DO CODE ENFORCEMENT VIOLATIONS "RUN WITH THE LAND"? COMPETING INTERESTS OF LOCAL GOVERNMENTS AND PRIVATE PARTIES AND THEIR CONSTITUTIONAL CONSIDERATIONS IN CODE ENFORCEMENT PROCEEDINGS

Harry M. Hipler*

I. INTRODUCTION

In a traditional sale between private parties, a real estate attorney ascertains title and whether there are any judgment liens against the seller and his or her real property after the purchaser inspects and visits the site. If the real property is purchased on the courthouse steps at a foreclosure sale, not only must the prospective purchaser and his or her attorney ascertain the title, they must determine if liens were properly joined in the lawsuit before purchase. It is the responsibility of the purchaser to make sure that the affairs of the real property are in order before the purchase is finalized, with the number one consideration being—Does it make economic sense to purchase and own the real property? This legal due diligence normally occurs in the sixty to ninety days prior to purchasing the real property, which is a cost to the purchaser.[1]

 M.A., Political Science, Florida International University, 2013; M.U.R.P., Florida Atlantic University, 2007; LL.M., University of Miami, 1981; J.D., University of Florida, 1975. The Author practices primarily in the areas of local government law, commercial litigation, and family law. The Author has served frequently as a local government hearing officer in quasi-judicial proceedings, an attorney to code enforcement boards, and represented numerous property owners in code enforcement proceedings. The Author has also written many articles in a variety of areas including local government law, urban and regional planning, taxation, family law, evidence, and constitutional liberties.

1. Ralph A. DeMeo & Lynn S. Scruggs, *All Appropriate Inquiries in Commercial Real Estate Due Diligence: What Inquiring Minds Need to Know*, 81 Fla. B.J. 24, 29 (Feb. 2007); George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from* Caveat Emptor *to "Seller Tell All"*, 39 Real Prop. Prob. & Tr. J. 193, 198 (2004).

Local governments' code enforcement departments have been inundated with a rising number of mortgage foreclosures of residences and buildings that have become vacant and abandoned.[2] Code enforcement departments have been described as "first responders" because they attempt to maintain and stabilize order in neighborhoods from the social and economic harm that is attributable to building code violations, vacant and abandoned properties, and increased crime.[3] The 2008 economic meltdown in Florida and elsewhere in the United States facilitated the financial crisis, substantially increased mortgage foreclosures, and placed a great deal of pressure on code enforcement departments, which are tasked with keeping neighborhoods and communities free from becoming blighted, unsafe, and depreciated in value.[4] Before the real estate meltdown in 2008, purchasers overpaid for their homes and commercial buildings, causing the equity in the real property to vanish after the nationwide economic recession grew, resulting in plummeting values along with a barrage of mortgage foreclosures that hit the state.[5] From 2008 and thereafter, there has been a marked uptick in code violations for overgrown vegetation and landscaping, failure to clean away trash and debris, maintenance of real property, illegal dumping, lot clearing, junk and abandoned vehicles, real property upkeep, fire code violations, construction without a building permit, and other building code violations.[6] In light of the burgeoning violations, code enforcement violations and liens have become significant concerns for real estate practitioners and their clients.

---

2. Diana Ferguson, *County Code Enforcement and the Foreclosure Crisis: The Experience of Florida's Counties* 2, http://www.fl-counties.com/docs/pdfs/county-code-enforcement-and-the-foreclosure-crisis.pdf?sfvrsn=0 (2009).

3. Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 Alb. Govt. L. Rev. 101, 103–104 (2009).

4. *Id.* at 128.

5. Kendall Coffe, *Florida: The State of Foreclosure*, 41 Stetson L. Rev. 655, 657 (2012); Yuliya Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis*, 24 Rev. Fin. Stud. 1848, 1875 (2011).

