



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

June 28, 2013

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The Honorable Jennifer R. Sims  
Clerk of Court  
Warren County Circuit Court  
1 East Main Street  
Front Royal, Virginia 22630

Dear Ms. Sims:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether a subordinate mortgage giving a security interest to the Secretary of Housing and Urban Development, Department of Housing and Urban Development (HUD) is subject to state and local recordation taxes.

## Response

It is my opinion that a subordinate mortgage giving a security interest to HUD is subject to state and local recordation taxes.

## Background

You advise that you have been presented with a document entitled "SUBORDINATE MORTGAGE" listing HUD as the lender/mortgager reciting a debt evidenced by the borrower's note of \$13,434.74 ("the subordinate mortgage"). The cover sheet lists HUD as the grantee and references a prior deed of trust recorded in 2009 in the amount of \$249,829.00.<sup>1</sup> The cover sheet also claims an exemption from recording tax pursuant to § 58.1-809 of the *Code of Virginia* for the amount of the subordinate mortgage.

## Applicable Law and Discussion

Recordation taxes are based on the privilege of having access to the benefits of state recording and registration laws.<sup>2</sup> Section 58.1-803 imposes a state recordation tax on deeds of trust or

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<sup>1</sup> For purposes of this Opinion, I will assume that this prior deed was properly recorded and that all recordation taxes were collected.

<sup>2</sup> Ruling of the Tax Comm'r, No. 92-234 (Nov. 9, 1992).

mortgages.<sup>3</sup> Localities are authorized to impose a local recordation tax in an amount equal to one third of the state recordation tax collectable by the Commonwealth.<sup>4</sup> Generally, the recording of any document is taxable absent a statutory exemption.<sup>5</sup>

Section 58.1-809 of the *Code of Virginia* provides that:

Sections 58.1-803, 58.1-807, and 58.1-808<sup>[6]</sup> are not to be construed as requiring the payment of any tax for the recordation of any deed of trust, deed of subordination, mortgage, contract, agreement, modification, addendum, or other writing supplemental to any such deed, mortgage, contract, agreement, modification, addendum, or other writing theretofore admitted to record...upon which the tax herein imposed has been paid...when the sole purpose and effect of the supplemental instrument or writing is to convey property, in addition to or in substitution, in whole or in part, of the property conveyed in a prior instrument, to secure or to better secure the payment of the amount contracted for in a prior instrument, to alter the priority of the instrument, or to modify the terms, conditions, parties, or provisions of such prior instruments, other than to increase the amount of the principal obligation secured thereby.

The clear and unambiguous language of this statute evidences that the exemption applies only to a supplemental writing that modifies the terms of, or the parties to, a previously taxed writing.<sup>7</sup> The Tax Commissioner has opined that in the context of the exemption, “supplemental” means “. . . add[ing] a thing to complete” a deed of trust or other security interest.<sup>8</sup>

A subordinate mortgage is not completing an existing deed of trust or other security interest. Instead, the subordinate mortgage evidences a separate, new agreement between a newly secured lender and the borrower and therefore is outside the exception provided by 58.1-809.<sup>9</sup> A subordinate mortgage is a second mortgage, one that is inferior in priority to a primary mortgage.<sup>10</sup>

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<sup>3</sup> VA. CODE ANN. § 58.1-803 (2009).

<sup>4</sup> Sections 58.1-814 (2009); 58.1-3800 (2009).

<sup>5</sup> Ruling of the Tax Comm’r, No. 92-234.

<sup>6</sup> Sections 58.1-807 and 58.1-808 apply to contract leases and sales contracts for the sale of rolling stock or equipment and are not relevant to the question you present.

<sup>7</sup> See 1987-88 Op. Va. Att’y Gen. 562 (opining that an assignment of a deed of trust merely modified the parties to a previously recorded instrument and, therefore, was exempt from taxes pursuant to § 58.1-809); 1990 Op. Va. Att’y Gen. 257 (finding that an instrument that evidences a separate, new agreement does not fall within the exemption provided by § 58.1-809); 1998 Op. Va. Att’y Gen. 134 (concluding that a grantor’s assignment that merely modifies parties to a previously recorded lease qualifies for the exemption provided by § 58.1-809).

<sup>8</sup> Ruling of the Tax Comm’r, No. 92-234.

<sup>9</sup> 1990 Op. Va. Att’y Gen. 257, 258.

<sup>10</sup> See, e.g., VA. CODE ANN. § 6.2-300 (defining “subordinate mortgage” as “a mortgage or deed of trust that is subject to a prior mortgage or deed of trust in existence at the time of the making of the loan secured by such subordinate mortgage or deed of trust”); BLACK’S LAW DICTIONARY 433 (8th ed. 2004) (defining “subordinate debt” as “a debt that is junior or inferior to other classes of debt”).

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**Conclusion**

Accordingly, it is my opinion that a subordinate mortgage giving a security interest to HUD is subject to state and local recordation taxes.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and cursive.

Kenneth T. Cuccinelli, II  
Attorney General