

OAG 09-002

March 20, 2009

Subject: The filing of an amended mortgage by the County Clerk.

Requested by: Representative Scott W. Brinkman
32nd District

Written by: Ann Louise Chevront
Assistant Attorney General

Syllabus: The County Clerk does not have the authority to refuse to file amended mortgages.

Statutes construed: KRS 382.300; KRS 446.080; KRS 382.297

OAGs cited: OAG 94-32

Opinion of the Attorney General

Representative Scott W. Brinkman has requested an opinion on a letter issued by Richard A. Vance regarding the following:

1. Whether or not the county clerk must record all duly prepared and submitted substantive types of mortgage amendments.

There is no specific statute that sets forth what is required of a county clerk. The responsibilities of the office are set forth in various statutes. One for example, is KRS 382.300 which requires every county clerk to “record all deeds, mortgages and powers of attorney that are lodged for record, properly certified, or that are acknowledged or proved before him as required by law.” The statute does not specify that the document has to be titled mortgage or a mortgage amendment. The statute just requires county clerks to record all mortgages.

As Mr. Gerhard opined in OAG 94-32, which you attached to your request, "although styled as an 'extension agreement' or 'modification agreement' such an instrument, in our view, is recordable as a mortgage. Whether in terms of common usage of language, or as a technical term of the law (KRS 446.080(4)), a 'mortgage' is an instrument pledging real property to a creditor as security for payment of a debt. In our view an extension of a mortgage, or substantially similar agreement, meets such definition. Assuming that a given extension of a mortgage meets general requirements for recordation of a mortgage, an extension of a mortgage may be recorded on the same basis as a mortgage."

KRS 446.080(1) provides:

All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature...

The clear intention of the recording statutes is to give notice to future purchasers and lenders or lien holders. The title of the document is irrelevant. KRS 382.297 specifically allows for the recording of amended mortgages. Though the first sentence states "a recorded mortgage may be amended by an affidavit of amendment prepared by an attorney to correct clerical errors or omitted information," this is not exclusive to what an amended mortgage may contain to be filed. It goes on to state "an amendment may not change any term, dollar amount, or interest rate in the mortgage, *unless signed by the mortgagor and secured party.*" Therefore, KRS 382.297 does contemplate that amended mortgages may change dollar amounts, interest rates or terms of the original mortgage with the agreement of the parties to the transaction.

If there is any question on the legitimacy of the filing it is for a court of law to make that ruling.

Yours truly,

JACK CONWAY
ATTORNEY GENERAL

Ann Louise Cheuvront
Assistant Attorney General