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.

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF ON THE MERITS OF PETITIONER
CITY OF PALM BAY

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PRELIMINARY STATEMENT

In this brief we adhere to the same abbreviations used in the initial brief. In addition, "IB" refers to our initial brief on the merits, "AB" refers to Wells Fargo's answer brief on the merits, and "FLTA Br." refers to the amicus brief filed by the Florida Land Title Association.

ARGUMENT IN REPLY

Two well-settled and uncontested propositions of law decide this appeal. The City of Palm Bay may (1) "enact legislation concerning any subject matter upon which the state Legislature may act"[1] and (2) exercise any such governmental power "except when expressly prohibited by law."[2] Wells Fargo gives a passing nod to these dispositive principles in its brief (AB at 12), and then proceeds to ignore them. Indeed, Wells Fargo turns these standards on their head by arguing that it is somehow the City's burden to demonstrate specific statutory authority to enact its lien priority ordinance. *See, e.g.*, AB 26. To the contrary, the City needs no permission to act. It has all the permission it needs under Chapter 166. The real issue in this case is whether the Legislature has "clearly" and "expressly" prohibited the City from acting. *See* IB at 8-9.

Viewed in this light, the case is easy to resolve. Nothing in the statutory framework concerning lien priority or code enforcement proceedings contains any limitation on the City's powers. Just as the state has the power to regulate lien priority, the City may regulate. There is no express preemption.

I. There is no Conflict with Section 695.11

Wells Fargo's analysis begins with the simplistic proposition that the City's lien priority ordinance conflicts with the "first in time" rule, which it claims is

[1] § 166.021(3), Fla. Stat. (2006).
[2] *City of Boca Raton v. State*, 595 So. 2d 25, 28 (Fla. 1992).

codified in Section 695.11, Florida Statutes. The question is not, however, whether "first in time" is the general rule in Florida. Of course it is. The question is whether the *entire* statutory framework concerning lien priority -- a framework that extends beyond Section 695.11 and which contains many exceptions to the first in time principle -- can be read as expressly prohibiting a municipality from adopting its own lien priority exceptions. Nothing in the broader statutory framework evinces an intent to expressly preempt municipalities from this realm. *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010) (in determining whether preemption applies, the court must look to "the whole law, and to its object and policy.").

Once again, Wells Fargo applies the wrong standards, in two important ways. First, it argues that in reviewing whether the City's ordinance creates conflict, the Court must resolve any doubt in favor of the state statute. This outdated proposition appears in two cases decided before the 1968 Constitution and the enactment of Chapter 166.[3] These cases have not been cited for this principle since, and for good reason. Chapter 166 is a broad grant of legislative power, and courts must construe it to effectuate that purpose. *See City of Miami Beach v. Forte Towers*, 305 So. 2d 764, 766 (Fla. 1974). Section 166.021(4) itself commands that deference by removing "any limitations, judicially imposed or

[3] *See* AB at 13-14 (*citing, 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).

otherwise, on the exercise of home rule powers other than those so expressly prohibited." Thus, before the Court will find preemption, it must find a "clear and unambiguous legislative intent" to limit city powers. *See Pinellas County v. City of Largo*, 964 So. 2d 847, 853 (Fla. 2d DCA 2007); *Sarasota Alliance*, 28 So. 3d at 886 (Fla. 2010) (express preemption "must be accomplished by clear language stating that intent."). In short, the burden is on Wells Fargo, not the City.[4]

Secondly, Wells Fargo's conflict analysis erroneously begins and ends with Section 695.11. According to Wells Fargo, Section 695.11 commands that the first lien has priority and the ordinance conflicts with the statute by not honoring this principle. But the analysis of statutory lien priority does not stop there. As even Wells Fargo concedes elsewhere in its brief, the question is whether the ordinance conflicts with the "legislative scheme," not a particular statute that is but a part of a larger framework. AB at 26 (*citing, Sarasota Alliance,* 28 So. 3d at 886).

The point we made in our initial brief was that Section 695.11 is but one piece of a larger common law and statutory puzzle concerning lien priority. Thus, Wells Fargo's debate about whether Section 695.11 is the codification of the first in time rule misses the point.[5] The real point is that Section 695.11 is part of an

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[4] *City of Aventura v. Masone*, __ So. 3d __, 2011 WL 5964359 (Fla. 3d DCA Nov. 30, 2011) (in a home rule challenge, "a party who seeks to overthrow such an ordinance has the burden of establishing its invalidity.'").