6. Harry M. Hipler, *Developments in the Law on Local Government Code Enforcement Proceedings: Quasi-Judicial Proceedings Pursuant to Chapter 162, Florida Statutes*, 42 Stetson L. Rev. 681, 681 (2013) [hereinafter *Developments*]; Schilling, *supra* n. 3, at 104; Kyle McCollum, *Top Ten Building Code Violations in Florida* (unpublished M.S. thesis, U. Fla., 2004) (on file with U. Fla. Lib. http://ufdcimages.uflib.ufl.edu/UF/E0/00/88/22/00001/mccollum_k.pdf).

Do code enforcement violations "run with the land"? How do homestead exemptions apply to attempts to enforce and collect code enforcement liens? How does the fundamental rule "first in time, first in right" apply to duly filed and recorded code enforcement liens and mortgages that encumber the real property insofar as priority is concerned? What effect should the Florida Supreme Court's decision in *City of Palm Bay v. Wells Fargo Bank, N.A.*[7] have on real property encumbered by a mortgage and code enforcement lien? Are there situations when unrecorded violations existing on dwellings and office buildings affect a current owner's title to real property? Do code violations begin to accrue on a date certain until they become time barred, or do these violations last ad infinitum until they are remedied? How long do code enforcement liens last and remain subject to collection? Do the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of Article 1, Section 9, of the Florida Constitution compel notice of code enforcement proceedings to protected and interested parties beyond actual owners? Should there be one or more code enforcement proceedings in obtaining administrative finality? In raising these questions, this Article will discuss the effects that code enforcement violations and liens have on current and former owners and other interested parties on their real property in Florida.

II. CODE ENFORCEMENT VIOLATIONS: CHAPTER 162, FLORIDA STATUTES

It has been declared that local government code violations "run with the land."[8] Subsequent purchasers can be held responsible for bringing their real property into compliance with current code regulations, and they can be liable for the payment of liens, interest, attorney fees, and costs.[9] Chapter 162 of the Florida Statutes grants local governments the power to provide a method of enforcing codes and ordinances in counties and munici-

7. 114 So. 3d 924 (Fla. 2013) [hereinafter *City of Palm Bay* S. Ct. of Fla.].

8. *City of Gainesville Code Enforcement Bd. v. Lewis*, 536 So. 2d 1148, 1151 (Fla. 1st Dist. App. 1988); *Monroe Co. v. Whispering Pines Assocs.*, 697 So. 2d 873, 875 (Fla. 3d Dist. App. 1997); *Henley v. MacDonald*, 971 So. 2d 998, 1000 (Fla. 4th Dist. App. 2008).

9. *Lewis*, 536 So. 2d at 1151.

palities where violations exist.[10] Chapter 162 also provides that local governments are authorized to create a code enforcement board and appoint special magistrates within their jurisdictions for the purpose of imposing administrative fines on a per diem basis, until the real property owner remedies the violations and complies with any code enforcement orders.[11]

Some liens cannot be foreclosed, and these liens survive attempts at foreclosure. They include unpaid real estate taxes;[12] mechanics and construction liens;[13] obligations to improve or repair real property;[14] mortgage pledges;[15] Internal Revenue Service (IRS) tax liens;[16] charges made to real property owners for certain services and facilities through special assessments;[17]

10. Fla. Stat. § 162.02 (2013); Fla. Att'y Gen. Op. 2001-77, 2001 WL 1347157 (Oct. 30, 2001).

11. Fla. Const. art. II, § 3; Fla. Const. art. V, § 1; Fla. Stat. §§ 162.03(2), 162.09; *Verdi v. Metro. Dade Co.*, 684 So. 2d 870, 873 (Fla. 3d Dist. App. 1996).

12. Fla. Stat. § 197.122(1). The State of Florida and its counties or municipalities can force the sale of a homestead to collect past due property taxes. *Nassau Realty Co. v. City of Jacksonville*, 198 So. 581, 582 (1940).

