IN THE SUPREME COURT OF FLORIDA

CITY OF PALM BAY,

Petitioner,

v. Case No. SC11-830

WELLS FARGO BANK, N.A., L.T. Case No. 5D09-1810

Respondent.

______________________________________/

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STATEMENT OF THE CASE AND FACTS

Petitioner City of Palm Bay (the "City") has petitioned this Court to review the Fifth District's decision in *City of Palm Bay v. Wells Fargo Bank, N.A.*, 57 So. 3d 226 (Fla. 5th DCA 2011), following the district court's certification of 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 (Fla. 5th DCA 2011). The Fifth District answered this question in the negative, holding that Ordinance 97-07 of the Palm Bay City Code of Ordinances, which purports to give the City's code enforcement liens priority over prior recorded mortgages, conflicts with section 695.11, Florida Statutes, which codifies the common law rule of "first in time, first in right." 57 So. 3d at 227. The district court did not reach numerous additional arguments made by Respondent Wells Fargo, N.A. ("Wells Fargo") that also demonstrated the invalidity of the City's superpriority ordinance.

The City's Initial Brief disagrees with the Fifth District and, in doing so, incorrectly contends that Wells Fargo never advanced the argument on which it prevailed below. Ini. Br., at 4, 12, 15 n.8. The City also argues that the district court erred and that the City's home rule authority permits it to prioritize liens,

including liens from code enforcement board fines, over prior recorded mortgages such as Wells Fargo's mortgage in this case.

In this Answer Brief, Wells Fargo demonstrates that this Court should approve the Fifth District's decision. As shown below, the City's effort to prioritize its fines for code violations over prior recorded mortgages violates multiple legal principles, most particularly by conflicting with section 695.11—a statute that the City admitted below codifies the common law first-in-time rule. Wells Fargo further demonstrates that the City can no longer challenge the trial court's ruling that application of the City's ordinance violates Wells Fargo's due process rights in this case—a correct ruling that the City chose not to appeal.

BACKGROUND

On December 10, 2004, Mr. and Mrs. Robert Gauthier executed a $115,531 mortgage with Wells Fargo with respect to real property located at 1075 Brickell Street S.E., Palm Bay, Florida. R 38-53. Wells Fargo recorded its mortgage on December 21, 2004. R 32-33; Brevard Cty. Off. Records, Bk. 5399, Pgs. 4478-96.

Mr. Gauthier was an active member of the U.S. military, and his property fell out of compliance with the City's codes. R 33, 105, 145. On October 11, 2006, the City's Code Enforcement Board entered an order finding that the Gauthiers failed to maintain their fence in an upright condition and imposing a $50 per day fine if the violation were not corrected by October 26, 2006. AR C, at 1-2;

R 105; Brevard Cty. Off. Records, Bk. 5741, Pgs. 9518-19 (available online at http://199.241.8.115/oncoreweb/ShowDetails.aspx?id=5939967&direct=1). The City recorded its Code Enforcement Board order on January 23, 2007, *id.*, thereby constituting a lien under section 162.09(3), Florida Statutes (2006). The City gave Wells Fargo no notice of the violation, the fines, or the lien. R 8, 18-19.

On February 14, 2007, the Code Enforcement Board entered an order finding a "[t]all grass and weeds" violation and imposing *another* $50 per day fine if the violation was not corrected by March 1, 2007. AR C, at 2; R 105-06; Brevard Cty. Off. Records, Bk. 5778, Pgs. 2029-30 (available at http://199.241.8.115/oncoreweb/ShowDetails.aspx?id=6146366&direct=1). The City recorded its order on May 15, 2007. *Id.* Once again, the City gave Wells Fargo no notice of the violation, the fines, or the lien. R 8, 18-19.

The Code Enforcement Board found the property in compliance regarding the second lien on June 6, 2007, and found the property in compliance regarding the first lien on February 13, 2008. R 105-06. The City sought $23,750 in fines regarding the first lien, and $4,850 in fines regarding the second lien, for a combined total of $28,600 in fines. R 105-06. These amounts were based entirely on the violations. *See* R 105-06. The City did not repair the fence or cut the grass.

THE FORECLOSURE PROCEEDINGS

In September 2007, after the Gauthiers defaulted on their mortgage and missed six months of payments, Wells Fargo filed a mortgage foreclosure complaint in the circuit court. R 32-35. To address all subordinate interests in the property, Wells Fargo named the City as a defendant, acknowledging that the City may claim an interest in the property by virtue of the code enforcement liens it recorded after Wells Fargo recorded its mortgage. R 33.

Based on Mr. Gauthier's active military service, Wells Fargo sought and obtained the appointment of an attorney ad litem to represent his interests. R 62, 81. The attorney ad litem filed an answer that confirmed Mr. Gauthier's status as an active member of the military but raised no defense to Well Fargo's foreclosure claim. R 83-84. Mrs. Gauthier failed to file an answer, and the clerk entered a default against her. R 91, 101.

The City initially asserted that it had an interest in the property because its code enforcement board liens, plus interest, were "co-equal" to Wells Fargo's claim. R 60. Nine months later, the City amended its answer and for the first time relied upon Ordinance 97-07 of the Palm Bay City Code of Ordinances to claim that the City's later-recorded liens were superior to Wells Fargo's mortgage. R 104-11. That ordinance created the City of Palm Bay Code Enforcement Board ("Code Enforcement Board"), adopted the Local Government Code Enforcement

Boards Act codified in chapter 162, Florida Statutes, and stated that liens created by the Code Enforcement Board were "coequal with the liens of all state, county, district and municipal taxes, superior in dignity to all other liens, titles and claims." R 108-09.

At a hearing on Wells Fargo's motion for summary judgment, the only issue before the trial court was the priority of the parties' liens. The City did not dispute that Wells Fargo recorded its mortgage long before the City's liens were recorded or that its claim for superiority was based on Ordinance 97-07. R 3-4. The City further admitted that the subject property was homestead property and thus, under section 162.09(3), Florida Statutes, the City could not foreclose on its liens had Wells Fargo not initiated foreclosure proceedings. R 14-15. The City claimed its two liens with interest totaled $31,658, with interest continuing to accrue. R 4, 105-06.

Wells Fargo asserted that its mortgage was superior to the City's liens despite Ordinance 97-07. R 17-20. Wells Fargo explained that when it receives notice of a code violation, it immediately notifies the mortgagor that the violation must be remedied and, if the homeowner allows Wells Fargo to enter the property, Wells Fargo will make the necessary corrections to bring the property into compliance. R 18-19. Here, however, Wells Fargo was unaware of the violations until it sought foreclosure because the City never gave it any notice. R 8.

The trial court agreed with Wells Fargo. R 162-64. The trial court examined chapter 162 and concluded that the Legislature determined that code enforcement board liens are given ordinary "first-in-time" priority and are not to be superior to mortgage, contract, or judgment liens. The trial court therefore held Ordinance 97-07 invalid. The trial court further concluded that due process required the City to provide Wells Fargo with notice regarding the code enforcement liens. Accordingly, the trial court granted Wells Fargo summary judgment on the priority issue.

