



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

## BILL ANALYSIS



Telephone: (517) 373-5383  
Fax: (517) 373-1986  
TDD: (517) 373-0543

Senate Bill 927 (Substitute S-2 as passed by the Senate)  
Senate Bill 1160 (Substitute S-1 as passed by the Senate)  
Sponsor: Senator Tupac A. Hunter (S.B. 927)  
Senator Mark C. Jansen (S.B. 1160)  
Committee: Local, Urban and State Affairs

*(as enrolled)*  
*(as enrolled)*

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**RATIONALE**

Since the 1830s, county registers of deeds have been responsible for recording documents involved in real estate transactions, such as deeds, mortgages, land contracts, liens, and court orders. Recording a document gives notice to the public, and subsequent purchasers in particular, of ownership interests in property, encumbrances, and pending lawsuits affecting property rights. Recording can determine the priority of multiple interests; if there are two mortgages on the same parcel, for example, the first recorded generally has priority. In addition, some statutes require documents to be recorded by specific deadlines, in order for an interest to be valid or have priority. The responsibilities of registers of deeds and the procedures for recording documents are set forth in a law that was enacted in 1846. Although its provisions have been amended over time, the law still requires registers to note certain information in entry books when they receive a document; after a document is reviewed for completeness and transcribed or duplicated, the register must enter the information in a general, alphabetized index (sometimes called the grantor-grantee index). Most or all registers stopped using entry books in the 1980s, however, after legislation allowing registers to computerize the general index was enacted, and the use of computers became commonplace.

Without the use of entry books, the gap between the time a document is received and the time information is entered in the general index (whether in a book or on the

computer) can be problematic in at least two respects. The statute requires registers of deeds to note in the books the day, hour, and minute of receipt, in the order in which the instruments are received, and provides, "The instrument shall be considered recorded at the time so noted...All subsequent owners or encumbrances shall take subject to the perfected liens, rights, or interests." In practice, however, many registers evidently first examine a document and then "certify" the time of receipt as the time the review or transcription process is finished, which can be weeks or months after the actual receipt. This has led to differing views as to when a document is considered recorded, and resulted in State and Federal litigation.

In addition, the absence of entry books can make it difficult to discover what documents have been delivered to a register of deeds office but have not yet been entered into the general index—information that is needed by title insurers, among others. Traditionally, entry books served as a chronological listing of documents received and gave notice of the existence of a document during the recording process. Without the entry books or a means to search documents that have been delivered, the public cannot determine the existence of documents before they became available for public inspection.

Various statutory amendments have been suggested to accommodate the computerization of the recording process while maintaining public notice. Suggested changes would eliminate requirements for

entry books but continue to require registers to enter the actual date and time a document is received; codify the principle that a recordable document is considered recorded when it is received; provide for access to documents before they are indexed; and require registers to post the date through which documents have been entered in the general index.

## **CONTENT**

**Senate Bill 927 (S-2)** would amend Chapter 65 of the Revised Statutes of 1846, which provides for the recording of conveyances, to do the following:

- Delete requirements that a register of deeds keep various entry books; and delete provisions regarding the effect of entry in those books.
- Require a register to note the date, hour, and time an instrument was delivered for recording; and provide for noting information on instruments delivered in bulk.
- Specify that an instrument would be deemed recorded at the time of delivery if it were later determined to have satisfied all recording requirements.
- Require public access to an instrument delivered to a register.
- Allow a register to charge a fee for a search of an original instrument or a name search, before a document was entered into the general index.
- Provide for civil immunity for a register or employees of a register conducting or deciding whether to conduct a search.
- Require a register to post a "general index date" and maintain a record of the calendar date and the general index date recorded on that calendar date.
- Specify that a register's assignment of a liber and page or other unique identifying number would be prima facie evidence that an instrument had satisfied all recording requirements.

**Senate Bill 1160 (S-1)** would amend Chapter 65 to:

- Allow a register of deeds to note on an instrument the date and time it

**was accepted, after recording requirements had been met.**

- **Delete a requirement that a register certify on a recorded instrument when it was received.**
- **Rewrite requirements for a general index of instruments recorded, specifying information that a general index would have to contain, which would include the date processed.**
- **Require a register of deeds to note a reference to the liber and page or other unique identifying number where an instrument was recorded.**

The bill also would repeal a section requiring each register of deeds to provide different sets of books for recording deeds and mortgages.