13. *All St. Plumbing, Inc. v. Mut. Sec. Life Ins. Co.*, 537 So. 2d 598, 599 (Fla. 3d Dist. App. 1988).

14. Fla. Stat. §§ 713.001–713.37.

15. *See* Julia Patterson Forrester, *Still Crazy after All These Years: The Absolute Assignment of Rents in Mortgage Loan Transactions*, 59 Fla. L. Rev. 487, 510–511 (2007) (noting that mortgage pledges require possession before a lien foreclosure).

16. Federal IRS tax liens attach to homestead real property. The IRS may sell a couple's homestead even when only one spouse is liable for the tax. *United States v. Rodgers*, 461 U.S. 677, 691–694 (1983). Federal law establishes the priority of federal tax liens. *Id.* at 683. The Uniform Federal Lien Registration Act states that, except for qualifying property tax liens and special assessment liens, the priority of a federal income tax lien is set by the date the lien is properly filed on record. 26 U.S.C. § 6323 (2012). Once recorded, the established priority continues for ten years and can be timely renewed and refiled every ten years without losing its initial priority. *Id.*

17. *See* Fla. Stat. § 170 (offering "supplemental and alternative method[s] of making local municipal improvements"). Local governments have many service needs and capital funding needs, from building or staffing new fire stations to construction of stormwater system improvements; however, they do not always have the funding to provide ongoing services or enhanced and new services for their citizens. Florida's home rule authority allows local governments to collect charges from property owners for certain services and facilities through special assessments, which are a form of non-ad valorem (not based on property value) fees. *Id.* at § 125.01. Special assessments fall under two categories: "service" assessments such as fire, garbage, and stormwater services that provide revenue for operating costs; and "capital" assessments, for construction of roads, stormwater facilities, fire stations, and the like. *Id.* at § 170.201. Capital assessments are fixed according to the debt service schedule at assessment initiation and end when the affected property owners pay off the borrowed amount. *Id.* at § 197.3632. Florida Statutes Section 170.09 makes special assessments co-equal with taxes. Florida Statutes Section 153.05(10) provides for the imposition of liens for special assessments for water system improvements and sanitary sewers. Florida Statutes Section 191.009 provides for liens for non-ad valorem assessments for independent fire districts.

utility taxes for gas, water, sewer, storm water drainage, and garbage liens;[18] bonds issued by a drainage district;[19] homeowners and condominium association fees and assessments;[20] and child support and alimony arrears.[21] If a local government takes affirmative action to enforce and collect accruing fines on account of the entry of a code enforcement lien during a federal bankruptcy action, this may amount to a willful violation of the automatic stay rendering the act of entry and recording of the code enforcement lien as void and thereby subjecting the local government to sanctions if it knew or should have known of the federal bankruptcy action.[22]

A code enforcement lien may be established by recording a certified copy of the order in the public records.[23] A fine imposed pursuant to Chapter 162 will "continue to accrue until the violator comes into compliance or until judgment is rendered in a suit filed pursuant to [Chapter 162], whichever occurs first."[24]

---

18. Fla. Stat. § 159.17; Fla. Att'y Gen. Op. 95-02 at 3 (Jan. 11, 1995) (available at http://www.myfloridalegal.com/ago.nsf/printview/306D72BC945CA52F8525620A006656EF); Fla. Att'y Gen. Op. 85-70 at 5 (Aug. 28, 1985) (available at http://www.myfloridalegal.com/ago.nsf/printview/D1D550F518EA41E185256576005C704F); Fla. Att'y Gen. Op. 84-84 at 5 (Aug. 21, 1984) (available at http://www.myfloridalegal.com/ago.nsf/printview/5057851BD3C0F41285256577005DE3B8).

19. Fla. Stat. § 157.12.

20. *Id.* at §§ 718.116(1)(a)–(c), (5)(a). "[L]iability for [Homeowners' Associations (HOA)] assessments can survive the transfer of title through foreclosure." J. Martin Knaust, *Guilt by Association: Assessment Liability to Homeowners' Associations after Foreclosure*, 41 Stetson L. Rev. 835, 836 (2012).

