



OHIO LEGISLATIVE SERVICE COMMISSION

Final Analysis

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Am. Sub. S.B. 257 131st General Assembly (As Passed by the General Assembly)

Sens. Seitz and Skindell, Eklund, Bacon, Brown, Jones, Oelslager, Schiavoni, Tavares, Thomas, Yuko

Reps. Celebrezze, Antani, Antonio, Barnes, Blessing, Burkley, Butler, Perales, Rezabek, Sweeney

Effective date: April 6, 2017

ACT SUMMARY

Real property instruments

- Specifies that, upon delivery to and acceptance by a county recorder, certain real property instruments raise a rebuttable presumption that the instrument conveys, encumbers, or is enforceable against the interest of the person who signed the instrument.
- Specifies that, upon delivery to and acceptance by a county recorder, certain real property instruments raise a rebuttable presumption that the instrument is valid, enforceable, and effective as if the instrument were legally made, executed, acknowledged, and recorded.
- Specifies that these presumptions may be rebutted only by clear and convincing evidence of fraud, undue influence, duress, forgery, incompetency, or incapacity.
- Reduces from 21 years to four years the period of time a real property instrument, for which the record shows there is a defect, is cured of defects by operation of law and becomes effective as if it had been legally made, executed, acknowledged, and recorded.

* This version updates the effective date.

- Expands the type of defects in a real property instrument that may be cured from three specific defects under prior law to any defect in the making, execution, or acknowledgement of the instrument under the act.
- Eliminates a provision that requires any person claiming adversely to a real property instrument with a defect to bring proceedings to contest the effect of the instrument only within 21 years after the instrument is recorded.
- Specifies that, when delivered to the appropriate county recorder and filed in the chain of title, a real property instrument provides constructive notice to all third parties of the instrument notwithstanding a defect in the making, execution, or acknowledgment of the instrument.
- Specifies that the real property instrument curative statute generally applies to all real property instruments notwithstanding any other provision under Ohio law, specifically including a continuing law provision concerning constructive notice.
- Specifies that nothing in the real property instrument curative statute discharges the obligations under the Ohio Marketable Title Act, the Ohio Dormant Mineral Act, and law concerning the forfeiture and cancellation of natural gas and oil land leases.
- Specifies that the act gives the real property instrument curative statute retroactive effect to the fullest extent the Ohio Constitution permits.

Process for property owners to opt out of incentive district TIFs

- Allows the owner of a parcel of land to exclude the parcel from a tax increment financing incentive district, under specific circumstances, by submitting a written response to the political subdivision proposing the creation of the incentive district.
- Requires the political subdivision to include in its notice of public hearing a map of the proposed incentive district on which the subdivision has delineated an "overlay," any parcels located outside of which qualify to be excluded from the district.
- Requires the subdivision to amend its ordinance or resolution creating the incentive district to exclude any qualifying parcel for which a written response has been submitted.



CONTENT AND OPERATION

Real property instruments

Rebuttable presumptions

The act creates a rebuttable presumption that a real property instrument *conveys, encumbers, or is enforceable against* the interest of the person who signed the instrument and that it is *valid, enforceable, and effective* as if *in all respects* the instrument was legally made, executed, acknowledged, and recorded when a signed and acknowledged instrument is delivered to and accepted by the county recorder.¹ The presumptions can be rebutted any time by showing clear and convincing evidence of fraud, undue influence, duress, forgery, incompetency, or incapacity.² Clear and convincing evidence is "that which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."³

Reduced cure time for recorded instruments

The act reduces from 21 to four the number of years after which a defect in a recorded real property instrument is deemed cured and *effective in all respects* by operation of law.⁴ The act also eliminates the requirement that a person bring proceedings to contest the instrument during that time period, thereby eliminating the necessity to contest defects within the act's four-year period.⁵ In other words, the four-year period does not operate as a statute of limitations for contesting the effect of a defective instrument. Similarly, it does not operate as a period limiting the ability to rebut the presumptions on the basis of fraud, undue influence, duress, forgery, incompetency, or incapacity.

