



STATE OF KANSAS

## Office of the Attorney General

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*Curt T. Schneider*  
Attorney General

June 24, 1976

ATTORNEY GENERAL OPINION NO. 76-191

Mr. Michael H. Haas  
County Attorney  
Sheridan County  
Hoxie, Kansas 67740

RE: Mortgage Registration Fees--Open end contracts.  
K.S.A. 1975 Supp. 79-3102

Synopsis: When the mortgage or contract offered for recording states a specific sum as being the current obligation or debt, but contains an agreement that in the future additional loan advances will be made not exceeding a second and larger specific sum, the mortgage registration fee shall be based on such second and larger sum.

\* \* \* \*

Dear Mr. Haas:

You say you have an open ended type mortgage, offered in your county for recording by the Register of Deeds, which will initially start at \$20,000.00 but provides that it may be increased to as much as \$100,000.00. You ask on which sum the mortgage registration fee should be figured.

In our opinion, the fee should be based on the \$100,000.00 figure, because the instrument being recorded creates a lien that can secure the repayment of that size of a debt. K.S.A. 1975 Supp. 79-3102 provides that the mortgage registration fee shall be based on "the principal debt or obligation which is secured by such mortgage,..."

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Article 11, Sec. 1 of the Kansas Constitution was amended in 1924 to permit separate classification of mortgages for taxation. In 1925 the Kansas Legislature enacted the mortgage registration fee statute, K.S.A. 79-3101, et seq. While designated a "fee", it is in reality a tax, because it provides in K.S.A. 1975 Supp. 79-3102 that upon payment of such fee, the mortgage and the note secured thereby "shall not otherwise be taxable".

The Kansas Supreme Court had found through the years some unusual circumstances not specifically covered by the statute, and filled the gaps in the law by judicial construction. The fee was allowed to be paid after action to foreclose the mortgage had been filed. Fowler v. Moore, 147 Kan. 108, 109, 110, 75 P.2d 222, (1938). This position was held true even in a completely "open ended" mortgage where agreed future advances were unlimited. A bank had agreed to finance a housing project by advances as construction progressed. A "dollar mortgage" was executed and, upon filing, a registration fee was paid on the first advance of \$1,000.00. The bank later declined to advance more additional money than \$8,950,000.00, re-recorded its mortgage and then paid registration fees on total sum of \$9,950.00, before filing foreclosure suit. The Court held that a mortgage to secure future advances is valid and will be judicially enforced, and that such mortgage has priority before a mechanics' lien recorded after the recording of the mortgage, but before the making of the advances. Potwin State Bank v. Ward, 183 Kan. 475, 491, 327 P.2d 1091 (1958).

There had always been legal problems with the law as written when a new mortgage was filed and claim made that no fee was due because the new mortgage was "solely" to secure the "same indebtedness". First Nat'l Bank v. Lovitt, 535, 540, 148 P.2d 738 (1944). This problem came to a head in Meadowlark Hill, Inc. v. Kearns, 211 Kan. 35, 505 P.2d 1127 (1973). The Supreme Court upheld the imposition of a second fee on a mortgage debt when the new "mortgage and Note Revision Agreement" was filed. But the Court called attention to the fact that other states had laws which provide that a mortgage may be increased or added to and the registration fee shall be taxable only on such increase or addition. Then, the Court pointedly stated: "The legislature has not seen fit to provide a similar exemption in the Kansas Act". (P. 44)

Meadowlark was handed down in the January, 1973 term. The Kansas legislature in session then passed Chapter 395, Section 1 amending K.S.A. 79-3102 by adding a third exemption:

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"(3) upon that portion of the consideration stated in the mortgage for filing which is verified by affidavit to be principal indebtedness covered or included in a previously recorded mortgage or other instrument with the same lender upon which the registration fee herein provided for has been paid..."

In our opinion, the Kansas Legislature clarified this area of the law by requiring that all mortgages be filed for a fixed and specific sum of money. If further advances are to be made, a new mortgage will not incur another fee on the old debt. That way, intervening liens are protected. In this way, the situation is eliminated whereby an open end mortgage might be recorded on a very small debt, and the mortgagee is in a position to avoid ever paying any further fees on the advances, unless the mortgage needs to be foreclosed.

Very truly yours,



CURT T. SCHNEIDER  
Attorney General

CTS/CJM/cgm