IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC11-830

CITY OF PALM BAY,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

AMICUS CURIAE BRIEF OF FLORIDA LEAGUE OF CITIES IN SUPPORT OF PETITIONER, CITY OF PALM BAY

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF INTEREST OF AMICUS

The Florida League of Cities ("League") is a statewide organization, consisting of more than 400 municipalities throughout the state. It represents the interests of Florida's municipal governments and promotes local self-government. The League was founded on the belief that local self-governance is the keystone of American democracy.

Many of the League's members have enacted code enforcement ordinances that share some of the characteristics of petitioner, City of Palm Bay's ("City") ordinance at issue here ("Ordinance"). These ordinances confer "super-priority" to code enforcement liens that arise from either (i) the rendering of municipal services that benefit property or the municipal abatement of nuisances and other code violations (comparable in many respects to special assessment liens), or (ii) the accrual of fines resulting from non-compliance by a property owner.

The League's primary interest in this proceeding is to urge the Court to reverse the decision below; failing that, to restrict its holding to the narrowest possible grounds, based upon the facts and circumstances of this case. A ruling broader than is required may fundamentally and unnecessarily undermine the longstanding operation of constitutionally derived municipal home rule authority of the League's members in the code enforcement arena.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal should be reversed. The court below adopted too limited an interpretation of municipal home rule authority by finding a statutory conflict where one does not exist. The common law principle

of "first in time, first in right," which the court believed was codified at section 695.11, Florida Statutes, is merely a *general* principle regarding order of recordation, which is subject to modification under various situations. The Fifth District's reading of the statute as a "black and white" rule of priority – and therefore, a source of conflict – was unwarranted. Inasmuch as Chapter 162 does not explicitly (or implicitly) preempt the City's authority to confer greater superiority on its code enforcement liens, the Ordinance constitutes a valid modification of the general principle enunciated in section 695.11.

This is particularly so where, as here, respondent, Wells Fargo Bank ("Bank"), entered into the mortgage relationship at issue fully cognizant of existing municipal law that granted greater priority to the City's code enforcement liens, regardless of their date of recordation. That law – the Ordinance – formed part of the Bank's mortgage contract, both as a matter of contract law and specific incorporation. The Bank was in the best position to contractually allocate the risks and burdens associated with making loans collateralized by property within the City's jurisdiction, and in fact, did so. Furthermore, the City's code enforcement scheme operated to the benefit of the Bank's interests in the mortgaged property. Rigorous code enforcement inures to the benefit not only of the property owner and society, in general, but also those lenders whose collateral is preserved, if not enhanced, by those code enforcement efforts. As such, code enforcement efforts directly benefit the mortgaged property and, much like a special assessment lien, should be afforded the greater priority such liens merit.

Lastly, the Court's jurisdiction to review the certified question presented is limited to that aspect of the question as was actually passed upon by the Fifth District Court of Appeal. Notwithstanding the broad language of the Fifth District's decision, the trial court proceedings sought to foreclose a mortgage and determine the relative priority of the parties with respect to a *single* transaction. The action was not a declaratory judgment action to invalidate the Ordinance *under all conceivable circumstances*. The trial court ruled consistently with the relief requested and entered a summary judgment of foreclosure, finding the City's lien inferior to the Bank's mortgage. The Fifth District engaged in a broader analysis of municipal home rule authority but, ultimately, only affirmed the trial court's determination of priority under the facts of *this* case. Should the Court be inclined to answer the certified question in the negative, it should not make a broader determination regarding municipal home rule authority than is necessary to resolve the foreclosure dispute presented.

ARGUMENT

I. THE CITY'S EXERCISE OF ITS MUNICIPAL HOME RULE AUTHORITY TO ENACT THE ORDINANCE IS NOT PREEMPTED BY OR IN CONFLICT WITH STATE LAW.

