IN THE SUPREME COURT OF THE STATE OF FLORIDA

CITY OF PALM BAY,
Petitioner,

vs.

WELLS FARGO BANK, N.A.,
Respondent.

_____/

Case No.: SC11-830
L.T. Case No.: 5D09-1810
05-2007-CA-29907

On Discretionary Review from the Fifth District Court of Appeal

Fifth DCA Case No.: 5D09-1810

BRIEF OF THE FLORIDA LAND TITLE ASSOCIATION

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IDENTITY AND INTEREST

The Florida Land Title Association ("FLTA) is an association representing the land title industry in Florida. Our members include all of the major title insurers authorized to do business in Florida, and title agents, title agencies and attorney-agents who close real estate transactions and issue title insurance. Our members perform title searches of the public records, examine title, clear title objections, handle escrows and closings and issue the title insurance that permits Florida's real estate economy to function. FLTA produces educational materials and seminars, drafts and promotes legislation relating to real property, and occasionally befriends courts to assist on issues related to the sanctity of the Florida's land title system.

The FLTA's interest in this case stems from our expertise and reliance upon the Recording Act, codified at §§695.01 and 695.11, Fla. Stat. (2011). The FLTA has substantial institutional history and perspective involving the Recording Act and how it has been applied in practice which may benefit the Court in deciding this case. Given our intimate knowledge of the inner functioning of Florida's real estate economy, we believe we have a unique and broader perspective to offer on the certified question and can help put certain elements of the problem into proper context.

The FLTA is also interested in befriending the Court in this case because a holding that a local government could alter the priority of its liens so as to take priority over mortgages and property interests that vested prior to any violation giving rise to the lien could have substantial and adverse effects on the availability of mortgage financing for Florida real estate and on the practices and procedures of the title industry. In a worst case scenario, Fannie Mae and Freddie Mac could decline to purchase or insure any mortgages that might be subject to super-priority local government liens.

QUESTION PRESENTED

The question certified by the Fifth District Court of Appeals is a significant issue with enormous, direct commercial significance to Florida's real estate driven economy and the potential to adversely impact the commercial availability of mortgage financing throughout Florida.

> Whether, under Article VIII, Section 2(b), Florida Constitution, section 166.021, Florida Statutes and Chapter 162, Florida Statutes, a municipality has the authority to enact an ordinance stating that its code enforcement liens, created pursuant to a code enforcement board order and recorded in the public records of the applicable county, shall be superior in dignity to prior recorded mortgages?

Many local governments have ordinances which purport to grant a priority status to their liens and fines other than a status based on notice provided by recording. As an industry, our concern is being able to clearly discern the

competing priorities of those interests so as to insure owners and mortgage holders of their respective rights and thereby facilitate real estate commerce. As such, our discussion will focus on real estate law generally rather than fact-specific issues in this case or the terms of any particular mortgage instrument.

SUMMARY OF ARGUMENT

Many local governments purport to grant a "super-priority" status to their liens and fines. In tight budget times, this has become an all too common practice and is not limited to liens and fines imposed under Chapter 162, Florida Statutes. While we understand the public policy pressures causing local governments to try to nudge their interests a little higher in the pecking order, changing the priority of recorded real estate liens by ordinance is beyond the scope of their home rule powers and expressly contrary to Florida's Recording Act.

In this case, both parties and the Fifth District Court have mischaracterized the subtleties of Florida's Recording Act, codified at §695.01, Fla. Stat (2011). It is this section, in conjunction with §695.11, which determines the "priority" of interests in real property. It does so based not on the order of recording, but based on the actual or constructive notice (provided by recording in the Official Records) available to the second party at the time they acquire an interest in real property. If the second party has no actual or constructive notice of the interest of the first party, he takes free of the first interest.

Perhaps the least understood element of the Recording Act is that, when there is a first interest which is not recorded (or actually known), "the second interest takes "priority" over the first interest, and the first interest is estopped from asserting priority as a direct result of the failure to timely provide notice.

