IN THE SUPREME COURT OF THE STATE OF FLORIDA

CITY OF PALM BAY,	Case No.:	SC11-830
Petitioner,	L.T. Case No.:	5D09-1810 05-2007-CA-29907

vs.

WELLS FARGO BANK, N.A.

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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

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INTRODUCTION

Does the City of Palm Bay, under its statutory home rule powers, have the power to give its code enforcement liens priority over an earlier recorded mortgage? The Fifth District answered this question in the negative, but certified the question as one of great public importance to this Court.

In this brief, filed on behalf of Petitioner, the City of Palm Bay (the "City"), we demonstrate that the Fifth District erred. There is no dispute that the Florida Legislature has the power to give certain liens "super" priority and such super priority liens are commonly-recognized and enforced. It is equally well settled that the City, under its home rule powers, has co-equal power to legislate on such matters, unless the City's ordinance is expressly preempted by state statute or is in direct conflict with a state statute.

As we demonstrate below, there is no such preemption or conflict here. Nor does the super priority violate the due process rights of respondent, Wells Fargo, N.A. ("Wells Fargo"). Wells Fargo contracted knowing of the priority given to code enforcement liens and had notice of those proceedings and the lien imposed by the City. The certified question should be answered in the affirmative and the decision below quashed.[1]

[1] Table of References: In this Brief, "R." refers to the original trial record on appeal and "AR." refers to the appellate record developed in the Fifth District.

STATEMENT OF THE CASE AND FACTS

The City of Palm Bay, like most Florida cities, has a code enforcement board that ensures that property owners comply with city codes and ordinances. When a property owner in the City fails to comply with an order of the code enforcement board, the board may enter an order imposing a fine or a fine plus repair costs. The board may record a certified copy of its order, which constitutes a lien against the property. Section 162.09(3), Fla. Stat.

On March 6, 1997, the City enacted Ordinance No. 97-07 (R. 111; 145). The ordinance declares that the City's code enforcement liens are "coequal with all the liens of all state, county, district and municipal taxes, *superior in dignity to all other liens, titles and claims*, until paid . . . " (R. 14) (emphasis supplied).

Nearly eight years after the adoption of this ordinance, respondent Wells Fargo extended a $115,531 mortgage to homeowners Robert and Carol Gauthier in December, 2004. The secured property is within the City. The mortgage, drafted by Wells Fargo, states that all rights and obligations in the mortgage "are subject to any requirements and limitations of Applicable Law" (R. 39). Likewise, the mortgage recognizes that it is "governed by . . . the law of the jurisdiction in which the Property is located" (R. 49).

The property fell out of compliance with City codes and, when the Gauthiers failed to bring the property into compliance, the City fined the Gauthiers and

recorded code enforcement liens against the property in January and May, 2007 (R. 33, 105, 145, 146). The Gauthiers failed to pay those fines.

The Gauthiers also failed to make their mortgage payments, and in September, 2007, Wells Fargo began foreclosure proceedings, serving all other lienors, including the City (R. 146). At that point, the City and Wells Fargo disputed the priority of their respective liens. The City argued that its code enforcement lien had priority under Ordinance 97-07, which predated the mortgage by nearly eight years (R. 145-53). Wells Fargo took the position that Ordinance 97-07 was unenforceable and that its 2004 mortgage took priority over the 2007 code enforcement lien (R. 17).

Hearing the issue on cross motions for summary judgment, the trial court held that Ordinance 97-07 was preempted by Chapter 162, the statute authorizing code enforcement proceedings and code enforcement liens (R. 162-67). Although the trial court correctly held that Chapter 162 was silent on lien priority, the court found that silence was "purposeful" and evinced an "intent to refuse to bestow superiority" on code enforcement liens (R. 163-64). The trial court held that Ordinance 97-07 was unenforceable and that Wells Fargo's lien had priority under the "common law principle" of first in time. *Id*. The Court also ruled that Ordinance 97-07 violated Wells Fargo's right to due process because the City did not send Wells Fargo notice of the code enforcement proceeding by U.S. Mail. *Id*.

The City appealed. Wells Fargo defended on the same two grounds articulated by the trial court -- that Ordinance 97-07 was preempted by Chapter 162 and violated Wells Fargo's right to due process (AR. C).

The Fifth District affirmed, but on different grounds (AR. 19-22). The Fifth District held that Ordinance 97-07 conflicted with a section of Florida's recording statute, Section 695.11, Florida Statutes. The Court held that Section 695.11 established a blanket statutory rule of "first in time, first in right," that preempted any local legislation on lien priority, an argument that was not raised by Wells Fargo or briefed by the parties. As we discuss in the argument section below, the decision overstates the intent and operation of Section 695.11, which merely deals with the mechanics of recordation. The district court did not reach the due process issue and was silent on the Chapter 162 conflict argued by Wells Fargo.

On a motion by the City (AR. 23-32), the Fifth District then certified the following certified question to this Court:

> Whether, under Article VII, 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?

(AR. 41).

The City's petition for discretionary review followed (AR. 43-44), and this Court ordered briefing on the merits (AR. 45-46).

SUMMARY OF THE ARGUMENT

The City has broad home rule powers and may legislate on any subject within the state's power to regulate unless the City's power has been expressly limited by the state or if the City's regulation directly conflicts with a state statute.