THE CITY'S APPEAL

The City appealed to the Fifth District and filed a brief challenging only the trial court's ruling that Ordinance 97-07 was invalid. AR 1-8; AR A. In response, Wells Fargo defended the summary judgment on numerous grounds. Contrary to the City's contentions before this Court, Wells Fargo in fact argued that, in following the code enforcement procedure set forth in section 162.09(3), the City could not apply Ordinance 97-07 to give the City's code enforcement liens superpriority without conflicting with section 695.11, which codifies the common law first-in-time rule. AR C, at 23-24. Wells Fargo specifically argued that section 695.11 "***is the codification of the common law 'first-in-time' principle***, and there are few exceptions to it, such as the *statutory* exception for tax liens and municipal special assessment liens. *E.g.*, § 197.122(1) (providing that tax liens are

superior to all other liens); § 170.09 (providing that special assessment liens are co-equal to tax liens and superior to all other liens)." *Id.*, at 24 (emphasis added). Wells Fargo further stated its point by asserting that the ordinance could not coexist with section 695.11 because compliance with both is not possible:

> Ordinance 97-07 seeks to overthrow the "first-in-time" general rule by making code enforcement board orders the equivalent of tax liens. That ordinance, however, cannot coexist with the statutory scheme described above. Where a lien is recorded against property prior to the recording of a code enforcement order, ***it is impossible to comply with both the first-in-time principles set forth in sections 162.09(3) and 695.11 and the City's ordinance. Either the earlier recorded lien is given priority as required by the Florida statutes or the Code Enforcement Board order is given priority as required by the City's ordinance***. A court "must violate one provision in order to comply with the other." *Sarasota Alliance for Fair Elections*, 28 So. 3d at 888. The ordinance thus conflicts with Florida law and is accordingly invalid.

Id., at 24 (emphasis added).

Wells Fargo also presented additional reasons to hold Ordinance 97-07 invalid. Wells Fargo asserted that a superpriority ordinance conflicts with the "take-it-or-leave-it" principle under which the Legislature made code enforcement boards available to municipalities through chapter 162 and with the enforcement procedures expressly set forth in section 162.09. Wells Fargo showed that the Ordinance violates Article I, section 18, of the Florida Constitution by authorizing an agency to impose a penalty not expressly authorized by the Legislature—a superpriority lien that detrimentally affects previously recorded interests. Wells

Fargo also maintained that the trial court correctly decided that application of Ordinance 97-07 would violate due process in this case, a ruling that the City did not challenge in its appeal to the Fifth District.

The district court resolved the case based on section 695.11. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 57 So. 3d 226 (Fla. 5th DCA 2011); AR 19-22. The district court held that section 695.11 codified the common law rule of first in time, first in right, and the court specifically observed that the City conceded this point at oral argument. *Id.* Because Ordinance 97-07 conflicts with the statute, the district court held that the ordinance must yield and affirmed the summary judgment order determining that Wells Fargo's mortgage lien had priority over the City's code enforcement liens. *Id.* The district court did not reach Wells Fargo's additional points regarding the ordinance's invalidity.

The City did not move for rehearing. Instead, it moved only for certification of a question of great public importance. AR 23-32. The district court granted that motion and certified the aforementioned question to this Court. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 67 So. 3d 271 (Fla. 5th DCA 2011); AR 40-41. This Court accepted review. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 61 So. 3d 410 (Fla. 2011). This proceeding follows.

SUMMARY OF ARGUMENT

The district court correctly held that Wells Fargo's mortgage is superior to the City's code enforcement liens. Municipalities do not have the authority to declare that their code enforcement liens are superior to previously recorded interests. The certified question should be answered in the negative.

First, as Wells Fargo argued below and as the district court held, Ordinance 97-07 conflicts with section 695.11. That statute codifies the common law rule of first in time, first in right. The Ordinance directly conflicts with that statute by requiring the City's liens to take priority over Wells Fargo's prior recorded mortgage.

Second, the Ordinance conflicts with and is preempted by chapter 162 because section 162.03(1) permits municipalities to adopt the Local Government Code Enforcement Boards Act (the "Act") only on a take-it-or-leave-it basis. The City may adopt the Act "as provided herein," or the City can utilize the judicial system to resolve code enforcement matters, but the City cannot do what it has done here—adopt the Act but customize the lien enforcement mechanism to give itself a greater remedy than the Legislature permitted. Similarly, the Ordinance is preempted by section 162.09(3), which comprehensively regulates how code enforcement liens may be imposed but does not utilize liens with superpriority.

Third, the Ordinance violates Article I, section 18, of the Florida Constitution. That provision prohibits agencies from imposing any penalty not authorized by the Legislature. The superpriority provided for by Ordinance 97-07 plainly penalizes holders of prior recorded interests when property owners commit code violations and fail to pay the resulting fines. That penalty, however, is not authorized by the Legislature and is therefore invalid.

Finally, if the Court holds the ordinance invalid and answers the certified question in the negative, then there is no reason for the Court to address the trial court's due process ruling. Moreover, the City waived any challenge to that ruling by electing not to appeal it in the district court, and thus it is not at issue. In all events, application of Ordinance 97-07 would violate Wells Fargo's due process rights because the City elected not to provide Wells Fargo with notice of what became substantial fines and liens.

STANDARD OF REVIEW

The validity of Ordinance 97-07 presents pure questions of law. This Court reviews pure questions of law de novo. *E.g.*, *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000). Likewise, the entry of summary judgment is reviewed de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Id.*

ARGUMENT

THE FIFTH DISTRICT CORRECTLY HELD THAT THE WELLS FARGO MORTGAGE HAS PRIORITY OVER THE CITY'S CODE ENFORCEMENT LIENS.

Pursuant to Florida law, Wells Fargo's prior recorded mortgage has priority over the City's subsequently recorded code enforcement liens. Ordinance 97-07 cannot reverse that priority because the ordinance does not represent a valid exercise of the City's home rule power. The ordinance conflicts with section 695.11, Florida Statutes, with the multiple aspects of Florida's Local Government Code Enforcement Boards Act, and with Article I, section 18, of the Florida Constitution. Simply put, it is not for municipalities to decide that code enforcement liens trump previously recorded mortgages. Under Florida law, only the Legislature can authorize the superpriority of local code enforcement liens created under chapter 162.

The trial court and the district court correctly recognized the infirmity inherent in the City's superpriority ordinance. This Court should agree. Wells Fargo will first demonstrate that the lower courts correctly held the ordinance invalid. Wells Fargo will then show that the trial court's due process ruling is not at issue and, in all events, that the trial court correctly concluded that application of the ordinance would violate Wells Fargo's due process rights.

I. THE CITY'S SUPERPRIORITY ORDINANCE IS INVALID UNDER GENERAL FLORIDA LAW.

The City defends Ordinance 97-07 as a proper exercise of its home rule authority. The Florida Constitution provides Florida's municipalities with home rule authority to exercise "any power for municipal purposes except as otherwise provided by law," Art. VIII, § 2(b), Fla. Const., and the Legislature has generally defined this authority to permit municipalities "to enact legislation concerning any subject matter upon which the state Legislature may act . . . ." § 166.021(3), Fla. Stat. (2006).

