IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-830

L.T. Case No. 5D09-1810

CITY OF PALM BAY,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

AMICUS CURIAE BRIEF OF THE FLORIDA BANKERS ASSOCIATION IN SUPPORT OF RESPONDENT'S ANSWER BRIEF

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STATEMENT OF INTEREST

Amicus Curiae, Florida Bankers Association ("FBA"), is a voluntary organization that represents the interests of lenders in Florida and is composed of more than 300 banks and financial institutions ranging in size from small community banks and thrifts, to medium sized banks operating in several parts of the state, to large regional financial institutions that are headquartered in Florida or outside the state. The FBA regularly represents the interests of its members before all branches of the government and frequently appears as *Amicus Curiae* in the state and federal courts, including this Court, in order to present the interests of its membership on issues of great import.

The issue in this appeal is of particular importance to the FBA and its members because a large part of FBA members' business is making loans to homebuyers throughout the state of Florida. For better or worse, this business also involves instituting foreclosure actions when borrowers default on their obligations. Financial institutions' home loans are usually secured solely by the homes purchased with the loans. Individual municipalities' "superprioritizing" their liens for code enforcement violations prejudices lenders' ability to sell their loans on the secondary market because the profits of these sales are used to make new loans. This harms the lending market, and in turn, the housing market. "Superprioritizing" loans also prejudices lenders' ability to foreclose their interests

when borrowers default on their loans. Thus the proper resolution of this case is of great interest to the FBA.

SUMMARY OF THE ARGUMENT

Ordinance 97-07 of the Palm Bay City Code of Ordinances is preempted by both the "first in time, first in right" principle articulated in section 695.11, Florida Statutes, and Chapter 162, Florida Statutes. Further, the Legislature did not intend for local governments to grant code enforcement liens superiority. When the Legislature has intended to grant liens superiority, it has specifically done so, and it has not done so in this case because granting code enforcement liens superiority leads to nonsensical results.

Ordinance 97-07 provides a low-cost revenue stream to municipalities, but at the same time infringes on first mortgagees' due process rights and embodies imprudent public policy. Municipalities can impose high daily fines on homeowners while giving no notice to first mortgagees. Ordinances like Ordinance 97-07 harm financial institutions because they make mortgages less secure; mortgages will not be sold on the secondary market due to the mortgages' insecurity, which could cause home lending to shut down in Florida.

STANDARD OF REVIEW

Amicus Curiae agrees with Respondent that the standard of review is *de novo.*

ARGUMENT

In this case, the City of Palm Bay (the "City") has attempted to enforce two liens in the amount of $28,600.00 for homeowners' failure to repair their fence and cut the grass on their property, and to claim that these liens are superior to Wells Fargo Bank, N.A.'s prior recorded mortgage memorializing a loan in the amount of $115,531.00. The City relied on Ordinance 97-07 of the Palm Bay City Code of Ordinances[1] to claim that its liens were superior to Wells Fargo's mortgage even though it provided no notice to Wells Fargo of the code violations, and it would be unable to foreclose the liens absent Wells Fargo's mortgage foreclosure action because the property to be foreclosed was homestead property. Fla. Stat. § 162.09(3). The trial court correctly ruled that the City's liens were not superior to Wells Fargo's mortgage interest in the subject property because code enforcement board liens have ordinary "first in time, first in right" priority, and because due process required the City to notify Wells Fargo of the code violations when they occurred. The Fifth District Court of Appeal properly affirmed the trial court's

[1] Ordinance 97-07 provides:

> Liens created pursuant to a Board order and recorded in the public record shall remain liens coequal with the liens of all state, county, district and municipal taxes, superior in dignity to all other liens, titles and claims, until paid, and shall bear compound interest annually at a rate not to exceed the legal rate allowed for such liens and may be foreclosed pursuant to the procedure set forth in Fla. Stat. Ch. 162.

decision, holding that Ordinance 97-07 conflicts with section 695.11, Florida Statutes, which codifies the "first in time, first in right" rule. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 57 So. 3d 226, 227 (Fla. 5th DCA 2011). On the City's motion for certification of a question of great public importance, the Fifth District certified the following question:

> 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?

City of Palm Bay v. Wells Fargo Bank, N.A., 67 So. 3d 271, 271 (Fla. 5th DCA 2011).

This Court should answer the certified question in the negative. It is not within local governments' power under the Florida Constitution or the Florida Statutes to enact ordinances like Ordinance 97-07 that give superpriority to liens recorded due to local code enforcement violations. If municipalities like the City are able to "superprioritize" their liens for code enforcement violations, such local ordinances will place enormous burden on financial institutions extending loans to homebuyers. They will also make an already tenuous housing market completely unstable in the state of Florida because it will be impossible for lending institutions to sell the loans on the secondary market, and, in turn, banks will have no revenue with which to make new loans. Only the Legislature has the ability to enact such

superpriority laws; it has not done so with regards to code enforcement liens and, in all probability, does not intend to do so because of the negative effects it would cause, illustrated by the facts of the case under review.