There is no preemption by or conflict with Section 695.11 which merely regulates the mechanics of recordation and determines which interest was recorded first. Lien priority is determined by contract, common law, and state statutes, and there are numerous exceptions to the principle of first in time, first in right. If the state has the power to establish exceptions, so does a municipality. Nothing in Section 695.11 or any other statute reserves the regulation of lien priority to the state and Ordinance 97-07 is valid. There is also no conflict with Chapter 162 which regulates code enforcement boards. Chapter 162 does not regulate lien priority and does not expressly preempt any attempt to do so.

Finally, Ordinance 97-07 does not violate Wells Fargo's right to due process. Ordinance 97-07 predated Wells Fargo's mortgage interest by nearly eight years and the mortgage specifically stated that it was subject to local regulations and ordinances. Wells Fargo also had publication notice of the original enforcement proceedings and constructive notice of the imposition of the lien. No Florida case has invalidated a lien priority statute under such circumstances. The certified question should be answered in the affirmative and the decision below quashed.

ARGUMENT

The certified question posed to this Court concerns the City's home rule powers under Chapter 166. Section I of this brief examines those home rule powers and demonstrates that the City, like the Florida Legislature, has the power to regulate lien priority. After discussing the applicable framework of analysis, we then demonstrate that none of the narrow exceptions to the City's home rule powers apply to limit the enforceability of Palm Bay Ordinance 97-07.

Section II of this brief explores the due process issue raised by Wells Fargo below. Although not within the scope of the question posed by the Fifth District (and not discussed in the opinion below), Wells Fargo is likely to raise due process in its response. Therefore, the brief includes a brief discussion in Section II to put the due process issue in proper context.

Standard of Review

Whether Ordinance 97-07 is enforceable or violates Wells Fargo's right to due process are both questions of law reviewed *de novo* by this Court. *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001) (summary judgment raising a pure question of law is reviewed *de novo*); *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000) (questions of law reviewed *de novo*).

I. ORDINANCE 97-07 IS NOT EXPRESSLY PREEMPTED BY EITHER SECTION 695.11 OR CHAPTER 162, FLORIDA STATUTES.

A. The City Has Broad Home Rule Powers.

This Court is well familiar with the broad powers conferred upon Florida municipalities to regulate matters within their respective jurisdictions. That power stems from Article VIII, Section 2(b) of the Florida Constitution which expressly confers upon municipalities, the right to "exercise any power for municipal purposes except as otherwise provided by law."

Section 166.021 further defines that power, making clear that a municipality has the power to enact legislation "concerning any subject matter upon which the state Legislature may act . . . ." § 166.021(3). *See Wyche v. State*, 619 So. 2d 231, 237-38 (Fla. 1993) (a municipality may legislate concurrently with the legislature on any subject not expressly preempted to state government). The exceptions to home rule power are limited. Municipalities may not legislate on the subjects of annexation and merger, the exercise of extraterritorial power, or on any subject expressly prohibited by the constitution. §§ 166.021(3)(a) and (b). Nor may a city legislate on any "subject *expressly* preempted to state or county government by the constitution or by general law." § 166.021(3)(c) (emphasis supplied).

Any exception to a city's broad home rule powers should be construed narrowly. According to Section 166.021(4), Chapter 166 is to be construed "so as to secure for municipalities the broad exercise of home rule powers granted by the

constitution." As the First District aptly stated in recognition of this policy, "The courts should be careful in imputing an intent on behalf of the Legislature to preclude a local elected governing body from exercising its home rule powers." *Tallahassee Memorial Regional Med. Ctr., Inc., v. Tallahassee Med. Ctr., Inc*., 681 So. 2d 826, 831 (Fla. 1st DCA 1996). Honoring this broad affirmation of local regulation, this and other courts routinely reject challenges to the exercise of home rule powers. *See, e.g., City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006) (upholding a local ordinance acknowledging a municipality's broad authority to enact ordinances under its home rule powers).[2]

B. Framework of Preemption Analysis

In determining whether the state legislature intended to limit the power of a municipality to regulate, Florida courts look to see whether the subject of the regulation has been expressly preempted to the state. *See id.* at 1243. *City of Hollywood* describes the framework of preemption analysis which involves three steps. First, the Court looks to see if the state has expressly reserved the topic of regulation exclusively to the legislature. The intent to preempt must be clear:

[2] *See, e.g., Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 681 So. 2d 826; *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144 (Fla. 2d DCA 2006); *Edwards v. State*, 422 So. 2d 84 (Fla. 2d DCA 1982); *City of Miami Beach v. Rocio Corp*., 404 So. 2d 1066 (Fla. 3d DCA 1981); *GLA and Associates, Inc. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th DCA 2003); *City of Kissimmee v. Florida Retail Federation*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005); *F.Y.I. Adventures, Inc. v. Ocala*, 698 So. 2d 583, 584 (Fla. 5th DCA 1997).

