

**IN THE SUPREME COURT OF FLORIDA**

CITY OF PALM BAY,

Petitioner,

v.

Case No. SC11-830

WELLS FARGO BANK, N.A.,

Respondent.

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**AMICUS BRIEF OF CITY OF PALMETTO  
IN SUPPORT OF PETITIONER, CITY OF PALM BAY**

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Respectfully submitted,

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## STATEMENT OF INTEREST

CITY OF PALMETTO, like many other local governments, has a substantial interest in protecting the public from health, safety and welfare issues caused by property owners' failures to comply with the City's ordinances. There are numerous cases of abandoned properties which contain unsecured and inadequately maintained structures and properties, and these problems have been exacerbated by the current economy. As an example, abandoned houses frequently have swimming pools which are not properly maintained or enclosed, which creates significant safety risks as an attractive nuisance to children and as a breeding ground for mosquitoes and vermin. As grounds to promote and encourage compliance, the CITY OF PALMETTO's code enforcement board levies fines and, if such fines are unpaid, the CITY OF PALMETTO files liens against the property.

CITY OF PALMETTO Ordinance No. 07-916 provides for the priority of the CITY OF PALMETTO's liens over mortgages filed after the date of the ordinance. In this regard, CITY OF PALMETTO's ordinance is similar to the one at issue in this action. CITY OF PALMETTO has filed liens and taken other actions in reliance upon its ordinance and such liens and actions may be adversely impacted by the decision of the Fifth District Court of Appeal in *City of Palm Bay v. Wells Fargo Bank, N.A.*, 57 So.3d 226 (Fla. 5<sup>th</sup> DCA 2011). Accordingly, the

CITY OF PALMETTO is interested in this action and files this amicus brief in support of the position of Petitioner, City of Palm Bay.

## **SUMMARY OF ARGUMENT**

This Court should find that a municipality has the authority to enact an ordinance making its code enforcement liens superior in dignity to mortgages recorded after the effective date of the ordinance.

Mortgagees are on notice of all municipal ordinances when they loan money and secure repayment of such loans with real property located in a municipality. Florida is a “notice” state and a contract lienor, having notice of a potential claim, may not “race” to the offices of the local clerk of courts and record its mortgage and thereby gain a superior interest in the property.

Here, Wells Fargo Bank, N.A., had notice of the City of Palm Bay’s ordinances and knew that any code enforcement liens would take precedence over its mortgage at the time it made the subject loan. Thus, the City of Palm Bay’s code enforcement liens are superior to the mortgage at issue.

## ARGUMENT

Pursuant to Florida Statute, §695.01, the recording of an instrument in the public record gives notice to all subsequent purchasers and mortgagees. Florida Statute, §695.11, provides that those instruments which are authorized or required to be recorded are deemed so upon filing with the office of the clerk of the circuit court. Section 695.11 also provides that the official numbers associated with each filed document determines the priority of recordation and that those instruments bearing a lower number have priority over those bearing a higher number.

Notwithstanding the timing and priority language used in these statutes regarding the recordation of instruments, Florida remains a “notice” state. *Argent Mortgage Co. LLC v. Wachovia Bank, N.A.*, 52 So.3d 796, 801 (Fla. 5th DCA 2010).

In *Argent Mortgage Co. LLC*, Wachovia Bank argued that amendments to §695.11 changed Florida from a “notice” state to a “race-notice” state because of the statute’s language regarding the “priority” of recorded instruments. *Id.* at 798. The appellate court disagreed and reasoned that §695.11 “was intended to provide a mechanism for determining the time at which an instrument is deemed to be recorded, not to alter the recording requirement found in Section 695.01.” *Id.* at 800. The court “conclude[d] that Florida is, and remains, a ‘notice’ jurisdiction, and notice controls the issue of priority.” *Id.* at 801. Thus, a subsequent

mortgagee of real property for value and without notice of a prior mortgage will prevail against the prior mortgagee even if the subsequent mortgage is recorded after the earlier mortgage. *Id.* at 798, 801.

