

VOLUME NO. 41

OPINION NO. 83

COUNTIES - Tax on personalty lien on realty--separate
assessment;

LIENS - Tax on personalty lien on realty--separate assessment;
PROPERTY, PERSONAL - Tax on personalty lien on realty--separate assessment;
PROPERTY, REAL - Tax on personalty lien on realty--separate assessment;
REVENUE, DEPARTMENT OF - Tax on personalty lien on realty--separate assessment;
TAXATION AND REVENUE - Tax on personalty lien on realty--separate assessment;
MONTANA CODE ANNOTATED - Sections 15-16-401, 15-16-402;
OPINIONS OF THE ATTORNEY GENERAL - 16 Op. Att'y Gen. at 337 (1936), 40 Op. Att'y Gen. No. 80 (1984).

- HELD: 1. A mortgage or lien holder is not generally required pursuant to section 15-16-402(2), (3), and (4), MCA, to file annual notices to prevent taxes on personal property that is valued in excess of \$1,000 from becoming a first and prior lien against the real property.
2. Section 15-16-402(5), MCA, requires that where the taxes have been delinquent for one or more years the owner of a mortgage on real property must comply with the procedural requirements of the section on an annual basis in order to prevent personal property taxes in any amount from becoming a lien upon the real estate.

9 September 1986

David L. Nielsen
Valley County Attorney
Valley County Courthouse
Glasgow MT 59230

Dear Mr. Nielsen:

You have requested my opinion concerning the application of the procedural requirement of section 15-16-402, MCA.

Must a mortgage or lien holder who wishes to prevent personal property taxes from becoming a prior lien upon the mortgage property comply on an annual basis with the procedural requirements set forth in section 15-16-402(5), MCA?

Subsections (2) to (5) were enacted in 1935 and have been a part of section 15-16-402, MCA, since that time. 1935 Mont. Laws, ch. 199, § 1. No legislative history is extant. Prior to enactment of that section, however, tax liens on personal property had absolute priority upon the personal property and the real property of the owner thereof. There was no provision to allow the owner or holder of any mortgage or other lien upon the real estate to perfect a superior lien.

The rules of statutory construction require that a statute be read as a whole and construed so as to avoid absurd results. Dover Ranch v. Yellowstone County, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980). The statute as it now exists provides:

Tax on personalty lien on realty--separate assessment. (1) Every tax due upon personal property is a prior lien upon any or all of such property, which lien shall have precedence over any other lien, claim, or demand upon such property, and except as hereinafter provided, every tax upon personal property is also a lien upon the real property of the owner thereof from and after 12 midnight of January 1 in each year.

(2) The taxes upon personal property based upon a taxable value up to and including \$1,000 shall be a first and prior lien upon the real property of the owner of such personal property. Taxes upon personal property based upon the taxable value thereof in excess of \$1,000 shall be a first and prior lien upon the real property of the owner unless the owner or holder of any mortgage or other lien upon said real property appearing of record in the office of the clerk and recorder of the county where such real property is situated, at or before the time such personal property tax attached thereto, shall have filed the notice hereinafter provided for, in which event the taxes upon such excess of \$1,000 of taxable value shall not be a lien on the real property of such owner. It shall be the duty of the county treasurer to issue to any mortgagee or lien holder, upon his request, a statement of the personal property tax due upon the taxable

value up to and including \$1,000. Personal property taxes upon a taxable value up to \$1,000 may be paid, redeemed from a tax sale as by law provided, or discharged separately from any personal property taxes in excess of such amount. Payment of such taxes upon a taxable value up to \$1,000, as herein provided, shall operate to discharge the tax lien upon the personal property of the owner to the extent of such payment in the order that the person paying such tax shall direct.

(3) The holder of any mortgage or lien upon real property who desires to obtain the benefits of this section shall file in the office of the county treasurer of said county a notice giving:

(a) the name and address of the mortgagee and holder of the mortgage or lien;

(b) the name of the reputed owner of the land;

(c) the description of the land;

(d) the date of record and expiration of the mortgage or lien;

(e) the amount thereof; and

(f) a statement that he claims the benefit of the provisions of this section.

(4) Such notice shall be ineffectual as to any taxes which shall have become a lien on real property prior to the filing of such notice as aforesaid. If the mortgage be not paid at maturity, such notice shall thereafter be filed annually unless the mortgage be extended for a definite period to be stated in such notice.

(5) Any owner of a mortgage on real estate upon which personal property taxes are by this section made a lien, where the owner of such real estate and personal property has failed to pay taxes due upon such real estate and personal property for 1 or more years, may file with the department of revenue or its

agent in the county in which such property is located a written request to have the personal property and real estate of the owner separately assessed. Such request must be made by registered or certified mail at least 10 days prior to January 1 in the year for which property is assessed. Upon receipt by the department or its agent of such request, it is hereby made the duty of the department or its agent to make a separate assessment of real and personal property of the owner thereof, and such personal taxes shall not be a lien upon the real estate so mortgaged of the owner thereof, and the personal property taxes shall be collected in the manner provided by law for other personal property. [Emphasis added.]