It is fundamental, however, that municipal ordinances are subordinate to the laws of the state. *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008) ("A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden." (quoting *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972))). The Legislature has limited municipalities' home rule authority with respect to matters preempted by general law and those prohibited by the Constitution. § 166.021(3)(b)-(c), Fla. Stat. (2006). *See generally City of Boca Raton v. State*, 595 So. 2d 25, 28 (Fla. 1992) ("[A] municipality may now exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law, and a municipality may legislate on any subject

matter on which the legislature may act, except those subjects described in paragraphs (a), (b), (c), and (d) of section 166.021(3).”).

Florida case law recognizes two principal ways in which local regulation may be fatally inconsistent with state law: where a local regulation conflicts with state law and where state law preempts local regulation of a particular field. *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 885-86 (Fla. 2010). Ordinance 97-07 is invalid in both respects, and it also violates the Florida Constitution.

Point I-A below demonstrates that Ordinance 97-07 conflicts with section 695.11. Point I-B demonstrates that chapter 162 preempts ordinances that give local code enforcement liens a superpriority, and Point I-C demonstrates that such ordinances violate Article I, section 18, of the Florida Constitution, by allowing an agency to impose a penalty on holders of prior recorded interests without the Legislature’s authorization. For each of these reasons, Ordinance 97-07 is invalid.

A. THE ORDINANCE CONFLICTS WITH SECTION 695.11.

The Fifth District held that Ordinance 97-07 is invalid because it conflicts with section 695.11, Florida Statutes. The district court was correct, and its decision should be approved.

A conflict exists where two legislative enactments cannot co-exist. *Sarasota Alliance*, 28 So. 3d at 888. Importantly, ***if any doubt exists as to whether a local***

ordinance conflicts with a state statute, the doubt is to be resolved against the ordinance and in favor of the statute. *Gustafson v. City of Ocala,* 53 So. 2d 658, 662 (Fla. 1951); *City of Wilton Manors v. Starling*, 121 So. 2d 172, 174 (Fla. 2d DCA 1960). The City overlooks this controlling principle.

The City's ultimate contention in this case is that its code enforcement liens have priority over Wells Fargo's prior recorded mortgage. It bases that claim on section 162.09(3), Florida Statutes, and Ordinance 97-07. Section 162.09(3) provides that certified copies of orders imposing code enforcement fines under that statute may be recorded in the public records and, as such, constitute liens that "shall be enforceable in the same manner as a court judgment by the sheriffs of this state" upon the violator's real and personal property. The City's ordinance then purports to elevate the status of the City's code enforcement liens, stating:

> ***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 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 Florida Statutes, Chapter 173.

R 109 (emphasis added).

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." Indeed, it is a longstanding

principle of Florida law that the priority of competing liens on real property is established by the date the liens were recorded, such that "first in time is the first in right." *Holly Lake Ass'n v. Federal Nat'l Mortgage Ass'n*, 660 So. 2d 266, 268 (Fla. 1995) (quoting *Walter E. Heller & Co. Southeast, Inc. v. Williams*, 450 So. 2d 521, 532 (Fla. 3d DCA 1984); *National Loan Investors, L.P. v. Burgher*, 742 So. 2d 406, 407 (Fla. 4th DCA 1999) (citing *Bank of South Palm Beaches v. Stockton, Whatley, Davin & Co.,* 473 So. 2d 1358, 1360 (Fla. 4th DCA 1985)). As the Fifth District held in *Morris v. Osteen*, 948 So. 2d 821, 826 (Fla. 5th DCA 2007), "[C]ompeting interests in land have priority in the order in which they are created."

Thus, where a mortgage on real property is recorded, it generally has priority over all liens recorded thereafter. *People's Bank of Jacksonville v. Arbuckle,* 90 So. 458, 460 (Fla. 1921) ("The recording of [a] mortgage affords notice thereof to all concerned, and gives it priority over all liens accruing thereafter."); *LR5A-JV, LP v. Little House, LLC*, 998 So. 2d 1173, 1175 (Fla. 5th DCA 2008) (affirming judgment of foreclosure and holding that mortgage that was filed before assessment liens had priority). This rule is "both logical and fair, and affords both stability and certainty." *Lamchick, Glucksman & Johnston, P.A. v. City Nat'l Bank of Fl.*, 659 So. 2d 1118, 1120 (Fla. 3d DCA 1995) (rejecting party's attempt to "leapfrog" over established real property priorities).

The Legislature codified the general rule of first in time, first in right in section 695.11, Florida Statutes. It provides:

> 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.***

§ 695.11, Fla. Stat. (emphasis added). The meaning of this language is plain. All persons are on constructive notice of an instrument once it is accepted for filing, and an instrument with a lower official register number has priority over any instrument bearing a higher number.

The Third District reached this precise holding in *Lamchick*. The court held that "[w]here real property is concerned, it is a firm, long standing principle, that priorities of liens on real property are established by date of recordation" and that "[t]his principle is ***statutorily embodied*** in Section 695.11 which exclusively establishes priorities between judgments." 659 So. 2d at 1120 (emphasis added). The City's Initial Brief characterizes this holding as dicta, Ini. Br., at 15 n.9, but *Lamchick* involved a lien that a trial court gave priority over a prior recorded lien,

and the Third District expressly relied on section 695.11 to reverse the trial court's ruling. The Third District's statement was not dicta.

Numerous other decisions, and the Attorney General, have reached similar conclusions about the meaning of section 695.11. *E.g.*, *Argent Mortgage Co., LLC v. Wachovia Bank N.A.*, 52 So. 3d 796, 800 n.3 (Fla. 5th DCA 2010) ("Section 695.11 has an important purpose to determine the priority between judgment liens. . . . Because a certified copy of a judgment must be recorded in order to create a lien on real property, a judgment that is recorded earlier in time, namely one that bears a lower official register number, will win priority."); *Anderson v. North Fl. Production Credit Ass'n*, 642 So. 2d 88, 89 (Fla. 1st DCA 1994) ("The statute further provides, in unmistakable terms, that 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."); *Martinez v. Reyes*, 405 So. 2d 468, 469 (Fla. 3d DCA 1981) ("A final judgment is an instrument required to be recorded in the official records . . . and . . . the sequence of official numbers determines priority of recordation, subordinating the higher number to the lower."); Op. Att'y Gen. Fla. 2005-48, 2005 WL 2034693 (Aug. 23, 2005) ("Florida courts have long recognized that where there is more than one judgment lien on real property, priorities between the liens are established by section 695.11, Florida Statutes.").

In the decision below, the Fifth District likewise concluded that, under section 695.11, the Legislature has codified the first-in-time principle. Not only is this conclusion supported by the preceding authorities, but at the oral argument in the district court, the City conceded that section 695.11 codifies the common law rule, as the district court stated in its opinion. 57 So. 3d at 227 ("This statute codifies, as Palm Bay recognized at oral argument, the common law rule of first in time, first in right."). 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 be applied to give the City's liens priority over Wells Fargo's prior recorded mortgage without conflicting with section 695.11.

The City all but ignores the concession it made below and asks the Court to do the same. Ini. Br., at 15 n.8. The City should be bound by its position, which is dispositive of the entire proceeding in this Court. Moreover, the City's efforts to show that no conflict exists with section 695.11 because it does not codify the first-in-time principle are without merit.

