



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

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ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 82- 91

Daniel L. Love
Ford County Attorney
P. O. Box 1057
Dodge City, Kansas 67801

Re: Taxation--Mortgage Registration Fee--Computation
of Amount Due

Synopsis: The mortgage registration fee is measured by the principal debt or obligation secured by a mortgage of real property. If the initial amount of the principal debt or obligation secured by a mortgage of real property is increased, an additional mortgage registration fee is due. In such circumstances, however, such fee need be paid only upon the difference between the initial amount of principal debt or obligation secured by the mortgage and the amount of principal debt or obligation subsequently secured by the mortgage. Attorney General Opinion No. 73-191 is withdrawn. Cited herein: K.S.A. 1981 Supp. 79-3102.

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Dear Mr. Love:

You seek an opinion of this office concerning the provisions of K.S.A. 1981 Supp. 79-3102, under which the mortgage registration fee is imposed. In reviewing the files of this office, we find no tax statute that has prompted as many inquiries as has this one. Given the number of requests this office has received for assistance in construing the provisions of this statute, we think the following observation of the Kansas Supreme Court concerning

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another tax statute is equally applicable to K.S.A. 1981 Supp. 79-3102: "The confusion of thought and inaccuracy of expression so frequently exhibited in legislative enactments are quite apparent in this one, and the precise purpose to be accomplished is somewhat difficult of discernment." Gas Co. v. Neosho County, 83 Kan. 335, 337 (1907).

On this occasion, you explain that a lending institution has tendered for filing a mortgage of real property covering real estate upon which the lending institution already has an existing mortgage which has been recorded in the office of the register of deeds. The existing mortgage was filed a number of years ago, and the mortgage registration fee due thereon was paid, based upon the total amount of the debt stated in and secured by that mortgage. Over the years, the debt owed to the lending institution has been reduced. Recently, however, the owners of the property borrowed additional money from the lending institution. The amount borrowed exceeds the amount stated in and secured by the mortgage of real property currently on file. Based upon this fact, the lending institution was granted a "new" mortgage on the real property which secures the total amount of indebtedness now owed to the lending institution by these borrowers.

At the time the lending institution tendered this new mortgage for filing, it also submitted an affidavit stating that this mortgage included principal indebtedness covered by the previously recorded mortgage, and that the mortgage registration fee had been paid on that mortgage. In addition, it offered to pay a mortgage registration fee based upon the difference between the total indebtedness secured by the new mortgage and the total indebtedness secured by the previously recorded mortgage. The register of deeds refused to receive the new mortgage, contending that the proper amount of mortgage registration fee due on the new mortgage should be based upon the total indebtedness secured by the new mortgage and the balance of the indebtedness that was owing immediately prior to the time the new mortgage was given to the lending institution. You ask us to decide which is the proper method of determining the amount of the mortgage registration fee due on the new mortgage.

Your inquiry concerns that portion of K.S.A. 1981 Supp. 79-3102 in which it is provided:

"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. . . . No registration fee whatsoever shall be paid, collected or required . . . (3) upon that portion of the consideration stated in the mortgage tendered 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" (Emphasis added.)

The above-emphasized language was added to the statute in 1973, apparently in response to the decision of the Kansas Supreme Court in Meadowlark Hills, Inc. v. Kearns, 211 Kan. 35 (1973). As explained in Attorney General Opinion No. 76-191:

"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, [158 Kan.] 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" Id. at 3.

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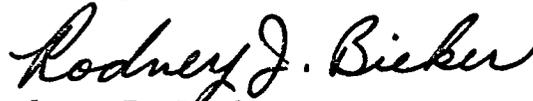
We believe the intent of the legislature in enacting the third exemption clause of K.S.A. 1981 Supp. 79-3102 was to establish a procedure whereby a mortgage could be "increased or added to" and the registration fee imposed only on such increase or addition. Therefore, we must conclude that in situations where the initial amount of the principal debt or obligation secured by a mortgage of real property is increased, an additional mortgage registration fee must be paid only upon the difference between the initial amount of principal debt or obligation secured by the mortgage and the amount of principal debt or obligation subsequently secured by the mortgage, as renewed or extended, or both.

In reaching the above conclusions, we have not overlooked Attorney General Opinion No. 73-191, in which an opposite conclusion was reached. In that opinion, however, Meadowlark Hill, Inc. v. Kearns, supra, is not cited or discussed. We believe the failure to consider that case produced an erroneous conclusion. Therefore, Attorney General Opinion No. 73-191 is withdrawn.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJS:RJB:jm