

OP. NO. 06-008

PROPERTY AND CONVEYANCES: RECORDATION OF DOCUMENTS – IN GENERAL.

Clerk of court of record may not record certified copy of instrument previously recorded in his court although copy contains additional exhibits or modification or change to legal description of real property conveyed.

The Honorable Ray S. Campbell, Jr.
Caroline Court Circuit Court Clerk
February 16, 2006

Issue Presented

You inquire regarding whether there is statutory authority for the recordation of a certified copy of an instrument previously recorded in your court to which exhibits, which were not included with the original recorded instrument, were added or modifications or changes to the legal description of the real property were made.

Response

It is my opinion that a clerk of a court of record may not record a certified copy of an instrument previously recorded in his court even though the certified copy has additional exhibits attached to it or contains a modification or change to the legal description of the real property conveyed thereby.

Background

You advise that pursuant to § 55-109, your office previously has recorded a certified copy of an instrument recorded in another jurisdiction upon presentation of an affidavit that the original instrument has been lost or destroyed. You observe, however, that § 55-109 does not provide for rerecording a certified copy of an instrument within the same jurisdiction where it was originally recorded.

Applicable Law and Discussion

Section 55-106 requires that a clerk of the circuit court of any county or city, "[e]xcept when it is otherwise provided, ... shall admit to record any such writing as to any person whose name is signed thereto with an original signature, ... when it shall have been acknowledged by him." Section 55-108 provides that such writing "shall be an original or first generation printed form, or legible copy thereof, pen and ink or typed ribbon copy, and shall meet the standards for instruments as adopted under §§ 17.1-227 and 42.1-82 of the Virginia Public Records Act." The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.¹ A clerk's authority to refuse to record an instrument is very limited.² Further, assuming that a document meets the parameters required by statute, a clerk may not inquire as to its legal sufficiency or add requirements for recording.³

Section 55-109 authorizes a certified copy of an instrument previously recorded in another county or city in the Commonwealth to be admitted to record in the court of another county based upon an affidavit that the original instrument has been lost. Section 55-110 authorizes the same procedure for deeds that were recorded prior to the formation of the State of West Virginia in any county or city in the Commonwealth that is now a part of West Virginia. I am not aware of another statute that authorizes the recordation of a certified copy of an instrument previously recorded in the same court, whether or not such copy includes the addition of exhibits or modifications or changes to the legal description of the real property conveyed thereby.

Section 55-106 clearly requires recordation of original writings that are signed by the parties to be charged.⁴ Sections 55-109 and 55-110 provide for recordation of copies where the original writings admitted to record in another county or city are lost. Because the writing about which you inquire is a certified copy of an instrument originally recorded in your court, which does not reflect the original signatures of the parties, it does not meet the requirements of § 55-106 or the circumstances required by § 55-109 or § 55-110. Accordingly, you are not statutorily authorized to record such writing.⁵

When applicable statutes are expressed in plain and unambiguous terms, whether general or limited, it is assumed that the General Assembly means what it plainly has expressed, and no room is left for construction.⁶ Applying the clear language of the pertinent statutory provisions to your inquiry, it is my opinion that the clerk of a court of record is not authorized to record a certified copy of an instrument previously recorded in his court even though exhibits have been added or modifications or changes have been made to the legal description of the real property.

Conclusion

Accordingly, it is my opinion that a clerk of a court of record may not record a certified copy of an instrument previously recorded in his court even though the certified copy has additional exhibits attached to it or contains a modification or change to the legal description of the real property conveyed thereby.

¹See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); Op. Va. Att'y Gen.: 1998 at 56, 58; 1996 at 178, 178; 1991 at 238, 240; 1989 at 250, 251-52; 1985-1986 at 133, 134.

²See 1984-1985 Op. Va. Att'y Gen. 380, 381; see also Va. Code Ann. § 55-58.1 (2003) (setting forth specific requirements for recording deeds of trust); § 55-106 (2003) (providing that, except as otherwise provided, circuit court clerk must record writings with original signatures that are acknowledged or proved); § 55-106.5 (2003) (providing that "[a] clerk may refuse any document for recording in which the name or names of the person under which the document is to be indexed does not legibly appear or is not otherwise furnished"); § 55-108 (Supp. 2005) (setting forth standards for writings to be docketed or recorded).

³See 1986-1987 Op. Va. Att'y Gen. 159, 160; see also Op. Va. Att'y Gen.: 1999 at 220, 220-21; 1984-1985, *supra* note 2, at 381.

⁴See *Abrahams v. Ball*, 122 Va. 197, 203-04, 94 S.E. 799, 801 (1918).

⁵See 2003 Op. Va. Att'y Gen. 60, 60 (concluding that scope of powers of clerk of court must be determined by reference to applicable statutes); see *also* Op. Va. Att'y Gen: 1986-1987 at 279, 279 (concluding that "notice of planned fraudulent lien" is not recordable because it is not type of writing contemplated to be recorded); 1975-1976 at 283, 283 (concluding that affidavit merely describing historical events is not recordable); 1967-1968 at 55, 55 (concluding that there is no authority for clerk to record petition in bankruptcy); 1958-1959 at 30, 31 (concluding that "notice of lease pending" is not required to be recorded if it is not contract related to real property).

⁶*Town of South Hill v. Allen*, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

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