First, the FBA will demonstrate that the Legislature properly grants liens "superpriority" status, not individual local governments. Second, the FBA will establish that the Legislature did not intend for local governments to "superprioritize" their code enforcement liens. Third, the FBA will provide reasons why ordinances like Ordinance 97-07 tend to violate due process and embody imprudent public policy because they harm lenders, and in turn homeowners and Florida's housing market.

I. THE LEGISLATURE, NOT LOCAL GOVERNMENTS, DETERMINES THE PRIORITY OF CODE VIOLATION LIENS.

A. The Principle Of "First In Time, First In Right" Articulated In Section 695.11, Florida Statutes, Preempts Ordinance 97-07.

It is a longstanding principle of Florida law that the priority of competing liens on real property is mandated by the principle of "first in time, first in right." *Holly Lake Ass'n v. Federal Nat'l Mortg. Ass'n*, 660 So. 2d 266, 268 (Fla. 1995). Thus, where a mortgage on real property is recorded, it has priority over all liens recorded thereafter, with limited exceptions. *People's Bank of Jacksonville v. Arbuckle*, 90 So. 458, 460 (Fla. 1921). This rule is "both logical and fair, and affords both stability and certainty." *Lamchick, Glucksman & Johnston, P.A. v.*

City Nat'l Bank of Fla., 659 So. 2d 1118, 1120 (Fla. 3d DCA 1995). Financial institutions have relied on this rule in extending and securing loans throughout the state. The first in time, first in right rule is codified in section 695.11, Florida Statutes:

> **Instruments deemed to be recorded from time of filing.**—All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, and which are to be recorded in the "Official Records" as provided for under s. 28.222, and which are filed for recording on or after the effective date of this act, shall be deemed to have been officially accepted by the said officer, and officially recorded, at the time she or he affixed thereon the consecutive official register numbers required under s. 28.222, and at such time shall be notice to all persons. The sequence of such official numbers shall determine the priority of recordation. 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.

Lenders, as well as other businesses and individuals, rely on this statute as mandating that all persons are on constructive notice of an instrument once it is recorded, and an instrument with a lower official register number has priority over any instrument bearing a higher official register number. *Lamchick*, 659 So. 2d at 1120 ("Where real property is concerned, it is a firm, long standing principle, that priorities of liens on real property are established by date of recordation. . . . This principle is statutorily embodied in section 695.11 which exclusively establishes priorities between judgments.").

It is for the Legislature to decide exceptions to section 695.11, not municipalities. In fact, the Legislature has created statutory exceptions to the first in time, first in right rule, including section 197.122(1), which provides that tax liens are superior to all other liens. There is no statutory exception for a municipality's code enforcement liens, and therefore Ordinance 97-07 is preempted, as the Fifth District correctly held.

B. Chapter 162, Florida Statutes, Preempts Ordinance 97-07.

Ordinance 97-07 and other ordinances of its kind are also preempted by Chapter 162 Florida Statutes. The Local Government Code Enforcement Boards Act (the "Act") contained in section 162.01-162.13, Florida Statutes, is an alternative provided by the Legislature for local governments to avoid using the court system to resolve code enforcement violations. This alternative is provided on a take-it-or-leave-it basis and a municipality cannot customize the penalties to prejudice financial institutions. Section 162.03, Florida Statutes, states: "Each county or municipality may, at its option, create or abolish by ordinance local government code enforcement boards as provided herein." Fla. Stat.§ 162.03(1). "[A]s provided herein" confirms the take-it-or-leave-it nature of the Act; therefore, the Legislature clearly preempted the specific field of code enforcement boards created pursuant to the Act. *See City of Tampa v. Braxton*, 616 So. 2d 554, 556 (Fla. 2d DCA 1993) ("municipalities derive no home rule power from article VIII,

section 2(b), of the state constitution to impose any duties or requirements on their code enforcement boards or otherwise regulate the statutorily required enforcement procedures"). As such, the Legislature creates a uniform code enforcement procedure, to be used throughout the state. This forbids local governments from converting code enforcement violation liens into superpriority liens that displace lenders who recorded mortgages first.