The Florida Legislature has, from time to time, created limited exceptions to the priorities granted by the Recording Act. Each time it has done so, it has done so expressly, by statute.

Home rule powers under Article VIII, Section 2(b) are broad, but always subject to the limitation "except as otherwise provided by law[1]." Here, the statute setting "priority" based on notice is an express statute. Changing the priority by ordinance is simply beyond the scope of a municipality's home rule powers unless the lien in question is of a type falling within one of the express statutory exceptions.

Notwithstanding that it is beyond the scope of home rule powers, the statute under which the City purports to assess this lien is violated by the Palm Bay Ordinance at issue. The concept of lien priority is expressly incorporated in the first sentence of §162.09(3):

> (3) A certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien

[1] The same limitation is present in §166.021(1), Fla. Stat. (2011) with the added qualifier "expressly."

against the land on which the violation exists and upon any other real or personal property owned by the violator.

This statute does not create an express super-priority for this class of liens so as to create an exception to the priority rules of §§695.01 and 695.11. More to the point, §162.09(3), Fla. Stat. describes the priority in a fashion entirely consistent with §§695.01 and 695.11, Fla. Stat. (2011). So, even if resetting the "priority" of local government liens is within the scope of their home rule powers generally, it would be contrary to the express language of chapter 162 and thus prohibited as "otherwise provided by law".

ARGUMENT

I. SECTION 695.01, FLORIDA STATUTES GOVERNS ALL PRIORITY AND NOTICE QUESTIONS AS TO REAL ESTATE EXCEPT WHERE THE LEGISLATURE HAS CREATED AN EXPRESS EXCEPTION.

A. THE NATURE OF THE RECORDING ACT

Florida has long been a "notice state" pursuant to §695.01 (the "Recording Act") whose roots can be traced to a time before Florida became a state. See e.g. *Argent Mortgage Co. LLC v. Wachovia Bank N.A.*, 52 So. 3d 796, (Fla. 5th DCA 2010); *Lesnoff v. Becker*, 135 So. 146, 147 (Fla. 1931); *Morris v. Osteen*, 948 So. 2d 821, 826 (Fla. 5th DCA 2007); *F.J. Holmes Equip., Inc. v. Babcock Bldg. Supply, Inc.*, 553 So. 2d 748, 750 (Fla. 5th DCA 1989) and 2-26 Ralph E. Boyer,

FLORIDA REAL ESTATE TRANSACTIONS § 26.02 (Matthew Bender & Co., Inc. 2010) ("Florida has a notice type recording statute the primary function of which is to protect subsequent purchasers against claims arising from prior unrecorded instruments...." (citations omitted)).

The Recording Act together with §695.11 provides the over-arching statutory framework for determining the existence and "priority" of interests in real property based on actual or constructive notice (through recording) and maintaining the sanctity and certainty of real property titles in Florida.

> 695.01 Conveyances to be recorded.—
> (1) No conveyance, transfer, or mortgage of real property, or <u>of any interest therein</u>, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law ….

(emphasis added).

The object of Florida's recording statute is to protect those who acquire interests in or liens upon real estate against "secret" deeds, mortgages and other liens or interests in real property. The law protects the party who expends money based on the notice afforded by the recorded documents in the public record and estops those who are dilatory in recording the documents reflecting their interest in the public records. *Rabinowitz v. Keefer*, 132 So. 297, 301 (Fla. 1931).

