed and acknowledged, they are not what they are called or purport to be and are thus not entitled to be recorded.

Id. at 232.

In the 1979 opinion we cited the case of *Eggert v. Ford*, 21 Wash. 2d 152, 150 P. 2d 719 (1944), which held that a Washington statute requiring a county auditor to record real estate conveyances did not make it the duty of the county auditor to record unacknowledged instruments. We also noted Nebraska cases in which the Supreme Court held that an instrument which was not properly acknowledged or proved does not operate as constructive notice, even though recorded. *Dawson County State Bank v. Durland*, 114 Neb. 605, 209 N.W. 243 (1926); *Warnick v. Latta*, 44 Neb. 807, 62 N.W. 1097 (1895) (in which the Court stated that "without being witnessed or acknowledged, this instrument should not have been recorded").

¹ This 1979 opinion also specifically overruled and superseded an opinion at 1979-80 Rep. Att'y Gen. 68 (Opinion No. 44, dated March 6, 1979) in which we stated that a register of deeds could not refuse to file any instruments presented.

We then answered the question posed in that 1979 opinion request, concluding that “a mere copy of an original instrument is not entitled to be recorded and a register of deeds may thus refuse to record it. Such an instrument would obviously not comply with the requirements of Neb. Rev. Stat. § 76-211. 1979-80 Rep. Att’y Gen. at 232.

Subsequently, in Op. Att’y Gen. No. 233 (November 2, 1984), we discussed the legal status of common law liens and other instruments affecting real estate that are not entitled to be filed under Nebraska law and concluded that the register of deeds must refuse to file such instruments. We cited Neb. Rev. Stat. § 76-237 which provides that “[e]very deed, entitled by law to be recorded, shall be recorded” and § 76-238 which makes reference to instruments “which are required to be or which under the laws of this state may be recorded.” We concluded “it is clear that deeds and other instruments affecting real estate can be filed with the register of deeds only if the instruments are entitled by law to be recorded or which under the law of this state may be recorded, and that the registers of deeds have the authority and duty to refuse to file instruments that do not meet those requirements.” *Id.* at 1. We added that, as these instruments were not authorized by law to be filed, the refusal by a register of deeds to file such documents should not result in liability for the register of deeds or for the county.

We answered a similar question concerning the recording of “land patents” which were being presented to various clerks and registers of deeds in Op. Att’y Gen. No. 102 (June 11, 1985). We explained that, although the document submitted with the opinion request was titled “land patent”, it was a purported grant of a land patent to two individuals by the same two individuals and not a transfer of title to public land to a private individual by the government. Such a document was invalid, null and void and not a document recognized by Nebraska law and entitled to be filed. Therefore, we concluded that a register of deeds “has a duty to review the document, to determine whether the ‘land patent’ is a grant of public land by the United States to an individual, and to reject any ‘land patents’ that do not meet these requirements.” *Id.* at 3. We also pointed out that “it would not be appropriate for the Clerk/Register of Deeds to review the various documents presented for filing in order to determine if the person presenting such documents has any interest in the real estate in question”, adding that the register of deed’s duty is solely to review the form of the document, to determine if it is in fact a document entitled to be recorded. *Id.* at 4.

Finally, in Op. Att’y Gen. No. 86024 (February 25, 1986), we addressed the authority of a register of deeds regarding the filing of improper “lis pendens.” We concluded that these bogus “lis pendens” did not meet the requirements for a valid lis pendens under Neb. Rev. Stat. § 25-531, were a legal nullity and were, thus, not entitled to be recorded. “When presented to the register of deeds for filing, they should be refused, or in the event that they were filed, they should be treated as if they had never been filed and returned to the filer along with the filing fees.” *Id.* at 2.

You have asked whether a register of deeds may refuse to record a document which meets statutory formatting and signature requirements. We assume you are referring to those formatting requirements set out at Neb. Rev. Stat. § 23-1503.01 and the signature requirements set out at Neb. Rev. Stat. § 23-1311. Section 23-1311 clearly states that the register of deeds may refuse to file any instrument failing to meet the signature requirements set out therein. Also, it is our view that, under current law, a register of deeds may also refuse to record a document which, on its face, is not entitled to recording. Therefore, even if a document meets statutory formatting requirements, the register of deeds may refuse to record the document if it is defective for the reasons we discussed in our prior opinions. This includes instruments not properly acknowledged, instruments which are mere copies of original documents, and certain other instruments which are not what they are called or what they purport to be. As such instruments are not permitted or authorized to be recorded under our state law, they may also be treated as if they had never been filed and withdrawn from the record.

2. Authority to require legally valid changes prior to filing

Your second question is whether a register of deeds has the authority, before filing a document, to require legally valid changes to be made to such a document which meets statutory formatting and signature requirements. We are not entirely sure what you mean by “legally valid changes.” As discussed above, it is our view that a register of deed’s authority is not only to determine whether statutory formatting and signature requirements are met. There are additional limited circumstances in which a register of deeds may refuse to record a document which, on its face, is not entitled to recording. In that sense, a register of deeds could require, for example, that a document be properly acknowledged or that the original be presented for recording rather than a copy. However, we think the register of deed’s authority would generally be limited to determining whether the document shows clearly on its face that it is not entitled to recording. As explained in Op. Att’y Gen. No. 102 (June 11, 1985), which we discussed in our answer to your first question, the register of deed’s duty is to review the form of the document and not to go beyond the document and attempt to determine, for example, whether the person presenting the document has an interest in the real estate or other underlying facts.

