

## **ERERTF Business Analyst Services Project Legal Considerations Summary**

### **Purpose**

The intent of this document is to provide the ERERTF with a summary of the primary legal issues identified to date in connection with implementation of an electronic recording system and the status of the resolution of those issues. This document addresses considerations referenced in items 27 to 30 of the ERERTF workplan dated January 15, 2001.

### **Background**

The Legal Subcommittee of the ERERTF Task Force has discussed and considered many of the legal issues surrounding electronic recording. A significant amount of time and effort has gone into this process. Through the course of the project the BenNevis team has made additional observations which the Legal Subcommittee has considered. This document is an effort to outline and summarize those legal observations and issues and to further summarize the conclusions and recommendations of the Legal Subcommittee as to each.

### **Considerations and Recommendations.**

1. **Pilot Project Enabling Legislation.** Legislation will be needed to enable the pilot project(s) (including “live” e-recording). This legislation presumably will supersede and/or amend the real estate recording exception in UETA, at least to the extent of the scope of the subject pilot project (e.g., limited initially to mortgage satisfactions). Consider whether amendment to Minn. Stat. § 507.24 is necessary to confirm that an e-signature, per UETA § 325L.07, satisfies the original signature requirement. Consider whether the standards necessary to the pilot(s) (and establishment of further “permanent” standards) be established directly in that legislation, by administrative rule pursuant to that legislation, in later legislation, or otherwise?

**Conclusions and Recommendation:** Legislation has been adopted as Chapter 365 of the 2002 Session Laws to authorize the pilot project(s). It is considered adequate to permit “live” e-recordings. The standards necessary to the pilot(s) will be established by the ERERTF.

2. **Non-Applicability of Non-Standard Document Surcharge.** Consider whether an amendment to Minn. Stat. §507.093 and §508.82 or other legislation is necessary or otherwise worthwhile to confirm that the surcharge contemplated by §507.093(b) and §508.82, subd. 2, respectively, will not apply to documents recorded or filed as part of (and in compliance with) the standards of the pilot project(s) for the electronic filing of real estate documents implemented by the Task Force. In addition, these sections need to be amended or superceded to the extent of the e-document standards being created for the e-recording pilot(s). These modifications to §507.093 and §508.82 might logically be made part of the pilot project enabling legislation.

Conclusions and Recommendation: The uniform document standards and surcharge provisions for non-uniform documents set in the above-referenced statutes are considered superseded by the above-referenced pilot project enabling legislation as to documents to be recorded pursuant to the pilot project(s). Legislation permanently setting post-pilot statewide standards for e-recorded documents and any associated non-standard surcharge provisions will be needed upon completion of the pilot project(s). That permanent legislation is on the Legal Subcommittee's long-term "to do" list.

3. Overlay Legislation to Eliminate Historic "Paper" Oriented Requirements. Consider general "overlay" legislation (and/or individual, specific statutory amendments in some instances) to supersede various paper-oriented recording requirements appearing throughout Minnesota Statutes (for example, requirements which specify a specific color of ink (e.g., Minn. Stat. §505.03), requirements which contemplate signatures on the back of documents (e.g., Minn. Stat. §103I.235); requirements for attestation on an instrument (e.g., §256.263); requirements for endorsements or notes upon, or on the face of, instruments (e.g., Minn. Stat. §§103I.235, 834.04, 272.12, 287.08, 287.25); and requirements for "substantially bound" books (e.g., Minn. Stat. §356.03)).

Conclusions and Recommendation: The above referenced "overlay" legislation, probably coupled with at least several specific statutory amendments, is considered necessary and would best be completed following completion of the pilot project(s). Such legislation is on the Legal Subcommittee's long-term "to do" list.

4. Recording Priority vis-à-vis Delivery Method. It appears there is no uniform system in place by which all counties prioritize for recording instruments received in person (i.e., "over the counter") vis-à-vis those instruments received by mail (and, in some cases, vis-à-vis those delivered by title companies). Electronic delivery of instruments for recording will presumably add to this lack of uniformity, absent corrective standards.