The City first argues that section 695.11 is no more than a "mechanical recording statute" that "says nothing about lien priority other than the fact that a court must determine the 'priority of recordation' (as opposed to the priority of a lien) by which document bears the lower serial number." Ini. Br., at 14.

According to the City, "It is then up to the Florida common or statutory law to tell us, under the particular circumstances of the case, the significance of the earlier recording." Ini. Br., at 14. This view is contrary to decades of decisions beyond the decision below, including *Argent Mortgage*, *Anderson*, *Martinez*, and the Attorney General's Opinion 2005-48. It also fails to identify any "statutory law" that provides for priority among recorded judgments if section 695.11 does not.

As the First District observed in *Anderson*, the plain meaning of section 695.11 is "unmistakeable." 642 So. 2d at 89. The priority referenced in the statute's final line is the common law concept of prioritization for enforcement purposes. The district court below correctly recognized this point, as did the decisions in *Argent Mortgage*, *Anderson*, and *Martinez*, and the Attorney General did so as well in Opinion 2005-48.

The only case the City and its supporting amici cite to support their argument that section 695.11 simply sets what would amount to sequential priority is the Fifth District's decision in *Argent Mortgage*. The City misreads that decision, which actually supports the Fifth District decision now under review. As observed above, *Argent Mortgage* expressly held that section 695.11 "has an important purpose to determine the priority between judgment liens" and that "a judgment that is recorded earlier in time, namely one that bears a lower official register number, will win priority." 52 So. 3d at 800 n.3. These very purposes are

in effect here in determining how section 695.11 prioritizes a lien that, under section 162.09(3), is to be enforced "in the same manner as a court judgment."

The portion of *Argent Mortgage* that the City relies upon involved an issue unrelated to this case: whether Florida utilizes a race, notice, or race-notice recording statute for purposes of determining whether an interest in real property is valid against a creditor or subsequent purchaser for value. The Fifth District explained that, for over 80 years, Florida's courts have held that Florida law utilizes a notice type of recording statute which is presently found in section 695.01. The Fifth District rejected an argument that the last two sentences in section 695.11, which were added to that statute in 1967, changed Florida from a notice state to a race-notice state. The court held that they did not and, focusing on the penultimate sentence, held that the 1967 amendment was "designed to refine the test for determining the time at which an instrument is deemed to be recorded, not to alter the recording requirement found in section 695.01." 52 So. 3d at 800.

By comparison, this case has nothing to do with whether Florida employs a race, notice, or race-notice recording statute to determine whether prior conveyances of real property are effective against those who later purchase the same property. Here, Wells Fargo has a prior recorded mortgage, and the City has subsequently recorded code enforcement liens that, under section 162.09(3), are to be enforced "in the same manner as a court judgment." Florida's notice recording

statute, section 695.01, is not at issue. The issue is whether Wells Fargo's earlier recorded interest has priority over the City's code enforcement liens *under section 695.11*. Because that statute codifies the general rule of first-in-time, Wells Fargo's prior recorded mortgage has priority, Ordinance 97-07 conflicts with the statute, and the ordinance is invalid. *Arent Mortgage* holds no different.

The City argues that section 695.11 does not codify the first-in-time principle because the statute is not "a blanket rule of lien priority" but rather is "fraught" with exceptions. Ini. Br., at 16. It is true that there are exceptions to the general first-in-time rule of section 695.11, but they do not support the City's position that the statute does not set forth the general rule.

For instance, the City argues that, under the *Argent Mortgage* decision, previously recorded conveyances of real property do not take priority over later recorded conveyances where the later transaction was for value and occurred without actual or constructive notice of the prior conveyance. Ini. Br., at 16. This exception to the general rule of first-in-time is based on the judiciary's interpretation of a statute, section 695.01, as *Argent Mortgage* explained. It is not based on a municipal ordinance that conflicts with section 695.11 and attempts to create a new exception to that statute.

As the City further recognizes, the Legislature has created other statutory exceptions to the first-in-time rule, such as section 197.122(1), which provides that

tax liens are superior to all other liens, and section 170.09, which provides that municipal special assessment liens are coequal with tax liens and superior to all other liens. Ini. Br., at 16-17. Once again, these are exceptions created by the Legislature, not a municipality. There is no statutory exception for a municipality's code enforcement liens.

Continuing to argue that the existence of exceptions to the general rule of first-in-time demonstrates that section 695.11 does not codify that rule, the City next points to cases such as *Holly Lake Association*, where this Court recognized that homeowners' associations may use declarations of covenants to give the associations' assessment liens priority over prior recorded mortgage interests. Ini. Br., at 17. The City overlooks that the rationale behind such decisions is that the assessment lien relates back to the association's declaration, which predates the recording of the mortgage. Therefore, such decisions are consistent with the general rule of first-in-time. Here, by comparison, the City's code enforcement liens do not relate back to any instrument recorded before Wells Fargo recorded its mortgage—the City is simply trying to give its liens a superpriority. Nothing in *Holly Lake* or similar cases undermines that section 695.11 sets forth the general rule of first-in-time.

The City appears to suggest that Wells Fargo agreed to the terms of Ordinance 97-07, even if it is invalid, through language in the mortgage stating it is

"subject to any requirements and limitations of Applicable Law." Ini. Br., at 2, 29. The City misreads the document. The mortgage defines "Applicable Law" as "all *controlling* applicable federal, state and local statutes, regulations, ordinances and administrative rules . . . ." R 39 (emphasis added). This standard language is fully consistent with basic Florida contract law, which holds, "*Valid laws* in effect at the time a contract is made enter into and become part of the contract as if expressly incorporated into the contract." *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) (emphasis added). Accordingly, just as Florida law does not hold that contracts incorporate invalid law, the mortgage does not purport to incorporate invalid laws, including Ordinance 97-07. Invalid laws are not controlling laws.

The City ends its argument on this point by focusing on the City's home rule authority and what the City calls "the most fundamental home rule principle of them all: A local government can regulate on any subject matter that the state legislature can regulate." Ini. Br., at 18 (citing section 166.021(3); *Wyche v. State*, 619 So. 2d 231, 237-38 (Fla. 1993)). The City contends that, under its home rule authority, the City can regulate lien priority just as the state can, and that "the fact that the City has added one more exception to a plethora of already established exceptions can hardly be considered a conflict." Ini. Br., at 18. The City is incorrect.

A conflict exists where two legislative enactments cannot co-exist, where one "must violate one provision in order to comply with the other." *Sarasota Alliance,* 28 So. 3d at 888. Section 695.11 codifies the general rule of first-in-time and requires that Wells Fargo's mortgage be given priority over the City's code enforcement liens. The City cannot reverse that priority by adopting an "exception" to section 695.11. Characterizing its ordinance as "one more exception" cannot mask, but rather confirms, the existence of an impermissible conflict that must yield to section 695.11. As a result, Ordinance 97-07 is invalid.

