

OPINION NO. 72-104

Syllabus:

1. A county recorder may not charge a recording fee upon the filing of a release of a lien created pursuant to Section 5749.02, Revised Code, since the legislature failed to provide for such a fee.

2. The failure of the legislature to make provision for a fee to a county recorder, pursuant to Section 5749.02, Revised Code, does not relieve the recorder of the duties imposed upon him by that Section.

To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio
By: William J. Brown, Attorney General, November 9, 1972

I have before me your request for my opinion, which reads as follows:

"Our County Recorder has requested me to write to you for an opinion concerning the recording fees under R.C. 5749.02, Severance Tax Lien Records.

"The question is whether, upon release by the payment of the lien the Recorder can charge the recording fees to the individual at the time of release as is done under R.C. 317.32."

The recently enacted "severance tax", Sections 5749.01 to 5749.16, Revised Code, is contained in Section 1 of Amended Substitute House Bill No. 475, which became effective on December 20, 1971. The pertinent parts of Section 5749.02, of which you seek an interpretation, read as follows:

"For the purpose of providing revenue with which to meet the environmental management needs of this state, an excise tax is hereby levied on the privilege of engaging in the severance of natural resources from the soil or water of this state. * * *

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"The moneys received by the treasurer of state from the tax levied in this section shall be credited to the general revenue fund and shall be used for the furtherance of environmental protection activities of the state.

"On the day fixed for the payment of the severance tax required to be paid by this section, such tax, with any penalties or interest thereon, shall become a lien on all property of the taxpayer in this state, whether such property is employed by the taxpayer in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of creditors or stockholders. Such lien shall continue until such taxes, together with any penalties or interest thereon are paid.

"Upon failure of such taxpayer to pay such tax on the day fixed for payment, the tax commissioner may file, for which no filing fee shall be charged, in the office of the county recorder in each county in this state in which the taxpayer owns or has a beneficial interest in real estate, notice of such lien containing a brief description of such real estate. Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor whose rights have attached prior to the time such notice is filed in the county in which the real estate which is the subject of such mortgage, purchase, or judgment lien is located. Such notice shall be recorded in a book kept by the recorder called the 'severance tax lien record' and indexed under the name of the taxpayer charged with such tax. When the tax, together with any penalties or interest thereon, has been paid, the tax commissioner shall furnish to the taxpayer an acknowledgement of such payment, which the taxpayer may record with the recorder of each county in which notice of the lien has been filed." (Emphasis added.)

It will be noticed that the only mention of fees is the

prohibition against the exaction of a fee upon the filing of the notice of lien. There is no mention of a fee in connection with recording of the release of the lien. It is, therefore, my opinion that the legislature, by the language employed, failed to provide fees, not only for the recording of the severance lien, but also for its release upon payment by the individuals involved.

This was the reasoning of my predecessor in Opinion No. 817, Opinions of the Attorney General for 1929. There, the issue was whether the legislature had provided for a fee in connection with the filing of a lien under Section 13435-7, General Code. (By inadvertence, the Opinion refers to Section 13435-5.) My predecessor said, and I agree, that:

"It is evident that there were no provisions made for the fees in connection with the recording of the particular lien mentioned in the act to which you refer. * * *

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"If the legislature had intended that fees for similar or like services were to be charged, it could have easily used appropriate language to convey such intent."

A similar conclusion was reached by my predecessor in Opinion No. 3617, Opinions of the Attorney General for 1941. Again, the issue involved Section 13435-7. There it was held that:

"* * * The fees which may be charged and collected by a county recorder are statutory. Therefore, since it has been shown that the Legislature has failed to make provision for any fees to be charged by the recorder for recording, etc., liens arising out of criminal recognizances, I am of the view that such duties must be performed gratuitously."

You have also referred to Section 317.32, Revised Code. That Section sets the amount of the fees to be charged by the county recorder for various services, but the authority to charge a fee must first be found in some other Section of the Revised Code. See Opinion No. 1770, Opinions of the Attorney General for 1960.

In specific answer to your question it is my opinion, and you are so advised, that:

1. A county recorder may not charge a recording fee upon the filing of a release of a lien created pursuant to Section 5749.02, Revised Code, since the legislature failed to provide for such a fee.

2. The failure of the legislature to make provision for a fee to a county recorder, pursuant to Section 5749.02, Revised Code, does not relieve the recorder of the duties imposed upon him by that Section.