# SUPREME COURT OF FLORIDA

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**Case No. SC11-830**

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CITY OF PALM BAY

Petitioner

vs.

WELLS FARGO BANK, N.A.

Respondent

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# AMICUS BRIEF OF PETER AND LAURIE PEPE, AND PORT MALABAR COUNTRY CLUB, INC. IN SUPPORT OF RESPONDENT, WELLS FARGO BANK, N.A.

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**On Review from the District Court of Appeal,**
**Fifth District of Florida**

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## STATEMENT OF INTEREST OF AMICI

Peter and Laurie Pepe ("the Pepes") came to Florida in 1997, with their life savings from a tow truck and auto repair business Mr. Pepe owned in New York. The Pepes used these savings to purchase real estate, including a golf course located in the City of Palm Bay, Florida. The 170 acre golf course property was titled to Port Malabar Country Club, Inc. ("PMCC"), the sole shareholders of which are the Pepes. Mr. Pepe ran the course until June of 2004, when Palm Bay Greens, LLC, bought the property for consideration which included a promissory note secured by a mortgage on the property.

The property is now subject of a lien foreclosure action by the City of Palm Bay based upon code violations such as tall grass and weeds, dead and fallen trees, mildew on walls, and failure to maintain certain structures. These violations all occurred after the Pepes sold the land to Palm Bay Greens. The City of Palm Bay's lien foreclosure action remains pending in the Circuit Court for the Eighteenth Judicial Circuit, in and for Brevard County, Florida, under the style City of Palm Bay v. Palm Bay Greens, LLC, et al. Case No. 05-2009-CA-041884. The City of Palm Bay has named the Pepes and PMCC as defendants in that suit and contend that the City's code enforcement liens are superior to the mortgage held by the Pepes and PMCC in the golf course property.

The Pepes and PMCC have moved to dismiss the City of Palm Bay's effort to foreclose their mortgage interest, contending that the previously recorded mortgage has priority over the City's subsequently recorded lien claims. The issues raised in the motion to dismiss include issues now before this Supreme Court, and the decision of this Court in the present case involving Wells Fargo is to that extent expected to provide binding authority in the Pepes' case. Accordingly the Pepes have a direct and significant interest in the decision of this Court.

The Pepes and PMCC file this amicus brief to assist the Court in resolving the novel legal argument raised by the City. We provide below additional arguments and authorities in support of the positions well-stated in the brief of Wells Fargo. But just as importantly, the presence of the Pepes in this case is intended to rebut any assumption that only banks or other sophisticated financial entities have an interest in the issue before the Court. Regular folks who work hard, save their money, and invest in property would also be affected by the result the City seeks. The Pepes' life savings hang in the balance. An understanding of the full range of interests at stake should assist the Court's ability to render a decision that does not overlook or fail to account for the broad spectrum of mortgage holders whose interests would be jeopardized by the position of the City of Palm Bay.

## SUMMARY OF ARGUMENT

The City raises a novel argument, supported by no existing authorities, and rejected by both Circuit Court and the District Court of Appeal, that home rule power allows the City to give its own code enforcement liens super-priority status. There is no statutory support for such priority, and the City's position conflicts with both the Local Government Code Enforcement Boards Act and the long-established rule that the priority of judgment liens is determined by time of recordation.

The City's argument presents a high stakes challenge to mortgage holders, as code enforcement liens can involve large amounts of money. The City seeks to collect against the interest of mortgage holders who generally have no culpability, as they are not in a position to bring property into compliance with local codes. This raises a number of constitutional concerns with the City's intrepid arguments, including that its contention would allow the imposition of fines against non-violators contrary to the Florida Constitution, without providing requisite notice to satisfy due process, and impairing contracts in a manner which could extend extraterritorially to the holders of mortgages in real property outside the boundaries of the City.

## ARGUMENT

Ordinance No. 97-07 provides that the City's code enforcement liens are "coequal with the liens of all state, county, district and municipal taxes [and] superior in dignity to all other liens, titles, and claims . . . ." To the extent that this Ordinance would make code enforcement liens superior in priority to previously recorded mortgage interests, it is inconsistent with general provisions of state law. The novel arguments of the City for upholding this policy are supported by no legal authority, and would raise numerous public policy and constitutional problems.

