



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 90- 127

Steven L. Opat
Geary County Counselor
715 North Washington Street
Junction City, Kansas 66441-0168

Re: Taxation--Mortgage Registration and Intangibles;
Mortgage Registration--Fee; Exemptions

Synopsis: Mortgage registration fees may be collected only once on a single indebtedness. Thus, a mortgage tendered for filing which includes principal indebtedness covered by a previously filed mortgage upon which mortgage registration fees were paid is not subject to K.S.A. 79-3102 except to the extent the "new" mortgage covers indebtedness in excess of that secured by the original mortgage. Cited herein: K.S.A. 79-3102, as amended by L. 1990, ch. 351, § 3.

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Dear Mr. Opat:

As counsel for the Geary county register of deeds, you request our opinion regarding payment of mortgage registration taxes under the following circumstances:

"(1) On October 1, 1984, an initial mortgage in the amount of \$90,000.00 was given by the borrower to the First National Bank of Junction City on Lot 'X' in Junction City, Kansas. This mortgage was recorded at Book 97, Page 969. On June 28, 1989, this mortgage was released;

"(2) On June 23, 1989, a mortgage between the same borrower and lender in the amount of \$60,000.00 was given to 'secure repayment' of the above indebtedness on property 'Y' and an affidavit of exemption was filed indicating that the consideration stated in the aforementioned mortgage 'is the same principal indebtedness covered and included in a mortgage previously recorded in mortgage Book 97, Pages 969-983', regarding property 'X'. This mortgage and accompanying affidavit were filed at Mortgage Book 107, Pages 481 through 486. On September 25, 1990, this mortgage was released;

"(3) On September 25, 1990, a mortgage between the same borrower and lender in the amount of \$60,000.00 was given on property 'Z' and recorded in Book 108, Page 1372, with an accompanying affidavit stating that the \$60,000.00 'is that portion of the total consideration in the attached mortgage tendered for filing that is the principal indebtedness in the real estate mortgage recorded in Mortgage Record 107 at Page 481-486 . . . on which the mortgage registration tax as required by law had previously been paid."

You inquire whether the two subsequent mortgages are entitled to exemption under K.S.A. 79-3102(d)(3) in view of the fact that the property descriptions in each mortgage differ, and the prior mortgages were released each time.

K.S.A. 79-3102, as amended by L. 1990, ch. 351, § 3, provides in part:

"(a) Before any mortgage of real property, or renewal or extension of such a mortgage, is 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 \$.26 for each \$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.

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"(d) No registration fee whatsoever shall be paid, collected or required for or on:

"(2) any mortgage or other instrument given for the purpose of providing additional security for the same indebtedness, where the registration fee herein provided for has been paid on the original mortgage or instrument; (3) any mortgage or other instrument 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 or their assigns upon which the registration fee herein provided for has been paid. . ." (Emphasis added).

As noted in Attorney General Opinion No. 82-91, subsection (d)(3) was added to K.S.A. 79-3102 in 1973, apparently in response to the Kansas Supreme Court's decision in Meadowlark Hills, Inc. v. Kearns, 211 Kan. 35 (1973). In that case, a substitute mortgage was offered for filing which stated a larger indebtedness than that secured by the original mortgage. The court held that the exemption now contained in K.S.A. 79-3102(d)(2), as amended, did not apply because the new mortgage was not given "solely for the purpose of providing additional security," as required by the statute at that time; it was also given to increase the indebtedness.

"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." Attorney General Opinion No. 82-91.

In Attorney General Opinion No. 79-211, this office concluded that in addition to the exemption afforded by K.S.A. 79-3102(d)(3), the 1973 amendment also served, through the language in the imposition clause, to make the tax inapplicable to all new mortgages covering old debts upon which mortgage registration taxes had already been paid. The question thus is whether the new mortgage tendered for filing includes principal indebtedness secured by an earlier mortgage upon which a registration fee has been paid.


The two subsequent mortgages in question were accompanied by affidavits stating that they covered the same indebtedness contained in a previously recorded mortgage upon which mortgage registration fees had been paid. There is nothing in the body of the mortgages to indicate otherwise. This office has previously opined that release of the original mortgage does not affect exempt status as long as the subsequent mortgage includes the original indebtedness. Attorney General Opinion No. 75-440. We did suggest in Attorney General Opinion No. 80-76 that

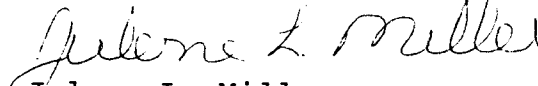
"if the mortgage tendered for filing is a newly executed mortgage, certain procedural safeguards should be followed to insure, as much as is possible, that payment of the mortgage registration fees is not being evaded. First, the records in the register of deeds office should be examined to verify that the mortgage tendered for filing is merely a replacement for the mortgage previously released and that the mortgage registration fee was in fact paid on the mortgage so released. Second, the previously released mortgage should be compared to the new mortgage to insure that the mortgage tendered for filing is consistent with the mortgage previously released. For example, both mortgages must name the same lender or an assignee thereof and give the same legal description of the mortgaged property. If such is not the case, mortgage registration fee is due." (Emphasis added).

The situation addressed in opinion no. 80-76 involved inadvertent release of a mortgage and an attempt to refile it

of record. In that situation, the property description should have been identical. However, since the mortgage registration fee is a tax on the indebtedness, and not the security [see Union Pacific Rld. Co. v. Stratemeyer, 119 Kan. 8, 9 (1925); Attorney General Opinion No. 76-269] we do not believe the fact that the instant mortgages describe different property as security is necessarily determinative. Again, the sole determination to be made is whether the "new" mortgage includes principal indebtedness covered by a previously filed mortgage upon which mortgage registration fees have been paid. If so, a second fee may not be collected on that portion of the consideration secured by the new mortgage. Finally, in determining whether the indebtedness is the same, we refer you to Attorney General Opinion No. 87-162 (the register of deeds need not go beyond the four corners of the affidavit; "The affiant has sworn [State v. Knight, 219 Kan. 863, 867 (1976)] that this is the same debt covered in a previously recorded mortgage . . . and if the substance of the affidavit is later discovered false, the affiant shall suffer the consequences.")

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
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