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**To:** Environment and Transportation (House)

**From:** Legislative Committee of the Real Property Section

**Date:** March 22, 2024 [Hearing Date March 26, 2024]

**Subject:** **SB 423** – Real Property - Recordation - Procedures

**Position:** **Favorable**

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The Real Property Section of the Maryland State Bar Association (MSBA) **supports** SB 423 – Real Property - Recordation – Procedures.

This bill seeks to solve *some* of the problems related to recording real property transaction documents in the land records.

Anyone who has managed real estate transactions in Maryland knows “closing” the transaction, which includes obtaining all the executed closing documents, clearing all liens of record, collecting the funds, and disbursing them according to the parties instructions, is only the beginning of the battle. Perfecting the transaction by recording documents in the Land Records can be as challenging as any stage of a transaction *and in many instances, the most difficult part.*

Maryland’s land recording system is made up of 24 jurisdictions (23 Counties and the City of Baltimore) managed by the State of Maryland Clerks of the Circuit Court. But the Clerks can only record what documents make their way to them after navigating the many offices and toll booths the documents have to go through along the way. These toll booths are maintained by Finance Offices in each of the 24 jurisdictions. To be clear, the Clerks and the Courts are not the problem. The problem is with what happens before the documents reach them.

In a basic residential real estate transaction in which there is a deed and a single mortgage or deed of trust, and the documents are e-recorded through Simplifile, the process could take as little as several days. However, if the property is in Baltimore City, this could take a month or more. But not all transactions can utilize Simplifile because they do not meet the requirement that it be a “simple” or “basic” transaction. And often there are hidden charges that cannot be discovered prior to submission for recording which cause them to be rejected.

Maryland can and should do better. In most jurisdictions around the country, documents are

recorded on the day on which they are delivered to the recorder by the settlement company. The documents are delivered to the recorder in the morning on the day of closing (i.e., the day the money is disbursed), and title is brought to date at that time. Once the documents are recorded, the recording service notifies the settlement company that the documents are on record, at which time the settlement company disburses the money according to the parties instructions. *All on the same day.*

We cannot disburse funds on that schedule in Maryland because of the length of time it takes for a deed to make its way through the system. No seller, buyer, lender, or real estate salesperson is willing to wait around for several days or weeks (or more in the case of Baltimore City) to receive their money or be able to move into the property. And if the seller's existing secured loan is not paid on the date of "closing," it will continue to accrue interest for which the settlement statement and Closing Disclosure do not account.

So what happens in Maryland to enable "closings" to include the disbursement of funds to the seller and seller's lender, so interest will cease to accrue, and to others and for the parties to act as if there has been a completed and perfected transaction? The parties inherently assume certain risks of which they may not even be aware and which the recording system is designed to prevent. Also, if the buyer has purchased title insurance, the title insurance company will assume certain risks, and at the same time try to reduce its exposure by obtaining representations and indemnities from parties to the transaction. Frequently, the settlement company will hold back from the settlement proceeds the amount of money that it thinks will be necessary to satisfy the liens and claims of the jurisdiction where the property is located. Some of the problems with the current system are explained in further detail below. While the entire process should be overhauled, with 24 jurisdictions and 24 different ways of doing things, that would be difficult without a concerted effort by all stakeholders. Instead, as a meaningful first step, **this bill** seek two modest changes that we hope will lead to cooperation by all stakeholders to fix our antiquated system.

#### **A. Prerequisites To Recording Documents**

Prerequisites to recording documents are found in RP §3–104. This code section contains about 80 provisions. This testimony focuses on the several most responsible for recording rejections:

#### **B. The Most Common Reasons for Recording Rejections**

##### **1. Pay Open Assessments**

RP §3–104(a)(1) states that "[t]he Clerk of the Circuit Court may record an instrument that effects a change of ownership if the instrument is: (i) Endorsed with the certificate of the collector of taxes of the county in which the property is assessed. . . ."

All public taxes, and if applicable, special assessments, special district taxes, public water and sewer assessments, front foot benefit charges, personal property taxes, hotel taxes, rollback or recapture taxes, local town or city taxes and municipal fees due and owing on the property must be paid in full to the treasurer, tax collector, or director of finance of the jurisdiction in which the property is assessed.

