

PUBLICATION

Florida to Government: Your Lien Doesn't Foreclose This Old Mortgage

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The Florida Supreme Court has ruled that cities cannot create ordinances that subject prior recorded mortgages to their subsequently recorded county or governmental liens, because it conflicts with Florida's state statutes on the issue.

Until now, Florida law had been divided on whether a city could give its subsequently recorded government lien super-priority and thus the ability to foreclose a prior recorded mortgage. In Florida's Fifth District Court of Appeal, it was clear that, even if the city had enacted a super-priority ordinance, prior recorded mortgages superseded subsequently recorded code enforcement liens. At issue in that case – the 2011 decision *City of Palm Bay v. Wells Fargo Bank, N.A.* – was that Florida Statute Section 695.11 provides that any instruments that are required to be recorded pursuant to section 28.222, will be deemed recorded once an official register number is affixed. It further provides that recorded instruments with a lower official number will have priority over one with a higher number. This statute codifies, as Palm Bay recognized at oral argument, the common law rule of "first in time, first in right." Thus, Florida's legislature had decided that priority for instruments such as mortgages and liens will generally follow the "first in time" rule. The Fifth District held that Ordinance 97–07 conflicted with this mandate by granting Palm Bay's code enforcement liens priority over a mortgage, even when the mortgage was recorded before the lien. The court held that the only way ordinance 97–07 could be effective was by violating the terms of Florida Statute Section 695.11, and that consequently, ordinance 97–07 must yield to the statute.

On May 16, the Florida Supreme Court held that the Fifth District's explanation of Section 695.11, set forth above, was "misleading" because it inferred that first in time always means first in right under Florida law, which is not a complete analysis. But the Florida Supreme Court nevertheless affirmed the Fifth District Court of Appeal's decision that held the City's ordinance unconstitutional under the Florida Constitution because it was inconsistent with Florida's state statutes. The net effect is that the prior recorded mortgage had priority over the subsequently recorded code enforcement lien.

But in Florida's Third District Court of Appeal (South Florida), county liens were made superior to a previously recorded mortgage. Two cases from 1965 and 1990, *Gleason v. Dade County* and *Miami Shores Village v. Gibraltar Savings and Loan Association*, are in conflict with the Fifth District's *Palm Bay* opinion. In these two cases, the Third District upheld a local government's authority to legislate lien superiority.

The *Palm Bay* case was appealed to Florida's Supreme Court, who ruled on May 16 by a vote of 5 to 2 that mortgages cannot be superseded by subsequently recorded county or government liens. This is good news for mortgage servicers, who were often forced to choose between releasing their mortgage liens, allowing themselves to be foreclosed by the governmental entity, or paying the liens off to save their mortgages. The *Palm Bay* case does not mention the above-referenced Third District cases, but it is hard to imagine how they could remain viable now.

It should be noted that the Court's decision does not affect situations where servicers are applying for excess funds after a tax deed sale; in those instances, governmental liens do have priority under Florida Statute Section 197.552.