"Express pre-emption requires a specific statement; the pre-emption cannot be made by implication nor by inference." *Id*. at 1243; *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005) ("express preemption . . . must be accomplished by clear language stating that intent"); *Edwards*, 422 So. 2d at 85 ("an 'express' reference is one which is distinctly stated and not left to inference"). *See also Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008).[3]

Section 166.021 itself contains an example of this sort of express preemption. Section 166.021(3)(a) provides that a municipality may not legislate on the subjects of annexation, merger, or the exercise of extraterritorial power. Other examples demonstrate the specific language necessary to find express preemption. *See* § 316.002 ("it is unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of this chapter"); § 847.09(1) ("it is the intent of the Legislature to preempt the field, to the exclusion of counties and municipalities").[4]

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[3] A similar test applies in testing whether a county ordinance has been preempted by a state statute and *Phantom of Brevard* and *Phantom of Clearwater* describe and apply this framework of analysis. 3 So. 3d at 314; 894 So. 2d at 1018.

[4] *See also Florida Power Corp. v. Seminole County*, 579 So. 2d 105 (Fla. 1991) (statute gives the Public Service Commission exclusive power to regulate rates and terms of electrical service) and *Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993) (statute states as its purpose to "make uniform traffic laws to apply throughout the state").

In the absence of a clear statement of preemption, the second step involves looking at the intent of the state statute to see if "it is clear that the Legislature has clearly preempted local regulation on the subject." *City Of Hollywood*, 934 So. 2d at 1243. Thus, even if the statute at issue does not expressly prohibit local legislation, a court may find preemption if the legislature has so comprehensively regulated a subject that the legislature has clearly "taken the field" and has intended to preempt further local regulation. *City of Hollywood*, 934 So. 2d at 1243. The case typically cited as an example of this sort of "field" preemption is *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).[5] That case concerned Florida's broad public records act which stated that "[i]t is the public policy of this state that all state, county and municipal records shall at all times be open for a personal inspection by any person." *Id*. at 1077. This statement was so comprehensive in its impact that it would be impossible for a city to establish exceptions to the release of public records without running afoul of that broad and unambiguous mandate. *Id*. at 1079.

In the absence of such clear legislative direction, the third step is to determine whether the ordinance and the statute are in conflict. *City of Hollywood*,

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[5] Wells Fargo argued both express and implied preemption below. Section 166.021(3) makes clear, however, that only express preemption may prevent a municipality from local regulation. In any event, the dispute is largely a matter of semantics; Wells Fargo's "implied" preemption is the equivalent of the sort of "field" preemption articulated by *Tribune Co. v. Cannella*.

934 So. 2d at 1243. That conflict must be direct: "[a] municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden." *Id*. at 1243 (*quoting Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972)). Put another way, the conflict must be so direct that to comply with the municipal ordinance would be to violate the state statute. *F.Y.I. Adventures, Inc. v. Ocala,* 698 So. 2d 583, 584 (Fla. 5th DCA 1997). Such conflicts are often raised but often rejected.[6]

Turning to the application of this framework of analysis, we demonstrate the absence of any legislative intent to preempt local regulation of lien priority.

C. Neither Chapter 162 Nor Section 695.11, Florida Statutes, Preempts Local Regulation of Lien Priority.

Wells Fargo argued below that Ordinance 97-07 was preempted by Chapter 162, Florida Statutes, which authorizes municipalities to establish code enforcement boards, authorizes the imposition of fines for code and ordinance violations, and establishes a municipalities' right to record a lien. As discussed

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[6] *See, e.g., City of Hollywood*, 934 So. 2d at 1243; *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc*., 681 So. 2d 826 (Fla. 1st DCA 1996); *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144 (Fla. 2d DCA 2006); *Hillsborough County v. Florida Restaurant Ass'n, Inc*., 603 So. 2d 587 (Fla. 2d DCA 1992); *Edwards v. State*. 422 So. 2d 84 (Fla. 2d DCA 1982); *Exile v. Miami-Dade County*; 35 So. 3d 118 (Fla. 2d DCA 2010); *City of Miami Beach v. Rocio Corp*., 404 So. 2d 1066 (Fla. 3d DCA 1981); *Palm Beach County v. BellSouth Telecomm. Inc*., 819 So. 2d 876, 878 (Fla. 4th DCA 2002); *Lowe v. Broward County*, 766 So. 2d 1199, 1207 (Fla. 4th DCA 2000); *City of Kissimmee v. Florida Retail Federation*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005); *F.Y.I. Adventures, Inc. v. Ocala*, 698 So. 2d 583, 584 (Fla. 5th DCA 1997).

below, Chapter 162 says nothing about lien priority and thus, evinces no intent to preempt local regulation on the subject. Before turning to Chapter 162, however, we address the alleged conflict identified by the Fifth District below, a conflict that was neither raised by Wells Fargo nor briefed by the parties. The Fifth District held that there was conflict between Section 695.11, a statute that addresses the mechanics of recording, and Ordinance 97-07. There is no such conflict.

1. Section 695.11, Florida Statutes

Florida, like virtually every other jurisdiction, follows the common law rule of "first in time, first in right." Thus, an earlier recorded interest in land takes precedence over a later recorded interest. As both the trial court and Wells Fargo acknowledge, this is an ancient common law rule. *See* R. 164; AR. C at 7 ("It is a longstanding principle of Florida law that . . . 'the first in time is the first in right.'"). To support this proposition Wells Fargo's brief cited several cases, without making any reference to Section 695.11 as the source of this rule. *See* AR. C at 7-8 (*citing National Loan Investors, L.P. v. Burgher,* 742 So. 2d 406, 407 (Fla. 4th DCA 1999); *Bank of South Palm Beaches v. Stockton, Whatley, Davin & Co.,* 473 So. 2d 1358, 1360 (Fla. 4th DCA 1985)).