[5] Even Wells Fargo's *amicus* disagrees with Wells Fargo on this point. As we argued, and as the FLTA agrees, Section 695.11 merely determines priority of

over-arching statutory and common law framework for determining lien priority in a particular case -- a point with which Wells Fargo's *amicus*, the FLTA, largely agrees. *See* IB at 14-15; FLTA Br. at 6-7.

Viewed in this light, the question of whether there is a conflict between the City's ordinance and the statutory scheme is resolved very differently. There is no Florida legislative command that lien priority is always determined by the first in time rule. Instead, one must look at the order of recording (Section 695.11); the principle that lien priority is ultimately determined by actual and constructive notice (Section 695.01); common law principles about when a party is on actual or constructive notice; statutory and other exceptions to the first in time principle;[6] and contractual exceptions to the first in time principle.[7] Nothing about the City's ordinance conflicts with this multi-faceted framework.

Thus, it is not enough to declare that the City's ordinance conflicts with the general rule. Instead, Wells Fargo must demonstrate that the Legislature intended "first in time" to be a blanket rule that always prevails. But the statutory scheme is quite different. Sometimes first in time wins; often it does not. Adding one exception to a statutory scheme rife with exceptions does not create a conflict.

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recording, not priority of interest. FLTA Br. at 9. The relative rights of the parties are not determined solely by the order of recording but by other principles as well such as actual or constructive notice. *Id*. at 6-7.

[6] *See* IB at 16-17 for a list of examples of exceptions.

[7] *See Holly Lake Association v. Federal National Mortgage Association*, 660 So. 2d 266 (Fla. 1995).

This is particularly evident when one applies the first of the two guiding principles discussed above: if the state has the power to regulate in a particular area, the municipality has the same power, unless the Legislature expressly limits that power. *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006). Here the state has enacted a statutory scheme where the first in time rule is but a starting point, and the ultimate determination of lien priority is determined by a broad range of statutes, statutory exceptions, and common law and contractual principles. Nothing in this framework evinces a "clear and unambiguous directive" that municipalities may not add to this patchwork of statutes, common law, and contractual principles. *See Pinellas County,* 964 So. 2d at 853; *Sarasota Alliance*, 28 So. 3d at 886; *Exile v. Miami-Dade County*, 35 So. 3d 118, 119 (Fla. 3d DCA 2010) (courts should be careful in imputing legislative intent to preclude local governments from exercising their home rule powers).

There is no Conflict with Chapter 162

Once again Wells Fargo applies the wrong standard. It argues that nothing in Chapter 162 *permits* a local municipality to adopt code enforcement options and then make changes -- even as to areas where the code enforcement statute is silent. AB at 26. This is exactly backwards. The City is not required to look for permission to regulate. To prevail, Wells Fargo must find a "clear and unambiguous directive" *prohibiting* the City from regulating.

Of course, there is no such directive in Chapter 162. Nothing in the statute regulates lien priority at all, let alone directs the City not to regulate lien priority. As we noted in our initial brief, silence on lien priority cannot be interpreted as a prohibition on the City's right to regulate. *See* IB at 20 (*citing Mulligan*, 934 So. 2d at 1243 ("Express pre-emption requires a specific statement; the pre-emption cannot be made by implication [or] by inference.")). If the Legislature intends to regulate lien priority, it knows how to do so. *See* IB at 16-17, 21. The Legislature's choice not to regulate lien priority in Chapter 162 is dispositive. The City is free to regulate where the state has chosen not to tread. *See Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314-15 (Fla. 2008) (there cannot be a conflict in an area the Legislature has chosen not to regulate); *City of Kissimmee v. Fla. Retail Federation*, 915 So. 2d 205, 209 (Fla. 5th DCA 2005) (city may regulate an area not covered by the statute).

In light of the absence of any regulation of lien priority, Wells Fargo must stretch in vain to find a conflict between Chapter 162 and the City's lien priority ordinance. Wells Fargo claims to find that conflict in Section 162.09(3) which states that the City's code enforcement lien "shall be enforceable in the same manner as a court judgment by sheriffs of this state . . . ." AB at 18-21. Because court judgments get no special lien priority, Wells Fargo reasons, the City cannot give its own liens additional priority.