21. *Havoco of Am., LTD. v. Hill*, 790 So. 2d 1018, 1028 n. 12 (Fla. 2001). This case appears to be controlling authority to shield homestead realty from all claims of creditors. *See id.* at 1030 (holding, "a homestead acquired by a debtor with the specific intent to hinder, delay, or defraud creditors" is protected by Florida's homestead exemption). However, *Havoco* questions and leaves open for future consideration decisions by district courts of appeal that permit equitable liens on homestead realty when a payor former spouse/parent has used the homestead exemption to avoid his or her alimony and child support obligation. *Id.* at 1028 n. 12; *see Sell v. Sell*, 949 So. 2d 1108, 1113 (Fla. 3d Dist. App. 2007) (reversing an order that denied imposition of a lien on the former husband's share of the proceeds from the sale of the martial residence); *Partridge v. Partridge*, 912 So. 2d 649, 649 (Fla. 4th Dist. App. 2005) (affirming a trial court decision to foreclose an equitable lien on the property of an individual who failed to pay support to his former wife). For a discussion why homestead real property should be exempted from forced sale when there exists child support and alimony arrears, please see Harry M. Hipler, *Florida's Homestead Realty: Is It Exempt from Imposition of an Equitable Lien for Nonpayment of Alimony and Child Support?* 82 Fla. B.J. 34 (July/Aug. 2008).

22. *McFarland v. City of Jacksonville*, 2008 WL 4550378 at **5–7 (Bankr. M.D. Fla. July 24, 2008).

23. Fla. Stat. § 162.09(3).

24. *Id.*; *Fong v. Town of Bay Harbor Is.*, 864 So. 2d 76, 78 (Fla. 3d Dist. App. 2003) (quoting Fla. Stat. § 162.09(3)).

Code enforcement liens arise on nonhomestead real property until the liens are satisfied or foreclosed.[25] These liens can be described as in rem against the real property on which the violation exists[26] and as a lien against the real property owner that attaches to "any other real or personal property owned by the violator."[27] Although Florida Statute 162.09(3) provides a broad statement of what these liens can attach to—the statute says that the lien attaches to any real or personal property owned by the violator—one can still question whether a code enforcement lien that attaches to specific real property bleeds onto all other real and personal property owned by the violator.[28] More specifically, Florida Statute 162.09(3) provides that "an order imposing a fine . . . may be recorded in the public records and thereafter shall constitute a lien against the [real property] on which the violation exists and upon any other real or personal property owned by the violator."[29] While the statute can be read narrowly to apply only to a specific piece of real property where the violations exist, it has been read broadly to include a lien against all personal and real property owned by the violator.[30] Whether it was wise for the legislature to have taken the liberty of expanding the attachment of a lien entered from a code enforcement proceeding onto unrelated real property without a circuit court's adjudication is questionable.

A code enforcement order and lien entered by the special magistrate should be limited to the subject real property where the violations exist. The lien should not bleed onto other real and personal property owned by the violator that is not related to the

25. Fla. Stat. § 162.09(3); *Sarasota Co. v. Andrews*, 573 So. 2d 113, 115 (Fla. 2d Dist. App. 1991); *Whispering Pines Assocs.*, 697 So. 2d at 873; *Henley*, 971 So. 2d at 1000.

26. Fla. Stat. § 162.09(3); *Horne v. City of Ocala*, 196 So. 441 (Fla. 1940); *Ismael v. Certain Lands*, 51 So. 3d 583, 586 (Fla. 3d Dist. App. 2011).)

27. Fla. Stat. § 162.09(3).

28. *See* Annabella Barboza, *Code Liens Are Not "Superpriority" Liens: Is It the End of the Debate?* 87 Fla. B.J. 28, 29, 31 (Sept./Oct. 2013) (suggesting there is some ambiguity on whether code enforcement liens attach only to specific real property or all nonhomestead real and personal property owned by the owner/violator).