To enforce this longstanding common law rule, it is important to have a recording system in place that enables the parties and the court to determine which interest was filed first. In other words, the recording system needs to have a way

to establish the "priority of recordation" in the official public records. This is where Section 695.11 comes in. Section 695.11 requires each document accepted by the officer in charge of recording to be affixed with "consecutive official register numbers." *Id.* The sequence of those 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."[7] *Id*. Thus, Section 695.11 establishes that the document with the lower number is the document that was filed first and thus has "priority of recordation" in the public record.

Overstating the intent of Section 695.11, the Fifth District held that Section 695.11 was the statutory codification of the common law rule of "first in time first in right," and any local regulation that granted priority to a later-filed lien conflicts with (or is preempted by) Section 695.11. The Fifth District erred on at least two

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[7] Section 695.11 reads in its entirety as follows:

> 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.

levels. First, Section 695.11 is a mechanical recording statute, not a lien priority statute. Second, even if Section 695.11 could be considered a lien priority statute, it does not establish a blanket rule that first recorded interests always prevail.

Section 695.11 is a Mechanical Recording Statute. As a threshold matter, Section 695.11 does not intend to codify the long-standing common law rule of first in time, first in right. Indeed, Section 695.11 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. In other words, Section 695.11 merely tells us how to determine which document was recorded first. 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. Often the earlier recorded document has priority, but far from always, as discussed in detail below. Simply put, a document with a "priority of recordation" often is in a junior position to another lienholder.

Thus, it is a gross over-simplification to state that Section 695.11 (or any statute for that matter) grants lien priority in all cases based on the "first in time" rule. Because Section 695.11 sets forth no general rule of lien priority, there is no

conflict with Ordinance 97-07. Wisely, Wells Fargo made no such argument below based on recording statutes in general or Section 695.11 in particular.[8]

Interestingly, the Fifth District itself in another case recognized the limited role of Section 695.11, describing it as a mechanical recording statute, not a lien priority statute. *Argent Mortg. Co. v. Wachovia Bank N.A.*, 52 So. 3d 796 (Fla. 5th DCA 2010). In *Argent*, a lendor was first to record, but ultimately was held not be first in priority, because the subsequent purchaser purchased without notice of the earlier purchase. The lendor argued that Section 695.11 imposed a substantive rule of first in time that superseded the general rule in Florida that a subsequent bona fide purchaser took free of the prior interest. The Fifth District, in a scholarly opinion by Judge Griffin, examined different common law notice and recording schemes and held that Section 695.11 was merely "a mechanism for determining the time at which an instrument was deemed to be recorded." *Id*. at 800. Judge Griffin is surely correct.[9]

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[8] Wells Fargo may point out that counsel for the City answered a pointed question from the bench at oral argument that Section 695.11 codified the "first in time rule." Counsel for the City was quick to point out, however, that nothing in Section 695.11 suggests that it was intended to establish a blanket rule of lien priority in every case. In light of the fact that Section 695.11 was not argued by Wells Fargo in its brief, counsel can be forgiven for not articulating on the spot the additional argument that Section 695.11 is merely a mechanical recording statute, and is not a lien priority statute.

[9] The City recognizes that one Third District decision, occasionally cited by other courts, has described Section 695.11 in *dicta* as a codification of the common law "first in time" rule. *Lamchick, Glucksman & Johnston, P.A. v. City Nat. Bank of*

Section 695.11 is not a Blanket Rule of Lien Priority. Moreover, even if Section 695.11 were interpreted as a lien priority statute, it sets forth no blanket rule of "first in time" applying to all cases, overrules none of the many statutory, common law and even contractual exceptions to the rule, and does not limit the power of private parties or local governments to enact exceptions to the rule.

The "first in time" rule, regardless of its source, is fraught with statutory, common law, and contractual exceptions. For example, as demonstrated by Judge Griffin's discussion in *Argent*, purchasers for value without notice take priority, regardless of the order of recording. *See Argent*, 52 So. 3d at 800. As *Argent* confirms, Section 695.11 does not change Florida's long standing position as a "notice" jurisdiction. *Id*.

Other statutes establish the "super" priority of certain liens. For example, Section 197.22 gives tax liens priority over all other interests. Under Section 170.09, special assessment liens have priority over subsequent mortgages. Under Section 197.552, municipal liens survive a tax sale, even when other interests are

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Florida, 659 So. 2d 1118, 1120 (Fla. 3d DCA 1995). Respectfully, there is no indication that the source of the "first in time" rule was at issue in the case. Moreover, the Third District's conclusion was based on a misreading of an earlier decision which, like Judge Griffin's decision in *Argent*, emphasized that Section 695.11 was merely a mechanical statute determining which interest was filed first. *See Martinez v. Reyes*, 405 So. 2d 468, 469 (Fla. 3d DCA 1981). In any event, *Lamchick* does not suggest that Section 695.11 imposes a blanket priority rule that applies in all cases.

extinguished. There are numerous other examples ranging from condominium assessment liens (Section 718.116) to mechanics liens (Section 713.07(2)).[10]

Priorities can also be altered by private parties by contract. For example, when a subsequent loan is extended to pay off an earlier lien, the new mortgagee is often substituted (subrogated) to the position of the earlier mortgagee, regardless of the "first in time" rule. *See* 8 Fla. Prac. Constr. Law Manual § 8:21 (2010-11 Ed.).

