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December 28, 2012

ATTORNEY GENERAL OPINION NO. 2012-34

Richard Euson, County Counselor  
Sedgwick County  
525 N. Main, Suite 359  
Wichita, KS 67203-3790

Re: Personal and Real Property—Commercial Real Estate Broker Lien Act—  
Notice of Lien; Recording in the Office of the Register of Deeds

Taxation—Mortgage Registration and Intangibles—Mortgage Registration  
Fee

Synopsis: A notice of a commercial real estate broker's lien is a "mortgage of real property" as that term is defined by the Mortgage Registration Act. A commercial real estate broker must pay the mortgage registration fee before filing such a notice with the county register of deeds. Cited herein: K.S.A. 58-30a01; 58-30a03; 58-30a04; 58-30a05; 58-30a08; 58-30a13; 79-3101; 79-3102.

\* \* \*

Dear Mr. Euson:

As County Counselor for Sedgwick County, you ask whether a notice of a commercial real estate broker's lien on commercial real estate, recorded with the county register of deeds pursuant to the Commercial Real Estate Broker Lien Act<sup>1</sup>, is a "mortgage of real property" for purposes of the Mortgage Registration Act.<sup>2</sup>

You inform us that the Sedgwick County Register of Deeds, operating under the assumption that these notices are mortgages, has been requiring payment of the

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<sup>1</sup> K.S.A. 58-30a01 *et seq.*

<sup>2</sup> K.S.A. 79-3101 *et seq.*

mortgage registration fee prescribed by K.S.A. 79-3102 before recording them. Recently, however, one broker argued that a notice of a broker's lien is not a mortgage and thus not subject to the mortgage registration fee. Because of time limitations for filing, you advised the Sedgwick County Register of Deeds to record the notice without payment of the fee, but you now seek our opinion for the benefit of future filings.

"To insure that the cost of a system for recording mortgages is not borne by the public, but by those who wish the protection of notice," the Mortgage Registration Act prescribes a fee that must be paid before any "mortgage of real property" is recorded with the county register of deeds.<sup>3</sup> This Act defines "mortgage of real property" to include "every instrument by which a lien is created or imposed upon real property."<sup>4</sup> In determining whether a notice of a broker's lien is a "mortgage of real property," we look to this statutory definition rather than the ordinary meaning of the term.

The key question, then, is whether a notice of a broker's lien is an instrument by which the broker's lien is either "created" or "imposed upon real property." You recognize that a commercial real estate broker's lien is created by statute and not by the notice. Specifically, the Commercial Real Estate Broker Lien Act provides that, when certain conditions are met, a broker shall have a lien on commercial real estate in the amount of the broker's compensation as agreed upon by the owner or purchaser of the property.<sup>5</sup>

Although a broker's lien is not created by the notice of the lien, you believe this notice is an instrument by which the lien is "imposed upon" the real estate. We agree. As relevant here, "impose" ordinarily means "to establish or apply by authority."<sup>6</sup> And, under the Commercial Real Estate Broker Lien Act, a broker's lien does not "attach" to the real estate until the broker records a notice of the lien with the county register of deeds.<sup>7</sup> Thus, the notice is an instrument by which the lien is imposed upon, or attached to, the property.<sup>8</sup>

Admittedly, a notice of a broker's lien *standing alone* does not impose any lien on real property. The lien must be created pursuant to statute. Then, the notice must be recorded with the register of deeds in order for the lien to attach; an unrecorded notice has no legal effect. However, because recording the notice with the register of deeds has the effect of attaching the lien to the property, the notice is an instrument "by which" a broker's lien is imposed upon real estate.

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<sup>3</sup> *Misco Industries, Inc. v. Bd. of Sedgwick County Comm'rs*, 235 Kan. 958, 961 (1984).

<sup>4</sup> K.S.A. 79-3101.

<sup>5</sup> K.S.A. 58-30a03.

<sup>6</sup> See, e.g., <http://www.merriam-webster.com/dictionary/impose>.

<sup>7</sup> See K.S.A. 58-30a05 (if the broker has an agreement with the seller) or K.S.A. 58-30a08 (if the broker has an agreement with the buyer). The form of the notice is prescribed by K.S.A. 58-30a04, while K.S.A. 58-30a13 provides that the broker's lien is void if the broker does not record it as provided in the Act.

<sup>8</sup> We realize that because the mortgage registration fee is considered to be a tax, the definition of "mortgage of real property" must be strictly construed in favor of the taxpayer. See *GT, Kansas, LLC v. Riley County Register of Deeds*, 271 Kan. 311, 317-18 (2001). Even so, a notice of a broker's lien falls squarely within the Mortgage Registration Act's definition of a "mortgage of real property."