Immediate effectiveness

Under the act, when a real property instrument is delivered to the county recorder and filed in the chain of title, it provides constructive notice to all third parties

¹ R.C. 5301.07(B)(1).

² R.C. 5301.07(B)(2).

³ *In re J.V.*, 134 Ohio St.3d 1, 7 (2012).

⁴ R.C. 5301.07(C).

⁵ R.C. 5301.07.



of the instrument, notwithstanding any defect in the making, execution, or acknowledgment of the instrument.⁶

Background; prior law

Prior law provided a 21-year period after which a recorded instrument conveying real estate was cured of a defect shown in the record and became *effective in all respects* as if [it] had been legally made, executed, and acknowledged as long as the defect was because it was improperly witnessed, contained no certificate of acknowledgment, or contained a defective acknowledgment. Additionally, any person claiming adversely to the instrument, if not already barred by limitation or otherwise, was required to bring proceedings to contest the effect of the instrument not later than 21 years from the time of recording.⁷

Curable defects

The act removes the limitation that only the defects specified under prior law could be cured. Rather, the act provides that *any* defect in the making, execution, or acknowledgement may be cured. The act does not define "defect," but it specifically includes as curable defects: (1) the instrument was not properly witnessed, (2) the instrument contained no certificate of acknowledgment, (3) the certificate of acknowledgment was defective, and (4) the name of the person with an interest in the real property does not appear in the granting clause of the instrument, but the person signed the instrument without limitation. Previously, an instrument and its record was cured if a defect was due only to (1), (2), or (3), above.⁸

Provision applies notwithstanding other law; retroactive effect

The act specifies that, except for certain Ohio law provisions, the real property instrument curative statute applies to all real property instruments notwithstanding any other Ohio law provision and that the statute controls if a conflict exists between it and R.C. 1301.401, which relates to the constructive notice provided by the recording of certain documents.⁹ (See **COMMENT 1**.) The act provides that nothing in the real property instrument curative statute operates to discharge the obligation to comply with all provisions of the Ohio Marketable Title Act, the Ohio Dormant Mineral Act, and a provision of state law concerning the forfeiture and cancellation of natural gas

⁶ R.C. 5301.07(D).

⁷ R.C. 5301.07.

⁸ R.C. 5301.07(C).

⁹ R.C. 5301.07(F). See **COMMENT 1**.



and oil land leases before an interest in real estate is extinguished, abandoned, or forfeited under those provisions.¹⁰ Finally, the act states that it has a retroactive effect to the fullest extent the Ohio Constitution permits.¹¹ (See **COMMENT 2**.)

Real property instrument meaning

Under the act, a "real property instrument" means a deed, mortgage, and installment contract, lease, memorandum of trust, power of attorney, or any instrument accepted by the county recorder under R.C. 317.08.¹² Also, the act's rebuttable presumption provision appears to apply only to instruments that describe real property.

Process for property owners to opt out of incentive district TIFs

The act establishes a procedure by which landowners may exclude their real property from a tax increment financing incentive district. Under continuing law, a county, township, or municipal corporation may create such a district over an area of up to 300 acres, and all the parcels within the district are exempted from property taxation to the extent of any increases in value after the creation of the district, or some specified percentage of that increased value. Instead of owing property taxes on the increased value, landowners instead owe payments in lieu of taxes that are used to finance public infrastructure projects that serve property in the district and, in some cases, to reimburse local taxing units for the foregone property taxes. The political subdivision may apply for the tax exemption on behalf of the property owners without the owners' express prior consent.¹³

For a landowner to exclude a parcel from an incentive district under the act, both of the following conditions must exist:

(1) The parcel must be wholly or partly located outside an "overlay" delineated on a map of the proposed district by the political subdivision's legislative authority proposing to create the district. An "overlay" is an area of not more than 300 acres that is

¹⁰ R.C. 5301.07(E).

¹¹ R.C. 5301.07(G).

¹² R.C. 5301.07(A); R.C. 317.08, not in the act, specifies the applicable fees for the documents recorded by a county recorder.