Another example occurs in the context of homeowner's associations' declarations of covenants. The association can declare in such covenants that its assessment liens have priority over previously filed mortgages. This and other courts have honored that super priority without any suggestion that this super priority somehow conflicted with Section 695.11 or any other statute. *See Holly Lake Association v. Federal National Mortgage Association*, 660 So. 2d 266 (Fla. 1995); *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980); *Association of Poinciana Villages v. Avatar Properties, Inc*., 724 So. 2d 585 (Fla. 5th DCA 1999).

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[10] *See also* § 55.10(1) (failure to comply with lien renewal statute results in the loss of lien priority); § 55.10(2) (improperly filed lien loses priority); § 83.08 (liens for rent have special priority); § 157.12 (drainage district bonds constitute a lien with super priority); § 191.011 (liens for non-ad valorem assessments have super priority); § 197.582 (priority granted to liens obtained by the Florida Department of Environmental Protection); § 206.15 (giving fuel tax liens priority); § 713.77 (mobile home park liens have priority over other interests except for a purchase money lien). Significantly, none of these statutes find any need to except themselves from Section 695.11 (or reference Section 695.11 at all).

In the face of such a complex web of statutes and common law principles governing lien priority, it is impossible to suggest that Section 695.11 is intended to establish a blanket "first in time" rule that preempts any local legislation.

Turning to the application of the *City of Hollywood* test, nothing in Section 695.11 expressly preempts any local regulation. There is no express statement of preemption warning local governments not to regulate. As noted above, when the legislature wishes such preemption, it expresses it directly. *See, supra at* 9, 9 n.4.

Nor is there anything in Section 695.11 that suggests an intent to establish an iron clad rule of priority that applies in all cases and which local governments are forbidden to alter. To the contrary, as discussed extensively above, such a broad interpretation of Section 695.11 would make no sense in light of the complex framework of common law and statutory principles that determine lien priority. Similarly, there can be no conflict. Unless Section 695.11 is interpreted as a blanket rule of lien priority, the fact that the City has added one more exception to a plethora of already established exceptions can hardly be considered a conflict. In short, the City is not treading on ground expressly reserved to the state. *See City of Hollwood,* 934 So. 2d at 1243.

Not to be forgotten is the most fundamental home rule principle of them all: A local government can regulate on any subject matter that the state legislature can regulate. Section 166.021(3); *Wyche v. State*, 619 So. 2d 231, 237-38 (Fla. 1993).

No one argues here the power of the Florida Legislature to regulate lien priority. But if the state has that power, the City has that power as well, unless the legislature specifically and expressly forbids the City from exercising that power.

The principle of home rule is firmly established under Florida law and the courts must construe any potential conflict so as to "secure for municipalities the broad exercise of home rule powers granted by the constitution." Section 166.021(4). *See M & H Profit, Inc. v. City of Panama City*, 28 So. 3d 71, 77 (Fla. 1st DCA 2009) (courts should reject an interpretation of state statutes that impede the ability of local governments to regulate); *City of Kissimmee v. Florida Retail Federation*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005) (courts should indulge every reasonable presumption in favor of an ordinance's constitutionality). Nothing in Section 695.11 expressly forbids the City from regulating lien priority. The reasoning of the Fifth District below is flawed and its decision should be quashed.

2. Chapter 162, Florida Statutes

Wells Fargo's argument below centered on Chapter 162, Florida Statutes, which deals with the regulation of code enforcement proceedings. Chapter 162 is necessitated by Article I, Section 18 of the Florida Constitution which prevents a municipality from imposing any sentence of imprisonment or other penalty without statutory authorization. Chapter 162 authorizes a municipality to set up a code enforcement board and authorizes the board to levy fines, thus, satisfying the

requirement of Article I, Section 18 that penalties be authorized by law. *See* Section 162.03, Florida Statutes (authorizing the creation of a code enforcement board conferring the power to levy fines for non-compliance).

The heart of Wells Fargo's argument is Section 162.09(3). In the event the code enforcement board imposes a fine, this section allows the board to record a certified copy of the order imposing the fine which "thereafter shall constitute a lien against the land on which the violation exists . . ." *Id*. The lien shall be enforceable "in the same manner as a court judgment by sheriffs of this state, including execution and levy against the personal property of the violator." *Id*. If the lien is not paid in three months, the board may authorize the foreclosure of the lien, except that the lien may not be foreclosed on homestead property. *Id*.

