

Real Property, Probate, and Trust Law Section of the Florida Bar

White Paper Fair Notice of Governmental Liens Draft of 6/29/09

I. SUMMARY

This proposed bill requires all governmental liens (other than ad valorem taxes, special assessments collected using the uniform method and liens for utility services) to be recorded in the official records before such are binding as to subsequent interests acquired for value. The bill expands the authority of local governments to enter onto property, make emergency repairs and to make special assessments as to the costs of repairs which have the same priority as ad valorem taxes and which attach notwithstanding homestead status, preserves those from elimination in foreclosure and limits the duration of the lien unless enforced. Cost assessments are distinguished from fines and penalties, which are treated under the current rules regarding priority, foreclosure and homestead. The bill expands the current mechanism for determining the applicability of homestead protections under s. 222.01.

By making it easier to identify liens which attach to real property, and eliminating the ability of cost assessments to be rejected in foreclosure, the bill should have a slight favorable impact on local government revenues.

II. CURRENT SITUATION

Liens assessed and maintained in the office of a municipality or branch of a municipality often go undetected due to the difficulty in finding the liens, when they are unrecorded, and in knowing which branches of government have the right to impose the lien and whom to contact to determine the existence of possible liens. In an unscientific polling of local governments by the RPPTL Section, only 60.8% of the responding governments recorded all of their liens in the official records of the county.

The result is that liens often go undetected and unpaid for extended periods and through successive mortgages and transfers of ownership, and the burden of such liens falls unfairly on innocent purchasers. Non-record liens are not covered by Florida title insurance policies, except in rare cases.

With the mass of foreclosures, local governments are facing increasing difficulties with vacant, unmaintained, and unsecured properties. Local governments are bearing significant costs in mowing, securing properties and eliminating health hazards and nuisances on these properties, and the current lien mechanisms under Chapter 162, Fla. Stat. leave those assessments (arguably) subject to elimination in foreclosure. Nor do such cost liens attach to homestead property under the current statutory framework. The mechanisms for noticing violations and instituting repairs under chapter 162 are not well

suiting to dealing with emergency situations needing immediate repair in order to protect the public health and welfare.

The Florida constitutional provisions of Article X, sec. 4, regarding the forced sale of homestead have been generally applied with regard to local government liens. This concept is codified in s. 162.09(3). The same is true of criminal cost assessments, public defender and restitution liens. However, the expedited statutory mechanism at s. 222.01 for the determination of homestead does not apply as to these categories of liens, leading to a need for a separate lawsuit to judicially determine homestead status and whether such liens attached. This is a significant waste of judicial resources where in most cases, the homestead status is not disputed.

III. EFFECT OF PROPOSED CHANGES

The conceptual changes being implemented in this bill are:

1. Amending the Recording Act s. 695.01
 - a. To require all governmental liens on real property (except taxes, special assessments levied and collected under the uniform method described in s. 197.3632, and liens for utility services) to be recorded in the official records before such are binding upon a lienor or subsequent purchaser for value without notice.
 - b. To require any lien which asserts a priority other than based on its recording order to so state on the face of the recorded lien and include a reference to the law authorizing such priority.
 - c. To permit the assignment of such liens to third parties paying the amounts owed.
2. Amends s. 162.03
 - a. To clarify that any liens assessed other than by the mechanisms set forth in chapter 162 (ie an alternative ordinance adopted code enforcement mechanism) must be recorded in the official records.
 - b. Clarifies that local governments have the authority under ch. 162 to provide by ordinance that the failure to repair a property which is broken into or vandalized, or which otherwise falls into disrepair, becomes uninhabitable, or creates a public health, safety or welfare risk is a violation subject to enforcement action
 - c. Reiterates that procedures for alienation of property and foreclosure of mortgages and liens have been pre-empted by state statute and court rules and may not be limited or preconditions established by local ordinance.
 - d. Restricts the authority of local government to require lenders to file or register as to abandoned, vacant, or foreclosed properties or of properties in default.
3. Amends s. 162.09