Very generally said, the Minnesota Recording Act provides that the first instrument duly recorded will have priority over an instrument later recorded. Minn. Stat. §386.31 goes on to provide the recording number given to an instrument by the county is prima facie evidence of the priority of "registration" and that the county is to give each instrument a consecutive recording number as soon as received for filing ("to the extent practicable"). In addition, the county is to keep grantor and grantee reception books (§386.03, §507.37) and a consecutive index book (§386.32), in which each instrument is to be entered as soon as received by the county. The grantor/grantee reception books and consecutive index book may be condensed per §386.04.

Presumably, each county's recording processes satisfy the foregoing requirements, possibly with differing interpretations of when a document is "received". (For example, a county may treat a document as "received" immediately upon delivery "over the counter" assuming it is in form acceptable for recording, whereas a document delivered by mail

may not be treated as “received” until the end of the county’s office hours on the day during which that document arrived by mail at the county offices.) There does not appear to be an existing statewide standard governing when a document is to be deemed “received” by the county for recording, at least not vis-à-vis other documents delivered that same day.

Although priority disputes which are dependent upon time of receipt by the county appear infrequent, consideration should be given to legislating, or otherwise providing, a more detailed standard or rule governing the priority of, and/or time of receipt as between, instruments delivered by the various methods described. It appears there may be a general consensus that instruments delivered “over the counter” should be given priority over instruments delivered by other means. If, however, an e-recording process evolves to the point where an e-delivered document is processed and returned to sender electronically more or less immediately, then treating such an electronically delivered document as received (and recorded) subsequent to documents delivered later that day “over the counter” or otherwise may likely be inconsistent with the above-cited statutory provisions. Depending upon the standards chosen, some of the aforementioned statutes may require amendment.

Also, consider whether the provisions of UETA §325L.15 regarding time of receipt will be automatically superseded (pursuant to the terms of UETA §325L.18) by governmental standards concerning “receipt” of documents delivered electronically for recording as contemplated above in this Paragraph 4.

*Conclusions and Recommendation:* The filing of real estate documents and their numbering was discussed at some length by both the Legal Subcommittee and the Executive Committee of the ERERTF. It was acknowledged that the document number does not govern priority. It was agreed that date and time of acceptance of a document for recording would be preferred to the statutorily mandated consecutive numbering system. Further discussion was had as to when a document is accepted for recording vis-à-vis delivery and priority. There appears to be a consensus that the date and time of acceptance should govern priority, but that each county would or should have discretion to set its own policy in regard to the precise process of affixing such date and time to documents. Amendment of Minn. Stat. § 386.31 consistent with the foregoing has been placed on the long-term “to do” list of the Legal Subcommittee.

5. Elimination of Paper CRV Form. Consider legislation, or rule change by the commissioner of the Department of Revenue, to eliminate the requirement for the carbon paper form of the Certificate of Real Estate Value (“CRV”) currently being used, or, in the alternative, affirmatively allow a paperless e-alternative form, in order that CRVs can be filed electronically. (See Minn. Stat. § 272.115).

*Conclusions and Recommendation:* The ERERTF is seeking feedback from the Department of Revenue as to an e-recordable CRV form (in which the social security number of the parties is “hidden” to satisfy privacy requirements). The Legal Subcommittee expects to further consider legislation expressly authorizing an e-recordable form of the CRV and has placed this item on its long-term “to do” list.

6. Well Disclosure Certificate Drawing. Consider legislation (or perhaps a mere form change) which eliminates, replaces or further qualifies the requirement for a map to be drawn on the well disclosure form showing the location of wells. Such a change should allow a more e-user-friendly means of satisfying the well disclosure certificate requirements under Minn. Stat. § 103I.235. A written description of well location could be considered as an alternative to the drawing. Note that § 103I.235, subd. 1 does state that a map is to be drawn “to the extent practicable”.

*Conclusions and Recommendation:* Consensus was reached that, in lieu of the paper map currently used in most cases, a textual description or electronic drawing should be permissible. The ERERTF is establishing a liaison with the Department of Health to discuss this further and to implement any agreed upon changes.

7. Electronic Return of e-Recorded Documents. Consider legislation amending Minn. Stat. §§ 386.30 and 508.38 which appear to require the return of each recorded instrument either in person or by mail. Return of electronically recorded documents by electronic delivery should likely be provided for in these sections.

