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Judicial Proceedings Committee
Executive Nominations Committee

Senate Chair

Joint Committee on
Children, Youth, and Families

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

**Testimony of Senator Mary-Dulany James
In Favor of SB 423 - Real Property - Recordation – Procedures
Before the Environment and Transportation Committee
On March 26th, 2024**

SB 423 passed the Judicial Proceedings Committee and the Senate unanimously. This legislation is a modest proposal by the Real Estate section of the Maryland State Bar Association, and it is a small step toward addressing two questions:

1. Why is it so difficult to record land record documents?
2. How can we begin to address this difficulty?

Attached to my remarks is a five-page white paper from the 2023 legislative session explaining some of the many problems and obstacles that have grown over the years (Exhibit A). At the heart of the issue is the fact that Maryland's land recording system is not unified or uniform. Because state law says deeds and other instruments affecting real property must be filed in the county where the land is located (Real Property Section 3-103), our system is made up of 24 jurisdictions, each of which have differing requirements. Over the years, in addition to requiring that all real estate taxes be paid prior to the recording of instruments covering title, local governments have been loading up the process with all sorts of special assessments, special district taxes, public water and sewer assessments, personal property taxes, hotel taxes, local town or city taxes, and so on. These too all must be paid in full.

While starting in 2015, Maryland began allowing the electronic filing of documents, it was not until the pandemic that all the different jurisdictions embraced it. So far, however, only simple recording packages can be e-recorded. That means some residential real estate and most commercial transactions are not eligible. Thus, these different and often tangential fees and taxes are administered and collected by offices in addition to the Clerks of Court, such as city halls, local administrators, treasurers, or directors of finance that must be personally visited. These processes can take hours at each visit or require that documents be dropped off necessitating return trips. Some offices have their own special forms that are

different from the standardized Maryland Land Intake Sheet. Not all fees, taxes, and assessments, nor their necessary information, are available online. Information that is provided online does not stop jurisdictions from demanding payment of fees and assessments not showing in the system but is due and owed. Local county offices have refused to process a deed based on these newly created bills with surprise undisclosed charges, and the practical effect of this sharp practice is that settlement companies are left with either becoming a de facto collection agency chasing after the responsible party who may claim they have no money to pay or taking a loss on the hidden charges.

There are many issues and complications because of the variability and inefficiencies across counties and even within counties that strongly suggest the real estate recordation system should be overhauled, ideally with all the stakeholders' collaboration behind it.

This bill is meant as a first step toward that cooperation and brings some certainty to real estate closings, which are ubiquitous in every county and affect thousands of our constituents every day and every year, by amending the Real Property Code as follows:

First, by changing the word "may" to "shall" in Real Property Section 3-703 (b) (7) and (c) (The Electronic Recording Act) so that it reads:

"(b) ... the clerk of a circuit court...

(7) SHALL COORDINATE with other State or county officials on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording documents or the electronic payment of fees or taxes

(c) The State Department of Assessments and Taxation or a county:

(1) MAY ACCEPT by electronic means any fee or tax that the Department or county is authorized to collect as a condition precedent to recording a document; and

(2) SHALL COORDINATE with the clerk of a circuit court or other State official on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording documents or the electronic payment of fees or taxes."

The Maryland Circuit Court Clerks Association supports this proposal and is willing to take the lead and work with the local finance officials to develop a process for allowing the electronic payment of all fees and taxes required to record documents (see their email attached from last session in Exhibit B).

Second, by adding new section (b)(3) into Real Property Section 3-104 (Prerequisites to Recording), the goal of this language is to improve the nature and quality of certificates

already existing by mandating they be made accurate, complete, timely, and, once issued, can be relied on in favor of all purchasers.

The real estate settlement industry is responsible for collecting billions of dollars on behalf of state, local, and municipal governments each year at no cost. These taxes and fees (along with annual real property taxes) are the backbone of county revenues and budgets. It behooves our local governments to begin to modernize and streamline all facets of recordation and elevate notice, transparency, and certainty to its proper place.

As a final point, during the previous legislative session, this bill passed unanimously in the Judicial Proceedings Committee, the Senate, and this committee. There are minor differences between the 2023 and 2024 versions, which can be found in Exhibit C. The issues that this legislation seeks to address were brought to my attention well into the 2023 session, so it was a late-filed bill that did not end up receiving a vote by the entire House of Delegates. I hope with an earlier start this year, it will find success in the House.

Exhibit A

Why is it so Difficult to Record Documents in the Land Records?

How Can We Begin to Address this Difficulty?

Anyone who has handled commercial 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.

Maryland can and should do better. In most jurisdictions around the country, documents get recorded on the day on which they are delivered to the recorder by the settlement company. Generally, 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 record 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, we propose some 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 can be found in RP §3–104. This code section contains about 80 provisions. This paper will focus on the several most responsible for 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 most recently 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. **A Modest Proposal to Correct Some of the Problems**

This paper has highlighted 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, we propose to change the word “may” to “shall” in RP§ 3-703 (i.e., the Electronic Recording Act) which states in relevant part (with the proposed change shown):

(a) In this section, “paper document” means a document received by the clerk of a circuit court in a form that is not electronic.

