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November 18, 2016

ATTORNEY GENERAL OPINION NO. 2016-18

Dee McKee, Chairperson  
Board of Pottawatomie County Commissioners  
207 North 1st Street  
P.O. Box 187  
Westmoreland, Kansas 66549

Re: Counties and County Officers—Sewer Districts—Maintenance Fund; Tax Levy; User Charges; Priority of Lien

Synopsis: When unpaid user fees from a sewer district, established by a county commission pursuant to K.S.A. 19-27a01 *et seq.*, are converted into a lien against the property to which the services were provided, authority to enforce that lien against claims with senior priority cannot be inferred nor read into the statute. In the absence of explicit authority, such liens are subject to the established rules of priority. Cited herein: K.S.A. 12-6,112; 12-808c; 19-2716; 19-2729; 19-27a01; 19-27a-09; 58-2222; 58-2305; K.S.A. 2016 Supp. 79-2801.

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Dear Ms. McKee:

On behalf of the Board of County Commissioners of Pottawatomie County, you ask our opinion regarding the priority of a lien established by a sewer district operated by the board of county commissioners pursuant to K.S.A. 19-27a01 *et seq.* Specifically, you inquire whether a lien created under a sewer district's authority to collect unpaid user fees has priority against a recorded mortgage. In response to your question and as discussed below, we conclude that absent any explicit authority in the authorizing statute, collection of a statutory lien established under K.S.A. 19-27a09 should follow the established rules of priority.

### Sewer Districts Established by a Board of County Commissioners

A sewer district established by a board of county commissioners may fund the annual operation and maintenance of its facilities through a special maintenance tax and by collecting charges based on the use of the utility by customers within the sewer district.<sup>1</sup> In the case of non-payment, any “special maintenance tax or user charge shall become a lien upon the property against which the levy or service charge is made from the date the levy or sewer charge becomes due.”<sup>2</sup>

In your request, you specifically ask about the collection of unpaid user charges and not the special maintenance tax. Therefore, the special maintenance tax will not be addressed in this opinion. Further, you ask about the priority of such a lien as compared to a “recorded” mortgage. Presumably, you are inquiring about a mortgage recorded prior to the establishment of the sewer district lien, and which generally has priority over other liens, judgments, and mortgages recorded at a later date.<sup>3</sup> Additionally, if the mortgage is a purchase money mortgage, it may have priority over existing judgments against the purchaser<sup>4</sup>, along with priority over any later recorded liens, judgments, and mortgages.<sup>5</sup>

### Priority of Mortgages

The general rule regarding mortgages in Kansas is that the “first to record a mortgage has priority and is perfected over all others.”<sup>6</sup> Regarding purchase money mortgages, a “mortgage given by a purchaser to secure the payment of purchase money shall have preference over a prior judgment against such purchaser.”<sup>7</sup> A notable exception to the priority of a purchase money mortgage is when a mortgage is given with actual or constructive notice of an existing lien that has attached to the property and was not extinguished before or during a transfer of the property.<sup>8</sup>

In order to overcome the priority of a previously recorded mortgage or purchase money mortgage, some statutory mechanism is required. For example, when unpaid taxes are collected through a tax foreclosure auction, K.S.A. 2016 Supp. 79-2801 requires that the court make the “amount due ... a first and prior lien upon the real estate,” which provides priority over an existing mortgage.

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<sup>1</sup> K.S.A. 19-27a09(a), (b).

<sup>2</sup> K.S.A. 19-27a09(c).

<sup>3</sup> K.S.A. 58-2222.

<sup>4</sup> K.S.A. 58-2305.

<sup>5</sup> K.S.A. 58-2222.

<sup>6</sup> *In re Patton*, 314 B.R. 826, 832 (Bankr. D. Kan. 2004). (discussing the rights of a bona fide purchaser of real property as expressed in K.S.A.58-2222.)

<sup>7</sup> K.S.A. 58-2305.

<sup>8</sup> *Harms v. Burt*, 30 Kan.App.2d 263, 267 (2002). (“The doctrine of equitable subrogation may not be applied to relieve a party who negligently takes a lien on or an interest in property which is subject to prior liens of record of which that party had either actual or constructive notice.”).