29. Fla. Stat. § 162.09(3).

30. *See Jones v. City of Winter Haven*, 870 So. 2d 52, 53 (Fla. 2d Dist. App. 2003) (stating that when the "City recorded a certified copy of the Order Imposing Fine, it became a lien against the property by operation of law"); *City of Boynton Beach v. Janots*, 101 So. 3d 864, 865 (Fla. 4th Dist. App. 2012) (interpreting Florida Statute Section 162.09(3) to mean that the "code enforcement liens attached to all real and personal property").

code violations. Until and if a circuit civil money judgment is entered against the owner and a certified copy of the money judgment is recorded,[31] code violation orders should pertain only to a specific piece of real property where the violations exist. A nexus between the real property and the code violations should be shown to exist, and the lien should not attach to unrelated real property owned by the violator. By allowing a lien to attach to all real and personal property of the owner–violator in the county where the lien has been recorded before a civil court civil judgment is entered, the purpose of Chapter 162 has been unduly expanded beyond the law's intent, which is to compel the owner to remedy the code violations on a particular piece of real property so that a particular neighborhood remains sturdy and solid.[32]

Another uncalled for effect of Florida Statute 162.09(3) is that by allowing cross-attachment and bleeding onto all real and personal property owned by the owner–violator, sales of real property effectively can be hindered or even stopped due to the title that will appear upon every piece of real and personal property owned by the owner–violator in the same county where the lien has been recorded regardless of the innocence of the violator–owner's additional unrelated property.[33] In such event, the amount of the lien itself can become insurmountable if it is not timely remedied,[34] and in the real estate market the lien can exceed most of the equity in the real property being purchased and sold in the transaction.[35] The goal of code enforcement proceedings should not be to punish the violator by attaching to an unrelated nonhomestead piece of real property that has no connection to the violations resulting on a particular piece of real property. This result goes well beyond other local government liens involving unpaid real estate taxes, special assessments,

---

31. Fla. Stat. § 162.09(3).

32. *Id.* at § 162.02; *Developments*, *supra* n. 6, at 685, 712–713.

33. *Janots*, 101 So. 3d at 865; *see Jones*, 870 So. 2d at 52 (discussing an agreement between the plaintiff and a seller of real property that the plaintiff would be obligated to indemnify seller for fines as a result of an Order Imposing Violation).

34. *Jones*, 870 So. 2d at 54 (stating that the total fine was initially $55,600 and later became $86,200).

35. *See* Rana M. Gorzeck, *How Super Liens Prevent Your Florida Home from Closing*, Daily Bus. Rev., (Dec. 7, 2011) (available at http://www.warddamon.com/news/pdfs/gorzeck_dbr_12-7-2011.pdf); Barboza, *supra* n. 28, at 28 (discussing that the code enforcement board may impose a fine of up to $500 per violation each day until the property owner fixes the violation).

utility taxes, bonds issued by a drainage district, among others that solely attach to the specific piece of real property on account of a default in payment.[36]

Once code enforcement claims are adjudicated and become liens, the liens can grow and become excessive if compliance with the order does not occur by a certain date.[37] The uncapped fines imposed on the owner's real property continue to accrue until there is compliance or a judgment is rendered.[38] Liens can be difficult to reduce through local government administrative procedures; even if one is reduced, the owner is still liable to pay whatever amount the lien is reduced to after the entry of a final order from an abatement or mitigation proceeding.[39] Even if the real property is owned by several common owners at the time of the imposition of the code enforcement lien, it will still constitute a lien on the owners' real property after recordation of the lien, as long as an owner is properly served with notice of the code violations and scheduled hearings.[40]

---

36. *Supra* nn. 11, 16, 18 and accompanying text.