Preemption also exists because section 162.09(3) is so comprehensive with respect to code enforcement liens that it preempts local regulation regarding such liens, including Ordinance 97-07. Section 162.09 articulates penalties, including liens, that a code enforcement board may impose. It directs how liens may be created, how they are to be calculated, what property they cover, how and when they can be foreclosed, in whose favor they run, and who can execute a satisfaction or release. In the present case, there is no dispute that, absent Ordinance 97-07, Wells Fargo's prior recorded mortgage has priority over the City's code enforcement liens, which are "enforceable in the same manner as a court judgment." Fla. Stat. § 162.09(3). Because section 695.11 gives judgments priority in the order they are recorded, and because section 162.09(3) only permits the City's liens to be enforced "in the same manner as a court judgment," Ordinance 97-07 cannot give the City's liens priority over a lender's prior recorded

mortgage without conflicting with section 695.11. Thus, Ordinance 97-07 is preempted by this comprehensive regulation concerning liens for code violations.

II. THE LEGISLATURE DID NOT INTEND TO ALLOW LOCAL GOVERNMENTS TO GRANT CODE ENFORCEMENT LIENS SUPERPRIORITY.

The Legislature did not intend for municipalities to enact ordinances like Ordinance 97-07, and, therefore, they are invalid. When the Legislature desires liens to have superpriority status, it enacts statutes to that effect. For example, the Legislature has enacted legislation that tax liens are to be superior to other liens. Fla. Stat. § 197.122(1) ("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 . . ."). Further, the Legislature has balanced the interests of lenders and associations in the context of liens resulting from nonpayment of condominium association and homeowners association dues. A first mortgagee's liability for unpaid assessments that became due before the first mortgagee's acquisition of title is limited to the lesser of (a) unpaid assessments accrued or came due during the twelve months preceding the acquisition of title and for which payment in full has not been received, or (b) one percent of the original mortgage debt. Fla. Stat. §§ 718.116(1)(b); 720.3085(2)(c). In contrast, the City simply intends to give its liens for code violation fines a superpriority (like that for tax liens), no matter the amount of the fine compared to the mortgage debt.

In the present case, the liens' total value is $28,600.00. There is nothing to prevent this amount from rising much higher to a point where it is worth more than the collateral, leaving the lender with nothing to recoup if it forecloses. This is a nonsensical result the Legislature did not intend.

Another nonsensical result of Ordinance 97-07 is that a municipality cannot foreclose on its lien if the property at issue is homestead property, Fla. Stat. § 162.09(3), but it can assert its lien on the same homestead property if a lender brings a foreclosure action first.[2] It is unreasonable that the Act permits municipalities to possess a superior interest in homestead property that remains dormant and unenforceable until a lienholder with a prior recorded interest, such as a financial institution that recorded its mortgage in the public records, acts on its right to foreclose when the borrower defaults. *See* Fla. Const. Art. X, § 4(a). Municipalities cannot place mortgage lenders in the perilous position of either not enforcing their mortgage interests, or going through the time and expense of enforcing them only to have previously unenforceable code enforcement liens, possibly worth more than the mortgage debt, jump in priority.

[2] As noted in Wells Fargo's Answer Brief, the property at issue in this case was homestead property.

III. ORDINANCE 97-07 PROVIDES LOW-COST REVENUE TO LOCAL GOVERNMENTS AT THE EXPENSE OF FIRST MORTGAGEES' DUE PROCESS RIGHTS AND EMBODIES IMPRUDENT PUBLIC POLICY.

On top of the Legislature not allowing or intending local governments to enact ordinances like Ordinance 97-07, these types of ordinances, while guaranteeing low-cost revenue to municipalities, infringe on first mortgagees' due process rights and embody imprudent public policy. The present case is a perfect example—the City allowed large fines to accrue on real property for fairly minor code violations without notifying Wells Fargo, and then imposed liens of significant value, claiming they were superior to Wells Fargo's prior recorded mortgage. Put another way, Wells Fargo loaned the homeowners $115,531.00 in 2004, and the City imposed a lien with superpriority to recover $28,600.00—nearly a third of the value of the mortgage—because grass was not mowed and a fence not repaired. Add in the drop in Florida's property values since 2007, and Wells Fargo may be left with very little, if any, recovery after it completes the foreclosure process. *CTX Mortg. Co., LLC v. Advantage Builders of America, Inc.*, 47 So. 3d 844, 846 (Fla. 2d DCA 2010) (recognizing the bottom of the Florida real estate market had begun to drop out of the "overheated" housing market in mid-2007).