The bills are tie-barred to each other, and are described in detail below.

### **Senate Bill 927 (S-2)**

#### Delivery of Instrument; Entry Books

Currently, every register of deeds must keep an entry book of deeds and an entry book of mortgages, with each page divided into columns having specific headings (date of reception, grantors, grantees, township, to whom delivered, and fees received). Each register of deeds also keep a reception book of levies, which may be consolidated into one book with sheets divided into columns having particular headings or titles (receipt number, date of receipt, grantors, grantees, location, kind of instrument, to whom delivered, date mailed, and fees received).

In the entry book of deeds, the register must enter all deeds of conveyance "absolute in their terms, and not intended as mortgages or securities, and all copies left as cautions". In the entry book of mortgages, the register must enter all mortgages and other deeds intended as securities, and all assignments of any mortgages or securities. In the entry book of levies, the register must enter all levies, attachments, liens, notices of lis pendens (pending lawsuits affecting property), sheriffs' and U.S. marshals' certificates of sale, other instruments of encumbrances, and required documentation, noting the day, hour, and minute of receipt, and other particulars, in the appropriate columns, in

the order in which the instruments are received.

An instrument must be considered recorded at the time so noted, and is notice to all people except the recorded landowner, of the liens, rights, and interests acquired by or involved in the proceedings. All subsequent owners or encumbrances take subject to the perfected rights or interests.

The bill would delete all of these provisions.

Under the bill, when an instrument was delivered to the register of deeds for the purpose of recording, he or she would have to note the date, hour, and minute of delivery on the first page of the instrument using a stamp or other method signifying that the date, hour, and minute were affixed by the register or his or her duly authorized representative. If the instrument were received in bulk with other instruments, the date, hour, and minute of delivery would have to be affixed in this manner as soon as practical after delivery. The date, hour, and minute so noted would have to be presumed to be the date and time of delivery.

#### Satisfaction of Recording Requirements

Under the bill, a register's assignment of a liber and page or other unique identifying number would be prima facie evidence that the instrument had satisfied all recording requirements, including the payment of fees, and had been accepted for recording. (Prima facie evidence is evidence sufficient to establish a given fact unless disproved.)

An instrument would be deemed to be recorded at the date and time of delivery to the register if it were later determined that the instrument had satisfied all recording requirements, including the payment of fees.

When an instrument that was rejected on a prior occasion was delivered, a new delivery date and time would have to be noted on the face of the instrument, and the later date and time would be rebuttably presumed to be the date and time of delivery.

#### Public Review; Search; Fee; Immunity

The bill would require each instrument delivered to a register to be accessible for public review. Accessibility would be

satisfied by provision of the instrument inscribed in a tangible medium when requested. The accessibility requirement would be considered satisfied if the length of time between a request to locate a particular document or documents and the time the search was initiated and completed were reasonable in light of the volume of all instruments being recorded and the ability to gain access to requested documents without undue disruption to the office of the register.

A register would be permitted to do either of the following:

- Provide at least the first page of the instrument, stored in an electronic or other medium.
- Provide a temporary searchable journal containing at least the date of delivery, title of the instrument, and names of the parties to it.

Any information created or maintained under these provisions could be destroyed when the instrument was entered into the index described in Section 28 of Chapter 65 or when the instrument was not accepted for recording. (Section 28, which Senate Bill 1160 (S-1) would amend, requires each register of deeds to keep a general index of instruments.)

A register could not charge a fee for any review or search under these provisions unless it involved the search of an original instrument. An original instrument would be available for public review only in the presence of the register, the deputy register, or a representative of the register appointed for that purpose. When the register or his or her representative performed a name search, a reasonable fee could be charged for any search or review requested. This fee could not exceed \$15 for each 15 minutes or fraction of 15 minutes.

These provisions would not apply once an instrument was indexed as required in Section 28.

If a county register of deeds or an officer, employee, or agent of a register of deeds were, or believed that he or she was, acting within the scope of his or her authority and in the course of his or her employment when authorizing, conducting, or deciding when or whether to conduct a search under the

provisions described above, that action would be within the exercise or discharge of the person's governmental function, and the register of deeds or the officer, employee, or agent would be immune from any claim for liability, including tort liability, that otherwise could entitle any individual or entity to monetary damages.