B. THE ORDINANCE CONFLICTS WITH, AND IS PREEMPTED BY, CHAPTER 162.

Because the Fifth District held that Ordinance 97-07 conflicts with section 695.11 and is consequently invalid, the district court did not address Wells Fargo's additional arguments demonstrating the ordinance's invalidity. The certified question, however, broadly presents this Court with the overarching issue of the ordinance's validity, and, as the parties and the amici acknowledge, this larger issue is of great importance to the state and the many different interests implicated by the validity question. Accordingly, if the Court does not approve the decision below based on conflict between the ordinance and section 695.11, then the Court should address Wells Fargo's additional validity challenges, each of which demonstrates additional reasons why a municipality cannot simply declare its code

enforcement liens to be of equal dignity to tax liens and therefore to take priority over prior recorded mortgages.

The first such additional reason is that the ordinance conflicts with and is preempted by Part I of Chapter 162, the Local Government Code Enforcement Boards Act (the "Act"). The Legislature has prescribed the precise means of utilizing code enforcement boards under chapter 162 and the precise type of liens that may be imposed. Ordinance 97-07 attempts to change the legislative scheme. It cannot do so.

1. The Local Government Code Enforcement Boards Act Can Be Adopted Only "As Provided Herein."

The Legislature has presented local governments with the Act, §§ 162.01-162.13, Fla. Stat., as an alternative to using the court system to resolve code enforcement violations, but the Legislature has done so on a take-it-or-leave-it basis. Municipalities are not free to modify the Act, as the City has done, to customize the enforcement penalties so they differ from those authorized by the Act. The City's Initial Brief never addresses this limitation.

"Florida law recognizes two types of preemption: express and implied." *Sarasota Alliance*, 28 So. 3d at 886. Express preemption occurs where the Legislature explicitly states that intent, but the "preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." *Id.* (*quoting Barragan v. City of Miami*, 545 So. 2d 252, 254 (Fla.

1989)); *see also Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984) (holding pervasive regulation under Public Records Act preempted municipality's authority to adopt a policy providing for a delay in producing public records for public inspection). Preemption is implied "when 'the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature.'" *Sarasota Alliance*, 28 So. 3d at 886 (quotation omitted). In determining if implied preemption applies, the court must look to the provisions of the whole law, and to its object and policy. *Id.*

Section 162.03 specifically authorizes municipalities and counties to create or abolish code enforcement boards "***as provided herein***." § 162.03(1), Fla. Stat. (2006) (emphasis added). This language confirms the Act's take-it-or-leave-it nature. Nothing in the Act permits a local municipality to adopt the Act's code enforcement options and then alter them in ways not expressly permitted by the Act's terms. The Act can be adopted "as provided herein," or a local government can choose not to adopt it at all and allow code enforcement matters to be handled the way local ordinance violations are generally handled—through the judicial system. The Legislature has clearly preempted the specific field of code enforcement boards created pursuant to the Act.

The Attorney General has long concluded that the Act preempts local governments from adopting modified versions of the Act. In 1984, in declaring that local governing bodies cannot supplement code enforcement boards' powers by allowing them to impose administrative charges, the Attorney General stated that "***a local governing body, by ordinance, may not in effect amend or add any provision to Ch. 162*** . . . ." Op. Att'y Gen. Fla. 84-55, 1984 WL 1825554 (June 7, 1984) (emphasis added).

The Attorney General has repeatedly applied this interpretation to other circumstances involving local governments that wished to adopt modified versions of the Act, and in each instance the Attorney General has opined that the local governments could not do so. *E.g.*, Op. Att'y Gen. Fla. 92-73, 1992 WL 527483 (Oct. 15, 1992) (compensation for board members); Op. Att'y Gen. Fla. 86-76 1986 WL 219774 (Jan. 29, 1986) (timing of fine); Op. Att'y Gen. 85-84, 1985 WL 190064 (Oct. 25, 1985) (alternative procedures). As General Smith explained:

> Local government entities derive no delegated authority from Ch. 162, F.S., to enforce codes and ordinances in any manner other than as described therein nor do such governmental entities possess home rule powers to regulate the code enforcement boards or to impose any duties or requirements on such boards or to otherwise regulate the statutorily prescribed enforcement procedure described in this chapter.

Op. Att'y Gen. 85-84, 1985 WL 190064 (Oct. 25, 1985).

In *City of Tampa v. Braxton*, 616 So. 2d 554 (Fla. 2d DCA 1993), the Second District agreed with the Attorney General and squarely held that

"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***." 616 So. 2d at 556 (emphasis added). Once a city opts to utilize a code enforcement board as provided in chapter 162, it may not enforce its ordinance "by any manner except that described in chapter 162." *Id.*

The City's Ordinance 97-07 expressly adopts the Act but alters it with respect to liens by changing the type of lien that the City's Code Enforcement Board imposes. R 108-09. Ordinance 97-07 states, "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 . . . ." R 109. Absent that modification, the lien imposed through section 162.09(3) would simply be a standard lien "enforceable in the same manner as a court judgment by the sheriffs of this state . . . ." § 162.09(3), Fla. Stat. (2006). The City has plainly attempted to change the penalties that the Act permits its Code Enforcement Board to impose.

Indeed, there is no reasonable way to view Ordinance 97-07 other than as an effort to alter the enforcement procedures set forth in the Act. The Second District's decision in *City of Tampa*, which correctly held that section 162.09 must be strictly construed, prohibits such alterations to the statutory scheme, and

decades of opinions from Florida's Attorney General prohibit such alterations as well.

It bears mention that while the Act states that it does not prohibit a local governing body "from enforcing its codes by any other means," § 162.13, Fla. Stat. (2006), this provision does not permit local governments to adopt the Act and yet alter its terms. As the Attorney General has explained, this provision instead clarifies that the Act does not prohibit local governments from utilizing other mechanisms that are lawfully available to enforce local codes, such as direct enforcement through county courts, the supplemental enforcement procedures of sections 162.21-.30, interlocal agreements pursuant to section 163.01, or a combination of these methods. Op. Att'y Gen. Fla. 2001-77, 2001 WL 1347157 (Oct. 30, 2001). *See also Goodman v. County Court in Broward County, Fla.*, 711 So. 2d 587, 588-89 (Fla. 4th DCA 1998) (holding county could adopt code enforcement board under chapter 162 and also pursue direct enforcement for violations in county court); *Verdi v. Metropolitan Dade County*, 684 So. 2d 870, 872-73 (Fla. 3d DCA 1996) (holding county could combine procedures under parts I and II of chapter 162 and can expand procedures where authorized by section 162.03); *Deehl v. Weiss*, 505 So. 2d 529, 531 (Fla. 3d DCA 1987) (holding county could determine which code violations were heard by code enforcement board).

In sum, where, as here, a local government opts "to create a code enforcement board under Chapter 162, Florida Statutes, [it] is bound by the requirements or restrictions contained therein and may not alter or amend those statutorily prescribed procedures but must utilize them as they are set forth in the statutes." Op. Att'y Gen. Fla. 2001-77, 2001 WL 1347157 (Oct. 30, 2001). Thus, having adopted the Act and created its Code Enforcement Board, the City cannot modify the type of lien that the Code Enforcement Board may impose. The City must take the Act "as provided herein," § 162.03(1), or not take it at all. Ordinance 97-07 conflicts with that restriction and intrudes onto a field the Legislature has expressly, or at least implicitly, preempted. For this additional reason, Ordinance 97-07 is invalid and the certified question should be answered in the negative.