To begin with, the reference to "enforceable in the same manner" cannot be read as a restrictive reference to lien priority. If the Legislature had intended this provision to limit a municipality's power to regulate lien priority, it could have said so far less obtusely. For example, Chapter 162 could have stated directly and unambiguously that municipalities are prohibited from granting their code enforcement liens super priority. That is exactly how Chapter 162 handles homestead property; Section 162.09(3) directly prohibits the City from foreclosing a homestead. This is the sort of "clear and unambiguous directive" that can form the basis of preemption. The absence of such a clear prohibition is dispositive.

A more reasonable reading of "in the same manner" is that the Legislature was making clear that a code enforcement lien could be enforced through the usual remedies available to a judgment creditor such as attachment, garnishment, proceedings supplementary and the like. Nothing about Section 162.09(3) reads like a prohibition, which is what Wells Fargo must demonstrate to find preemption. *See Fla. Retail Federation*, 915 So. 2d at 209 (rejecting preemption because, in the absence of direct conflict, "courts should indulge every reasonable presumption in favor of an ordinance's constitutionality").

Equally important, Wells Fargo had no response to our point that not all judgments are equal. *See* IB at 26. Some judgments do have super priority. *See, e.g.*, § 197.582, Fla. Stat. (judgment in favor of Department of Environmental

Protection has super priority). Thus, to say that code enforcement liens are enforceable in the same manner as judgments says nothing about lien priority.

Wells Fargo next claims that a super priority lien creates a conflict with Chapter 162 because it adds an additional remedy not specifically granted by Chapter 162. Once again, Wells Fargo erroneously focuses on whether the statute grants permission for the remedy rather than whether the statute prohibits a particular remedy. There is no such prohibition in Chapter 162. Moreover, the cases and Attorney General Opinions upon which Wells Fargo relies have already been examined in our initial brief. *See* IB at 23-25. In each of those cases, the city attempted to adopt a procedure or remedy that conflicted with the remedies in Chapter 162. *Id*.

There can be no such conflict in this case. Chapter 162 specifically contemplates that the City may have a lien and says nothing to limit the priority of that lien vis-à-vis other creditors. Absent a clear and unambiguous directive imposing such a limitation, the City remains free to regulate. As this Court has made clear, there is no conflict when the statute and the ordinance can peaceably co-exist. *Phantom*, 3 So. 3d at 315. Because Chapter 162 is silent on lien priority, there can be no conflict and the ordinance and the statute are compatible. *See Phantom*, 3 So. 3d at 314-15 (regulating an area not addressed by the state statute does not create conflict). Put another way, the test for conflict is whether

compliance with the ordinance compels a violation of the statute. *See Sarasota Alliance*, 28 So. 3d at 886. There is no such conflict. Granting lien priority in no way violates Section 162.09(3), which is silent on priority.

Nor has the City imposed an additional penalty within the meaning of Article I, Section 18 of the Florida Constitution. The so-called "penalty" is the imposition of a lien, which is fully authorized by Section 162.09(3). Thus, a lien is not an "additional" penalty. Moreover, as we discussed in our initial brief, the order in which creditors are paid is not a penalty and is largely irrelevant to the debtor. *See* IB at 25.

The fact that other creditors, such as Wells Fargo, may be affected by this lien, does not make the lien a penalty within the meaning of Article I, Section 18. Penalties imposed on one party often have a collateral effect on other parties, but Wells Fargo has offered no authority that this collateral impact is considered a "penalty" prohibited by the Constitution. Indeed, in this case, this sort of collateral impact on creditors is an inevitable consequence of the code enforcement scheme, regardless of whether the City's lien had super priority. If, for example, the city had a "standard" lien and Wells Fargo later extended a mortgage subject to that lien, the foreclosure of that code enforcement lien would likely render the second mortgage less valuable. But there has been no suggestion that this collateral impact to the lender is an additional penalty not authorized by the Legislature. In

other words, the collateral impact that may result from a super priority lien is no different from the sort of collateral impact that may result from the enforcement of any lien. Simply put, there is no additional penalty beyond the sort of penalty already contemplated by the statute.[8]

Finding no express preemption, Wells Fargo then retreats to implied preemption, arguing that Chapter 162 is such a pervasive and detailed scheme that the Legislature has occupied the field. Implied preemption is "severely restricted and strongly disfavored" and rarely imposed. *Exile,* 35 So. 3d at 119. Indeed, this Court has found implied preemption without some sort of express statement of uniformity or exclusivity only once, in *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984). As we discussed in our initial brief, the statute at issue in the *Tribune Co.* case declared that all public records were open for inspection at all times. This broad statement was completely incompatible with any municipal attempt to impose conditions or exceptions to public access. *Id*. at 1077; IB at 22.