A. The City has broad municipal home rule authority.

The City's enactment of the Ordinance was proper under its broad municipal home rule authority, which permits a municipality to act without legislative authorization. *See* Art. VIII, § 2(b), Fla. Const.; § 166.021(1), (3)(c), (4), Fla. Stat.

(2011). This Court, in *City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006), explained the breadth of that authority:

> In Florida, a municipality is given broad authority to enact ordinances under its municipal home rule powers [and] … may legislate concurrently with the Legislature ***on any subject which has not been expressly preempted to the State***. Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature. Express pre-emption requires a specific statement; the pre-emption cannot be made by implication []or by inference. However, the preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject.

Id. at 1243 (emphasis added; citations and internal quotation marks omitted).

This broad constitutional authority evolved from a much more restrictive view of the role of municipalities in governance. Under the 1885 Florida Constitution, local governments' authority was limited to express grants from the Legislature conferred by general law or special act and any powers implied from such express grants. *Malone v. City of Quincy*, 62 So. 922 (Fla. 1913). Those powers not conferred by the legislature were deemed to be reserved to the Legislature under the nineteenth century local government theory known as "Dillon's Rule". *Id.* at 924. Florida courts consistently applied Dillon's Rule to resolve against local governments any doubts as to the scope of authority conferred. *Id. See also* James R. Wolf, *Municipalities and the Florida Constitution*, 37 Stetson L. Rev. 435, 439 (2008) (hereafter, *Wolf*); *Amos v. Mathews*, 126 So. 308 (Fla. 1930); *Molwin Inv. Co. v. Turner*, 167 So. 33 (Fla. 1936).

In 1968, the Constitution was amended to abolish Dillon's Rule and provide municipalities with governmental, corporate and proprietary powers necessary to carry out a municipal purpose, except as otherwise provided by law. *See* Art. VIII, § 2(b), Fla. Const.; § 166.021(1), (3)(c), (4), Fla. Stat. (1997); *City of Boca Raton v. Florida*, 595 So. 2d 25, 27 (Fla. 1992). After a later decision adverse to home rule authority,[1] the Legislature enacted the Municipal Home Rule Powers Act ("Act") to clarify that municipalities may enact legislation concerning any subject matter upon which the state legislature may act (except where expressly prohibited by the constitution, preempted to the state or county government, or concerning annexation, merger, and exercise of extraterritorial power) and to "remove any limitation, judicially imposed or otherwise, on the exercise of home rule powers." *See* § 166.021, Fla. Stat. (2011).

Subsequently, this Court has liberally construed home rule authority and upheld municipal action concerning a municipal purpose where it is not expressly prohibited by the constitution, general or special law, or county charter. *See Wolf* at 439 (citing *City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1280 (Fla. 1983) and *State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978)). Most disputes concerning municipal home rule authority center around whether municipal action

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[1] *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972) (holding city lacked power to enact rent-control ordinance absent legislative authorization). *Cf. City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (Fla. 1974) (upholding rent-control ordinance on basis that the Act conferred authority to exercise any power not expressly prohibited by law).

is inconsistent with state law because such action is either preempted by or conflicts with the Florida Constitution or Statutes. *Wolf* at 440.

The Fifth District, quite correctly, did not conclude that the City was preempted by Chapter 162 from adopting the Ordinance.[2] Instead, the court concluded that the Ordinance – as applied to this transaction – conflicted with section 695.11, Florida Statutes, and could not confer priority because the City's lien was recorded later than the Bank's mortgage. In this regard, the Fifth District, respectfully, has erred; it has found a conflict where none exists.

B. Section 695.11 is neither a rule relating to lien collection priority nor a rigid standard immune from modification.

At the heart of the Fifth District's conflict analysis is the erroneous assumption that the common law principle articulated in section 695.11 is a hard-and-fast rule from which there can be no local governmental deviation. In fact, that is not the case. Section 695.11 does nothing more than articulate a principle governing the timing of *recordation*. It establishes (i) when an instruments is "deemed to have been officially accepted" (when the official register numbers are affixed), and (ii) the "priority of recordation" as determined by the "sequence of such official numbers." § 695.11, Fla. Stat. (2011). Nowhere does the statute state that an instrument having a lower official register number shall *always* be entitled

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[2] On the contrary, section 162.09, Florida Statutes, authorizes the imposition of fines and recordation of liens arising from municipal code enforcement. The remainder of Chapter 162 is ***silent*** with respect to the priority such liens should be afforded vis-à-vis other recorded instruments.

to priority in collection or enforcement. In fact, the common law principle of "first in time, first in right" is frequently subject to modification.