We are in receipt of a letter from the attorney for the broker in Sedgwick County who argued that a notice of a broker's lien is not subject to the mortgage registration fee. This letter cites the Kansas Supreme Court's decision in *Misco Industries, Inc. v. Board of Sedgwick County Commissioners*,<sup>9</sup> for the proposition that:

In determining whether an instrument is a mortgage or not, courts are guided to the substance of the transaction, not the form. The fact that an instrument is entitled Notice does not preclude it from being a mortgage. The ultimate determination in a case where it is sought to construe whether an instrument is a mortgage or not is the intention of the parties who executed the instrument.<sup>10</sup>

Along with other points, the letter argues that a notice of a broker's lien is not a mortgage because the parties do not intend for it to be one. In fact, the letter notes, the notice is executed by the broker alone, so the owner of the property has no intent at all respecting the instrument.

We do not, however, read *Misco Industries* as holding that an instrument must be executed by two or more parties in order to be a mortgage for purposes of the Mortgage Registration Act. As noted above, the Act defines "mortgage of real property" as "every instrument by which a lien is created or imposed upon real property,"<sup>11</sup> and an instrument executed by a single party can, as here, satisfy this definition. Holding that the term "mortgage of real property" only includes instruments executed by two or more parties would require reading words into the statute that are not readily found there, something the Kansas Supreme Court has consistently declined to do.<sup>12</sup>

Similarly, we also do not interpret *Misco Industries* as suggesting that the parties' beliefs concerning whether an instrument is a "mortgage of real property" for purposes of the Mortgage Registration Act somehow trump the statutory definition of that term. In fact, *Misco Industries* relied on the Kansas Supreme Court's earlier decision in *Assembly of God v. Sangster*,<sup>13</sup> which held that an instrument was a mortgage despite a clause in the instrument stating that the parties did not intend it to be one.<sup>14</sup> Instead of relying on the expressed intent of the parties, the *Assembly of God* Court looked to the purpose of the instrument in question.<sup>15</sup>

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<sup>9</sup> 235 Kan. 958 (1984).

<sup>10</sup> *Id.* at 963.

<sup>11</sup> K.S.A. 58-30a03 (emphasis added).

<sup>12</sup> See, e.g., *Bd. of County Comm'rs of Leavenworth County v. Whitson*, 281 Kan. 678, 685 (2006). The letter also suggests that requiring two or more parties is consistent with the ordinary meaning of the word "mortgage," citing Black's Law Dictionary's definition of "mortgage" as a conveyance or grant. This may be true, but because the term "mortgage of real property" is defined in statute, we look to this definition, not the ordinary meaning of the term.

<sup>13</sup> 178 Kan. 678 (1955).

<sup>14</sup> *Id.* at 681.

<sup>15</sup> *Id.*

Here, one purpose of recording the notice of a broker's lien is to cause the lien to become attached to — or imposed upon — the commercial real estate. The notice thus falls within the Mortgage Registration Act's definition of "mortgage of real property," regardless of whether the parties (or the broker alone) "intended" for the notice to be considered a mortgage subject to the recording fee.

Our conclusion that a notice of a broker's lien is a "mortgage of real property" does not necessarily resolve whether the mortgage registration fee must be paid. That is because the Mortgage Registration Act contains several exemptions from the fee. A letter from the Kansas Association of Realtors argues, among other things, that one of these exceptions, K.S.A. 79-3102(d)(5), applies to a notice of a broker's lien. This exception provides that "[n]o registration fee whatsoever shall be paid, collected or required for or on . . . any mortgage or other instrument given in the form of an affidavit of equitable interest solely for the purpose of providing notification by the purchaser of real property of the purchaser's interest therein."<sup>16</sup> The Kansas Association of Realtors argues that this exemption covers a notice of a broker's lien because the purpose of such a notice is to provide notification to others of the broker's interest in the property.

We disagree with this analysis. Even assuming that a notice of a broker's lien is an "affidavit of equitable interest," the plain text of this exception only includes affidavits filed "for the purpose of providing notification *by the purchaser* of real property *of the purchaser's interest* therein."<sup>17</sup> Because a mortgage broker is not the "purchaser" of the commercial real estate, a notice of a broker's lien does not fall within this exception.<sup>18</sup> Neither do we see any other exception that would exempt a notice of a broker's lien from the mortgage registration fee.

Accordingly, we opine that a notice of a commercial real estate broker's lien is a "mortgage of real property" as that term is defined by the Mortgage Registration Act and that a commercial real estate broker must pay the mortgage registration fee prescribed by K.S.A. 79-3102 before filing such a notice with the county register of deeds.

Sincerely,

Derek Schmidt  
Attorney General

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<sup>16</sup> K.S.A. 79-3102(d)(5).

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> See also *Misco Industries*, 235 Kan. at 961 (exemptions from taxation "must be strictly construed against the party who claims the exemption and such party must bring himself clearly within the exemption provisions").

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