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January 4, 1979

ATTORNEY GENERAL OPINION NO. 79- 4

Lyndus A. Henry
County Counselor
Johnson County Courthouse
Olathe, Kansas 66061

RE: Mortgage Registration Tax - Home Association Annual
           Dues - Provision that Unpaid Dues Become a Lien -
           Definition of Debt. Agreements for Unaccrued Payments.
           K.S.A. 79-3102.

SYNOPSIS: Where a Home Association sells land in a subdivision
           with a restriction on title that the owner must belong
           and pay dues to the Home Association, and, if such dues
           are not paid, they shall become a lien on the land, the
           Mortgage Registration Tax should not be collected upon
           such dues at the time of recording a mortgage of sale
           contract by the Home Association. Unaccrued payments,
           which may or may not ever become actual liens, are not
           presently due and are not ascertainable as part of the
           principal debt or obligation secured at the time of re-
           cording. To perfect such liens, the Association must
           file with the Register of Deeds some written document,
           whenever delinquent dues exist, and claim a lien for an
           exact sum under the contract. It is at this time that
           the Mortgage Registration Tax should be collected on
           such dues.

               *   *   *

Dear Mr. Henry:

You write that you have a Home Association, which developes sub-
divisions, and when selling lots include in the sale contract a
restriction that the owner shall pay dues annually by a certain

date to the Association, and, if unpaid, such delinquent dues shall become a lien on the land. You ask if, at the time of sale and recording of such contract, an additional mortgage registration tax should on such annual dues lien.
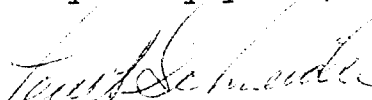
In our opinion the legislative intent was to impose the mortgage registration tax under K.S.A. 79-3102 only upon the accrued debt and obligation existing on the date of recording and which will that date be secured by a lien on real estate.

Many years ago, in the early days of this tax, this very point was considered by the Kansas Supreme Court. Land was sold with the buyer giving back a mortgage for a definite sum and an agreement to pay a flat percent of interest upon the unpaid balance, and to pay taxes. The mortgage registration tax was collected only on the basic amount of the mortgage. Later, when the buyer defaulted in both interest and taxes, foreclosure of the mortgage was filed, asking judgment for the unpaid balance of the mortgage, and the amount due in back interest and unpaid taxes. The Court rejected a defense that the mortgagee had paid an insufficient registration tax and could not under K.S.A. 79-3107 offer his mortgage in evidence. The Court held that K.S.A. 79-3102 did not require or contemplate the collection of additional taxes at the time of foreclosure on such items as accrue after recordation "even though they were in fact secured by the mortgage." Frost v. Kirkpatrick, 141 Kan. 517, 518, 41 P.2d 719 (1935).

We have followed this philosophy in a recent opinion No. 78-171, copy of which is enclosed, as to Uniform Consumer's Credit Code and Truth in Lending transactions. In such instances, by law, the lender must pre-compute all possible charges, at the time of lending. But by the same laws, such lenders are compelled to agree that the borrower may at any time pre-pay the loan and avoid payment of such charges. So, the charges are actually unaccrued. They are undetermined, and are undeterminable, at the time of recordation.

Payment of dues to a Home Association annually is an agreement like the Frost case supra. It is an unaccrued liability. When delinquency occures, then the Association must, as you say occasionally occurs, file an instrument with the Register of Deeds setting up a lien for the specific dues. It is then, at the time of recording such a lien, that the Mortgage Registration Tax should be collected.

Very truly yours,

CURT T. SCHNEIDER
Attorney General

CTS:CJM:dh
Enclosure