2. The Legislature Comprehensively Regulates Liens Imposed Under The Act.

A second type of preemption also exists. Section 162.09(3) is so comprehensive with respect to code enforcement liens that the statute preempts local regulation regarding such liens, including Ordinance 97-07.

Subsection (3) of section 162.09 governs the penalties, including liens, that a code enforcement board may impose. Nearly every word of this provision relates to code enforcement board liens and, viewed in full, the provision demonstrates the

comprehensive nature of the legislature's regulation in this particular area. Section 162.09(3) states in full:

> 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. A fine imposed pursuant to this part shall continue to accrue until the violator comes into compliance or until judgment is rendered in a suit filed pursuant to this section, whichever occurs first. A lien arising from a fine imposed pursuant to this section runs in favor of the local governing body, and the local governing body may execute a satisfaction or release of lien entered pursuant to this section. After 3 months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body attorney to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest. No lien created pursuant to the provisions of this part may be foreclosed on real property which is a homestead under s. 4, Art. X of the State Constitution. The money judgment provisions of this section shall not apply to real property or personal property which is covered under s. 4(a), Art. X of the State Constitution.

§ 162.09(3), Fla. Stat. (2006).

As this lengthy quotation shows, section 162.09(3) directs how such 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. Apart from section 162.03(1)'s command that the Act may

be adopted "as provided herein," the narrow field of code enforcement board liens is impliedly preempted by the comprehensive regulation of section 162.09(3).

This Court's opinion in *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984), is instructive on this point. There, the Court considered whether local government bodies could impose waiting periods before requested public records are released to the public. The City of Tampa asserted that the Public Records Act did not specifically speak to waiting periods and therefore local government bodies could supplement the law with such additional regulation. This Court rejected that argument. The Court held that the pervasive regulation under the Public Records Act demonstrated the Legislature's implied preemption of the field with regard to delays in producing public records for public inspection. Based on that holding, the Court concluded that if any waiting period is to be permitted, the Legislature must say so.

Here, the Legislature established a comprehensive scheme with respect to liens that a code enforcement board may impose, a scheme that does not provide municipal code enforcement board liens with the superpriority given to tax liens and special assessments. Accordingly, section 162.09(3) impliedly preempts Ordinance 97-07. If liens such as the City's liens in this case are to have the superpriority of tax liens, the Legislature must say so.

As the trial court recognized, allowing substantial liens to accrue on property for code violations and then directing those liens to be superior to previously recorded mortgages is, at best, questionable public policy and a significant detriment to banks lending money for mortgages in a particular area. The Act is intended to create a specific legislatively approved code enforcement procedure, resulting in a uniform code enforcement lien, not to allow various local government bodies to convert code enforcement board liens into superpriority liens that displace lenders who accepted mortgages in good faith. The uncertainty of how much a fine may impact the value of a mortgage is exemplified by this case, where Wells Fargo loaned the Gauthiers $115,531 but the City sought a priority to recover nearly a third of that value—$28,600, plus thousands in accruing interest—for grass-related and fence-related code violations.

The City's amici curiae in this case urge that without being able to give their own code enforcement liens superpriority, they will be unable to recoup the funds they expend keeping properties in compliance with local codes. This argument is unsupported in this record and in the amici curiae's own briefs. First, the code enforcement liens the City imposed in this case were entirely for the Gauthiers' high grass and broken fence, not for the City bringing the property into compliance. Second, the Act permits municipalities to impose hefty daily fines on property owners, and it is the continuing accrual of those fines that permits

municipalities to supplement their revenues for the cost of merely seeking out code violations. Nothing in this record or the amici curiae's briefs shows how often code enforcement liens are used to recoup compliance expenditures as opposed to recovering punitive fines imposed on property owners. Notably, in this case, the City permitted nearly $30,000 in fines to accrue based on high grass and a broken fence with respect to a modest residential home owned by a person in active military service. The City's collection efforts have nothing to do with recouping expenses.

Finally, it bears emphasis that the City admitted in the trial court proceedings that it could enforce its lien only after Wells Fargo obtained a foreclosure judgment, since Florida law prohibits a code enforcement board lien from being foreclosed on homestead property, and the Gauthiers' property at issue was homestead property. R 14-15; *see also* § 162.09(3), Fla. Stat. (2006). It is inconceivable that the Act permits the City to possess a *superior* interest in homestead property that remains dormant and unenforceable until a lienholder with a prior recorded interest such as Wells Fargo acts on its constitutional right to eliminate a borrower's homestead interest through foreclosure. *See* Art. X, § 4(a), Fla. Const. Plainly, the Legislature could not have intended a statutory scheme by which municipalities could place mortgage lenders in the precarious position of either not enforcing their mortgage interests or going through the expense of

enforcing them only to have previously unenforceable code enforcement liens jump in priority over the lender's interest, substantially reducing or even eliminating that interest completely.

Thus, for this final reason, Ordinance 97-07 is inconsistent with Florida law because section 162.09(3) impliedly preempts the narrow field of code enforcement board liens. The ordinance is therefore invalid, and the certified question should be answered in the negative.

C. THE ORDINANCE VIOLATES ARTICLE I, SECTION 18, OF THE FLORIDA CONSTITUTION.

Ordinance 97-07 is invalid for another reason. It violates Article I, section 18, of the Florida Constitution by imposing a penalty that the Legislature has not authorized.

Article I, section 18, states, "No administrative agency . . . shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." By its terms, this provision prohibits any administrative agency in this state from imposing any penalty that is not provided by law. *E.g.*, *State, Dep't of Envtl. Regulation v. Puckett Oil Co.,* 577 So. 2d 988, 992 (Fla. 1st DCA 1991) ("Article I, Section 18, of the Florida Constitution prohibits an administrative agency from imposing a sentence of imprisonment or any *other penalties* except as provided by law." (emphasis in original)). The phrase "provided by law" refers to acts of the Florida Legislature. *Broward County v. Plantation Imports, Inc.*, 419

So. 2d 1145, 1147-48 (Fla. 4th DCA 1982). Accordingly, the City's Code Enforcement Board, which is an administrative agency, may not impose any penalty unless that penalty is specifically authorized by the Legislature.

Yet, as demonstrated above, the Act does not authorize imposing a code enforcement lien with a superpriority that displaces prior recorded mortgages. Section 162.09, entitled "Administrative fines; costs of repair; liens," sets forth the precise penalties that a code enforcement board may impose. Subsections (1) and (2) of the statute discuss the amounts of permissible fines, and subsection (3) discusses liens. In pertinent part, subsection (3) states:

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

§ 162.09(3), Fla. Stat. (2006). Hence, the statute authorizes code enforcement boards to issue orders imposing fines and for such orders to constitute liens against a violator's real and personal property.

Nowhere in section 162.09, however, or anywhere in any state law, has the Legislature authorized code enforcement boards to impose liens with the superpriority of tax liens. That specific form of penalty is authorized only by Ordinance 97-07, the municipal provision at issue here, which on its face purports to elevate "[l]iens created pursuant to a [Code Enforcement] Board order" to the equivalent of a tax lien, superior to all other liens. Because Ordinance 97-07

attempts to convert the lien penalty authorized by section 162.09(3) to a different form of penalty that is ***not authorized*** by Chapter 162, the ordinance violates Article I, section 18. *See Broward County*, 419 So. 2d at 1148 (holding county ordinance unconstitutional because it authorized an agency to impose penalties not provided by law).