- a. to permit a local government official, to whom such authority has been delegated and after an attempt to notify the record owner and holder/servicer of any mortgage, to institute emergency repairs necessary to address a serious threat to the public health, safety, and welfare.
- b. to provide that the code enforcement board shall, after review and determination of reasonableness, assess the costs of making emergency repairs
- c. to limit liability with regard to any negligence in having made emergency repairs.
- d. to authorize two categories of liens which may be assessed by a code enforcement board.
 - i. Those costs of making repairs, determining ownership and giving notice, recording liens and direct costs of enforcement, which may be assessed as special assessments on a par with taxes and which may be enforced without regard to Constitutional homestead protections, to expressly provide that such may not be eliminated by foreclosure or precluded from attachment by s. 48.23 regarding lis pendens.
 - ii. Those fines and penalties assessed to incentivize compliance with orders of the board, which would amount to a “taking” were they placed ahead of existing liens on the property and do not fit within the language of Florida’s Constitutional provisions regarding homestead.
- e. to give local government the authority to also file liens attaching to personal property by filing in the Secretary of State’s personal property lien database created under s. 55.201-55.209.
- f. to remove the current statutory provision providing that the lien attaches to all real property owned by the violator while making the obligation to pay fines, penalties and assessments a personal obligation of the owner of the property at the time of assessment.
- g. Authorizes entry upon private property for purposes of making emergency repairs and creates an exemption from criminal trespass statutes for doing so.

Amends s. 162.10 to limit the duration of a lien for fines or assessments to 2 years unless action is begun to enforce.

Creates s. 162.14 to provide for severability if any portion of the chapter is declared invalid or unconstitutional.

Amends s. 222.01 regarding the designation of homestead property

- a. to permit non-judicial determinations of homestead exemption to be made as to a code enforcement lien pursuant to ch. 162 other than a cost assessment pursuant to s. 162.092(3), or a notice of lien for any other purpose by any court, governmental or municipal body.

- b. to permit the use of this non-judicial determination mechanism by subsequent owners, lienholders and successors in interest to the party entitled to homestead protections.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

State Government: No direct fiscal impact

Clerk of Court: Positive Fiscal Impact by increased recording fees.

Local Governments:

There should be a positive fiscal impact on local government assessing the liens by (a) expanding the authority to assess for repairs; (b) permitting the recovery of costs ahead of foreclosure, other liens, and without homestead restriction.

This will be partially offset by increased administrative costs and recording costs, only some of which will be recoverable (search, notice and recording costs are to be added to the cost assessment) and the costs of organizing and recording existing liens.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposed legislation should have a positive impact on the private sector through greater certainty and determinability of liens. Lenders will be adversely impacted by the imposition of special assessments for costs, however it must be kept in mind that these costs directly protect the value of their collateral and this bill eliminates the need to comply with the myriad of local ordinances attempting to regulate foreclosure and require registration. .

VI. CONSTITUTIONAL ISSUES

There are three constitutional issues raised by this bill.

The first is in giving assessments for costs a priority on a par with taxes. Many local government ordinances have asserted this authority for years, but any change in priority (when applied to existing interests such as mortgage liens) is subject to constitutional challenge as a taking.

The second is the characterization of the costs incurred by the local government in making repairs as both an assessment and an obligation contracted for repairs. The pertinent part of Art. X. Sec. 4 reads:

- (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for

house, field or other labor performed on the realty, the following property owned by a natural person:

While we are unaware for any precedent for imputing a contract, the nature of an assessment for repairs to a single property is sufficiently similar to the traditional use of assessing for street, sidewalk and utility improvements serving a property that backed by a legislative statement, it should qualify.

The third constitutional issue is in permitting the enforcement officials to enter onto private property for purposes of making repairs.

The bill includes a severability clause at s. 162.14

VII. OTHER INTERESTED PARTIES

The League of Cities, Florida Association of Counties and Florida Bankers Association are expected to have an interest in this bill.