The relative rights of the parties in this case are not determined solely by the order of recording, but rather based on the actual or constructive notice (which is

provided by recording in the Official Records) available to the second party at the time they acquire an interest in real property. If the second party has no actual or constructive notice of the interest of the first party, that second party takes free of the first interest.[2]

In *Van Eepoel Real Estate Co. v. Sarasota Milk Company*, 100 Fla. 438, 129 So. 892 (Fla. 1930),[3] the Florida Supreme Court illustrated the operation of Florida's recording statute with the following example:

> [I]f A conveys lands to B, a bona fide purchaser for value, who does not go into possession and who failed to record his deed until after A conveys the same land to C, a second bona fide purchaser for value without notice of B's interest, and B then records his deed before C records his, the title of C shall nevertheless prevail as between C and B, because it is the fault of B that he did not immediately record his deed, thereby permitting C to deal

[2] The notice required under §695.01 must be of an actual existing "interest" in real property. The notice which would be provided by recording a copy of the Palm Bay ordinance is that of a highly tenuous and contingent, conditional interest that may or may not ever come into existence as to a given property. Such a notice would neither satisfy the public policy goals nor qualify as a vested future interest. But that is a different *amicus* for a different day.

[3] *Van Eepoel* was decided before the adoption of the modern construction lien statute requiring a recorded notice of commencement. In that case, the Florida Supreme Court held that a mechanic's lien had priority over a prior recorded mortgage, because the mechanic's lienor had commenced work prior to the recording of the mortgage, even though the mortgage was recorded prior to the mechanic's lienor recording his notice. The court held that the mechanic's lienor was entitled to rely on the record when work was commenced, and since the mortgage was not recorded at that time, the mechanic's lienor was entitled to believe that any lien for his labor, services and materials would be a first priority lien.

> with the property and part with his consideration without knowledge of B's interest. So B is estopped and the equities are with C.

Van Eepoel at 444.

Thus, in Florida, notice, not the order of recording, controls the priority of interests in real property, and that has been the interpretation of Florida's recording statutes for more than 80 years.

B. INTERACTION BETWEEN §695.01 AND §695.11

It has been suggested that the 1967 amendments to §695.11 somehow transformed Florida into a "race-notice" state. Those arguments were expressly rejected in *Argent Mortgage Co. LLC v. Wachovia Bank N.A.*, 52 So. 3d 796, (Fla. 5th DCA 2010). [4]

We go into such detail regarding §695.01 out of concern that the 5th District Court of Appeal in its opinion, and the parties in their respective briefs, were focusing on §695.11, *Fla. Stat.* to the exclusion of the Recording Act and potentially confusing the law with the suggestion that §695.11 governed in all

[4] In that case, the 5th DCA considered a situation in which a mortgage held by Wachovia Bank, N.A. was executed first and recorded first versus a mortgage in favor of Argent Mortgage Company, LLC, which was executed second and recorded second. The 5th DCA correctly held that although Argent's mortgage was both executed and recorded after Wachovia's mortgage, Argent's mortgage had priority over Wachovia's mortgage because the Wachovia mortgage was not yet recorded when the Argent mortgage was executed.

instances and determined the order of priority of liens and other interests based solely on the order of recording. *City of Palm Bay v. Wells Fargo Bank, N.A.* , 57 So. 3d 226 (Fla. 5th DCA 2011).

This is an entirely understandable misconstruction, as the last sentence of §695.11 does specify a legal effect based on the order of recording. "An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series." (emphasis added). However, the prior sentence in §695.11 identifies that the priority being discussed is not the priority of the interests of the parties to the recorded instrument, but simply the priority of recordation, and therefore the priority with which notice is imparted by the Official Records.[5]

We submit that §695.11 should be viewed as providing a gloss on and tools for applying the notice rule contained in the Recording Act. Section 695.11 accomplishes this by providing certainty as to when a recorded instrument provides constructive notice. It should also be viewed as determining the relative priorities of those instruments which under Florida law attach to real property only as of the time of recording. Thus it would be appropriate to look solely to §695.11 to

[5] The next to the last sentence of §695.11, Fla. Stat. (2011) reads: "The sequence of such official numbers shall determine the priority of recordation." [Emphasis added.]

determine the conflicting priorities of judgment liens[6] or of code enforcement liens.[7] But where a creditor or purchaser is acquiring an interest for value, an evaluation of actual and constructive notice under §695.01 must be conducted.