This result is supported by a long line of authorities applying Article I, section 18, in the specific context of Chapter 162. In 1984, the Attorney General considered whether a municipality could adopt an ordinance requiring its Chapter 162 code enforcement board to impose an administrative charge on a violator. *See* Op. Att'y Gen. Fla. 84-55, 1984 WL 1825554 (June 7, 1984). The Attorney General explained that such boards are quasi-judicial, that the judicial power in this state is vested in the supreme court, district courts of appeal, circuit courts, and county courts, and that chapter 162 provides municipalities with an alternative to county court enforcement of their codes. *See also* Art. V, § 20(c)(4), Fla. Const. (granting county courts original jurisdiction over violations of municipal ordinances). Concluding that a municipal ordinance could not provide for penalties not authorized by Chapter 162, even under home rule powers, the Attorney General explained:

> ***[I]t would appear that the local governing bodies do not possess any home rule power over such boards or the duties and powers conferred and imposed thereon by the Legislature. Were it not for Ch. 162 and the enforcement procedures prescribed thereby, the***

> ***local governments, or their administrative agencies and officers, would be without any power to enforce their various technical codes by administrative agencies or*** to impose the administrative fines or ***place the liens as provided therein by the Legislature.*** Rather, such technical codes would be exclusively enforced by the county courts. Therefore, in view of the fact that the Legislature has not delegated any authority to the local governing bodies in that regard, I must conclude that a local governing body, by ordinance, may not in effect amend or add any provision to Ch. 162, F.S., so as to authorize or require the local government code enforcement board to impose an administrative charge or fee on individuals or entities found guilty of violating any of the various technical codes in force in the counties and municipalities.

Op. Att'y Gen. Fla. 84-55 (emphasis added); *see also* Op. Att'y Gen. Fla. 86-10 1986 WL 219774 (Jan. 29, 1986) (Jan. 29, 1986) (opining that code enforcement board is not authorized under chapter 162 to provide for the continued running of a fine after a lien has been recorded); Op. Att'y Gen. Fla. 85-17, 1985 WL 190036 (Feb. 27, 1985) (opining that code enforcement board is not authorized to levy a fine against a person who has been cited for a code violation but who brings the property into compliance before the board reviews the case).

The Second District agrees. In *City of Tampa v. Braxton*, 616 So. 2d 554 (Fla. 2d DCA 1993), the court considered whether a municipality could bring an action for a money damages judgment with respect to a fine imposed under section 162.09. The Second District first held that section 162.09 must be strictly construed, not liberally construed, because it is a penal statute and is in derogation of the common law. *Id.* at 555. Expressly agreeing with the Attorney General, the

Second District then held that "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." *Id.* at 556. The Second District concluded its opinion, and rejected the municipality's effort to seek a remedy not found in the Act, by holding that Article I, section 18, precluded money judgments:

> We conclude that once the City opted for a code enforcement board under chapter 162, ***it was prohibited by article 1, section 18 of the state constitution to enforce its ordinance by any other manner except that described in chapter 162.***

Id. (emphasis added). This analysis confirms Ordinance 97-07's invalidity.

More recently, in *Stratton v. Sarasota County*, 983 So. 2d 51 (Fla. 2d DCA 2008), the Second District considered whether a county could rely on its local code as authority to include payroll expenses for its code enforcement employees in a code enforcement board lien on a code violator's property. Because section 162.09 did not authorize any such penalty, nor did any other provision in Florida law, the Second District held that the county could not impose such a penalty by local code. *Id.* at 55 ("Therefore, the County cannot rely on local code provisions to collect these expenses in contravention of the authorized penalties set forth in chapter 162."). As the Second District explained, a county's code enforcement board "has no authority to impose penalties that are not authorized by law." *Id.*

Simply put, the City's Code Enforcement Board cannot impose a penalty in the form of a lien with tax lien superpriority unless that penalty is authorized by a state law. No such authorization exists, and Ordinance 97-07 is therefore invalid.

In its Initial Brief, the City concedes that Article I, section 18, "prevents a municipality from imposing any sentence of imprisonment or other penalty without statutory authorization." Ini. Br., at 19. The City nonetheless argues that this restriction does not invalidate Ordinance 97-07 because, according to the City, the superpriority created by the ordinance is not a penalty. Ini. Br., at 25-26. The City focuses, however, on the debtor, saying the order in which creditors are paid "is largely irrelevant to the debtor." Ini. Br., at 25. The Constitution, on the other hand, prohibits agencies from imposing penalties on ***anyone*** without statutory authorization. It is incontestable that the owners of prior recorded interests are penalized by an ordinance that subordinates their interests to a municipality's code enforcement lien because a property owner failed to comply with a local code provision.

The City's only effort to explain how Wells Fargo is not penalized by the City's superpriority ordinance is a single sentence that contends, "Nor is there any penalty to Wells Fargo as discussed in connection with Wells Fargo's due process argument below." Ini. Br., at 26. This contention misses its mark. A penalty imposed consistent with due process is no less a penalty than one imposed contrary

to due process. The point of Article I, section 18, is that ***no penalty*** may be imposed by any agency, no matter how much process is provided, without legislative authorization. Nothing in the Act or elsewhere in the Florida Statutes authorizes municipalities to impose code enforcement liens with priority over prior recorded interests. For this final reason, Ordinance 97-07 is invalid, and the certified question should be answered in the negative.

II. APPLICATION OF THE ORDINANCE VIOLATES DUE PROCESS.

If the Court answers the certified question in the affirmative and agrees with the trial court and the district court that Ordinance 97-07 is invalid, then the Court need not address due process. If, however, the Court were to disagree and uphold the ordinance as a valid exercise of municipal authority, then, as shown below, the City's due process argument should be rejected. The City cannot challenge the trial court's due process ruling at this time, and in all events that ruling was correct.

A. THE TRIAL COURT'S DUE PROCESS RULING CANNOT NOW BE CHALLENGED AND REQUIRES AFFIRMANCE OF THE JUDGMENT.

The trial court's summary final judgment was based not only on the conclusion that Ordinance 97-07 is invalid but also on the alternative ground that application of the ordinance in this case would violate Wells Fargo's constitutional right to due process of law. *See* U.S. Const., amend. XIV, § 1; Art. I, § 9, Fla. Const. The trial court held:

> [N]otice should have been provided to the Plaintiff when these code enforcement liens were recorded in the public records of Brevard County, Florida via US Mail so as to avoid a due process issue with respect to the mortgagee's interest in the property, as explained in *Mennonite Bd. of Missions v. Adams*, 462 US 791, 798 (1983).

R 164. As the City conceded in the Reply Brief filed in the Fifth District, the City did not challenge this alternative holding by reference to it in either its Notice of Appeal or its Initial Brief. AR D, at 10. It addressed the issue in its Reply Brief only because Wells Fargo argued in its Answer Brief that the City had waived any challenge to the alternative holding. *Id.* at 10-12. The City did not, however, present any legal argument that the alternative holding was incorrect. *Id.* The Fifth District did not discuss the issue in its opinion.