37. *See Moustakis v. City of Ft. Lauderdale*, 2008 WL 2222101 at *1 (S.D. Fla. May 27, 2008), *aff'd*, 388 Fed. Appx. 820 (11th Cir. 2009) (stating that the fees imposed on the plaintiff's property exceeded $700,000); *Jones*, 870 So. 2d at 54 (discussing that the Order Imposing Fine was initially $55,600 then increased to $86,200); *Broward Co. v. Recupero*, 949 So. 2d 275, 276 (Fla. 4th Dist. App. 2007) (stating that Broward County assesses a daily fine of $250 "if the estate's property [is] not brought into compliance with the Broward County Zoning Code").

38. Fla. Stat. § 162.09(3); *Fong*, 864 So. 2d at 78; *Co. Collection Servs., Inc. v. Allen*, 650 So. 2d 650, 650–651 (Fla. 4th Dist. App. 1995).

39. *See City of Miami v. Cortes*, 995 So. 2d 604, 605 (Fla. 3d Dist. App. 2008) (reinstating both an enforcement order and a mitigation order reducing a fine from $105,750 to $10,000). Florida Statutes Section 162.09(2)(c) provides that a code enforcement board or special magistrate may reduce a code enforcement fine before the order imposing such fine has been recorded. Fla. Att'y Gen. Op. 2002-62, 2002 WL 31035909 at *3 (Sept. 11, 2002); Fla. Att'y Gen. Op. 99-03, 1999 WL 20660 at *1 (Jan. 15, 1999).

40. Fla Stat. § 162.12; *Ciolli v. City of Palm Bay*, 59 So. 3d 295, 297 (Fla. 5th Dist. App. 2011). Florida Statutes Section 162.12 as amended by the Legislature provides that notice by certified mail must be sent to *either* the owner's address listed in the tax collector's office *or* at any other address provided in writing to the local government by the owner. Section 162.12's predecessor statute, from 2011, provided that notice must be served by certified mail to the property owner at the address listed in the tax collector's office for tax notices *and* at any other address provided in writing to the local government by such owner. Fla. Stat. § 162.12; *see Little v. D'Aloia*, 759 So. 2d 17, 19 (Fla. 2d Dist. App. 2000) (emphasizing the due process import of proper notice).

III. CODE ENFORCEMENT LIENS AND HOMESTEAD REAL PROPERTY

Florida's homestead exemption grants nearly absolute protection from forced sale by claims of creditors, except in three limited circumstances: (1) payment of taxes and assessments owed to state or local governments (e.g., real property taxes); (2) obligations contracted for the purchase, improvement, or repair of real property (e.g., mortgage pledges); and (3) obligations contracted with persons to repair or improve real property for materials and labor performed (e.g., construction liens).[41] After a local government records a certified copy of a code enforcement order imposing a fine, the order will constitute a lien upon the owner's real property.[42] However, the order will have no effect on homestead real property located in the county where the lien has been recorded. A local government is prohibited from foreclosing a code enforcement lien against the owner's homestead.[43] This is consistent with the fundamental principle adopted by Article X, Section 4(a), of the Florida Constitution that homestead real property is protected from forced sale regardless of illegal, immoral, fraudulent, egregious, or bad faith acts of an owner.[44] The courts have long emphasized that Article X, Section 4(a), of the Florida Constitution must be strictly followed[45] and liberally construed in favor of protecting the owner's home from forced sale.[46]

---

41. Fla. Const. art. X, § 4(a).

42. *City of Panama City v. Head*, 797 So. 2d 1265, 1267 (Fla. 1st Dist. App. 2001); *Monroe Co. v. McCormick*, 692 So. 2d 214, 215 (Fla. 3d Dist. App. 1997).

43. *Ilkanic v. City of Ft. Lauderdale*, 705 So. 2d 1371, 1373 (Fla. 1998); *Demura v. Co. of Volusia*, 618 So. 2d 754, 756 (Fla. 5th Dist. App. 1993). Florida Statutes Section 162.09(3) expressly prohibits enforcement and foreclosure of a code enforcement lien on homestead real property on account of Article X, Section 4(a), of the Florida Constitution.