For example, in the Fifth District's own recent decision in *Argent Mortg. Co., LLC v. Wachovia Bank, N.A.*, 52 So. 3d 796 (Fla. 5th DCA 2010), the court departed from the principle of "first in time, first in right" to protect a second mortgage that had been recorded ***after*** an earlier mortgage because the second mortgagee did not have notice of the first mortgage. *Id.* at 801. In distinguishing the application of section 695.11, the Fifth District reasoned:

> As a result of the 1967 amendment, section 695.11 now includes the following language: "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." (Emphasis added). Wachovia contends that the inclusion of this language converted Florida from a "notice" state to a "race notice" state. We disagree. The amendment to section 695.11 is designed to refine the test for determining the time at which an instrument is deemed to be recorded ….

Id. at 800 (emphasis in original); *see also id.* at 800 n. 3 ("Case law confirms that the purpose of section 695.11 is to determine the time at which an instrument is deemed to be recorded and to serve as notice.").

Additionally, nothing in section 695.11 would preclude contracting parties from voluntarily subrogating earlier recorded interests in favor of later incurred and recorded debt. Thus, if a lender in "first" position by virtue of recordation date were willing to surrender that position in favor of another lender who subsequently provides a mortgage, the common law timing principle reflected in section 695.11

would not control disbursement of proceeds in a foreclosure suit. In short, the principle can be modified by the circumstances of the particular transaction.

A similar modification of the principle is evident in *Holly Lake Ass'n v. Fed. Nat. Mortg. Ass'n*, 660 So. 2d 266 (Fla. 1995). In that case, the Court considered whether a claim of lien recorded by a homeowners' association pursuant to its declaration of covenants had priority over an intervening mortgage, recorded *before* the lien, where the declaration did not indicate that the association's liens related back or took priority over an intervening mortgage. *Id.* at 269. The Court acknowledged the principle of "first in time is first in right" and held that

> in order for a claim of lien recorded pursuant to a declaration of covenants to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the lien relates back to the date of the filing of the declaration *or that it otherwise takes priority over intervening mortgages*.

Id. (emphasis added). *See also New York Life Ins. & Annuity Corp. v. Hammocks Community Ass'n, Inc.*, 622 So. 2d 1369 (Fla. 3d DCA 1993) (homeowners association's lien had priority over mortgage lien because of specific language in the declaration of covenants which gave association's lien priority over mortgage). In each of these scenarios, the common law principle of priority of recordation did not control the question of superiority of lien.

Other courts have more explicitly upheld the priority of municipal liens over earlier recorded mortgages. *See, e.g., Miami Shores Village v. Gibraltar Savings and Loan Ass'n*, 561 So. 2d 27, 28 (Fla. 3d DCA 1990) (affirming summary judgment in foreclosure and upholding priority of municipal waste collection lien

over earlier recorded mortgage); *Gleason v. Dade County*, 174 So. 2d 466, 469 (Fla. 3d DCA 1965) (same). In both *Gibraltar Savings* and *Gleason*, the Third District relied upon this Court's pronouncements in *Gailey v. Robertson*, 123 So. 692 (Fla. 1929) and *Lybass v. Town of Fort Myers*, 47 So. 346 (Fla. 1908), both of which involved municipal liens for improvements abutting property, and quoted the following relevant language:

> The intention of the lawmaking power to give priority to a municipal lien for local improvements over contract liens of individuals ***may be implied*** from the language of the law creating the lien and from the nature and purpose of the lien. [citations omitted]. A statutory municipal lien upon abutting lots for sidewalk improvements … *may be* superior to a mortgage lien upon the lots given after the enactment of the law creating the lien, but before the improvements upon the sidewalks were made.
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> All private rights and interests in real property in a municipality are subject to the statutory powers of the municipality to levy assessments for local improvements pursuant to its governmental functions; and the legislature ***may*** by statute create liens upon private property in favor of a municipality for local improvements, and make such liens superior to other liens acquired subsequent to the enactment of the statute.

