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January 6, 2006

Christina Wise
Stark County Auditor's Office
110 Central Plaza South
Canton, OH 44702

Re: Agreement between county auditor and county recorder for processing land transfers and conveyances
Our file no. M101.00272

Dear Ms. Wise:

You have requested on behalf of the county auditor an opinion regarding the legality of certain arrangements involved in the transfer and conveyance of property, an area in which both the county auditor and the county recorder have duties. I understand that the county has purchased or expects to purchase software that will make it possible to accomplish electronically all filings necessary for the conveyance of property, whether with the county auditor or the county treasurer. Because each office has separate responsibilities – but will be working within the restrictions of a single software system – you ask whether the two offices may legally protect their respective functions by means of a "contract" covering any or all areas in which questions may be expected to arise in the course of the operation of the system.

As creatures of statute, the county auditor and the county recorder have only those powers expressly provided by statute, or necessarily implied to accomplish an express power. *State ex rel. Kuntz v. Zangerle* (1935), 130 Ohio St. 84, syllabus paragraph 1. In general, the power to bind a county by contract is within the exclusive authority of the board of county commissioners; and resides in other county officers only where expressly provided by law. 20 O.Jur.3d *Counties, etc.* §237.

There does not appear to be any statutory authority for an agreement between the county auditor and the county recorder with respect to accounting for land transactions, and such a power does not seem necessary in order to accomplish any purpose of either office.

It is also generally true that an elected county official may not limit the discretion of his or her successor. See *State ex rel. Hubbard v. Hilty* (Ct. App. Allen County 1940), 31 Ohio L. Abs. 538, 540 (board of county commissioners "is inhibited by law from making any agreement which has the effect of restraining it or its successors in office from exercising any of the discretionary powers vested in it, or

performing any of the duties imposed upon it by law"). Therefore, where office policies and procedures are within the discretion of a county auditor or county recorder, they remain subject to the official's discretion.

From the foregoing, I conclude that your discussion of a "contract" between the county auditor and the county recorder must be limited to an administrative agreement in principle between the two officials. Such an intra-governmental agreement is often termed a "memorandum of understanding," or "MOU" for short. An MOU does not have the force of contract, but in some instances it may form part of an overall scheme of inter-agency cooperation which is independently authorized by law. See R.C. §2152.421 et seq. (inter-agency participation in programs addressing child abuse and neglect). In some circumstances, the failure of an agency to abide by its own MOU may be a violation of due process vis-a-vis third parties within the scope of its provisions; and may give rise to a mandamus action brought by another party to the MOU. See generally, *State ex rel. Act One, Inc. v. Juvenile Court of Columbiana County* (7th Dist.), 2004-Ohio-3215 at {¶¶ 45-48}. However, as with a pre-contractual letter of intent among the parties, an MOU generally is not meant to be enforceable at law.

With the foregoing in mind, it appears that the county auditor, the county recorder, and the county treasurer may enter into a memorandum of understanding covering discretionary aspects of real property conveyances and collection of fees, so long as each official remains ultimately responsible for carrying out the duties of his or her office.

You have asked particularly whether the county auditor may legally draw the auditor's conveyance fees, transfer fees and copying fees from the same escrow account previously established by the county recorder upon an agreement with the recorder's patron and the county treasurer. First, I understand that the escrow account now used by the county recorder is pursuant to an agreement with each patron utilizing the account. Any change in the permissible uses of the account would require the consent of each patron. Apart from this consideration, however, I am not aware of any legal impediment to such a joint working arrangement among the county auditor, the county recorder, and the title companies or other persons having business with those offices. Also, as a practical matter, my brief discussions with the county treasurer's office indicate that such an arrangement would not be expected to present any significant difficulties for the treasurer.

From the foregoing, I have concluded and you are so advised as follows:

1. The county auditor and the county recorder may not on their own authority make any enforceable agreement that would limit the statutory duties or inherent discretion of their respective offices.

2. The county auditor and the county recorder may enter into a memorandum of understanding setting out procedures to be followed in connection with electronic filing

of real property transfers and conveyances in whatever detail is considered necessary or convenient.

3. With the written consent of the escrow depositors, the county auditor and the county recorder may jointly administer an escrow fund for the payment of the separate charges and fees of their respective offices. Such a fund should be established and administered with the concurrence of the county treasurer, in accordance with this office's prior opinions, and in a manner in which all funds are properly accounted for.

If you have any questions concerning this opinion letter, or if you have additional information that you feel may be relevant, please do not hesitate to contact me.

Very truly yours,

Ross Rhodes
Assistant Prosecuting Attorney
(330) 451-7863

cc: Kim Perez
Rick Campbell
Glenn Owens