

# News Alert

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## Florida Supreme Court Declares “Superpriority” Municipal Liens Invalid

It has become increasingly common in recent years for Florida municipalities to enact local ordinances granting so-called “superpriority” status to liens for municipal assessments. These types of ordinances typically state that municipal liens enjoy a higher priority than any other lien, including the lien of a first mortgage holder. In Sarasota, for example, both the City and the County have enacted a number of such ordinances, granting themselves superpriority status for liens imposed for a variety of assessments for services ranging from the clearing of rubbish or overgrowth, to towing and impounding motor vehicles, to performing fire rescues, among much else. Due to the purported superpriority status of municipal liens, banks, title companies, real estate professionals, and foreclosure purchasers typically assume that such liens cannot be avoided through the foreclosure process, since the foreclosed mortgage would necessarily be lower in priority than the municipality’s superpriority lien. Accordingly, many times banks do not even join municipal lienholders as defendants in a foreclosure action.

The Florida Supreme Court, however, recently turned these long-standing practices and assumptions upside down with its ruling in *City of Palm Bay v.*

*Wells Fargo Bank, N.A.*, No. SC11-830 (Fla. May 16, 2013). At issue in *Palm Bay* was a municipal ordinance granting superpriority status to all municipal liens, which the City justified based on its “broad home rule powers.” The Court noted, however, that the source of such powers, Article VIII, section 2(b) of the Florida Constitution, provides that municipal powers are subject to limitation “as otherwise provided by law.” While the Court acknowledged the broad general authority of municipalities to enact ordinances under their home rule powers and to regulate concurrently with the Legislature, the Court reiterated the well-established principle that municipalities may not regulate subjects that are expressly preempted by State law. The Court further noted that such “preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation on the subject.”

Turning to the superpriority lien ordinance at issue in the case, the Court cited two statutes as evidence of the States’s intent to preempt the subject of lien priority. First, Florida Statutes § 695.11 provides that the sequence in which an instrument is recorded in the official public register determines its priority as to other instruments, with the lower number holding the higher priority.

Second, the Court cited Florida Statutes § 695.01(1), which provides that no conveyance, transfer, or mortgage of a property interest is valid against a subsequent bona fide purchaser unless it is recorded in the public register. This is commonly known as a "recording statute," because it requires a property interest to be publicly recorded in order to maintain its priority against later-acquired interests.

In striking down the City's municipal ordinance, the Court held that the ordinance "establishes a priority that is inconsistent with the priority established by the pertinent provisions of chapter 695." The ordinance, the Court reasoned, displaced the policy judgments of the Legislature and "destroy[ed] rights that the Legislature established by state law. A more direct conflict with a statute is hard to imagine." The Court concluded that the municipal ordinance could not be reconciled with the Legislature's statutory priority scheme, and therefore, the ordinance was invalid.

The Court concluded its ruling by rejecting the City's argument that its own exceptions to the Legislature's statutory scheme were justified by the fact that the Legislature itself had created numerous exceptions to the recording statute. This was similar to the position adopted by dissenting Justices Perry and Pariente, who concluded that the existence of such numerous exceptions indicated that the Legislature did not in fact intend its statutory scheme to be so pervasive as to preclude concurrent regulation by municipalities, which is generally permitted in the absence of an explicit prohibition from the Legislature. The majority, however, categorically rejected this argument, holding that the City's ordinance directly and irreconcilably conflicted with the Legislature's statutory scheme, and that the Legislature's power to craft exceptions to its own statutes in no way implied a similar power for municipalities. "In this context," the Court concluded, "concurrent power does not mean equal power."

The Palm Bay decision comes as welcome news to lenders, title companies, and others involved in the foreclosure market. The ruling removes a cloud of uncertainty from the titles of properties subject to such liens and simplifies the foreclosure process. Until now, lenders often faced the unpleasant choice between releasing their mortgages, allowing themselves to be foreclosed by the municipal lienholder, or paying off the municipal liens to save their mortgages. The Palm Bay decision is also certain to help the balance sheets of lenders and other purchasers who acquire title pursuant to a foreclosure sale, as municipal liens can now be extinguished. Going forward, it will be important for lenders and their attorneys to join municipalities as defendants in foreclosure actions, in order to take advantage of the relief Palm Bay provides.

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