Gleason, 174 So. 2d at 467-68 (quoting *Lybass*, 47 So. at 826 and *Gailey*, 123 So. at 693; emphasis in original).

Of course, the statutory lien authority referenced in both *Lybass* and *Gailey* predates the 1968 amendment of the Florida Constitution and the adoption of the Act. In other words, what a municipality prior to 1968 could do *only* upon statutory authorization from the Legislature it can now do pursuant to its home rule

authority. Consequently, the rationale in *Gailey* and its progeny for allowing municipal lien priority over earlier recorded mortgages is equally applicable here.

II. THE ORDINANCE WAS PART OF THE MORTGAGE, AND THE BANK WAS IN THE BEST POSITION TO ALLOCATE RISKS ASSOCIATED WITH THE BORROWERS' FAILURE TO COMPLY WITH THE CITY'S CODE.

When the Bank entered into the mortgage contract with its borrowers, the Ordinance was already in effect. As a result, the Bank was fully aware that its mortgage might be subject to code enforcement liens that would take priority over the mortgage.[3] In fact, Florida law has long recognized that existing law is incorporated into every contract. *Bd. of Pub. Instr. of Dade County v. Town of Bay Harbor Islands,* 81 So. 2d 637, 643 (Fla. 1955). *See also Dep't of Ins. v. Teachers Ins. Co.*, 404 So.2d 735, 741 (Fla. 1981); *Franz Tractor Co. v. J.I. Case Co.*, 566 So. 2d 524, 526 (Fla. 2d DCA 1990) ("The law existing at the time and place of making a contract forms part of the contract as if it had been incorporated into it.").

Even if the Ordinance were not incorporated in the mortgage as a matter of law, it is apparent that the Ordinance was explicitly made part of the Bank's mortgage agreement. The mortgage defines "Applicable Law" as "all controlling applicable federal, state and *local* statutes, regulations, *ordinances* and administrative rules and orders (that have the effect of law)…." Moreover, paragraph 16, which articulates the "governing law" of the mortgage, states:

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[3] It is noteworthy that the Bank chose not to institute a declaratory judgment action to have the Ordinance invalidated, but instead merely proceeded to foreclose on the mortgage.

> This Security Instrument shall be governed by federal law and *the law of the jurisdiction in which the Property is located*. ***All rights and obligations contained in this Security Agreement are subject to any requirements and limitations of Applicable Law***.

(emphasis added).

Additionally, the Bank's mortgage, on its face, reflects that the Bank contemplated the need to require the borrower to maintain the property and to protect it from the imposition of liens. The "Uniform Covenants" section of the mortgage states, in pertinent part:

> 4. Charges; Liens. Borrower shall pay all…*fines*, and impositions attributable to the Property which can attain priority over this Security Instrument….
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> *Borrower shall promptly discharge any lien which has priority over this Security Instrument* unless Borrower: (a) agrees in writing to the payment of the obligated secured by the lien in a manner acceptable to Lender…; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.
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> 9. Protection of Lender's Interest in the Property and Rights Under this Security Agreement. If…(b) *there is 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*…then Lender may do and pay whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under

> this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; [and] (b) appearing in court…. *Securing the Property includes…entering the Property to…eliminate building or other code violations or dangerous conditions….*
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> 11. Assignment of Miscellaneous Proceeds; Forfeiture.
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> Borrower shall be in default if any…proceeding…is begun that, in Lender's judgment, could result in…material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default…by causing the… proceeding to be dismissed with a ruling that, in Lender's judgment, precludes…material impairment of Lender's interest in the Property or rights under this Security Instrument.