### Collection of Unpaid User Fees

We must first turn to the language of K.S.A. 19-27a09 to determine if any special priority is granted to a sewer district lien. The statutory language used in K.S.A. 19-27a09 is clear and unambiguous. A lien against the subject property is created from the date the charge is due.<sup>9</sup> There are no other statutes in this article which offer any further guidance on the enforcement of a lien created under a sewer district's authority. Kansas courts favor a strict interpretation of statutorily created liens. In *Mark Twain Kansas City Bank v. Kroh Bros. Development Co.*,<sup>10</sup> the Kansas Court of Appeals, in examining the extent of a mechanic's lien, stated that:

“Lien statutes cannot be extended by implication beyond the clear import of the language employed and their operation cannot be enlarged to include activities not specifically embraced. It is well settled that, where a statute is clear and unambiguous, the court must give effect to the expressed legislative intent without regard to what the court thinks the law should or should not be.”<sup>11</sup>

Absent any specific language in K.S.A. 19-27a09 granting priority to a sewer district lien, none should be inferred.

When the legislature has intended to modify the rules of priority, they have plainly done so. Other improvement districts<sup>12</sup> created by counties are granted specific authority to collect unpaid fees and taxes by giving those claims senior priority.<sup>13</sup> Such districts are empowered to collect unpaid special assessments “in the same manner as general taxes, and [such] shall be first liens on the lands on which they are levied on par with other taxes....”<sup>14</sup> Similar specificity is also provided to improvement districts operated by cities, as “special assessments, when levied and certified and when they become due shall be collected as other taxes.”<sup>15</sup> When liens, assessments, or fees are to be collected as other taxes are collected, a tax foreclosure sale may be utilized, and as noted above, this procedure ultimately results in senior priority.<sup>16</sup>

Municipal utilities also operate with specific statutory language that provides priority in the collection of unpaid fees. Regarding municipal utilities:

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<sup>9</sup> K.S.A. 19-27a09(c).

<sup>10</sup> 14 Kan.App.2d 714 (1990).

<sup>11</sup> *Id.* at 719 (citation omitted) (discussing what activities constitute “improvement” of real property in regards to whether a valid mechanic's lien was created for architectural services that did not physically alter the property; the same principles limiting the scope of a statutory lien would presumably apply to the enforcement of any such lien).

<sup>12</sup> K.S.A. 19-2716.

<sup>13</sup> K.S.A. 19-2729.

<sup>14</sup> *Id.*

<sup>15</sup> K.S.A. 12-6,112.

<sup>16</sup> K.S.A. 2016 Supp. 79-2801.

“[T]he unpaid fees or charges shall constitute a lien upon the property to which such utility service is provided. The amount of unpaid fees or charges shall be certified by the governing body of the municipality to the county clerk of the county in which such property is located, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other taxes are collected by law.”<sup>17</sup>

The Legislature has consistently drafted specific language that provides a collection method which improves the priority of statutory liens when desired. K.S.A. 19-27a09 does not contain any additional language that improves the priority of a sewer district lien. An alternate means of collection that would improve the priority of the sewer district lien is also absent. Further, since a user fee is not a tax, it should not be treated as a tax and placed on a county’s tax roll without explicit statutory authority.<sup>18</sup>

When unpaid user fees from a sewer district, established by a county commission pursuant to K.S.A. 19-27a01 *et seq.*, are converted into a lien against the property to which the services were provided, authority to enforce that lien against claims with senior priority cannot be inferred nor read into the statute. In the absence of explicit authority, such liens are subject to the established rules of priority.

Sincerely,

Derek Schmidt  
Kansas Attorney General

Kenneth B. Titus  
Assistant Attorney General

cc: John Watt, Pottawatomie County Counselor  
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<sup>17</sup> K.S.A. 12-808c.

<sup>18</sup> See generally, *Regency Park, LP v. City of Topeka*, 267 Kan. 465, 471-72 (1999). (“Sewer charges and fees are not taxes or special assessments...but are in the nature of tolls or rents paid for services furnished or available.”); *Heartland Apartment Ass’n, Inc. v. City of Mission*, 51 Kan.App.2d 699, 707 (2015). (“[A] tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public. By contrast a fee is not a revenue measure, but a means of compensating the government for the cost of offering and regulating the special service, benefit, or privilege.”).