For purposes of this case, it is not necessary to reconcile the two statutes. Under either statute, and certainly when reading them together, Wells Fargo's mortgage has priority over the lien interest of the city. We do however urge this court to correct any misperception which might arise from the 5th District Court of Appeals' suggestion that Florida might be a "first in time, first in right" state rather than a "Notice State."

II. THE FLORIDA LEGISLATURE HAS CREATED A NUMBER OF EXPRESS EXCEPTIONS TO THE GENERAL "PRIORITY" RULE OF SECTIONS 695.01 AND 695.11.

Sections 695.01 and 695.11 are the general law to which all persons creating or obtaining interests in real property must adhere, unless the Florida Legislature makes a specific exception. Where the Florida Legislature has elected to deviate

[6] "A judgment, order, or decree becomes a lien on real property in any county when a certified copy of it is recorded in the official records or judgment lien record of the county" §55.10(1), Fla. Stat. (2011).

[7] "A certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator." §162.09(3), Fla. Stat. (2011).

from the general "notice" and "priority"[8] rules of §§695.01 and 695.11, Fla. Stat. (2011), it has done so expressly and unambiguously and then described the intended priority and any "relation back" in detail. The Legislature uses several different formulations to accomplish this purpose:

- Regarding taxes, the Legislature described the exception to the general rule as follows: "All taxes imposed pursuant to the State Constitution and laws of this state shall be a first lien, superior to all other liens, on any property against which the taxes have been assessed …." §197.122(1), Fla. Stat. (2011).
- In the case of several local government liens, the Legislature has created special priority rules. For example, special assessment liens "shall remain liens, coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims" §170.09, Fla. Stat. (2011). Liens for gas, water and sewer service "shall be prior to all other liens on such lands or premises except the lien of state, county and municipal taxes and shall be on a parity with the lien of such state, county and municipal taxes." §159.17, Fla. Stat. (2011)

[8] We are hesitant to use the term "priority" in relation to the Recording Act as that is only one of its elements and can lead to dangerous over-simplifications.

- Special assessments for water system improvements and sanitary sewers constitute a lien "to the same extent as the lien for general county taxes." §153.05(10), Fla. Stat. (2011)
- Bonds issued by a drainage district "shall be a lien . . . prior in dignity to all others except taxes." §157.12, Fla. Stat. (2011).
- Liens for non-ad valorem assessments for independent fire districts are "coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims, until paid." §191.01(7), Fla. Stat. (2011).

Not only does the Florida Legislature have a well established vocabulary for creating exceptions to the Recording Act and its over-arching rules of "priority" based on notice, [9] none of the above sections would have required legislative action

[9] As appellant correctly points out, condominium association liens, homeowners association liens and construction liens also have rules of priority which deviate from the rule of the Recording Act, §695.01, Fla. Stat. (2011). Each of those deviations is expressly created by a statute which spells out the applicable rule with great specificity.

As to condominium liens, §718.116(5)(a), Fla. Stat. (2011) provides in pertinent part: "[T]he lien is effective from and shall relate back to the recording of the original declaration of condominium …. However, as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the condominium parcel is located."

The condo statute, like the community association statutes, gets more convoluted by backstopping the lien with "personal liability" at §718.116(1), Fla. Stat. (2011) "A unit owner, regardless of how his or her title has been acquired, including by

at all if, as appellant argues, setting priority of liens is within the scope of a local government's home rule powers.

We understand that difficult fiscal times create an incentive on the part of local governments to stretch in order to protect their budgets and find additional sources of revenue. The City of Palm Bay, like many other municipalities, has been aggressive in claiming a super-priority for its liens by ordinance, whether or not authorized by statute.

Palm Bay has adopted a general position that any "[l]iens created by the city and recorded in the public records shall remain liens coequal with the liens of all state, county, district and municipal taxes, superior in dignity to all other liens,

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purchase at a foreclosure sale or by deed in lieu of foreclosure, is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title."