(b) In compliance with any standards established by the Administrative Office of the Courts, the clerk of a circuit court: . . .

(7) ~~May~~ **SHALL** agree with other State or county officials on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording documents or the electronic payment of fees or taxes.

(c) The State Department of Assessments and Taxation or a county ~~may~~ **SHALL**: . . .

(2) Agree with the clerk of a circuit court or other State official on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording documents or the electronic payment of fees or taxes.

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.

Thus, the real estate settlement industry proposes adding such a requirement with the addition to RP § 3-104 of a new section (b)(2)(iii) stating:

(iii) THE DIRECTOR OF FINANCE, OR HIS OR HER DESIGNEE, FOR EACH COUNTY SHALL MAKE PROVISIONS FOR:

(1) THE TIMELY, SYSTEMATIC, AND RELIABLE COLLECTION OF ACCURATE DATA IN REGARD TO ALL COUNTY AND MUNICIPAL, IF APPLICABLE, CHARGES OR ASSESSMENTS AFFECTING ANY PARTICULAR PIECE OF REAL PROPERTY SITUATE IN THE COUNTY; AND

(2) THE ISSUANCE WITHIN FIVE BUSINESS DAYS OF RECEIPT OF THE APPLICATION OF ANY PERSON TENDERING A FEE OF \$55 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 THAT WILL BE REQUIRED TO OBTAIN THE ENDORSEMENT CONTEMPLATED IN SECTION (II).

(3) SUCH 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;

(4) SUCH CERTIFICATE SHALL BE ACCEPTED BY THE COLLECTING AGENT IF PRESENTED WITHIN 45 DAYS OF ISSUANCE WHO SHALL ENDORSE THE DEED AS REQUIRED IN (III) AND UPON PAYMENT OF ALL CHARGES SET FORTH IN SAID CERTIFICATE ALONG WITH ANY APPLICABLE TRANSFER AND RECORDATION TAXES.

(5) NEITHER THE PAYMENT OF THE SAID FEE NOR THE ISSUANCE OF SUCH CERTIFICATE MENTIONED SHALL IN ANY EVENT BE HELD TO PRECLUDE THE CLAIM BY THE COUNTY TO ANY CHARGE OR ASSESSMENT AS AGAINST THE OWNER OF THE PROPERTY AT THE TIME SUCH CERTIFICATE AS IS HEREIN PROVIDED FOR IS APPLIED FOR AND ISSUED OR ANY PERSON ACQUIRING SAID PROPERTY WITH KNOWLEDGE OF SUCH CLAIM.

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, through the Chief Clerk in charge of said Bureau, to be appointed as aforesaid, 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 proposal will not cure all of the problems related to the recording process and delays in recording in Maryland, but we believe that this includes an important first step to doing so.

Exhibit B

From: Enten, D. Robert <denten@gflaw.com>
Sent: Thursday, March 16, 2023 11:30 AM
To: James, Mary-Dulany Senator <MaryDulany.James@senate.state.md.us>
Subject: SB971

See email below to Bill O'Connell.

Bill, The Maryland Circuit Court Clerks' Association supports this legislation. A special Thank You goes out to Sen James for asking for our position. Please pass that along if you could.

Thank you,

Katherine

Katherine B. Hager

Clerk of Court

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Exhibit C

SB 423 was drafted identically to the 2023 version of the bill. The two amendments below are the changes mentioned in the final paragraph of this testimony.

SB0423/373723/1

BY: Judicial Proceedings Committee

AMENDMENTS TO SENATE BILL 423 (First Reading File Bill)

AMENDMENT NO. 1

On page 1, in line 4, strike “or municipality”; and in line 7, after “deed” insert “on payment of transfer and recordation taxes and all charges stated in the certificate”.

AMENDMENT NO. 2

On page 3, in line 6, strike “OR MUNICIPALITY”; strike beginning with “INDICATING” in line 15 down through “BOOKS” in line 19 and substitute “SHALL ENDORSE THE DEED AS REQUIRED UNDER PARAGRAPH (1)(II) OR (2)(II) OF THIS SUBSECTION ON PAYMENT OF ALL CHARGES SET FORTH IN THE CERTIFICATE AND ANY APPLICABLE TRANSFER OR RECORDATION TAXES”; in line 30, strike “OR MUNICIPALITY”; and in line 31, after “PARAGRAPH” insert “, INCLUDING PROCEDURES FOR OBTAINING A STATEMENT ON A CERTIFICATE ISSUED UNDER THIS PARAGRAPH OF ALL TAXES, ASSESSMENTS, AND CHARGES DUE TO A MUNICIPALITY ON THE TRANSFER OF OWNERSHIP OF A PROPERTY”.