This civil immunity would be in addition to any civil immunity provided by law, including the application of Section 7 of the governmental immunity Act. (That section provides immunity from tort liability for personal injury or property damage caused by an employee or officer of a governmental agency if he or she is acting or reasonably believes he or she is acting within the scope of his or her authority, the governmental agency is engaged in the exercise or discharge of a governmental function, and the employee's or officer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.)

#### General Index & Calendar Dates

The bill would require a register of deeds to post in a conspicuous place in his or her office the general index date, and to maintain a record that memorialized both the calendar date and general index date that was posted on that calendar date. This public record would have to be maintained in any reasonable medium selected by the register.

As used in these provisions, "general index date" would mean that date through which all recorded instruments bearing a delivery date up to and including the general index date have been fully recorded at length and indexed and are available for public inspection.

### **Senate Bill 1160 (S-1)**

#### General Index

Each register of deeds currently is required to keep a proper general index to each set of books in which he or she must enter alphabetically the name of each party to each instrument recorded, with a reference to the book and page where the instrument is recorded. In a county where reproductions under the Records Media Act (now called the Records Reproduction Act) are combined in one set of books, the

register must keep separate indexes of the instruments. The register also must keep a separate index in which all discharges of mortgages are entered daily, together with a reference to the volume and page where recorded or entered upon the margin. The bill would delete these requirements.

The bill also would delete a provision allowing each index required under Chapter 65 to be maintained wholly or partially by computerization.

The bill would require each register of deeds to keep a general index of instruments accepted for recording, after they had met all recording requirements, including the payment of fees. A register would have to keep the general index by means of books or computerization, or a combination of both. The index would have to include the following information:

- Liber and page, or other unique identifying number, which would have to be sequentially, not randomly, assigned.
- Instrument type.
- The name of each party to each instrument.
- Date processed, having met all recording requirements, including payment of fees.
- Location of land: section, town and range, platted description, or other description authorized by law.
- Other reference information as required.

Each computerized index would have to be maintained to allow for an alphabetical search of the names of each party to each instrument recorded by the register of deeds.

#### Certification on Recorded Instruments

Currently, a register of deeds must certify upon every instrument recorded the time when it was received and a reference to the book and page where it is recorded.

The bill instead would permit a register of deeds to note upon every instrument recorded the date and time when it was accepted, after the instrument met all recording requirements, including the payment of fees. The register would have to note a reference to the liber and page, or other unique identifying number, where the instrument was recorded.

## Mortgage Discharge Certificate

Chapter 65 requires a register of deeds to record a discharge of mortgage when he or she is presented with a certificate of the discharge executed by the mortgagee or signed by a circuit court judge. The certificate must be recorded and a reference must be made to the book and page containing it, in the minutes of the discharge of the mortgage. The bill would require that a reference be made to the liber and page, or other unique identifying number.

## Repeal

Section 26 of Chapter 65 requires each register of deeds to provide different sets of books for recording deeds and mortgages. In one set, deeds that are required to be entered in the entry book of deeds must be recorded at full length, with the certificates of acknowledgement or proof of the execution of the deeds. In the other set, instruments required to be entered in the entry book of mortgages must be recorded a similar manner. A register who uses a medium under the Records Media Act as a method of recording may combine all reproductions of instruments into one set of numbered books.

The bill would repeal this section.

MCL 565.24 et al. (S.B. 927)  
565.27 et al. (S.B. 1160)

## **BACKGROUND**

### Michigan Courts

The Michigan Court of Appeals and the Michigan Supreme Court issued opinions in *Central Ceiling & Partition, Inc. v Department of Commerce* in 2002 (249 Mich App 438) and in 2004 (470 Mich 877), respectively. This case involved three subcontractors' claims against the Homeowner Construction Lien Recovery Fund, which is governed by the Construction Lien Act. Under that Act, the right to a construction lien ceases to exist unless a claim of lien is recorded with the register of deeds within 90 days after the last furnishing of labor or materials for home improvements. In *Central Ceiling*, the subcontractors presented liens to the Wayne County register of deeds within that 90-day period and obtained date stamps on the

filings. The claims of lien were not assigned a liber and page number (or "formally recorded", according to the Court of Appeals) until more than 30 days after their receipt, which was past the 90-day deadline for recording. Like the trial court, the majority of the Court of Appeals panel applied a "substantial compliance" provision of the Act to the facts of the case, and found that the subcontractors had met the statutory requirement. (The dissent rejected this application and argued that recording does not take place until an entry has been made on the books.)