Since *Tribune Co*., this Court has made clear that it is not enough simply to argue that the state statutes at issue are "detailed or extensive." *See Sarasota*

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[8] Wells Fargo may respond that, as a later mortgagee, it would be contracting knowing that a code enforcement lien already exists. This may be relevant to the due process issue, which we discuss below, but has nothing to do with whether the possibility of collateral damage to other lenders is an additional penalty prohibited by Article I, Section 18. As we explain below there is no due process issue because Wells Fargo extended a mortgage in Palm Bay knowing full well that any code enforcement lien in the City would have super priority.

Alliance, 28 So. 3d at 886 (Fla. 2010) (rejecting preemption despite the fact that Florida election law was subject to 10 chapters and 19 statutory pages of detailed regulation). A city ordinance is free to add additional requirements or address areas not dealt with by even a detailed state statute unless the ordinance creates an irreconcilable conflict. *See id*. As noted above, Chapter 162 does not deal with lien priority; thus, an express conflict is impossible.

II. The Ordinance Does not Violate Due Process

As a threshold matter, the City did not waive this argument. Although an appellant may not affirmatively raise a new issue in its reply brief, in this case Wells Fargo raised the merits of the due process issue in its answer below. The City had the right to respond to this argument in its reply. *See* Fla. R. App. P. 9.210(d). Thus, the due process issue was fully presented to the Fifth District in the briefs and was a feature at oral argument. There is no prejudice to Wells Fargo when this Court addresses an issue that was raised, briefed, and argued below.[9]

Moreover, once this Court accepts jurisdiction, it has the discretion to consider any issue raised by the parties. *See, e.g., Tillman v. State*, 471 So. 2d 32, 34 (Fla. 1985). In light of the fact that the important due process issues were briefed and argued below and have been fully briefed in this Court, this Court

[9] The obvious purpose behind the principle that an appellant cannot raise an issue for the first time in the reply is that the appellee has no opportunity to respond. This concern does not exist when the appellee raises and briefs the issue first.

should exercise its discretion and resolve the issue. The due process issue is clearly of statewide importance, as demonstrated by the many amicus briefs in this case. The alternative is an inevitable subsequent appeal in this or another case raising the same due process issue that is ripe for decision in this case, a result that this Court has often cautioned against. *See. e.g., S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974).

Turning to the merits, the significant flaw in Wells Fargo's analysis is the fact that it extended this mortgage with full knowledge of the City's lien priority ordinance and the super priority it gives to code enforcement liens. The ordinance pre-dated the mortgage by eight years. Moreover, Wells Fargo specifically agreed in its mortgage to be bound by and "subject to" all applicable City ordinances, which obviously includes the ordinance at issue here. In short, Wells Fargo contractually agreed to be bound by the City's lien priority ordinance.

Thus, this case is no different from cases like *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 we discussed in our initial brief, these cases stand for the proposition that a party could be bound by a declaration of covenants imposing a homeowners' lien with super priority so long as the mortgagee had notice of that declaration and extended its loan with actual or constructive knowledge of the super priority lien. IB at 28-29. But if a pre-

existing declaration of covenants can be enforced to grant super priority, why should a similar City ordinance be unenforceable when it long predates the mortgage at issue? In each case, the reasoning and the result should be the same.