The same basic rule applies with regard to assessments by a homeowners' association. "[T]he lien is effective from and shall relate back to the date on which the original declaration of the community was recorded. However, as to first mortgages of record, the lien is effective from and after recording of a claim of lien in the public records of the county in which the parcel is located." §720.3085(1), Fla. Stat. (2011)

Chapter 713 creates a differing priority for construction liens depending on type. Liens for the services of an architect, landscape architect, interior designer, engineer, or surveyor and mapper and for subdivision improvements "attach at the time of recordation of the claim of lien and shall take priority as of that time." §713.07(1), Fla. Stat. (2011). Other types of construction liens "attach and take priority as of the time of recordation of the notice of commencement, but in the event a notice of commencement is not filed, then such liens shall attach and take priority as of the time the claim of lien is recorded." §713.07(2), Fla. Stat. (2011).

titles and claims, until paid, and may be foreclosed pursuant to the procedures set forth in Fla. Stat. Ch. 173." §118.04, Palm Bay Code of Ordinances (available online at http://www.amlegal.com). Section 118.03 of their Code of Ordinances specifies that this priority is applicable to all liens, including but not limited to: nuisance liens; sanitation (garbage and trash removal) liens; sign removal liens; and water, sewer, and other utility liens.

Other sections of the Palm Bay Code of Ordinances also purport to create super-priority liens for, among other things: Unsightly and unsanitary conditions §93.09; Code Enforcement Board liens and fines §52.086; liens for false alarms §117.13; sanitary nuisances §95.17; and violations of wastewater permits §201.165.

In one of their most aggressive positions, the City of Palm Bay purports to change the priority of certain judgment liens in their favor to be "coequal with the lien of all state, district and municipal taxes superior in dignity to all other liens, titles, and claims." §33.77.

The Florida Legislature has not created exceptions authorizing a different priority than would be established under §§695.01 and 695.11 for any of these, nor a blanket exception to allow cities to set their own lien priorities. To the contrary, by creating specific, narrowly tailored statutory deviations from the general rule set forth in §§695.01 and 695.11 for local government liens, the Legislature has

exhibited an intention to pre-empt the field. A local government purporting to create a rule for priority of its liens on real estate which differs from the statutory scheme set forth in §§695.01 and 695.11 is beyond the scope of its home rule powers.

III. CHAPTER 162, FLORIDA STATUTES DOES NOT CREATE A DIFFERENT EXPRESS PRIORITY FOR CODE ENFORCEMENT LIENS, BUT RATHER ESTABLISHES A STANDARD CONSISTENT WITH §695.01.

The Florida Legislature is quite capable of defining different standards for the "priority" of liens when it so intends and has done so in a number of statutes. Perhaps that alone is a sufficient basis for concluding that the Legislature did not intend to create a different priority model with regard to Chapter 162. Chapter 162 simply does not include any of the normal formulations used by the Legislature when it intends to deviate from the baseline priority and notice rules of §§695.01 and 695.11 Fla. Stat.

To the contrary, the Legislature expressly indicated its intention that Chapter 162 code enforcement liens have priority only from and after the date of recording. Section 162.09(3) provides:

> (3) A certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator.

(emphasis added)

The Legislature did not create a lien with retroactive attachment. It did not create a lien with the same priority as taxes. It created a lien that only attaches from and after the date of recording -- and it does so in a fashion entirely consistent with §§695.01 and 695.11, Fla. Stat. (2011). Had the Legislature intended otherwise, it would have been expressly stated and created a clear exception to the general law.

So, even if resetting "priority" of local government liens is within the scope of a local government's home rule powers, it would be contrary to the express language of Chapter 162, Florida Statutes and therefore beyond the scope of any home rule powers conferred by Article VIII, Section 2(b) of the Florida Constitution or §166.021, Fla. Stat. (2011).