¹³ R.C. 5709.40(C), 5709.73(C), 5709.78(B), and 5709.911.



a square, or that is a rectangle having two longer sides that are not more than twice the length of the two shorter sides.¹⁴

(2) If the district is proposed by a township, the landowner must submit a statement to the board of township trustees indicating the owner's intent to seek a separate TIF tax exemption for the owner's property from the county. Alternatively, if the district is proposed by a county, the statement must indicate the owner's intent to seek a separate exemption for the owner's property from the township. (Because only municipal corporations may grant a TIF for property located within the municipal corporation, this requirement does not apply to districts proposed by municipalities.)

Under continuing law, the political subdivision proposing to create an incentive district will be required to conduct a public hearing before adopting the ordinance or resolution creating the district. Before holding the public hearing, the political subdivision must give notice of the hearing and of the proposed incentive district to every real property owner whose property is located within the district. The act requires that the notice include a map of the proposed district on which an overlay is delineated. The notice must inform the property owner of the owner's right to exclude the owner's property from the district if the owner's parcel is wholly or partly located outside the overlay. The notice must include information detailing the required contents of the response, the address to which the response may be mailed, and the deadline for submitting the response, which is 45 days after the postmark date on the notice.

A property owner may exclude the owner's parcel by submitting a written response to the political subdivision by the deadline. The response must be sent by first class mail or delivered in person at the public hearing, and must conform to any content requirements included in the notice. In the response, the owner may identify a parcel by street address, by the manner in which it is identified in the ordinance or resolution, or by other means allowing the identity of the parcel to be ascertained.¹⁵

The act requires the political subdivision to amend its ordinance or resolution to exclude any qualifying parcel for which a written response has been submitted. Under the act, a political subdivision cannot file an application for property tax exemption for any such parcel, and payments in lieu of taxes may not be required from the owner of the parcel.¹⁶ Improvements to a parcel excluded from an incentive district under the act's procedure may be exempted from taxation individually under any other section of the Revised Code under which the parcel qualifies, including the tax increment

¹⁴ R.C. 5709.40(A)(6) and (C), 5709.73(A)(5) and (C), 5709.77(G), and 5709.78(B).

¹⁵ R.C. 5709.40(C)(2), 5709.73(C)(2), and 5709.78(B)(2).

¹⁶ R.C. 5709.40(C), 5709.73(C), 5709.78(B), and 5709.911(A).



financing exemption that may be applied to parcels on an individual basis instead of as a district.¹⁷

COMMENT

1. R.C. 1301.401 states:

(A) For purposes of this section, "public record" means either of the following:

(1) Any document described or referred to in section 317.08 of the Revised Code;

(2) Any document the filing or recording of which is required or allowed under any provision of Chapter 1309. of the Revised Code.

(B) The recording with any county recorder of any document described in division (A)(1) of this section or the filing or recording with the secretary of state of any document described in division (A)(2) of this section shall be constructive notice to the whole world of the existence and contents of either document as a public record and of any transaction referred to in that public record, including, but not limited to, any transfer, conveyance, or assignment reflected in that record.

(C) Any person contesting the validity or effectiveness of any transaction referred to in a public record is considered to have discovered that public record and any transaction referred to in the record as of the time that the record was first filed with the secretary of state or tendered to a county recorder for recording.

2. Under Ohio Constitution, Article II, Section 28, "The General Assembly shall have no power to pass retroactive laws . . ." Generally, this prohibits the General Assembly from enacting laws imposing new substantive duties and obligations upon a person's past conduct and transactions. For example, a law may run afoul of this prohibition if it impairs vested rights; affects an accrued substantive right; imposes new burdens on a past transaction; creates a new right that did not exist when the act occurred; or takes away the right to sue or defend legal actions.¹⁸ A court must evaluate the facts in each case to determine to what extent the act's provisions may apply retroactively.

¹⁷ R.C. 5709.40(B), 5709.73(B), and 5709.78(A).

¹⁸ *State v. White*, 132 Ohio St.3d 344, 352 (2012).



HISTORY

ACTION	DATE
Introduced	12-30-15
Reported, S. State & Local Gov't	05-03-16
Passed Senate (32-0)	05-17-16
Reported, H. Judiciary	12-07-16
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