### I. Municipal Ordinances May Not Conflict With State Law

Municipalities have home rule authority to enact local laws for municipal purposes. See Fla. Const. art. VIII, § 2(b); Fla. Stat. § 166.021. This legislative power is not unlimited however; among other limitations, "ordinances are inferior to laws of the state and must not conflict with any controlling provision of a statute." Thomas v. State, 614 So.2d 468, 470 (Fla. 1993). An ordinance is invalid to the extent that it conflicts with state law. See Wyche v. State, 619 So.2d 231, 237 (Fla. 1993). In Wyche, for example, a local ordinance imposed a penalty for loitering which exceeded the penalty specified by state law regulating similar conduct. This violated the doctrine that: "Although municipalities and the

legislature may legislate concurrently in areas not expressly preempted to the state, a municipality's concurrent legislation may not conflict with state law." Id. at 238.[1]

The rule that local ordinances may not conflict with state law has been applied in the context of a code enforcement lien dispute. In Stratton v. Sarasota County, 983 So.2d 51 (Fla. 2d DCA 2008), the lien imposed following the demolition of an unsafe structure included personnel costs. Sarasota County's arguments for including these administrative expenses in its lien amounts were found to be contrary to Florida Statutes Section 162.09.

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[1] Other examples of such conflict where the state law renders the local law invalid include: (1) a local ordinance cannot criminalize riding a bike lacking specified safety equipment where state law treats such violations as a civil violation, Thomas, 614 So.2d at 470; (2) a local ordinance cannot provide election certification and recount procedures which materially differ from the state election code, Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So.3d 880, 889-91 (Fla. 2010); and (3) a local ordinance cannot set millage rates in a manner differing from provisions of state law governing the determination of millage rates, Board of County Comm'rs v. Wilson, 386 So.2d 556, 560-61 (Fla. 1980). See also West Palm Beach Ass'n of Firefighters v. Board fo City Comm'rs, 448 So.2d 1212 (Fla. 4th DCA 1984) (proposed ordinance making special master recommendations binding in employment disputes contrary to dispute resolution procedures specified in state public employee bargaining laws was invalid as conflicting with state law); Edwards v. State, 422 So.2d 84 (Fla. 2d DCA 1982) (Grimes, J.) (ordinance imposing more severe penalties for possession of cannabis than statutory penalties was invalid due to conflict with state law); Donisi v. Trout, 415 So.2d 730 (Fla. 4th DCA 1981), review denied, 426 So.2d 29 (Fla. 1983) (city cannot waive immunity beyond waiver provided in statute); City of Miami Beach v. Rocio Corp., 404 So.2d 1066, 1069-71 (Fla. 3d DCA 1981), review denied, 408 So.2d 1092 (Fla.

Accordingly, while county and municipal governments have authority to enact local laws, such laws may not conflict with general state law. Where such conflict appears, including in the context of code enforcement proceedings, the courts have not hesitated to hold the conflicting local law to be invalid.

## II. The City's Ordinance Conflicts With State Law

The District Court of Appeal and the Circuit Court agreed that the City's Ordinance conflicts with general state law. The Ordinance conflicts with both the Local Government Code Enforcement Boards Act, and with the doctrine that first in time for recording is first in priority.

### A. The Ordinance Conflicts With The Local Government Code Enforcement Boards Act

The Local Government Code Enforcement Boards Act, Fla. Stat. §§ 162.01 et seq. ("Code Enforcement Act"), authorizes the creation of administrative boards "with authority to impose administrative fines and other noncriminal penalties" for "enforcing any codes and ordinances in force in counties and municipalities . . . ." Fla. Stat. § 162.02. The Code Enforcement Act specifically prescribes the method by which an order of an enforcement board may be recorded so as to create a lien:

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1981) (ordinance which was inconsistent in several respects with Condominium Act was invalid.

> 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. Upon petition to the circuit court, such order **shall be enforceable in the same manner as a court judgment** by the sheriffs of this state, including execution and levy against the personal property of the violator, but such order shall not be deemed to be a court judgment except for enforcement purposes.