Montana law expressly provides that every tax has the effect of a judgment against the person, and every lien created by Title 15 has the force and effect of an execution duly levied against all personal property in possession of the person assessed from and after the date the assessment is made. § 15-16-401, MCA. The tax liens attach to personal property or to the realty owned by the person against whom the property assessment is made. Stensvad v. Musselshell County, 180 Mont. 489, 496, 591 P.2d 225, 229 (1979). See also O'Brien v. Ross, 144 Mont. 115, 119-20, 394 P.2d 1013, 1015-16 (1964) (lien attaches to all real and personal property owned by the person assessed pursuant to sections 15-16-113 and 15-17-901, MCA).

I have previously examined section 15-16-402(1), MCA. 40 Op. Att'y Gen. No. 80 (1984). In that opinion, I held that local tax liens on personal or real property have priority over liens or private mortgages. Section 15-16-402, MCA, expressly confers priority of tax liens on personal property over the liens of private mortgagees except as provided within the statute. In my earlier opinion, I noted that tax liens are superior to all other liens. I relied upon United States v. Christensen, 218 F. Supp. 722 (D. Mont. 1963), which analyzed sections 15-16-401 to 403, MCA, and the Montana cases of State ex rel. Malott v. Board of Commissioners, 89 Mont. 37, 296 P. 1 (1930), and Hartman v. City of Bozeman, 116 Mont. 392, 154 P.2d 279 (1944). I agreed with the holding in Christensen that those statutes and cases compel the conclusion that tax liens on real

property take priority over mortgages. See also 16 McQuillin, Municipal Corporations: Taxation § 44.144 n.4 (rev. ed. 1984).

Section 15-16-402, MCA, establishes the exclusive means by which a mortgage holder or other lien holder upon real property may prevent taxes upon personal property from becoming a first and prior lien upon the real property of the owner. There are two methods set forth in the statute. The first method protects the mortgage or lien holder's interest in the property value which is in excess of the initial \$1,000 of taxable value of the personal property. The county has a first and prior lien upon that property. That method does not generally require that the mortgage holder comply with notice provisions on an annual basis. The second method provides that the mortgage holder may in some cases assert a first and prior lien which protects his entire interest ahead of any personal property tax lien. That method does require that a request be filed annually. They are two distinct privileges in the holder of the mortgage or lien. See 16 Op. Att'y Gen. at 337 (1936).

Section 15-16-402(2), MCA, provides that the initial \$1,000 in taxes upon personal property is a first and prior lien upon the real property of the owner of the personal property. Taxes upon personal property in excess of \$1,000 are also a first and prior lien against the real property unless the owner or holder of the mortgage complies with the notice provisions set forth in subsections (3) and (4). Where the owner or mortgage holder complies with those provisions, the personal property tax in excess of \$1,000 is not a prior lien upon the property. Subsection (4) specifically provides, however, that where a mortgage is not paid at maturity, future notices shall be filed annually unless the mortgage is extended for a definite period of time stated in the notice. No such requirement for an annual notice is set forth where the notice gives the information required by subsection (3) and the mortgage has not yet expired. A mortgage or lien holder is not generally required to file annual notices to prevent personal property taxes in excess of \$1,000 from becoming a first and prior lien against the real property.

Section 15-16-402(5), MCA, provides for separate assessment of taxes upon real property and personal property where the owner of the real estate and personal

property has failed to pay the taxes due on the property for one or more years. That section allows the owner of a mortgage on real estate which is subject to a tax lien for personal property to file a request that the assessments for the real property and the personal property be made separately. That request must be made by registered or certified mail at least ten days prior to January 1 in the year for which property is assessed.

Personal property taxes are assessed on an annual basis. § 15-8-201, MCA. The language of the statute is clear. A request for separate assessment must be filed at least ten days prior to January 1 in the year for which the property is assessed. Where that request is properly made, the statute provides that those personal property taxes will not become a lien upon the real estate. This subsection allows any mortgage holder to prevent personal property taxes in any amount from becoming a first and prior lien against the property where the owner of the real estate and personal property has failed to pay taxes due on the real estate and personal property for one or more years. The delinquency period of "1 or more years" provides an opportunity for the county to timely pursue the taxes on the initial \$1,000 of taxable value of the personal property that is protected as a first and prior tax lien in subsection (2). Where the county fails to pursue its tax claim, the owner of the mortgage may request separate assessment on an annual basis and thus prevent personal property taxes in any amount from becoming a lien of any sort upon the real property. Such filing will protect all prior liens upon the property.

THEREFORE, IT IS MY OPINION:

1. A mortgage or lien holder is not generally required pursuant to section 15-16-402(2), (3), and (4), MCA, to file annual notices to prevent taxes on personal property that is valued in excess of \$1,000 from becoming a first and prior lien against the real property.
2. Section 15-16-402(5), MCA, requires that where the taxes have been delinquent for one or more years the owner of a mortgage on real property must comply with the procedural requirements of the section on an annual basis in order to

prevent personal property taxes in any amount
from becoming a lien upon the real estate.

Very truly yours,

MIKE GREELY
Attorney General