Significantly, Chapter 162 says nothing about lien priority, nor does it contain any language suggesting that local regulation is preempted by Section 162. Indeed, the trial court recognized as much when it held that Section 162 was silent on lien priority regulation (R. 163-64). Where the trial court (and Wells Fargo) go wrong is their suggestion that this silence is "purposeful" and can be construed as a preemption of the City's right to regulate lien priority. *Id*. As discussed above, this Court has made clear that preemption cannot be inferred by implication. *See, e.g.*, *City of Hollywood*, 934 So. 2d at 1243 ("Express pre-emption requires a specific

statement; the pre-emption cannot be made by implication nor by inference"). *See supra* at 8-9.

Thus, it is error to infer "purposeful" silence. To the contrary, when the legislature has intended to regulate lien priority, it has done so directly, not by implication. Perhaps the best example is mechanics lien regulation where the statute contains great detail about lien priority. *See* §§ 713.04, 713.07(2), 713.73, Fla. Stat. Another example in the municipal context is Section 197.552 which preserves municipal liens after a tax sale, even when all other interests, including purchase money mortgages, are wiped out. These are just two of many examples discussed above of the legislature's regulation of lien priority. *See supra* at 16-17.

In short, the legislature knows how to regulate lien priority when it wishes to do so, and the only thing that should be inferred from its silence in Chapter 162 is that it did not wish to regulate lien priority in this context. Indeed, Section 166.021(4) requires this inference by commanding the courts to construe exceptions narrowly and in favor of the exercise of home rule powers. *See Tallahassee Memorial Regional Med. Ctr., Inc., v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

Sensing this problem, Wells Fargo argues that Chapter 162 regulates code enforcement boards so comprehensively, there is no room for local regulation. In other words, Wells Fargo attempts to shoehorn itself into the second *City of*

Hollywood test -- whether the regulation is so comprehensive "it is clear that the legislature has clearly preempted local regulation on the subject." *City of Hollywood*, 934 So. 2d at 1243.

Wells Fargo's misunderstanding of this narrow exception to home rule authority is demonstrated by the decisions of this Court finding local regulation to be preempted. *See Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993); *Florida Power Corp. v. Seminole County*, 579 So. 2d 105 (Fla. 1991); *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984). In *Thomas*, the legislature not only regulated comprehensively, it stated its intent to preempt in clear terms. As this court observed, Chapter 316 states as its purpose to "make uniform traffic laws to apply throughout the state and several counties and uniform traffic ordinances to apply in all municipalities." *Thomas*, 614 So. 2d at 470. Clearly any attempt at local regulation would conflict with this expressed command of uniformity.

Similarly, in *Florida Power*, the statute at issue gave the Public Service Commission the exclusive jurisdiction to regulate rates and service. The local regulation, which impacted rates and service, clearly conflicted. 579 So. 2d at 106.

The only case in which this Court found preemption without some sort of express statement of uniformity or exclusivity was *Tribune Co.*, a case interpreting Florida's broad Public Records Act. In that case the statute declared that all public records were open for inspection at all time. This broad statement was completely

inconsistent with any municipal attempt to impose conditions or exceptions to public access. 458 So. 2d at 1077. *Tribune Co, Florida Power*, and *Thomas* are representative of the many cases around the state rejecting preemption in the absence of a clear and direct conflict between the state statute and the local regulation. *See supra*, 10-11. No such direct or comprehensive statement on lien priority appears in Chapter 162. Once again, Chapter 162 says *nothing* about lien priority. *See GLA and Associates, Inc. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th DCA 2003) (field preemption should be limited to the actual scope of the statutory regulation).

The main case Wells Fargo cited below is not to the contrary. *See City of Tampa v. Braxton*, 616 So. 2d 554, 556 (Fla. 2d DCA 1993). In *Braxton*, the City of Tampa attempted to obtain a personal money judgment in the amount of the fines issued in a code enforcement proceeding. Section 162.09(3), however, authorizes only the enforcement of a lien against the property. In light of the express prohibition on additional fines or penalties not authorized by law contained in Article I, Section 18 of the Florida Constitution, Tampa could not impose an additional penalty in the form of a personal money judgment not authorized by Chapter 162. Thus, *Braxton* is a limited holding based on the prevention of a direct conflict with Section 162.09(3). *See also Stratton v. Sarasota County*, 983

So. 2d 51, 54-55 (Fla. 2d DCA 2008) (county could not assess violators with costs beyond the specific costs authorized by Chapter 162).

Wells Fargo also placed much stock below in a series of Attorney General opinions containing broad language about the power of local governments to regulate code enforcement boards. The actual opinions, however, are narrow in scope and firmly within traditional express preemption principles. In one case, for example, the local municipality attempted to impose a fine or a penalty on the violator not authorized by Chapter 162. This the municipality could not do, because of the prohibition on penalties not authorized by law in Article I, Section 18 of the Florida Constitution. Fla. AGO 1984-55, 1984 WL 182554 (June 7, 1984) (municipality may not impose additional penalties in the form of administrative charges in code enforcement proceedings).