Fla. Stat. § 162.09(3) (emphasis supplied).

The emphasized portions of the above-quoted provision are each in conflict with the City's claim that its lien has super-priority status over a previously recorded mortgage. First, the provision that a certified copy may be recorded "and **thereafter** shall constitute a lien against the land" makes a clear temporal demarcation as to the effective date of the lien. Thereafter means:

> After the time last mentioned; after that; after that time; afterward; subsequently; thenceforth.

Black's Law Dictionary 1478 (6th ed. 1990). By this temporal indicator, Section 162.09(3) specifies the effective date of the lien created by recording the order. To allow retroactive effect by giving priority against a previously filed lien would be contrary to the Legislature's use of this term in the statute. It would ignore the word "thereafter" in violation of the canon of construction that all statutory terms are to be given effect and should not be disregarded as mere surplusage. See, e.g.,

Stratton, 983 So.2d at 55-56. Use of "thereafter" in Section 162.09(3) precludes the argument for some form of retroactive priority even more clearly than language in the lien statute for judgments, which provides, less emphatically, that a judgment "becomes a lien on real property in any county when a certified copy of it is recorded in the official records . . . ." Fla. Stat. § 55.10.

That a lien enforceable under the Code Enforcement Act does not apply retroactively to have priority over previously recorded lien interests is underscored by the provision in the same subsection (3) that, upon petition to the circuit court, the order that has been recorded "shall be enforceable in the same manner as a court judgment . . . ." Fla. Stat. § 162.09(3). Court judgment liens are subordinate to previously recorded liens as a matter of law. See Lamchick Glucksman & Johnson, P.A. v. City Nat'l Bank, 659 So.2d 1118, 1120 (Fla. 3d DCA 1995), review denied, 670 So.2d 937 (Fla. 1996) ("it is a firm, long standing principle, that priorities of liens on real property are established by the date of recordation"). This principle that the priority of judgment liens is established by the date of recordation is "statutorily emobodied in Section 695.11 which exclusively establishes priorities between judgments." Id. We may presume that the Legislature was aware of this long-standing legal principle and intended exactly this priority scheme when it enacted legislation providing for enforcement of code

enforcement liens in the same manner as court judgments. See Preston v. Health Care & Retirement Corp., 785 So.2d 570, 572 (Fla. 4th DCA 2001), review dismissed, 804 So.2d 329 (Fla. 2001).

When interpreting Section 162.09(3)'s provision that code enforcement liens "shall be enforceable in the same manner as a court judgment" it is proper to consider other statutory provisions which provide the manner by which a court judgment may be enforced. This follows from the canon of construction that courts must give full effect to all statutory provisions and construe related provisions to be in harmony with one another. City of Hollywood v. Mulligan, 934 So.2d 1238, 1244-45 (Fla. 2006). This requires interpretation of Section 162.09(3) in light of the general law that judgments are prioritized by date of recording.

To give a code enforcement lien super priority over a previously recorded mortgage would be contrary to the statutory language that such lien should be enforceable as a court judgment. There is nothing novel in this interpretation. For example, as the Office of General Counsel for the Department of Revenue stated in considering whether municipal liens might survive the issuance of a tax deed:

> The administrative fine liens imposed in accordance with the provisions of section 162.09(3), Florida Statutes, are based upon the violation of an order of a code enforcement board. They therefore constitute an exercise of the government's "police power." Such liens are not of equal dignity with the lien imposed for ad valorem taxes,

> which is based upon the sovereign's inherent power to tax. By section 162.09(3) they are given the dignity of a judgment. Judgments are enforceable as provide in section 55.10(1), Florida Statutes, and become a lien when recorded in the public records of the county.