*Conclusions and Recommendation:* Consensus was reached that legislation will be needed to permit post-pilot return of electronically recorded documents by electronic delivery. This item is on the long-term “to do” list of the Legal Subcommittee.

8. Tract Index. To the extent it is determined that a tract index should replace the so-called grantor-grantee index/reception book as the official index, consideration should be given as to whether or not to continue to require the county to maintain a consecutive index (as per Minn. Stat. § 386.32). The consecutive index may, in some counties, have been combined with the grantor/grantee reception book pursuant to Minn. Stat. § 386.04. Preservation of the consecutive index requirement (or a like requirement in case of changes per Paragraph 4 above in this summary) may be worthwhile in connection with priority determinations, depending upon what information will necessarily be “affixed” to a recorded instrument concerning the time of its reception.

*Conclusions and Recommendation:* A few counties continue to appear opposed to making the tract index the official index in Minnesota. The concern is, in part, lack of certainty in where to index some legals on a tract index and, in part, that some recorded documents have no legal description. Some recorders may feel uncomfortable with their expertise in legal descriptions which would be exacerbated if the tract index becomes the official index. There may further be a perception of increased liability exposure, especially with the smaller counties. No resolution has yet been reached on this issue, but further discussion by the ERERTF is planned.

9. Consistent Standards - Interoperability. To the extent e-recording standards are created and intended to be statewide in their applicability, consider legislation confirming that such state-wide standards are binding upon all counties which elect to participate in e-recording, notwithstanding provisions in Minn. Stat. § 325L.18(a) or § 325L.19, which might be construed to the contrary.

*Conclusions and Recommendation:* Consensus is reached that legislation will be necessary for post-pilot e-recording which provides for state-wide standards. Such legislation is on the long-term “to do” list of the Legal Subcommittee.

10. Notary Seals. Arguably, certain requirements for legally effective notarization (including need for a notary seal) otherwise provided for in Minn. Stat. Chapters 358 and 359 are eliminated by the provisions of UETA (see § 325L.11). However, consideration should be given to legislation confirming the form and content of a legally sufficient e-notarization of an e-document for recording purposes to avoid uncertainty as to what requirements, if any, currently prescribed for notarization are not satisfied by the mere electronic signature of the notary (i.e. confirm need for certificate of notarial act, including printed name, title, expiration date of commission, etc.). Similarly, review of Minn. Stat. §359.03 may be warranted to confirm whether a seal should be required of a notary who performs notarization only using his or her electronic signature (and so would have no need for a seal other than to comply with the current requirements of Minn. Stat. § 359.03).

*Conclusions and Recommendation:* There appears to be concurrence that confirmation of the continuing requirement for placing notary information on e-recorded documents, in addition to the notary’s e-signature, is worthwhile. Such clarification vis-à-vis e-recording may likely be best covered by the so-called “overlay legislation” contemplated by Item 3 above. This item is on the long-term “to do” list of the Legal Subcommittee.

11. Allocation of Risk for E-Recording Problems. Consideration should be given to legislation allocating between the private sector and government the financial risks associated with the introduction of electronic technology into the real estate recording system. Possible problems which may give rise to such risks include errors in filing or handling of electronic documents, security breaches, record loss, failure of governmental software systems, failure of private software systems as well as mistakes, fraud or negligence by or involving a private party or parties to an electronic recording transaction. It would appear the primary focus of this inquiry would be on the proper extent of the government’s liability and exposure for problems with those aspects of the e-recording process over which it may have control. At least with respect to governmental filing errors and omissions, there are remedies currently available under Minnesota Statutes to persons claiming a loss due to such errors. For example, with respect to abstract property, the recorder has obligations by statute to accept and record documents presented which are in proper form within certain prescribed time periods and to reject documents which are not properly signed, executed and acknowledged or are otherwise unrecordable (*See* Minn. Stat. §§ 386.30; 386.39). In the event of a breach of such obligations, an aggrieved person may have various claims against the recorder, as provided and limited in

Minnesota Statute § 466.01 *et. seq.* With respect to certain errors concerning torrens property, the torrens statutory scheme creates a general fund from which a aggrieved person may seek recovery (*See* Minn. Stat. § 508.76 *et. seq.*). All, some or a combination of these remedial provisions could serve as the basis for an appropriate method of allocating and handling the risks attendant to governmental errors and omissions in connection with e-recordings.