44. *Havoco*, 790 So. 2d at 1019; *Tramel v. Stewart*, 697 So. 2d 821, 821 (Fla. 1997); *see Ilkanic*, 705 So. 2d at 1373 (holding that a criminal's homestead was exempt from a civil restitution lien related to his incarceration); *Butterworth v. Caggiano*, 605 So. 2d 56, 60 (Fla. 1992) (holding that Florida's homestead exemption makes "no exception for criminal activity"); *State v. Williams*, 343 So. 2d 35, 37 (Fla. 1977) (finding that a judgment debtor's homestead was protected from a lien imposed by the public defender's office); *Quigley v. Kennedy & Ely Ins. Inc.*, 207 So. 2d 431, 432–433 (Fla. 1968) (discussing a liberal construction of Article X, Section 1 when involving protection of the family home but a strict construction for the exceptions).

45. *See e.g. Chames v. DeMayo*, 972 So. 2d 850, 852, 860 (Fla. 2007) (declining to find that the homestead exemption is waivable); *Havoco*, 790 So. 2d at 1021 (noting that while the homestead exemption provision must be liberally construed, its exceptions must be strictly construed); *Ilkanic*, 705 So. 2d at 1373 (emphasizing that liens on homesteads are

Homestead exemption from forced sale can only be lost if the homeowner permanently abandons the property's use as a primary residence,[47] or if a sale's proceeds are not reinvested or intended to be reinvested into another homestead within a reasonable time after a sale.[48] Failure to reside in the residence once occupied by the owner does not necessarily constitute abandonment. If a homeowner temporarily leaves his or her residence, the homestead exemption from forced sale remains intact.[49] If a homeowner leaves his or her home due to economic, health, or family reasons, the homeowner will not be considered

---

not only unforeclosable but also nonexistent); *Tramel*, 697 So. 2d at 824 (holding that homesteads are protected from civil forfeiture); *Butterworth*, 605 So. 2d at 58 (holding that homesteads are protected from criminal forfeiture); *Williams*, 343 So. 2d at 35 (holding that homesteads are protected from liens imposed by the public defender's office); *Quigley*, 207 So. 2d at 432–433 (finding that a debtor's newly expanded homestead was still exempt, regardless of the debtor's motives for the expansion); *Robbins v. Robbins*, 360 So. 2d 10, 11–12 (Fla. 2d Dist. App. 1978) (holding that two heirs' inchoate interests in a homestead were protected against an attempt to deed them away).

46. Fla. Const. art. X, § 4(a)(1); *Milton v. Milton*, 58 So. 718, 719 (Fla. 1912) *rev'd in part on other grounds sub nom., Pasco v. Harley*, 75 So. 30 (Fla. 1917). Florida's homestead exemption protection is intended to prevent families from losing their homes on account of unpaid debts. *Bank Leumi Trust Co. v. Lang*, 898 F. Supp. 883, 887 (S.D. Fla. 1995); *Drucker v. Rosenstein*, 19 Fla. 191, 198–199 (1882). *See also Hill v. First Nat'l Bank of Marianna*, 75 So. 614, 617 (Fla. 1917) (refusing to allow the sale of a family's homestead property to satisfy the debt of the deceased head of household); *Palmer v. Palmer*, 35 So. 983, 984–985 (Fla. 1904) (emphasizing that Florida's constitutional homestead exemption frees a property from debt when it descends to a debtor's heirs); *Miller v. Finegan*, 7 So. 140, 140, 143 (Fla. 1890) (affirming an injunction that prohibited the forced sale of a homestead that had descended to the debtor's heirs).