Dep't of Rev. Advisement Letter 92-0051 (June 19, 1992).[2]

The Code Enforcement Act does not prohibit a local governing body from enforcing its code by other means. Fla. Stat. §§ 162.03, 162.13. However, if a municipality does adopt the Code Enforcement Act, it must accept all of the provisions of that Act, and may not pick and choose provisions to reject. While a local government has the option whether to create code enforcement boards, if it takes that option the "as provided herein" language of Section 162.03(1) indicates that such boards will be required to follow the Code Enforcement Act. This appears to be a fairly strict requirement, which follows both from the statute and from constitutional limitations on the ability of a municipality to impose penalties. See, e.g., City of Tampa v. Braxton, 616 So.2d 554, 556 (Fla. 2d DCA 1993) ("once the City opted for a code enforcement board under chapter 162, it was

[2] This Advisement Letter is available at: https://taxlaw.state.fl.us/view_search.aspx?r=92%2D0051+%7BVIC+%23%5B%7D&filename=PTA%5FADV%2EASK&orireg=survival+of+administrative+fine+liens+upon+issuance+of+tax+deed&banner=Advisement+Letters%0D%0A&files=%2A (viewed on Nov. 13, 2011).

prohibited by article I, section 18 of the state constitution to enforce its ordinance by any other manner except that described in chapter 162").

Even if some flexibility is left to municipalities in code enforcement matters, any such flexibility should not extend so far as to allow departure from those provisions of the Code Enforcement Act which by the terms of the Act are mandatory. The question at hand is whether having adopted a code enforcement board under the Code Enforcement Act, a municipality may give itself greater rights than those provided by the Code Enforcement Act. And in considering that question, attention must be given to the use of the mandatory term "shall" in the statutory provision that: "Upon petition to the circuit court, such order **shall** be enforceable in the same manner as a court judgment . . . ." Fla. Stat. § 162.09(3). The Legislator's use of the term "shall" in this context indicates "an obligation impervious to judicial discretion." City of St. Petersburg v. Remia, 41 So.3d 322, 326 (Fla. 2d DCA 2010). See also DeGregolia v. Balkwill, 853 So.2d 371, 374 (Fla. 2003). This mandatory language leaves no wiggle room on the question whether a code enforcement lien may be enforceable as if it were superior in priority to a court judgment.

That provisions of the Code Enforcement Act are not subject to modification by municipalities or counties with code enforcement boards is reflected as well in a number of Attorney General Opinions. For example:

> While the city may enforce its codes by a means other than that set forth in Chapter 162, Florida Statutes, if the city seeks to utilize the provisions of that chapter to authorize an administrative agency such as a code enforcement board or special master to impose fines, it may not change the procedures prescribed therein.

Att'y Gen. Op. 2001-77. See also Att'y Gen. Ops. 97-26 and 86-10. While such opinions are not binding on this Court, opinions of the Attorney General are "entitled to careful consideration and should be regarded as highly persuasive." State v. Family Bank of Hallandale, 623 So.2d 474, 478 (Fla. 1993).

A local government option to enforce its code in ways other than those specified in the Code Enforcement Act is limited to actions "against violators." Fla. Stat. § 162.03(2). Any alternative enforcement system that does not follow the Code Enforcement Act would still be limited to permit enforcement only against a violator. By limiting municipal efforts to enforce local codes against those who violate the code, Section 162.03(2) restricts the enforcement power from being applied against a mortgage holder who is not in possession or control of the property, and so has not violated the case. This follows from the canon that mention of one thing implies the exclusion of others. See Pro-Art Dental Lab v. V-

Strategic Group, 986 So.2d 1244, 1258 (Fla. 2008); City of Miami v. Kichinko, 22 So.2d 627, 629 (Fla. 1945).

### B. The Ordinance Conflicts With The First-In-Time Rule

The Ordinance's purported advance of lien priority ahead of a previously recorded mortgage conflicts with the first-in-time rule, a principle of common law that has been codified into Florida Statutes Section 695.11. The arguments on that issue are well-stated in the brief of Wells Fargo. We will limit ourselves to pointing out that the interpretation of Section 695.11 given by Wells Fargo and by the District Court is in perfect harmony with the interpretation of the Code Enforcement Act as described above in Section II.A of this amicus brief. Just as the Code Enforcement Act allows a lien when a code enforcement order is filed in the public record, Section 695.11 provides that such lien interest will have priority according to its timing. The City's position is based on an unharmonious reading of Section 695.11 and the Code Enforcement Act, in contravention of the rule that different statutory provisions addressing the same subject should be read so as to be without conflict whenever it is possible to do so. See, e.g.,Hollywood v. Mulligan, 934 So.2d at 1244-45.