The Michigan Supreme Court affirmed the decision of the Court of Appeals, "albeit for different reasons", without elaboration. The Supreme Court stated, "On the limited facts of this case, we conclude that the liens presented to the Wayne County Register of Deeds were timely recorded." The Court also ordered the register of deeds to show cause why it should not be required to pay the other parties' costs, as it appeared "...that the substantial questions about the validity of the liens in this case may have resulted from the failure of the Wayne County Register of Deeds to perform statutorily imposed duties regarding the recording of liens".

### Federal Courts

Michigan's recording laws were the subject of a 2007 opinion of the U.S. Bankruptcy Court for the Eastern District of Michigan, *Schmiel v Interstate Financial Corporation* (No. 03-66533). The debtors in this Chapter 7 bankruptcy case refinanced their home in 2003 by obtaining a mortgage from Interstate Financial Corporation. On April 30, 2003, an employee of the title company handling the closing delivered the mortgage to the Oakland County register of deeds by dropping it in a bin with several unrelated instruments. The register of deeds made no notation on the mortgage to show when it was received. A check from the title company to the register of deeds, dated June 17, 2003, included the recording fee. On July 30, 2003, 96 days after the closing, the check was deposited and the register of deeds stamped the mortgage with a liber and page number.

The debtors filed their bankruptcy petition on September 26, 2003, and the bankruptcy trustee filed a "complaint to avoid

preferential transfer" (a debt incurred within 90 days before the bankruptcy petition, giving the creditor more than it would receive in the bankruptcy). The trustee alleged that the mortgage was recorded on July 30, when the liber and page number were assigned. The trustee also claimed that the recording constituted a transfer and, since the transfer was made within 90 days before the Chapter 7 petition date, the trustee could avoid the mortgage under the Bankruptcy Code. The Court agreed that the recording constituted a transfer and therefore found it necessary to determine when the mortgage had been recorded.

The Court found that it was an undisputed fact that the Oakland County register of deeds did not maintain an entry book during the time in question, and was advised by the parties that many county registers of deeds did not do so. The Court also was advised that a proliferation of refinancings had led to a dramatic increase in the volume of mortgage documents that needed to be recorded, and some registers of deeds that did not maintain entry books had adopted various other procedures to deal with the increased volume. In addition, the Court was informed that title companies and mortgage lenders also had adopted their own practices involving the delivery of bundles of mortgages to registers of deeds. "[T]hese facts combined to result in significant delays in many counties in assignments of liber and page numbers to documents delivered for recording, thereby placing mortgage companies in a perilous position. As a result..., at least in the Bankruptcy Court context, trustees and debtors were filing adversary proceedings at an increased rate under...the Bankruptcy Code to avoid mortgages where such delays had occurred."

The bankruptcy judges in the district then conferred and, due to concern about the possibility of inconsistent rulings and the effect this might have upon real estate transactions throughout the State, the Court certified the following question to the Michigan Supreme Court: "When a county register of deeds does not maintain an 'entry book'..., when, if ever, is a mortgage deemed 'recorded'?" The Supreme Court declined the Bankruptcy Court's request to answer the question. As a result, the Bankruptcy Court created a procedure to

resolve the issue and decide how the Michigan Supreme Court would do so.

Based on a review of Michigan statutes, the Bankruptcy Court found that mere delivery of a document to a register of deeds is not by itself sufficient to constitute recording, but recording can occur absent an entry book. The Court identified three requirements for recording a mortgage in this State:

- The mortgage must be received by the register of deeds.
- The mortgage must meet the law's technical requirements (i.e., contain the names and addresses of the parties and the notaries public whose names appear on it, and meet requirements regarding type, margins, and print).
- The recording fee must be paid when the mortgage is left for record.

The Court held, "If these three requirements are met..., the Michigan Supreme Court would conclude that a mortgage is deemed recorded, even absent the entry of the mortgage in an entry book by the register of deeds as required by [the statute]..."