IV. ALLOWING EACH LOCAL GOVERNMENT TO EXERCISE HOME RULE AUTHORITY TO SET ITS OWN RULES FOR PRIORITY OF LIENS WILL INCREASE COSTS AND SERIOUSLY CONSTRAIN MORTGAGE LENDING IN FLORIDA.

Real estate commerce in the State of Florida is highly dependent on the availability of mortgage credit. Mortgage lenders, quite understandably, insist the lien of their mortgage will be a first priority lien on the property. Such is a requirement of the Fannie Mae loan programs (other than those specifically

addressing second mortgages) and permitted exceptions under those rules are few. See, FANNIE MAE, SINGLE FAMILY SELLING GUIDE, Page 590 (Oct. 25, 2011) (available online at https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sel102511.pdf)

Ad valorem taxes, which are not yet due and payable, are one of the few permitted exceptions under the Fannie Mae rules, and taxes are well understood by the lending community. The risk of taxes is manageable as the amount of such taxes is readily discernible and constitutionally limited to a small percentage of the value of the property, Art. VII, Sec. 9, Fla. Const. To further mitigate the risk of losing mortgage priority to unpaid *ad valorem* taxes, most lenders require that 1/12 of the estimated taxes be escrowed each month as part of the mortgage payment.

In contrast, local government costs, fines and penalties are not knowable in advance, often don't even arise for years after the mortgage was given, and are certainly not quantifiable as to amount. Chapter 162, Florida Statutes and many local ordinances authorize recovery of all costs plus "running fines" of up to $500 per day in order to incentivize a cure of the underlying violation. §162.09(2), Fla. Stat. (2011). If such fines were permitted to become liens with a priority superior to a first mortgage, it doesn't take long for the fines to exceed the entire value of the property, thereby rendering the mortgage worthless.

The ability of any (or potentially all) of Florida's 405 municipalities and 67 counties to create liens, in potentially unlimited amounts, which would take priority over existing mortgages would dramatically impair the economic model in the mortgage marketplace. At the very least, such a holding would make mortgage borrowing more costly for all Floridians.

The more likely result is that Fannie Mae and Freddie Mac, the two Government Sponsored Entities who are facilitating what little solvency there currently is in the mortgage marketplace, will simply prohibit the purchases or insurance of mortgages on which there is any possibility that the mortgage might lose priority to a future code enforcement lien.

That is the approach that was taken with regard to condominium and community association liens. The Fannie Mae Selling Guide prohibits the purchase of a mortgage loan unless the jurisdiction restricts the amounts which may have priority over the insured first mortgage to no more than 6 months of regular common HOA or condominium expense assessments. FANNIE MAE, SINGLE FAMILY SELLING GUIDE, Page 590 (Oct. 25, 2011) (available online at https://www.efanniemae.com/sf/guides/ssg/sg/pdf/sel102511.pdf). A similar prohibition on buying or insuring mortgages in jurisdictions which elect to create their own super-priority liens would not be unexpected.

CONCLUSION

The Recording Act (§695.01) together with §695.11, Fla. Stat. create an over-arching statutory framework for determining the rights of parties' interests in real property. Moreover §162.09(3) specifically provides that an order creating a lien on real property for local government code violation fines only takes effect after a certified copy of the order assessing the fines is recorded in the public records. Neither the Florida Constitution nor the Florida Legislature has granted local governments the authority to override the provisions of the Recording Act or §695.11. Therefore, the decision of the 5th DCA in the above-referenced matter should be affirmed.

We also urge the Court to clearly enunciate that both §§695.01 and 695.11 come into play in the decision of this case and to be cautious of generalizations that might call into question the holding of *Argent Mortgage Co. LLC v. Wachovia Bank N.A.*, 52 So. 3d 796, (Fla. 5th DCA 2010) that Florida is, and remains, a "Notice State."

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I CERTIFY this response complies with the font requirements of Rule 9.210(a) (2), Florida Rules of Appellate Procedure.

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