Municipal ordinances are not required to be recorded by the Clerk in the Official Records to become effective. §28.222, Fla. Stat. (2011); *See* §695.11, Fla. Stat. (2011) and §166.041, Fla. Stat. (2011). Indeed, the recording of an instrument, not authorized or required by law to be recorded, is a vain and futile act. *Malsby v. Gamble*, 54 So. 766, 773 (Fla. 1911); Op. Att’y Gen. Fla. 90-69 (1990) (“The clerk of circuit court may not accept any document for recording in the official records of the county which the law does not authorize or require him or her to record.”).

It is the adoption of a municipal ordinance which provides constructive notice of the contents of the ordinance and the powers of the governmental agency. *Town of Lauderdale-by-the-Sea v. Meretsky*, 773 So.2d 1245, 1249 (Fla. 4th DCA 2000); *See also Davis v. State*, 928 So.2d 442, 448 (Fla. 5<sup>th</sup> DCA 2006)(defendant’s professed lack of notice of county ordinances without merit because ignorance of the law is no excuse), and *Akins v. Bethea*, 33 So.2d 638 (Fla. 1948) (“every citizen is charged with knowledge of the domestic law of his jurisdiction”).

The City of Palm Bay's enactment of its ordinance provided notice to prospective mortgagees of the possibility that the City might file liens against the property which would be superior to any mortgagee's interests. Wells Fargo Bank, N.A., as an entity seeking to do business related to property in the City of Palm Bay, has been on notice since 1997 of the City of Palm Bay's code enforcement ordinances. Indeed, Wells Fargo Bank, in paragraph 9 of the mortgage at issue, expressly notes that there might be

a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (*such as a proceeding ... for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations*) ..."

(emphasis added)

Municipal ordinances are enacted to promote the health, safety, and welfare of the municipality. The enforcement of these ordinances benefits mortgaged property by ensuring that parcels and structures are safely and properly maintained. Under the current conditions in this state, it is an all-too-frequent occurrence for the values of mortgaged lands to be grossly insufficient to cover the amounts owed to the mortgagee. In such situations, 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. Adopting a rule to the contrary would hinder the ability of local

governments to provide for the safety of their citizens and to protect the property values of surrounding parcels. It would make little sense to leave it within the power of a lot owner to so encumber the land as to render nugatory, or even to impair, the municipal function. *See Lybass v. Town of Ft. Myers*, 47 So. 346, 350 (Fla. 1908)(making this conclusion in the context of prioritizing special assessments).

Wells Fargo Bank, N.A., had notice at the time it made the subject loan that the City of Palm Bay's code enforcement liens, if filed against the mortgaged property, would take precedence over the mortgage lien.<sup>1</sup> Thus, the City of Palm Bay's code enforcement liens are superior to the mortgage at issue.

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<sup>1</sup> Mortgagees often loan money where the mortgaged property might be subject to a superior, later determined claim. In the case of a second mortgage for example, a condominium lien, regardless of when recorded, relates back to the later of the recording date of the original declaration of condominium or April 1, 1992. §718.116(5)(a), Fla. Stat. (2011).

## **CONCLUSION**

Municipalities such as the City of Palm Bay have the authority to enact ordinances providing for future code enforcement liens to be superior to mortgages which are recorded after the enactment of the ordinance. Mortgagees have notice of such ordinances and their potential effect on the secured property at the time the loans are made, and the ordinances are enacted and enforced for the benefit of the health, safety, and welfare of the public and all of the properties within the city.

This Court should answer the certified question in the affirmative and remand this matter to the Fifth District Court of Appeal for actions appropriate to and consistent with this Court's decision.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by

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this 19<sup>th</sup> day of August, 2011.

## **CERTIFICATE OF COMPLIANCE**

I certify that this document was prepared in accordance with the font requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2).

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