An issue raised for the first time in a reply brief may not be considered, even if preserved for appeal. *Snyder v. Volkswagen of Am., Inc.*, 574 So. 2d 1161, 1161 (Fla. 4th DCA 1991); *accord Wood v. State*, 717 So. 2d 617, 617 (Fla. 1st DCA 1998); *RIS Inv. Group, Inc. v. Dep't of Bus. & Prof'l Reg.*, 695 So. 2d 357, 359-60 (Fla. 4th DCA 1997). By failing to challenge the trial court's due process ruling in its appeal to the Fifth District, the City waived and abandoned any challenge to that holding. *City of Miami v. Steckloff*, 111 So. 2d 446, 447 (Fla. 1959); *Hunter v. Hunter*, 2011 WL 4863698, at *1 (Fla. 2d DCA Oct. 14, 2011); *David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co.*, 972 So. 2d 275, 281 (Fla. 2d DCA 2008); *Dep't of Health & Rehab. Servs. v. Petty-Eifert*, 443 So. 2d 266, 268

(Fla. 1st DCA 1983). Moreover, having failed to appeal the ruling in the Fifth District, the City has failed to preserve the issue for review by this Court. *M.W. v. Davis*, 756 So. 2d 90, 97 n.17 (Fla. 2000); *Metro. Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 499 n.7 (Fla. 1999). Accordingly, the trial court's alternative holding that Ordinance 97-07 is unconstitutional as applied to Wells Fargo is not before this Court and requires that the summary judgment be affirmed.

B. DUE PROCESS REQUIRED THE CITY TO GIVE ACTUAL NOTICE OF THE CODE ENFORCEMENT LIENS.

If this Court should reach the merits of the due process issue, it should agree with the trial court's holding that application of Ordinance 97-07 violated Wells Fargo's due process rights. The City cannot enforce its superpriority ordinance and elevate its substantial code enforcement liens to a higher priority than Wells Fargo's prior recorded mortgage interest because the City failed to give Wells Fargo actual notice of the fines and liens.

Mortgages are interests in property protected by the Fourteenth Amendment. *See Zipperer v. City of Fort Myers*, 41 F.3d 619, 623 (11th Cir. 1995) (relying on *Sarasota County v. Andrews*, 573 So. 2d 113 (Fla. 2d DCA 1991)); *City of Panama City v. Head*, 797 So. 2d 1265, 1267-68 (Fla. 1st DCA 2001). Consequently, to avoid a due process violation, a municipality must provide actual notice to a mortgagee before substantially impairing that mortgagee's property interest. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). As the United States

Supreme Court held in the context of a sale for unpaid property taxes, an identifiable mortgagee with a prior lien must receive actual notice of a state actor's action if the action will "immediately and drastically diminish[] the value of [the mortgagee's] security interest." *Id.* at 798. The mortgagee's ability to safeguard its interests or seek relief from the property owner does "not relieve the State of its constitutional obligations." *Id.* at 799.

The City incorrectly relies on the subsequent Eleventh Circuit case of *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995), to support its interpretation of *Mennonite Board* as limited to tax deed sales. Ini. Br., at 30. *Zipperer* merely applies *Mennonite Board*'s holding, concluding that, given the facts of the case, no significant diminution in property value warranting actual notice occurred. *Zipperer* involved special assessment liens for land improvements, such as sewer lines and roadways, which likely enhanced the property's value. *Id.* at 621. The Eleventh Circuit therefore concluded that because the mortgagee had purchased the property and benefited from the improvements, it "retain[ed] a significant interest in the land even after its subordination to the special assessment." *Id.* at 624. By comparison, the fines in this case were solely punitive, based on unkept grass and a broken fence.

In *City of Panama City v. Head*, the First District likewise applied the *Mennonite Board* test, concluding on the facts of that case that the mortgagee

might have been entitled to actual notice. 797 So. 2d at 1270-71. Though the First District rejected a facial challenge to the municipality's ordinance, it recognized that the ordinance might be unconstitutional as applied because giving superpriority to the assessment liens may have drastically diminished the mortgagee's security interest. *Id.* However, because the trial court had failed to address the as-applied argument and the record was therefore inadequate, the First District reversed and remanded to afford the mortgagee an opportunity to prove a drastic diminution in value. *Id.* at 1271.

Here, the City's ordinance is unconstitutional as applied to Wells Fargo. The ordinance did not require actual notice to the mortgagee and none was given. Nonetheless, the City imposed two $50 per day fines and ultimately recorded code enforcement liens on the property totaling $28,600.00, with interest thereafter continuing to accrue. R 104-06. Wells Fargo's mortgage, which it took in 2004, totaled $115,531.00. R 39. In 2007, $112,238.65 of the principal remained unpaid. R 33. Thus, at the time of recording, the City's liens reduced Wells Fargo's interest in the property by over 25 percent, which constitutes a drastic diminution pursuant to *Mennonite Board*. Moreover, Wells Fargo had no notice of the accruing fines at any time before they became confiscatory. *Mennonite Board* thus required actual notice, and the City's discussion of constructive notice by publication and through the noncompliant property owner is irrelevant.

The City suggests that it would "be a simple matter for Wells Fargo" to monitor publications or courthouse bulletin boards on a weekly basis. Ini. Br., at 31. The City's position squarely conflicts with *Mennonite Board*'s actual notice requirement. *See* 462 U.S. at 799. Moreover, such monitoring would put an enormous and unfair burden on Wells Fargo and other lenders to prevent confiscation of their own property.

The City relies on this Court's decisions in *Holly Lake Association v. Federal National Mortgage Association*, 660 So. 2d 266 (Fla. 1995), and *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980), as well as the Fifth District's decision in *Association of Poinciana Village v. Avatar Properties, Inc.*, 724 So. 2d 585 (Fla. 5th DCA 1999), to argue that Ordinance 97-07 can be constitutionally applied here. Ini. Br., at 28. The City's reliance is misplaced. Those decisions, which address the priority of liens arising out of declarations of covenants of homeowners' associations, have no bearing on a due process analysis as they involved no state action. They turned entirely on contract and real property law.

In summary, to impose its code enforcement fines and liens *without* a superpriority, the City was not required to give Wells Fargo or any other holder of a prior recorded interest actual notice, but notice was required if the City now wishes to enforce confiscatory liens with a superpriority that subordinates prior recorded interests. The decision whether to provide such notice remains with the

City—the party fully aware of the accruing fines. If the City chooses not to do so and the amounts are ultimately confiscatory, then the City cannot utilize its superpriority ordinance without violating due process. Accordingly, should the Court reach the issue, it should agree with the trial court that application of Ordinance 97-07 violates Wells Fargo's constitutional rights to due process.

CONCLUSION

For all of the foregoing reasons, this Court should answer the certified question in the negative, approve the district court's decision, and hold Ordinance 97-07 to be invalid. Though the Court should not reach the due process issue that the City waived below, if the Court does so, it should hold that application of Ordinance 97-07 violates due process under the circumstances of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I FURTHER CERTIFY that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210(a)(2).

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