



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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July 28, 1981

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ATTORNEY GENERAL OPINION NO. 81-180

Paul D. Handy  
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Box M, Finney County Courthouse  
Garden City, Kansas 67846

Re: Taxation -- Mortgage Registration Fee -- Instru-  
ments Subject Thereto

Synopsis: A register of deeds may refuse to file a document that incorporates, by reference, the provisions of an executory contract for the sale of real property, if the mortgage registration fee has not been paid on the executory contract. However, a document tendered for filing, which references an affidavit of equitable interest filed under the provisions of K.S.A. 1980 Supp. 79-3102(5), may be recorded without payment of the mortgage registration fee on the executory contract which gives rise to the affidavit of equitable interest. In regard to such documents, if they are mortgages of real property, the mortgage registration fee would be paid on the document (unless the mortgagee is an instrumentality of the United States government), but no fee would be charged on the executory contract which gives rise to the affidavit of equitable interest referred to in the document.

Under K.S.A. 58-2221, only instruments, in writing, that convey real estate, or any estate or interest created by an oil and gas lease, or whereby any real estate may be affected are eligible for recording in the office of the register of deeds. (Attorney General Opinion No. 75-447 affirmed.) Cited herein: K.S.A. 58-2221, 79-3101, K.S.A. 1980 Supp. 79-3102, 79-3107.

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Dear Mr. Handy:

Your office has requested our opinion as to whether a mortgage registration fee should be paid in regard to a certain executory contract for the sale of real property, of which the Finney County Register of Deeds has just become aware.

You relate the facts as follows:

"1. In a contract dated May 15, 1977, X agrees to sell to Y certain real estate for the sum of \$36,000.00.

"2. Payments are made after the contract and Y acquires certain equitable interest in the property.

"3. The original sales contract being entitled Agreement for Warranty Deed is held in escrow at Fidelity State Bank at Garden City, Kansas and is not presented for recording.

"4. In April of 1981 Y mortgages her equitable interest in the said property to Farmers Home Administration for \$21,200.00.

"5. The mortgage is presented for recording by Farmers Home Administration and said mortgage contains the paragraph as follows:

"'Also subject to contract of sale between X and Y as to the specific property described in the original contract.'

"6. FHA also presents for recording a document entitled Agreement Between Real Estate Contract Sellers and Buyers wherein the original contract is referred to specifically and the property described specifically as well as the original amount of the contract being named specifically. The agreement sets forth that Sellers agree that Buyer may mortgage her equitable interest in the land for a specific amount to Farmers Home Administration and that further sellers agree they shall not institute any legal proceedings to rescind [sic] the original contract or to foreclose there on [sic] without first notifying [sic] the Government.

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"7. FHA also submits for recording an Affidavit of their attorney setting forth the belief that no mortgage registration tax is due and owing on the original contract."

Based upon these facts, you ask whether the Register of Deeds should collect a mortgage registration fee on the original contract between X and Y.

The mortgage registration fee is imposed pursuant to K.S.A. 1980 Supp. 79-3102, which, in pertinent part, provides:

"Before any mortgage of real property, or renewal or extension of the same shall be received and filed for record there shall be paid to the register of deeds of the county in which such property or any part thereof is situated, a registration fee of twenty-five cents (25¢) for each one hundred dollars (\$100) and major fraction thereof, of the principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid. . . . After the payment of the registration fees as aforesaid the mortgage and note thereby secured shall not otherwise be taxable." (Emphasis added.)

K.S.A. 79-3101 provides the following definitions:

"The words 'real property' and 'real estate' as used in this act, in addition to the definition thereof contained in the Revised Statutes of 1923, shall include all property a conveyance or mortgage of which is entitled to record as real property or interest therein under the laws of this state. The words 'mortgage of real property' shall include every instrument by which a lien is created or imposed upon real property, notwithstanding that the debt secured thereby may also be secured by a lien upon personal property. An executory contract for the sale of real estate, or a bond for a deed, the complete performance of which is deferred for a longer period than ninety days from its execution, under which the grantee or vendee is entitled to the possession of such real estate, by the terms of which the grantor holds the legal title as security for the unpaid purchase money, shall for the purpose of this act be treated as a mortgage of real property to secure the balance of the unpaid purchase price."

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K.S.A. 79-3107 provides:

"Any mortgage of real property executed on or after March 1, 1925, on which the registration fee as herein provided has not been paid, shall not be filed for record by any register of deeds, and such mortgage shall not be received in evidence in any suit, action or proceeding, and no judgment, decree or order for the enforcement thereof shall be rendered, made or entered in or by any court in this state." (Emphasis added.)

It is our understanding the executory contract for the sale of real property between X and Y is such that it is to be treated as a mortgage of real property, under the direction of K.S.A. 79-3101.

In Attorney General Opinion No. 75-447, dated December 4, 1975, Attorney General Curt Schneider answered the question of law you have asked. That opinion is based upon facts substantially similar to those presented herein. As in the case here, the FHA had made a loan to the purchaser of real property under an executory contract for the sale of real property and had attempted to file a mortgage granted it by the borrower. The FHA had attached to its mortgage, as "Exhibit A," a copy of the executory contract. The FHA also offered for filing a document entitled "Agreement Between Real Estate Contract Sellers and Buyers." (A document under the same title has been offered for filing in this case.)

After setting forth the above facts, Attorney General Schneider said:

"You ask whether the Register of Deeds should require that a registration fee be paid on the first lien. In our opinion this instrument does in fact incorporate by reference the prior existing contract lien, which is a mortgage as defined by K.S.A. 79-3101. It makes that first lien a matter of record, and protects the rights of both the buyers and sellers in that contract.