## III. The City's Position Raises Other Concerns

Whenever novel legal arguments are advanced, it is difficult to accurately foresee and assess the panoply of problems that may be presented by departure from current law. The motion to dismiss and supplement to motion to dismiss filed by the Pepes (in the action by Palm Bay in which the Pepes are parties) listed a number of such concerns. Now that the question is before this Court, the need to give careful consideration to such concerns is even more important.

### A. City's Position Would Lead To Unjust Consequences

Local code provisions vary. There can be additional variation in the aggressiveness and flexibility of the enforcement authorities. While this is a commonplace that is necessarily borne by local residents and landowners, imposing these conflicting expectations and enforcement regimes upon mortgage holders who lack the power to respond to a local government's code enforcement action imposes a threat to the mortgage holder's interest that cannot be justified by any wrong-doing of the mortgage holder. Threatening the interests of prior lien holders will lead to unreasonable, harsh, and absurd consequences, punishing mortgage holders for the sins of the title owners. The statutory provisions bearing on the subject should not be read as requiring such results when the governing statutes are so easily read as permitting no threat to mortgage holders at all. See

Florida Dep't of Environmental Protection v. ContractPoint Fla. Parks, 986 So.2d 1260, 1270 (Fla. 2008) ("Court should not interpret a statute in a manner resulting in unreasonable, harsh, or absurd consequences").

The threats to mortgage holders presented by the City's contentions are by no means trivial. In the action involving the Pepes and Palm Bay, the lien claims asserted by the City total $74,661.96. Six figure lien claims are not unprecedented.[3]

To be sure, many municipalities enforce their codes in a manner that gives primary emphasis to compliance, and will sharply discount monetary sanctions provided the violations are redressed. But local authorities can just as easily take a sharper approach in which such compromises are not made. In either case, the local authorities enforcement against the title owner of the land can be aggressive or forgiving for any number of reasons, including the title owner's responsiveness and efforts to comply, or the title owner's taking the attitude of a scofflaw. Laying punishment against a mortgage holder whose actions normally will have nothing to

[3] See Dundale v. City of Miami, 16 Fla. L. Weekly Supp. 1017a (Fla. 11th Cir. App. Sept. 22, 2009) ($163,000 lien reduced to $40,000 after correction of violations); Khan v. City of Orlando, 16 Fla. L. Weekly Supp. 608b (Fla. 9th Cir. App. March 30, 2009) (affirming penalties totaling $155,750); Fernandez v. City of Orlando, 16 Fla. L. Weekly Supp. 382a (Fla. 9th Cir. App. Dec. 1, 2008) (appeal of $132,750 penalty).

do with such factors punishes one party for the actions or nonactions of another. Because levying punishment against parties who have done no wrong is inherently unjust, the City's legal interpretation should be rejected.[4]

### B. City's Position Raises Several Constitutional Issues

A mainstay of statutory construction is to avoid interpretations which lead to constitutional problems. See, e.g., Waste Management, Inc. v. Mora, 940 So.2d 1105, 1108 (Fla. 206). A number of constitutional problems lurk within the path which the City invites this Court to follow.

#### 1. City's Position Would Violate Fla. Const. art. I, § 18

As noted in Tampa v. Braxton, 616 So.2d at 556, code enforcement liens are penalties, and so are subject to the limitation on penalties provided in Article I Section 18 of the Florida Constitution. Authorization for code enforcement liens is provided in Section 162.09(3), but that does not allow penalties to be imposed against the interest of an innocent prior lien holder who was not responsible for the violations. Allowing a municipality to exact fines against the interests of third

[4] See also Garcia v. Allstate Ins. Co., 327 So.2d 784, 786 (Fla. 3d DCA 1976), cert. denied, 345 So.2d 422 (Fla. 1977) (quoting 73 Am.Jur.2d Statutes § 269) ("[i]n the interpretation of statutes, a court should be astute in avoiding a construction which may be productive of much litigation and insecurity, or which would throw the meaning or administration of the law, or the forms of business, into hopeless confusion or uncertainty").

parties without some clearer legislative approval would be contrary to this constitutional mandate.[5]

### 2. City's Position Raises Due Process Concerns

Among the issues raised in Wells Fargo's brief is that it did not receive proper notice. This appears to be the normal course in such affairs, as municipal authorities notify title owners of property, but do not provide any notice, generally, to others with interests in property that is subject to a code enforcement proceedings. In contrast, where a municipal tax is imposed, the statute takes care to safeguard interests of third parties consistent with due process by requiring at least thirty days notice before filing suit by registered mail to "the holder of the record title and to the holder of each mortgage or other lien." Fla. Stat. § 173.04.