Some amici supporting the City assert that ordinances like Ordinance 97-07 are needed "to give teeth to their code enforcement efforts and . . . to ensure that

they recover the costs they are forced to incur repairing noncompliant properties." Amicus Brief of City of Casselberry, et al. p.8; *see also* Amicus Brief of City of Palmetto p.4 ("local governments rely on the prioritization of their liens to ensure that the defaulting property owner and the mortgagee cannot disregard the local government's efforts to *correct a dangerous condition or a blighted property*") (emphasis added). However, the City in this case made no effort to fix the fence or mow the lawn; it appears that it simply used Ordinance 97-07 to collect revenues lost due to the economy's downturn. Municipalities may impose high daily fines on property owners under these ordinances, and it is the continuing accrual of these fines that permits municipalities to supplement their revenues for the cost of merely seeking out code violations, not remedying them.[3] As such, this case is not about a local government's right to fix or maintain nonconforming property; it is about a local government's right to collect fines as a low-cost revenue stream and impose a lien with superpriority in the amount of these fines, at the expense of first mortgagees with a prior recorded interest.[4]

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[3] Additionally, Ordinance 97-07 already entitles the City, if it prevails in enforcing a code violation before the Code Enforcement Board, "to recover all costs incurred in enforcing the case before the Board, and in any appeals from the Board's order. Such costs include but shall not be limited to: investigative costs, administrative costs, prosecution costs, and preparation of the record on appeal."

[4] This issue is widespread considering the number of ordinances similar to the City's Ordinance 97-07. The City's Motion for Certification of a Question of Great Public Importance filed in the Fifth District Court of Appeal lists over eighty such

In addition to harming lenders who are first mortgagees, these ordinances will dramatically alter the mortgage market in Florida for the worse. Ordinances like Ordinance 97-07 lead to a lack of certainty as to priority, which inhibits the sale of mortgages in the secondary market. Banks do not hold and service the mortgages they sell; rather, they are sold in the secondary market to Fannie Mae or Freddie Mac, or securitized to private investors. The banks, in turn, use the proceeds of these sales to make other loans, and this stream of revenue keeps the economy growing. It is not unrealistic to predict that home lending could shut down in Florida if these ordinances are deemed valid due to the level of uncertainty superpriority liens create.

Finally, Ordinance 97-07 violates Article I, section 18, of the Florida Constitution by imposing an unauthorized penalty on banks who lend to homeowners. Article I, section 18 prohibits any administrative agency from imposing any penalty that is not authorized by the Legislature. Nowhere in the Florida Statutes has the Legislature authorized code enforcement boards to impose superpriority liens for code violations. While homeowners may not be penalized directly by these liens, as the City argues in its Initial Brief, financial institutions, and any other owners of prior recorded interests, are penalized by Ordinance 97-07 when homeowners fail to comply with code because they lose the priority of their

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similar ordinances from local governments throughout Florida and states that this is a representative, and not a complete, list.

mortgages, the only security for their loans. While the City argues that lenders are on notice under Ordinance 97-07 that liens for code violations can be imposed, this ignores the true problem—lenders have no idea *when* a code violation is alleged and *how high* the fines will go before a lien is imposed. If a lender received notice, it could possibly rectify the situation promptly to avoid the imposition of a lien, but this would defeat the municipality's goal—revenue.[5] While the City believes that lenders could monitor public records pertaining to code violations to ensure that none of their collateral properties are in violation, this itself would be a penalty due to the great resulting financial burden; it is also impossible practically given the tremendous number of homes financed within the state of Florida and the securitization of loans.

The City's goal is to shift the burden of enforcing its own ordinances to third parties who have no ability—and no duty—to enforce the City's standards of property maintenance. Nothing in Florida law, and nothing in public policy, is furthered by allowing municipalities to duck their own responsibilities and to foist

[5] Notice of code violations to lenders may help in limited situations, but probably not in most due to securitization. Typically, mortgages are returned to the original lenders when and if mortgagors stop making payments on the underlying notes and they go into default; the original lender may have no interest in the loan at the time of the actual default. Alternatively, securitized mortgages are placed with a servicer who has specific contractual obligations and limitations of authority; the servicer may have no delegated authority from the owner(s) of the securitized mortgage to take action upon receiving notice of a code violation. Thus, it is not clear to whom notice would be given, and this is another example why ordinances of this type are completely unworkable.

the role of "enforcer" onto a financial institution that has neither the ability nor the authority to interfere with municipal governance. The citizen at least has standing to protest the adoption of the ordinance or to seek its repeal. The financial institution is without representation or remedy if the City adopts an ordinance it cannot enforce without infringing the rights of non-residents. Thus, Ordinance 97-07 and other ordinances like it are invalid.

CONCLUSION

For the reasons expressed in this *Amicus Curiae* Brief and the Answer Brief filed by Respondent, Wells Fargo Bank, N.A., Florida Bankers Association, the *Amicus Curiae*, respectfully requests that this Court answer the question certified by the Fifth District Court of Appeal in the negative.

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