"In sum, the attributes of a mortgage received for record are the same irrespective of whether a register of deeds fulfills its statutory duty to enter it in an entry book... There being three statutory requirements for recording, with or without an entry book, it follows that a mortgage is only recorded upon satisfaction of all three requirements. The important point in time is when all of the statutory requirements for recording are met, rather than the date that someone conducts a review to see if they are met. If the mortgage is in recordable form and the fee is paid when the mortgage is delivered, even if those facts must be shown by extrinsic evidence, the moment of receipt by the register of deeds of such mortgage is the moment of recording. If a mortgage delivered to a register of deeds office is later determined not to meet all the requirements..., then such mortgage was not *received for record* and the mere delivery of such instrument will not constitute recording... [R]ecording is deemed to occur at the first moment that all three requirements have been met." (Emphasis in original.)

On August 21, 2008, in *Pankey v New Century Mortgage Corp. and Wells Fargo Bank, N.A.* (No. 07-13256), the U.S. District Court for the Eastern District of Michigan issued an opinion agreeing with the *Schmiel* decision. The facts in *Pankey* were similar to those in *Schmiel*, and the bankruptcy trustee appealed the Bankruptcy Court's decision that the debtor's mortgage was not a preferential transfer. The U.S. District Court held, "[A]n instrument is 'recorded' by a county register of deeds when the person who seeks the benefit of the recording laws completes all the legal requirements for recording such an instrument, even when county officials are unfaithful to their statutory duties."

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

It is essential for the public to have notice of recorded instruments, and the ability to ascertain exactly when a document was recorded, because Michigan has what is called a "race-notice" statute, which means that a subsequent purchaser has priority over someone with an unrecorded interest in the same property if, at the time of conveyance, the subsequent purchaser had no actual or constructive notice of the earlier conveyance, and the subsequent purchaser records his or her deed or mortgage. Recording an instrument gives notice to subsequent purchasers, and documenting when the instrument was received is integral to the recording process.

The bills would address the problems that have arisen since registers of deeds stopped using entry books, and would bring the register of deeds statute into the 21<sup>st</sup> century. Although the law already allows a general index to be computerized, it still contains antiquated requirements for the use of hard-copy entry books. Over the years, there have been numerous technological advances that permit registers of deeds to perform their functions in a manner that is more efficient and cost effective than what the statute requires. At the same time, however, essential information was lost when registers stopped entering the date and time documents were received. While the bills would bring update

the law by eliminating requirements for the use of entry books, they also would enact a requirement that registers note on a document the date, hour, and minute that it was delivered, using a stamp or another method.

Documenting the delivery of instruments would supply the evidence needed to determine when an instrument was recorded. As the Federal courts have held, a document is considered recorded when the statutory requirements for recording are met, which is the time of delivery if the document is in recordable form and the recording fee is paid, whether or not entry books are used. This interpretation of the law—which the bills would codify—is consistent with the existing requirement that an instrument be considered recorded at the time noted in the entry book. While the Federal courts have clarified Michigan law, the bills would clarify the language of the statute.

### **Supporting Argument**

Because there is a gap in time between a register's receipt of documents and the entry of information in the general index, Senate Bill 927 (S-2) contains provisions to ensure access to documents delivered during that period. Traditionally, someone such as a title insurer would search the general index to the most current date through which it was posted, and then use the entry books to discover recorded instruments to the day, hour, and minute that the search was made. Since entry books are not used and would no longer be required, the bill would require each instrument delivered to a register to be accessible for public review. A register could allow access by providing at least the first page of electronically stored instruments or providing a temporary searchable journal. A register also could search for delivered instruments, and charge a fee for searching original instruments or performing a name search. In addition, the bill would require a register to post the date through which records received had been indexed. As a result, a person performing a search for mortgages or liens would know the date through which the search was good.

Legislative Analyst: Suzanne Lowe

## **FISCAL IMPACT**

The bills would have no fiscal impact on State revenue or expenditures or any impact on local unit revenue. The bills could increase expenditures for some local units by an unknown amount, depending on the costs of adapting systems to the changes, whether a register already records the information mandated by the bills, and whether changes resulting from the bills would change the number of searches performed.

Fiscal Analyst: David Zin

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.