As we discussed in our initial brief, the *Mennonite* case upon which Wells Fargo relies concerned a tax sale of the entire property without any notice to the lender.[10] This case is far closer to *Zipperer*, in which the Eleventh Circuit 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.[11]

There is nothing confiscatory about the City's lien priority ordinance. In addition to providing notice to the offending property owner and publication notice to the world, the City recorded its lien as required by the statute. Thus, Wells Fargo was on constructive notice of the code violation and had every opportunity to step in and stop the accrual of fines simply by ensuring that the property was brought into compliance. Wells Fargo has not explained why it would be burdensome to monitor published legal notices or the public records to ensure that its properties had not been cited for code violations. How is Wells Fargo any different from an absentee landlord who has a similar obligation to monitor its properties and would unquestionably be bound by any code enforcement lien

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[10] *Mennonite Board of Mission v. Adams*, 462 U.S. 791 (Fla. 1983).
[11] *Zipperer v. City of Fort Myers*, 41 F.3d 619, 624 (11th Cir. 1995).

arising from the conduct of its tenants? In short, Wells Fargo did nothing to protect its interests despite having eight years' notice of Ordinance 97-07, and despite having agreed to be bound by the notice in its mortgage, receiving publication notice from the date of the violation, and having constructive notice from the date of the lien. Wells Fargo cannot claim a denial of due process.

Moreover, Wells Fargo ignores that it benefits from this code enforcement scheme. These fines, which are authorized by Chapter 162, are intended to provide the leverage the City needs to ensure that properties within the City stay in compliance with applicable City codes. This, in turn, raises property values to the benefit of every property holder (and lender) within the City. Thus, it is irrelevant whether the City stepped in to fix the property. The larger purpose of these fines is to encourage those with an interest in the property to comply with the law.

Wells Fargo similarly ignores the responsibilities that come with its interest in land. If it is going to take back an interest in land in return for its mortgage, then it must bear some responsibility for ensuring that the land remains in compliance -- particularly when Wells Fargo's own mortgage states that it is "subject to" this regulatory framework. As we said in our initial brief, if Wells Fargo finds these costs to be too high, it is free to take its business elsewhere.

In this regard, Wells Fargo's *amici* argue, without a shred of factual support, that the existence of super priority liens will unfavorably impact the lending

market. Yet, in the same briefs they note the ubiquity of these lien priority statutes around the state. *Amici* offer no evidence that any of these many ordinances on lien priority have had any impact on lending. They also ignore that there are many Florida Statutes impacting lien priority -- statutes that will not be affected by this Court's decision. *See* IB at 16-17. *Amici* offer no evidence that these super priority statutes have impacted lending in the slightest. Indeed, Wells Fargo made its decision to lend in this case despite the fact that the City's ordinance had been on the books for eight years. Nor do *amici* offer evidence that decisions such as *Holly Lake* and *Bessemer* that grant super priority to homeowner assessment liens have impacted lending in Florida. In other words, despite a long history of super priority ordinances and statutes in Florida, *amici* can do nothing more than speculate about an impact on the mortgage market. We submit that these unsupported claims should be taken with a grain of salt.

CONCLUSION

For all the foregoing reasons, this Court should answer the certified question in the affirmative, reject Wells Fargo's due process argument, and quash the Fifth District decision below.

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; Michael K. Winston, Carlton Fields, P.A., 525 Okeechobee Blvd., Suite 1200, West Palm Beach, Florida 33401; Jamie A. Cole and Susan L. Trevarthen, Weiss, Serota, et al., 200 E. Broward Blvd., Suite 1900, Ft. Lauderdale, Florida 33301; Edward G. Guedes, Weiss Serota, et al., 2525 Ponce de Leon Blvd., Suite 700, Coral Gables, Florida 33134; Mark Barneby, Scott Rudacill and Kurt Lee, Kirk Pinkerson, P.A., P.O. Box 3798, Sarasota, Florida 34230; Erin J. O'Leary, Brown, Garganese, Weiss & D'Agresta, P.A., 111 North Orange Ave., Suite 2000, P.O. Box 2873, Orlando, Florida 32802; Virginia B. Townes and Carrie Ann Wozniak, Akerman Senterfitt, 420 South Orange Ave., P.O. Box 231, Orlando, Florida 32802; Alan Fields, 249 E. Virginia Street, Tallahassee, Florida 32302; Homer Duvall, III, 6158 Bayou Grande Blvd. NE, St. Petersburg, Florida 33703; Heather M. Christman, Christman Law, P.L., P.O. Box 7692, Winter Haven, Florida 33883; and Stephen R. Senn, Peterson & Myers, P.A., P.O. Box 24628, Lakeland, Florida 33802 this ____ day of December 2011.

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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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