



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 92- 157

Robert W. Fairchild
Douglas County Counselor
808 Massachusetts Street
P.O. Box B
Lawrence, Kansas 66044-4700

Re: Taxation--Mortgage Registration and
Intangibles--Mortgage Registration; Fee;
Calculating Amount

Synopsis: Pursuant to L. 1992, ch. 265, §4, if a mortgage states that it is to secure an amount less than the total amount of principal debt or obligation, mortgage registration tax shall be based on the lesser amount. Intent of the parties, determined by a comprehensive review of the mortgage and the note as suggested in Attorney General Opinion No. 90-61, is no longer determinative of the amount upon which to base the tax. Cited herein: K.S.A. 1991 Supp. 79-3102, as amended by L. 1992, ch. 265, §4.

* * *

Dear Mr. Fairchild:

You request our opinion regarding the calculation of mortgage registration taxes. You state that the mortgage form in question is being used by many of the banks in the Douglas county area.

The sample mortgage you provide states that it will secure payment "of all of Borrower and Grantor's present and future,

indebtedness. . . to Lender pursuant to: (a) this mortgage and the following promissory notes and other agreements:. . .
" The mortgage then lists a principal amount or credit limit of \$122,500 which apparently was extended on November 9, 1992. The confusion in this case is caused by language appearing in the future advances clause:

"This Mortgage shall secure not only existing indebtedness, but also such future advances, whether such advances are obligatory or made at the option of Lender or otherwise, to the same extent as if such future advances were made on the date of the execution of this Mortgage, but such secured indebtedness shall not exceed at any time the maximum principal amount of \$100,000.00, Any such future advances, whether obligatory or made at the option of Lender or otherwise, may be made either prior to or after the due dates of the promissory notes or any other agreements secured by or described in this Mortgage. This Mortgage is given for the specific purpose of securing any and all indebtedness of the Borrower and the Grantor to Lender (but in no event shall the secured indebtedness exceed at any time the maximum principal amount set forth in this paragraph) in whatever manner this indebtedness may be evidenced or represented until this Mortgage is satisfied of record."

Thus, it is unclear whether the mortgage is intended to secure the \$122,500 principal amount already extended plus \$100,000 for any future advances beyond that amount, or whether the mortgage secures only \$100,000.

The Kansas Court of Appeals has held that a close-ended future advance clause secures indebtedness up to the maximum amount stated in the advance clause, and since that is the amount secured, mortgage registration taxes should be based on that amount. Halliburton Co. v. Board of Jackson County Comm'rs, 12 Kan.App.2d 704, syl. ¶6 (1988). (In Halliburton the amount stated in the future advance clause exceeded the amount originally extended.) Thus the court reaffirmed that the tax is based on the amount, wherever or however stated, that the

mortgage actually secures. In Attorney General Opinion No. 90-61 we concluded that:

"Determination of the amount any given mortgage secures must be made on a case-by-case basis, construing the mortgage and underlying note to determine the intent of the parties. A mortgage given to secure repayment of a \$100,000 indebtedness and which will not be released until the entire \$100,000 is repaid and other conditions met, secures the entire \$100,000 even though it contains a statement to the contrary. Mortgage registration fees should therefore be assessed based on the \$100,000 debt."

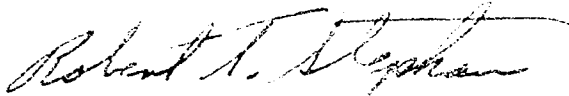
Subsequent to these decisions, however, the legislature amended K.S.A. 1991 Supp. 79-3102(a) as follows:

"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, except as provided in the following provision. In the event the mortgage states that an amount less than the entire principal debt or obligation will be secured thereby, the registration fee shall be paid on such lesser amount." L. 1992, ch. 265, §4 (emphasis denotes new language).

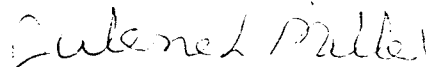
Thus, pursuant to this amendment, regardless of the amount actually secured by the mortgage (as determined by the intent of the parties), if it contains a statement that a lesser amount is secured thereby, the tax is to be based on that lesser amount. In this case the mortgage states that the secured indebtedness shall not exceed \$100,000. (While not absolutely clear, we believe the instrument in question limits

the total secured indebtedness to \$100,000, rather than just limiting the future advances to this amount). The tax should therefore be based on the \$100,000 amount.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

RTS:JLM: jlm