*Conclusions and Recommendation:* There is apparent concurrence that there should be no difference between e-recording and the current paper process in regard to this issue and so no further action is recommended.

12. Definition of the Official Record (Access and Reproduction).

(a) Consideration should be given as to what shall constitute the official “record” of a fully recorded document. Simply put, will a mere image of the document, perhaps taken together with governmental certifications attached to it and/or presumptions of its authenticity and integrity constitute the official “record” or must the entire e-transaction (or set of e-transactions) leading up to and including actual recording be considered the official record (e.g., a deed together with grantor’s e-signature wrap, together with the notary’s e-signature wrap, together with the County’s backroom certifications (possibly wrapped by e-signatures of those back room officials), together with the County’s certifications of recording and addition of recording data (possibly wrapped by e-signature of county recorder or registrar). Resolution of the issue bears on various Minnesota statutory requirements concerning public access to such records, reproduction of such records, preservation and archiving of such records, etc.

(b) Final standards and implementation of standards governing electronic real estate recording, including any which determine what constitutes the “record” itself, will need to be reviewed to confirm that the various requirements of the Official Records Act are satisfied, including confirmation that reproducibility of those “records” meet the archival standards specified by the historical society, all as provided in Minn. Stat. § 15.17.

(c) Similarly, such standards and the implementation of the standards will need to be reviewed to confirm that the various statutory requirements for the public accessibility to such official records are satisfied (*see* Minn. Stat. §§ 13.03 and 138.17). For example, Minn. Stat. § 13.03, subd. 1 requires that such records be kept in such an arrangement and condition as to make them easily assessable for convenient use by the public. Consider, for example, whether the official record of an e-recorded instrument, if comprised of multiple e-transactions, including various e-signature wrappings, will, by its nature, satisfy such assessability requirements. On the other hand, consider whether the official record of an e-recorded instrument should be comprised only of distilled or condensed information which can be reproduced and accessed by the public as a printable image. Consider too, whether the official record might be comprised of the entire e-transaction while at the same time providing the public with an alternative to access only the printable image version if they prefer (as a sort of abstracted copy, but not as the

complete, official record). Also, the above referenced access requirements, and the Governmental Data Practices Act generally, impose substantial obligations on any private vendor who may perform any aspect of the County's role in these respects. Standards developed in these regards should be verified for compliance with such laws.

Conclusions and Recommendation: There is concurrence that a definition of what comprises the "official record" of an e-recorded document is needed and that such "official record" will be the image of the transaction rather than the entire transaction itself (for each document). Legislation will be necessary to create such a definition. This item is on the long-term "to do" list of the Legal Subcommittee.

13. Social Security Number – Privacy Concerns. Minn. Stat. § 272.115 provides that the identification numbers of grantors and grantees on a Certificate of Real Estate ("CRV") are private data as to individuals (or nonpublic data as to other entities) but that notwithstanding, such ID numbers may be disclosed to the commission of revenue for purposes of tax administration. This is consistent with Minn. Stat. § 13.49, subd. 1. Although Minn. Stat. § 13.49, subd. 2 provides that social security numbers appearing in documents or records filed or recorded with the county recorder or registrar of titles are not private data, that exception should not apply given that the CRV is to be filed only with the county auditor (per the terms of Minn. Stat. § 272.115). Standards and implementation of standards for the electronic handling of CRV will need to be reviewed to confirm compliance with Minn. Stat. Ch. 13 (Government Data Practices Act), including, but not limited to, the limitations therein as to the collection, storage, use and dissemination of such private data.

Conclusions and Recommendation: There is concurrence that the Department of Revenue should design an e-CRV form which effectively "hides" the social security number to comply with the above privacy requirements. Per Item 5 above, the ERERTF will be working with the Department of Revenue in this respect.