Obtaining the amounts due often takes *herculean* effort. Six jurisdictions require purchasing official lien certificates. Four have optional certificates or tax reports. These lien certificates or tax reports typically contain only the basic real property tax information. Few include any other additional fees or charges that may need to be remitted in order to record a document. Seventeen jurisdictions have incorporated municipalities that must be separately contacted. Some require special water readings. Some have special forms in addition to the Maryland Land Intake Sheet. Some jurisdictions have separate utility companies owned by municipalities that you must contact directly. Some may have various departments under one roof, but you need to contact each individual department to inquire about charges and obtain a sign off. All have different turnaround times (from as little as three days to two weeks, and at times in Baltimore City six weeks or more) and varying expiration dates.

Not all necessary information is available through online systems. Information provided online does not prevent jurisdictions from demanding fees or assessments not showing in the system. Surprises at the county finance level happen frequently. Sometimes, the County will create a new bill (even when you obtain their voluntary lien certificate) once it receives the deed attempting to transfer title to a property and will refuse to process the deed until such new, undisclosed, and undiscoverable “lien” is paid in full.

The problem with all this, as noted above, is that the money on deposit with settlement company has already been disbursed or allocated to expected expenses, and there are no funds left from which to pay these hidden charges. The settlement company is left in the untenable position of trying to collect after the “closing” the additional sums from the responsible party before the deed is recorded or paying the hidden charges and trying to thereafter collect from a party who may then claim that it “has no money,” or arguing with the jurisdiction that rejected the deed, which goes nowhere.

The real estate settlement industry is responsible for collecting countless billions of dollars on behalf of the State and local governments each year for which the State and local governments pay nothing. Is it fair to make settlement companies the guarantor of hidden or undisclosed charges? Is it unreasonable to demand that each jurisdiction state promptly after request what must be paid to transfer title and allow the settlement companies to rely on such statement? If a mistake is made and the jurisdiction does not request all of the funds to which it might be entitled, the jurisdiction could demand payment from the responsible party (usually the seller) after the deed has been recorded, but that should not hold up recording or prevent a *bona fide* purchaser from obtaining record title to the property.

## 2. *Recording v. e-Recording*

Maryland began allowing electronic recording in some jurisdictions in 2015, and because of the pandemic that last remaining counties have now embraced it. Only simple recording packages can be e-recorded. As noted above, for a basic residential real estate transaction, if the documents are e-recorded, the documents could make it to record in as little as a day or two, or as long as a month or more.

But most commercial transactions are not eligible to be processed in the e-recording system, and thus, must be presented in person or by overnight mail (e.g., FedEx, UPS, DHL etc. . .). If presented in person, recording can be accomplished on the same day in some jurisdictions, but in others the documents must be left at each stop. Two or three office stops (Town, County Finance, Clerk of Court) is normal and can add hours of travel between the offices. Some jurisdictions require you to drop off the package and wait for clerks to get to yours for review. The delay between drop off and processing varies based on jurisdiction, time of year and the complexities of the recording package. It can be a few days or months if there is a problem. Often one does not learn that a document has been rejected for several weeks.

### **C. SB 423 is a Modest Proposal to Correct Two Problems**

This testimony highlights some of the challenges to successful recording in Maryland but does not cover every pitfall. The process is complicated even if there are no hidden fees or rejections based on a county's view of the transaction. The real estate settlement industry has noticed that the Clerks and the Finance Offices often do not work together to improve the process. And thus, this bill and SB 884 seeks to change the words "may agree" to "shall coordinate" in RP§ 3-703 (i.e., the Electronic Recording Act).

The second proposed change is to require each jurisdiction to provide a timely lien certification that can be relied on to show all charges and fees assessed against the property and prevent recording rejections based on charges not shown on the lien certificate. In exchange, the jurisdictions may charge a modest fee to cover the cost of producing such certificates.

This proposed addition to RP § 3-104 is modeled after Baltimore City Code Article 28, Section § 2-3, which says in relevant part, "The Director of Finance . . . shall make provisions for: (1) the systematic and reliable collection of accurate data in regard to all municipal charges or assessments affecting any particular piece of real property situate in the City of Baltimore; and (2) the issuance, upon the application of any person tendering a fee . . . for each separate piece of property inquired about, of a certificate showing plainly and accurately the kind and amount of all such charges or assessments against such particular piece of property. . . . Said certificate hereby provided to be issued, when issued, shall be and become effectual in favor of every bona fide purchaser for value and without notice to bar any claim thereafter, for and on account of any charge or assessment against any particular piece of property, precluded by the fact of said certificate. . . ."

We recognize that this proposed legislation will not cure all of the problems related to the recording process and delays in recording in Maryland, but this bill includes an important first step to doing so.

For these reasons, the Real Property Section Counsel of the MSBA **supports SB 423** and asks for a **favorable report**. Thank you for your consideration.