In other cases, the municipality attempted regulation that conflicted directly with a provision in Chapter 162. *See* Fla. AGO 2001-77, 2001 WL 1347157 (Oct. 30, 2001) (municipality may not impose fines after the first hearing, when the statute commands that the fines be imposed after a second hearing); Fla. AGO 2001-09, 2001 WL 175937 (Feb. 22, 2001) (municipality may not sell the enforcement of liens to third parties, when the statute specifically requires the liens to run in favor of the government); Fla. AGO 1992-73, 1992 WL 527483 (Oct. 15. 1992) (municipality may not pay salaries when the Chapter 162 states that code

enforcement officials must serve without compensation); Fla. AGO 1985-84, 1985 WL 190064 (Oct. 25, 1985) (municipality may not impose fines prior to the date of compliance); Fla. AGO 1985-17, 1985 WL 190036 (Feb. 27, 1985) (municipality may not impose a fine if the violation is fixed before the second hearing when the statute authorizes fines only if the violation is not fixed by the second hearing).

Neither *Braxton* nor the Attorney General Opinions are helpful to Wells Fargo, because, in each of these cases, there was a direct conflict with a provision of Chapter 162. By contrast, local regulation of lien priority does not conflict with any provision of Chapter 162. This is self-evident because Chapter 162 says nothing about lien priority and, as we have noted above, when the legislature wishes to regulate lien priority, it has not hesitated to do so. Thus, Wells Fargo is relegated to an attempt to infer a conflict, but as noted above, this Court strictly forbids imputing or implying any such conflict.[11]

For example, Wells Fargo argues, without any authority, that regulating lien priority imposes an additional "penalty" not authorized by Chapter 162 in violation of Article I, Section 18. The order in which creditors are paid, however, is not a penalty, and is largely irrelevant to the debtor. It does not matter to the former

[11] Wells Fargo seems to be arguing that Chapter 162 has much detail, therefore there is no further scope for local regulation. Florida courts, however, have specifically rejected the argument that preemption can be found just because a statute is detailed and complex. *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886-87 (Fla. 2010). Significantly, Chapter 162 does not regulate lien priority at all.

owners in this case whether the proceeds from the sale satisfy their municipal obligations or their mortgage obligations first. Nor is there any penalty to Wells Fargo as discussed in connection with Wells Fargo's due process argument below.

Alternatively, Wells Fargo argues that local regulation on lien priority conflicts with Section 162.09(3) where it states that code enforcement liens are enforceable "in the same manner as a court judgment." Because court judgments get no special lien priority, the argument goes, then the City cannot give its own liens additional priority. But not all court judgments are equal. Some judgments do have super priority. *See, e.g.*, § 197.582, Fla. Stat. (final judgment issued on behalf of Department of Environmental Protection has super priority). Thus, to say that code enforcement liens are enforceable in the same manner of judgments says nothing about lien priority. Some liens may lead to judgments and may have special priority (such as mechanic's liens, tax liens, or special assessment liens), some may not. But that is the subject of separate regulation.

Equally important, Wells Fargo ignores that by "enforcement" of the judgment, the statute is referring to collection remedies, as the next part of the sentence makes clear: Judgments are enforceable in the same manner as a court judgment "including execution and levy against the personal property of the violator." In other words, Section 162.09(3) is merely stating that the judgment is enforceable by the same mechanisms as any other judgment. To imply more, is to

impute or imply a conflict, something the court may not do when considering whether the legislature has intended to limit local home rule powers. *See City of Kissimmee v. Florida Retail Federation*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005) (in the absence of a direct conflict, "courts should indulge every reasonable presumption in favor of an ordinance's constitutionality").

In sum, Chapter 162 does not preempt the City's power to legislate lien priority.

II. THE CITY'S LIEN PRIORITY DOES NOT VIOLATE WELLS FARGO'S RIGHT TO DUE PROCESS.

Although not discussed by the Court below and not a part of the certified question, the City anticipates and discusses briefly Wells Fargo's argument that Ordinance 97-07 violates due process. As shown below, no Florida case has ever overturned a lien priority statute on constitutional grounds, and the United States Supreme Court case upon which Wells Fargo built its argument below is off point.

Our earlier analysis of Section 695.11 and Chapter 162 reveals that Florida has a plethora of statutes altering lien priority, often to the detriment of a mortgagee. *See supra* at 16-17. Despite the fact that such lien priority statutes are commonplace, there are no cases in Florida overturning any such statute or ordinance on constitutional grounds. To the contrary, such statutes have been approved when the mortgagee is on notice of the potential lien priority.

For example, this Court has twice addressed claims of lien priority arising out of declarations of covenants in homeowner's association cases. *Holly Lake Association v. Federal National Mortgage Association*, 660 So. 2d 266 (Fla. 1995); *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980). In each of these cases a developer or homeowner's association attempted to enforce a lien for dues or fees and claimed that their lien had super priority dating back to the filing of the declaration of covenants. In each, a party with an interest in the land that post-dated the declaration of covenants but pre-dated the homeowner's failure to pay challenged the super priority.

This Court held that the key was notice to subsequent mortgagees. If the original declaration of covenants made clear that the later lien would attach as of the date of the declaration of covenants, then the association's lien was superior. *Bessemer*, 381 So. 2d at 1348. If, on the other hand, the declaration of super priority was ambiguous about when the lien attached, then the mortgagees' lien was superior. *Holly Lake*, 660 So. 2d at 269. *See Association of Poinciana Villages v. Avatar Properties, Inc*., 724 So. 2d 585, 586 (Fla. 5th DCA 1999) (holding that the homeowner's association's claim of lien had super priority because the mortgagee had notice of the claim of super priority appearing in the declaration of covenants). *Cf., Sarasota County v. Andrews*, 573 So. 2d 113 (Fla. 2d DCA 1991) (holding that a super priority statute was unconstitutional as applied to the lender because the

statute conferring super priority was passed *after* the mortgage was executed; thus, the mortgagee had no notice of the potential super priority lien).