(emphasis added).

It is apparent that, under the facts of *this* case, the Bank and its borrowers modified the general common law rule in section 695.11 by incorporating the Ordinance into the mortgage as part of the applicable or governing law, and by making "all rights and obligations contained in this Security Agreement…subject to any requirements and limitations of Applicable Law." It is for this reason that the Court need not make unduly broad pronouncements regarding municipal home rule authority to reverse the decision below. The Fifth District's decision was in error because the parties to the mortgage agreed that the mortgage would be "subject to" the super-priority of the City's code enforcement liens.

Florida courts have acknowledged and upheld the right of contracting parties to be bound by their agreements, even to the point of precluding their causes of

action. Thus, when considering the viability of tort claims, for example, Florida courts have applied the economic loss rule to prohibit a tort claim arising from what amounts to a breach of the parties' contract. The rationale for restricting such tort claims is that the contracting parties are in the best position to allocate risk between them, and that such allocation of risk lies at the heart of contract law. *See, e.g., Indemn. Ins. Co. of N. America v. American Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004) ("Underlying this rule is the assumption that the parties to a contract have allocated the economic risks of nonperformance through the bargaining process. A party to a contract who attempts to circumvent the contractual agreement…is, in effect, seeking to obtain a better bargain than originally made.").

In *Casa Clara Condo. Ass'n, Inc. v. Charley Toppino and Sons, Inc.*, 620 So. 2d 1244 (Fla. 1993), this Court considered the broader question of whether the public, in general, should bear the burden associated with risk of loss between contracting parties:

> Thus, the basic function of tort law is to shift the burden of loss from the injured plaintiff to one who is at fault...or to one who is better able to bear the loss and prevent its occurrence. The purpose of a duty in tort is to protect society's interest in being free from harm…and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in the performance of promises. When only economic harm is involved, the question becomes *whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies*.

Id. at 1246-27 (emphasis added; citations and internal quotation marks omitted). While this principled analysis arises in the tort context, it is equally applicable here, where the question becomes whether the general public – rather than the contracting parties – should bear the burden of code enforcement.

In this case, the Bank negotiated with its borrowers for a contract that not only specifically incorporated the Ordinance, but also specifically addressed what would occur if liens were incurred that threatened the economic viability of the Bank's mortgage. Those detailed provisions squarely address the situation here, where the borrowers violated the City's code and code enforcement fines were imposed, later becoming one of the liens envisioned by the Bank. Equity dictates that the Bank abide by its mortgage contract and that the City's code enforcement lien be afforded the priority required by the Ordinance.

III. THE BENEFITS OF THE CITY'S RIGOROUS CODE ENFORCEMENT INURE TO THE BENEFIT OF THE BANK BY PRESERVING AND ENHANCING THE COLLATERAL'S VALUE.

Rigorous municipal code enforcement – including the fines and liens needed to give such enforcement efforts "teeth" – benefits society generally and lenders particularly by (i) safeguarding against the deterioration of collateralized property; (ii) preserving and often enhancing the value of such property, both directly through enforcement efforts related to the property, and indirectly by preserving neighborhood values; and (iii) actually improving the property when its owner refuses to take corrective action and the municipality effects the required repairs. To allow a lender to reap the benefits of such efforts while disregarding municipal

law that affords priority to municipal code enforcement liens would (i) be inequitable, (ii) result in a windfall to such lenders, and (iii) defeat well-recognized public policy favoring municipal code enforcement.