"A mortgage registration fee is a tax which is normally paid by the mortgagee. Meadowlark Hill Inc. v. Kearns, 211 Kan. 35, 41, 505 P.2d 1127 (1973). Kansas shall never tax the property of the United States. Act for Admission of Kansas into the Union, Section Sixth.

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"But it is not suggested that a mortgage registration fee be assessed on the second mortgage of the Farmers Home Administration. It is our opinion that by Exhibit 'A' an attempt is being made to record a first and prior lien, not belonging to an exempt entity, and upon which no registration fee has ever been paid. The first lien could not have been recorded without the parties paying the statutory registration fee. What cannot be done directly cannot be done indirectly. The Farm [sic] Home Administration cannot cast its cloak of exemption over non-exempt individuals.

"We believe that the Register of Deeds should request evidence of the amount of consideration involved in the first lien contract and then assess the statutory registration fee required by K.S.A. 79-3101 et seq., or refuse to record 'Exhibit "A"'. " (Emphasis added.)

The above-quoted opinion was issued in 1975. In 1979, the legislature amended K.S.A. 79-3102 to include the following emphasized provision:

"No registration fee whatsoever shall be paid, collected or required for or on any mortgage or other instrument . . . (5) given in the form of an affidavit of equitable interest solely for the purpose of providing notification by the purchaser of real property of his or her interest therein." (Emphasis added.)

The Kansas Supreme Court has held that when the legislature changes a statute, it will be presumed "the legislature intended to supply some want, to fill some deficiency or to add something to make the former legislation more complete and workable." Huss v. DeMott, 215 Kan. 450, Syl. ¶1 (1974). See also Safeway Stores, Inc. v. Director of Revenue, 211 Kan. 594, 595 (1973) and Curless v. Board of County Commissioners, 197 Kan. 580, 587 (1966). In our judgment, this judicial presumption is quite appropriate in regard to K.S.A. 1980 Supp. 79-3102.

Apparently, prior to the adoption of the exemption provision quoted above, a purchaser of real property under an executory contract for the sale of real property had no means available to him or her to give notice of his or her equitable interest in the real property, other than to record the executory contract. It is equally apparent, however, that the executory contract

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could not be recorded without payment of the mortgage registration fee. K.S.A. 79-3107. Thus, prior to the amendment of 79-3102 in 1979, such a purchaser, in order to give notice of and protect his or her interest in the property, was forced to pay a mortgage registration fee on the executory contract, which fee should have been paid by the seller of the property. This deficiency in the provisions of 79-3102 was corrected by enactment of the above-quoted exemption provision in K.S.A. 1980 Supp. 79-3102. Due to that amendment, a purchaser under an executory contract for the sale of real property is provided a means of giving notice of his or her equitable interest in the real property, without being required to pay someone else's tax liability.

However, the above quoted provisions of 79-3102 provide an exemption from taxation. As such, those provisions must be strictly construed (see Meadowlark Hill, Inc. v. Kearns, 211 Kan. 35 (1973) and the cases cited therein at 41), and in order to avoid payment of the mortgage registration fee, those provisions must be followed scrupulously. Construed strictly, those provisions waive payment of the mortgage registration fee, if the instrument offered for filing is given: (1) "in the form of an affidavit of equitable interest"; and (2) "solely for the purpose of providing notification by the purchaser of real property of his or her interest therein." (Emphasis added.)

Due to the enactment of this exemption provision, Y could have given, and still can give, notice of his or her equitable interest in the subject real property, without being required to pay the mortgage registration fee, if he or she merely follows the requirements of the statute. It is to be noticed, however, the exemption provided by the legislature does not permit the filing of the executory contract itself. Thus, in our judgment, the observation made by Attorney General Schneider in Attorney General Opinion No. 75-447 was a correct statement of the law, and continues to be so.

Since the legislature has provided a procedure whereby a purchaser under an executory contract for the sale of real property can give notice of his or her interest in the property, without payment of the mortgage registration fee, we believe that procedure should be followed strictly, if payment of the mortgage registration fee is to be legally avoided. That procedure has not been followed in the instant case. Therefore, we are of the opinion that, unless and until Y files an affidavit of equitable interest in the subject real property, and the mortgage offered for filing by the FHA is amended to make reference to that affidavit of equitable interest, instead of the executory contract between X and Y, the register of

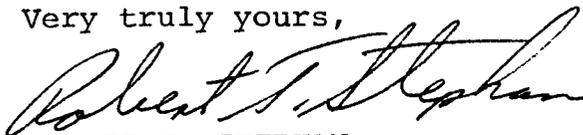
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deeds may refuse to file the mortgage granted to the FHA, unless, of course, the mortgage registration fee is paid on the executory contract.

In addition, we also are of the opinion that the document entitled "Agreement Between Real Estate Contract Buyers and Sellers" may not be recorded, without payment of the mortgage registration fee on the executory contract between the buyers and sellers. K.S.A. 79-3107.

Finally, the affidavit of the attorney of the FHA, stating his or her opinion in regard to payment of the mortgage registration fee, is not an instrument which may be filed in the office of the register of deeds. Under K.S.A. 58-2221, only written instruments that convey real property, or any estate or interest created by an oil and gas lease, or whereby any real estate may be affected, are eligible for recording in the office of the register of deeds. The above-referenced affidavit is not such an instrument. Thus, it may not be recorded.

Very truly yours,



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Rodney J. Bieker  
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RTS:BJS:RJB:jm