### 3. City's Position Amounts To Unauthorized Taxation

Under Article VII Section 1 of the Florida Constitution, all forms of taxation except for ad valorem taxes are preempted to the State. This Court on numerous occasions has blocked municipal efforts to avoid this bar by camouflaging revenue provisions in order to disguise their true form. See Alachua County v. State, 737 So.2d 1065 (Fla. 1999); Collier County v. State, 733 So.2d 1012 (Fla. 1999); State

[5] See also Stratton, 987 So.2d at 55; Broward County v. La Rosa, 484 So.2d 1374 (Fla. 4th DCA 1986), approved on other grounds, 505 So.2d 422 (Fla. 1987);

v. City of Port Orange, 650 So.2d 1 (Fla. 1994). Collection of code enforcement fines against the interests of third parties who have not violated any code goes definitionally beyond penalty, as it targets the interest of those who have done no wrong. By exceeding that definition, the City has crossed into the territory of unconstitutional non-ad valorem revenue generation.

**4. City's Position Would Impair Contracts**

Article I, Section 10 of the Florida Constitution protects against the impairment of contracts, and this protection extends to mortgage interests. See David v. Sun Fed. Sav. & Loan Ass'n, 461 So.2d 93, 95 (Fla. 1984). Here, the City claims power to take away a mortgage interest that has – before the City undertook any proceeding – previously been transferred from the alleged violator to the Pepes. To take away that which the violator does not own amounts to a retroactive undoing of the previously existing contractual transaction. See Brevard County v. Florida Power & Light, 693 So.2d 77 (Fla. 5th DCA 1997), review denied, 699 So.2d 1371 (Fla. 1997).

**5. City's Position Could Extend Extraterritorially**

Section 162.09(3) provides for a lien not just against the property on which the violation exists, but also "upon any other real or personal property owned by

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Broward County v. Plantation Imports, Inc., 419 So.2d 1145 (Fla. 4th DCA 1982).

the violator." Accordingly, if the City's position is accepted, and its lien is given priority, that would apply even to land outside the City owned by the visitor. To illustrate by hypothetical, if the Pepes hold a mortgage in land in Tallahassee owned by Mr. Jones, even if Mr. Jones maintains that Tallahassee property according to all code requirements, the Pepes would still be at risk. Because if Mr. Jones has property in Palm Bay found to be in violation of Palm Bay's code, a code enforcement order as to the Palm Bay property would, pursuant to Section 162.09(3) create a lien on the property in Tallahassee as well, and the City would contend that based on the ordinance its lien in Tallahassee should be given priority. This demonstrates that the City of Palm Bay's position leads not only to absurd and unjust results, but also to extraterritorial applications which would violate both Article VIII Section 2 of the Florida Constitution and Fla. Stat. § 166.021 (3)(a). See Root v. Mizel, 117 So. 380 (Fla. 1928).

## CONCLUSION

The Pepes had nothing to do with the violations relating to the City of Palm Bay's liens against the property in which they hold a mortgage. The same is true for most if not all mortgage holders in property subject to code enforcement proceedings. Foreclosure of their mortgage interests for violations by others should not be permitted absent a clear statutory basis.

The City of Palm Bay's claimed power to impose code enforcement liens which take priority over previously recorded mortgage interests is contrary to general law, and would present a considerable infringement on the interests of mortgage holders who generally lack any responsibility for the violations. The Circuit Court and the District Court of Appeal both rejected the City's claim to such unwarranted power. The Supreme Court should approve the decisions below.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this motion meets the font requirements of Rule 9.210.

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been forwarded via regular U.S. Mail this 14th day of November, 2011, to the addressees listed below:

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