While it may be expedient to envision code enforcement as compliance with picayune regulations that burden a homeowner, code enforcement confers substantial benefits that lenders factor into their lending decisions, whether explicitly or implicitly, in determining the value of collateralized property and the economic stability of neighborhoods. Particularly in the current economic climate, where homeowners are defaulting on mortgages and abandoning properties (which then begin deteriorating, thus reducing their value and the value of neighboring properties, also subject to their own mortgages), municipal code enforcement often represents the last bastion against complete deterioration of a neighborhood. *See, e.g., Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 535, 87 S. Ct. 1727, 1734 (1967) ("The primary governmental interest at stake [in code enforcement] is to prevent even the unintentional development of conditions which are hazardous to public health and safety [and may] adversely affect the economic values of neighboring structures….").

Scholars in the field also note the benefits of rigorous code enforcement:

> According to Oster and Quigley (1976), [code enforcement] benefits include "protecting the consumer from the consequences of their own ignorance" (e.g., a homebuyer purchasing a hazardous dwelling), as well as external benefits, such as protecting surrounding properties, or the community at large, from a dwelling that could collapse, catch fire, and otherwise be hazardous.

David Listokin & David Hattis, *Building Codes and Housing*, at 12 (April 2004). These enforcement efforts often translate directly into economic benefits to the community and the business sector:

> The consensus of the regulatory literature is that strong enforcement in general, and the frequency of inspections in particular, are critical elements in obtaining compliance with regulatory provisions (see Burby et al., 1998). Strong enforcement, however, does not necessarily stifle economic development, while weak enforcement may have that effect. For example, when enforcement programs are understaffed or poorly managed, construction projects can be delayed. Weak enforcement may also undermine the business climate by giving the impression that favors are being handed out to those with good political connections. If slipshod construction goes undetected, it may lower the attractiveness of a city as a place to live and pursue development investments.

Raymond J. Burby, Peter J. May, Emil E. Malizia & Joyce Levine, *Building Code Enforcement Burdens and Central City Decline*, 66 No.2, J. Am. Plan. Assoc., 143, 144 (Spring 2000).[4]

At least some commentators have noted the need for an *increased* municipal role in code enforcement in light of the current mortgage foreclosure crisis:

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[4] *See also* Phyllis Betts, Ph.D., *Best Practice Number Ten: Fixing Broken Windows – Strategies to Strengthen Housing Code Enforcement and Related Approaches to Community-Based Crime Prevention in Memphis*, at 7, Memphis Shelby Crime Comm., April 2001 ("Problem properties are usually 'eyesores' that discourage residents' commitment to their neighborhoods, cause property values to decline, and generally make a neighborhood a less pleasant place to live. … [P]hysical neglect is 'crimogenic'…because this kind of neighborhood decline encourages the 'taking' of neighborhoods by activities that threaten residents' safety and sense of security.").

> Vacant land and abandoned properties challenge both older industrial metros struggling with the effects of long-term population decline and metros that were booming until the foreclosure crisis and the recession wrought havoc on their economies. These properties are a significant drag on local economic and fiscal health, exacerbating already intense fiscal stress for local governments. … Unfortunately, weak and antiquated state laws governing…code enforcement and other areas make it difficult for local governments to address vacancy and abandonment, and prevent them from unlocking properties' productive potential. To give municipalities the tools they need to repurpose distressed land and buildings, states should:
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> - Empower effective code enforcement and nuisance abatement
> - Enhance local government's power to mitigate the harm created by mortgage foreclosure

Alan Mallach and Jennifer S. Vey, *Recapturing Land for Econ. and Fiscal Growth*, Brookings-Rockefeller Project on State and Metro. Innovation, 1 (May 2011).

In a climate of declining municipal revenues, municipal resources to engage in enforcement efforts are not limitless, and are dependent in part on the collection of code enforcement fines and liens and the ability to recoup municipal abatement expenses.

> State laws can discourage local governments from ensuring that vacant properties are maintained. … [I]f state law permits a city to place a lien on a property for the cost of abating a nuisance, but makes that lien subordinate… – making it unlikely that the city will ever get its money back – the city cannot afford to act.
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> Local governments need the authority to hold lenders equally responsible with property owners for maintaining properties in foreclosure, or to ensure that properties remain occupied during and after foreclosure. … [T]hese laws and policies…are critical to the ability of communities, metro areas and states to recover from the Great Recession.