3. Liability for expenses incurred as a result of rerecording documents

Your third question is whether, under current statute, a county is “liable for expenses incurred as a result of rerecording documents which were recorded in error (e.g. filed in the improper index or alphabetized improperly).” Neb. Rev. Stat. § 23-1506 (2012) provides that when documents are recorded, “[i]f an error should occur in recording any of the writings mentioned in this section thereby necessitating the rerecording of same, the expense thus incurred shall be paid out of the general fund of the county in the same way as any other claim, and the amount so paid shall be collected from the official responsible for the error or from his or her official bond.” It thus appears that if a document is filed in the improper index or alphabetized improperly, the county and appropriate county official would be liable for expenses incurred as a result of the recording error.

4. Misdemeanors under Neb. Rev. Stat. §§ 84-1213 and 23-1507

Your fourth question is whether the refusal by a register of deeds to file a document that meets the statutory requirements for filing, or the withdrawal of a document that is already of record, constitute a misdemeanor under Neb. Rev. Stat. §§ 84-1213 (2014) and 23-1507 (2012). Beginning with § 23-1507, this statute provides that a register of deeds who “shall neglect to perform any of the duties described in section 23-1506 shall be guilty of a Class IV misdemeanor.” The duties described in § 23-1506 include the recording of all deeds, mortgages, instruments and writings presented for recording. However, as discussed above in answer to your first question, certain instruments may not be entitled to recording, whether because they fail to meet statutory formatting and signature requirements or because they are not permitted or authorized to be recorded pursuant to Nebraska conveyancing statutes. In our view, if there is no duty to record such an instrument, the failure to do so would not constitute a misdemeanor under § 23-1507.

We note that the draft legislation which you submitted to our office with your opinion request proposes to amend § 23-1503.01 (formatting requirements for instruments submitted for recording in the office of the register of deeds) and § 23-1311 (legible signature requirements for instruments presented for filing or recording in the office of the county clerk or register of deeds). It appears to us that your amendments to these statutes would require a register of deeds to record all instruments that satisfy the formatting and signature requirements of these two statutes and would provide that the failure to record all instruments constitutes a Class IV misdemeanor. The authority of the register of deeds to refuse to record an instrument in the circumstances which we have addressed in prior opinions (one which is not properly acknowledged, which is a mere copy of an original instrument or which is not of a character entitled to be recorded under Nebraska law) would be in question if § 23-1503.01 and § 23-1311 were amended as you propose.

Neb. Rev. Stat. § 84-1213(1) (2014) provides that all records under the control of state or local agencies in the course of their public duties “are the property of the state or local agency concerned and shall not be mutilated, destroyed, transferred, removed, damaged, or otherwise disposed of, in whole or in part, except as provided by law.” Subsection (2) then provides that any person who “willfully mutilates, destroys, transfers, removes, damages, or otherwise disposes of such records, except as provided by law . . . shall be guilty of a Class III misdemeanor.” We first note that this statute is part of the Records Management Act, Neb. Rev. Stat. § 84-1201 et seq., which generally governs the management, retention and disposition of state or local government records pursuant to regulations and standards issued by the State Records Administrator and State Records Board. It does not appear to us that a refusal to record a document would subject a register of deeds to liability under this statute. As to criminal liability for withdrawing a document, the answer to your question may depend on the factual circumstances involved in withdrawing a document that has already been recorded. Our prior opinions indicate that the removal of a document which was not entitled to be recorded, would

likely not violate this statute as we previously concluded that a register of deeds had authority to refuse to record such a document and to withdraw such a document. Other circumstances would need to be addressed depending on the particular facts of each incident.

CONCLUSION

For the reasons set forth herein, it is our opinion that a register of deeds may refuse to record and may withdraw a document which, on its face, is not entitled to recording. The refusal to record a document under those circumstances would not constitute a misdemeanor under either Neb. Rev. Stat. § 23-1507 or § 84-1213. The withdrawal of a document which was not entitled to be recorded would also likely not constitute a misdemeanor under either current statute.

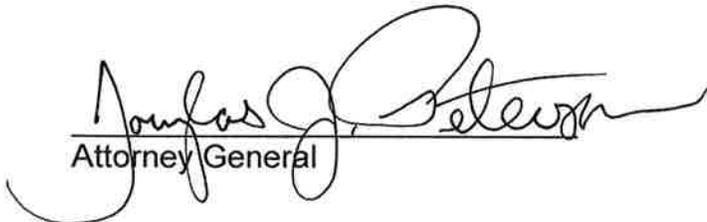
Sincerely,

DOUGLAS J. PETERSON
Attorney General



Lynn A. Melson
Assistant Attorney General

Approved by:



Attorney General

pc. Patrick J. O'Donnell
Clerk of the Nebraska Legislature