In this case, there is no question of notice to Wells Fargo. Wells Fargo was on notice in 2004 of Ordinance 97-07, which had been passed nearly eight years previously. In fact, Wells Fargo specifically agreed in its contract with the borrower that all of its rights as a mortgagee were "subject to any requirements and limitations" of local ordinances such as Ordinance 97-07. Thus, Wells Fargo chose to extend a mortgage in the City knowing that code enforcement liens, like tax or special assessment liens, would have priority. More than that, it agreed that its rights were "subject to" Ordinance 97-07. Wells Fargo is bound, just like the mortgagees in *Bessemer* and *Poinciana Villages* were bound, because it had notice of Ordinance 97-07 when it executed its mortgage.

The United States Supreme Court case relied upon by Wells Fargo is not to the contrary. *See Mennonite Board of Mission v. Adams*, 462 U.S. 791 (Fla. 1983). In *Mennonite Board*, the issue was not the posting of a lien, or the issue of super priority. Instead, the Court was focused on who should receive notice of a foreclosure of the property for back taxes. The Court came to the unremarkable conclusion that the property could not be sold, and all interests foreclosed, without notice to those who also claimed an interest in the property, such as a mortgagee.

Notice of an impending tax sale, however, is a far cry from requiring notice to a mortgagee every time a new lien is filed, as the Eleventh Circuit has observed. *See Zipperer v. City of Fort Myers*, 41 F.3d 619, 624 (11th Cir. 1995). In *Zipperer*, the Eleventh Circuit distinguished *Mennonite Board* and held that there was generally no obligation to give notice when a super priority lien is filed, except in the rare case where the lien so diminishes the value of the property as to be confiscatory. The Court thus affirmed a super priority special assessment and rejected the mortgagee's constitutional challenge. *See also City of Panama City v. Head*, 797 So. 2d 1265, 1267 (Fla. 1st DCA 2001) (rejecting a facial challenge to a lien with super priority which was imposed without any notice at all, but remanding for evidence as to whether the lien operated in a confiscatory manner).

There is nothing confiscatory about the operation of the ordinance here. Wells Fargo complains that, had it known of the lien, it might have stepped in earlier, fixed the problem on the property, and stopped the fines from running. The problem with this argument is that, unlike the mortgagees in *City of Panama City* or *Zipperer* who had no notice at all of the imposition of the lien, Wells Fargo had notice. Indeed, notice is built into the enforcement of code enforcement violations at every turn and Wells Fargo offers no evidence that the City failed to comply with these notice provisions in this case. For example, code enforcement starts with a notice to the violating property owner. §162.12, Fla. Stat. Wells Fargo can

protect itself by contract and require the homeowner to give notice to Wells Fargo of any code enforcement proceeding. If the homeowner fails to comply, Wells Fargo's remedy is against the homeowner, not the government.

Moreover, along with the notice to the homeowner, the City is required to either give publication notice of the violation for four (4) consecutive weeks in a newspaper of general circulation or to post the notice of the violation on the property and at the courthouse. § 162.12, Fla. Stat. It would be a simple matter for Wells Fargo to have an employee or agent check such publications or postings weekly to determine whether it is impacted by a code enforcement proceeding.

Finally, if the violation continues and the lien is filed, the lien becomes a matter of official public record. § 162.09(3), Fla. Stat. Thus, Wells Fargo was on constructive notice of the lien from the moment it was filed. Yet despite having notice of Ordinance 97-07 for nearly eight years, publication notice from the date of the violation, and constructive notice from the date of the lien, Wells Fargo did nothing to bring the property into compliance or to stop the fines from mounting. Having failed to take action sooner to protect its interests, Wells Fargo is hardly in a position to claim a denial of due process.

To the contrary, Wells Fargo benefits greatly from code enforcement boards and the work they do. The code enforcement system ensures that properties in the city remain up to code which benefits, not only the safety of the City’s residents,

but also the value of all the property in the City. As the legislature has recognized by authorizing a code enforcement scheme, it is important that a municipality, through its code enforcement board, have sufficient enforcement mechanisms to ensure compliance with its codes. Wells Fargo benefits from this system of regulation and enforcement just like every other citizen of the City. If Wells Fargo believes that the cost is too high, it is free to take its business elsewhere. What it cannot do, however, is fail to take steps to protect its own interests and then complain of violations of due process.

CONCLUSION

For all the foregoing reasons, the certified question should be answered in the affirmative and the decision of the Fifth District should be quashed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to Matthew J. Conigliaro, Carlton Fields, P.A., 200 Central Avenue, Suite 2300, St. Petersburg, Florida 33701 and Michael K. Winston, Carlton Fields, P.A., 525 Okeechobee Blvd., Suite 1200, West Palm Beach, Florida 33401 this ____ day of August 2011.

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Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Attorney