14. Confidentiality of Other Recording Information. It appears that currently data ordinarily included in real estate documentation publicly recorded is public data per Minn. Stat. § 13.03 and to which the public has the right to access. Nevertheless, as the electronic real estate recording system and access to the records generated thereby progresses toward systems which may allow the general public to easily perform more detailed searches concerning personal information, consideration should be given to the applicability of Minn. Stat. § 13.05, subd. 5 to such systems. That statutory subdivision requires that a county, being a responsible authority under that statute, establish appropriate security safeguards for all records containing data on individuals. Also, to the extent a County enters into a contract for a private vendor to perform any of its record handling functions, that vendor will need to comply with the requirements of Chapter 13, Government Data Practices Act, including those generally described above (per Minn. Stat. § 13.05, subd. 11). Consider whether standards should specify these requirements.

Conclusions and Recommendation: Following discussion, there was apparent concurrence that no action is currently necessary in regard to the issues addressed in this Item 14.

15. Records Management. Standards and implementation of standards will need to be reviewed for compliance with records management requirements under and pursuant to the Records Management Act (*see* Minn. Stat. § 138.17).

Conclusions and Recommendation: There is concurrence that e-recorded documents should be handled in a manner consistent with the state laws governing records management. The currently proposed standards were developed utilizing state records management guidelines supplied by the State, and so should be in compliance.

16. E-Sign Preemption Issues. Consider further inquiry as to whether, or to what extent, E-Sign may have a preemptive effect on Minn. Stat. §§ 325L, 325K and any legislation necessary to establish and/or implement standards for e-recording in Minnesota.

Conclusions and Recommendation: After thorough discussion, there is concurrence among the Legal Subcommittee that no further action is required on this item.

17. Evidence. Consider whether Minnesota evidentiary rules and practice warrant or require that the official “record” of an electronically recorded document include the entirety of the e-transactions comprising that recorded instrument.

Conclusions and Recommendation: Discussion was had among the Legal Subcommittee regarding issues of proof if the image, rather than the entire transaction, is the “official record” of an e-recorded document. E-signatures eliminate the ability to analyze a signature (i.e., can’t rely on handwriting experts). Assuming only the image is the official record, a person won’t be able to review the underlying e-signature transaction, at least not based solely on the county record. In effect, proof of a signature on an e-recorded document may come down to a presumption of its authenticity. Assuming this, the Legal Subcommittee has placed on its long-term “to do” list further consideration of whether legislation providing for such a presumption based on digital signatures or receipt of a signed document from a trusted business submitter is appropriate and/or necessary. Further consideration will also be given by the Legal Subcommittee to establishing standards defining the qualifications and duties of a trusted business submitter.

18. Issues Concerning Minn. Stat. Chapter 325K. Consider to what extent, if any, the provisions of Minn. Stat. Chapter 325K concerning the rights and obligations of a “recipient” (as defined therein) should be modified if and when the county is such a “recipient” of real estate documents submitted for recording and electronically signed pursuant to that chapter. For example:

- (a) Is a county, by accepting a digital signature, automatically bound by the terms and conditions of the licensed authority’s certification practice statement per Minn.

Stat. §325K.09, subd. 3? Will those terms and conditions be adequately controlled by the State's licensing process?

- (b) Does a county "assume the risk" that a certificate is forged per §325K.20? Should a county assume the risk that a certificate is forged under any circumstances?
- (c) Should a county, in accepting a digital signature for recording, be automatically and absolutely entitled to rely on the presumptions concerning the digital signatures and certificates otherwise provided in §325K.24 (i.e., should these presumptions be conclusive as to county reliance)?
- (d) Does the county have any responsibility to determine whether any party affected by a digital signature has objected to the use of the digital signature in lieu of an (ink) signature (per Minn. Stat. §325K.19(a)(1)(ii)) before accepting a digitally signed document for recording?

Conclusions and Recommendation: Review and discussion of this item by the Legal Subcommittee is recommended.

19. Arcanvs Patents. Arcanvs, a Utah company, apparently owns two patents (Nos. 5,872,848 and 6,085,322) which, generally said, involve the concept of electronic notarization of an electronic document for the purposes of authenticating an electronic document. It is unclear whether the scope of patent protection afforded by either of these patents would interfere with application of the standards for e-recording currently being considered by the ERERTF.

Conclusions and Recommendation There is consensus that it would be worthwhile for the ERERTF to obtain the legal opinion and advice of a patent attorney with respect to the scope of the Arcanvs patents vis-à-vis e-recording in Minnesota.