Id. at 3, 4. As a matter of sound public policy, the Bank should not be permitted to derive the benefit of the City's code enforcement efforts while claiming that the costs associated with such benefits should be borne by the general public rather than the properties benefited.

IV. THE COURT'S DECISION SHOULD BE LIMITED TO THE QUESTION ACTUALLY DECIDED BY THE FIFTH DISTRICT, NAMELY, THE PRIORITY OF THE LIENS.

The Court's jurisdiction to review a certified question is constitutionally restricted to that aspect of the question that the district court of appeal actually decided. *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 833 (Fla. 2007). Here, the question certified is broader than the question decided below in that it asks whether a municipality may, *in any and all circumstances*, exercise its home rule authority to confer greater priority on a code enforcement lien recorded later than an existing mortgage. The issue presented to the trial court, however, and affirmed by the Fifth District, was whether, in the context of a particular mortgage foreclosure proceeding, the City's code enforcement lien, arising from the accrual of non-compliance fines,[5] has a greater priority than an earlier recorded mortgage where the Bank did not receive actual notice of the hearing or the City's lien (but was on constructive notice).

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[5] As opposed to arising from the costs incurred in connection with municipal correction or amelioration of a code violation on the property, which efforts benefit the property.

The action filed in the trial court was *not* a declaratory judgment action facially challenging the City's authority to enact the Ordinance. Such a challenge would have required the Bank to demonstrate that the Ordinance was invalid under all conceivable circumstances. *Fla. Dep't of Rev. v. City of Gainesville*, 910 So. 2d 250, 256 (Fla. 2005) (holding a facial challenge to legislation must demonstrate that "no set of circumstances exist under which the [legislation] would be valid"). Additionally, to invalidate a municipal ordinance on the grounds that the City lacked constitutional home rule authority would have required the Bank to serve the complaint on the Attorney General or the State Attorney for the Eleventh Judicial Circuit. *See* § 86.091, Fla. Stat. This statutory requirement was never met.

Many of the League's members have enacted ordinances providing for "super-priority" of their code enforcement liens in situations that are markedly different than are presented here.[6] The certified question, as phrased, is broad enough to encompass a wide variety of code enforcement liens that were never before the trial court or the Fifth District. As such, the Fifth District has not passed upon the certified question as it relates to all recorded code enforcement liens.

The Court should rephrase the question to encompass only those code enforcement liens arising solely from the accrual of non-compliance fines where the mortgage holder has not received actual notice of the hearing or recordation of

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[6] For example, Key Biscayne, Indian Creek, Surfside, Sunrise and Bay Harbor Islands have enacted ordinances that confer "super-priority" on liens arising from municipal correction or abatement of code violations or nuisances, but not on liens arising from the accrual of non-compliance fines.

the municipal lien. Any broader articulation of the question risks interfering with the exercise of municipal home rule authority by the League's members in situations not contemplated by the trial court or the Fifth District.

CONCLUSION

The Fifth District's decision should be reversed. A municipality's home rule authority is broad enough to create an exception to the principle of "first in time, first in right," whether or not evinced in section 695.11, just as numerous other circumstances have modified and continue to modify the principle. Arguably, the Court need not reach that determination because the Bank executed the mortgage with knowledge of and after incorporating the Ordinance into the mortgage. The Bank allocated risks between it and its borrowers regarding the imposition of liens and should be held to its contract.

It would be inequitable for the Bank to derive the benefits of the City's code enforcement efforts while claiming that the City's interests should be wiped out by the Bank's mortgage. The Bank should not be permitted to reap a windfall from City's code enforcement.

Lastly, the issue before the Court is narrow: was the City's code enforcement lien entitled to priority vis-à-vis the Bank's mortgage under this record? Given the variety of municipal interests potentially implicated by the certified question, the Court's ruling as to municipal home rule authority should be no broader than necessary to resolve this case.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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