47. Whether property is homestead is an issue of fact. *E.g. Hillsborough Inv. Co. v. Wilcox*, 13 So. 2d 448, 452–453 (Fla. 1943); *Barton v. Oculina Bank*, 26 So. 3d 640, 641 (Fla. 4th Dist. App. 2010). Similarly, the issue of abandonment is a question of fact. Decisions have held that permanent abandonment of homestead does not occur where an owner involuntarily changes his or her residence because of infirmity or a court order. *E.g. Saint-Gaudens v. Bull*, 74 So. 2d 693, 694 (Fla. 1954); *City of Jacksonville v. Bailey*, 30 So. 2d 529, 530 (Fla. 1947); *Dean v. Heimbach*, 409 So. 2d 157, 158 (Fla. 1st Dist. App. 1982); *Marsh v. Hartley*, 109 So. 2d 34, 39 (Fla. 2d Dist. App. 1959); *McGann v. Halker*, 530 So. 2d 440, 440 (Fla. 3d Dist. App. 1988); *Cain v. Cain*, 549 So. 2d 1161, 1163 (Fla. 4th Dist. App. 1989); *In re Est. of Melisi*, 440 So. 2d 584, 585 (Fla. 4th Dist. App. 1983).

48. *Town of Lake Park v. Grimes*, 963 So. 2d 940, 943 (Fla. 4th Dist. App. 2007).

49. *Saint-Gaudens*, 74 So. 2d at 694; *Bailey*, 30 So. 2d at 530; *Semple v. Semple*, 89 So. 638, 639 (Fla. 1921); *Dean*, 409 So. 2d at 158; *Marsh*, 109 So. 2d at 39; *Poppell v. Padrick*, 117 So. 2d 435, 437 (Fla. 2d Dist. App. 1959); *Novoa v. Amerisource Corp.*, 860 So. 2d 506, 507 (Fla. 3d Dist. App. 2003); *McGann*, 530 So. 2d at 440; *Cain*, 549 So. 2d at 1163; *Melisi*, 440 So. 2d at 585. In the bankruptcy context, see *In re Betancourt*, 154 B.R. 90, 92 (S.D. Fla. 1993) and *In re Imprasert*, 86 B.R. 721, 723 (M.D. Fla. 1988). For a discussion of exceptions to Florida's homestead exemption, see Barry A. Nelson & Kevin E. Packman, *Florida's Unlimited Homestead Exemption Does Have Some Limits, Part I*, 77 Fla. B.J. 60, 64 (Jan. 2003).

to have permanently abandoned the homestead.[50] Where an individual is compelled to move from his or her homestead after a code enforcement order and lien are rendered, and the local government files a foreclosure action, this should not amount to permanent, voluntary abandonment.[51] Even if the homestead residence is demolished, the homestead exemption status of the real property should remain intact because the homeowner was required to leave and he or she did not intend to permanently abandon the residence.[52] Thus, it has been held that demolition costs incurred by a local government cannot be incorporated into a judgment or lien on homestead real property that was involved in a code enforcement proceeding.[53]

There is a way for a debtor to protect homestead real property when a creditor questions a homeowner's homestead exemption from forced sale in an attempt to collect the amount of the code enforcement lien. A verified notice of homestead should be filed and recorded by the owner with the clerk of the court. An action seeking a declaratory judgment can then be filed by the creditor within forty-five days by alleging that the real property does not constitute homestead and is therefore not exempt from forced sale.[54] Florida Statutes Section 162.09(3) expressly prohibits enforcement and foreclosure of a code enforcement lien on homestead real property under Article X, Section 4(a), of the Florida Constitution.[55] Even if Chapter 162 was silent about homestead protection from forced sale, a local government could

50. *In re Herr*, 197 B.R. 939, 941 (S.D. Fla. 1996); Nelson & Packman, *supra* n. 49, at 64.

51. *Saint-Gaudens*, 74 So. 2d at 694; *Bailey*, 30 So. 2d at 530; *Dean*, 409 So. 2d at 158; *Marsh*, 109 So. 2d at 38; *McGann*, 530 So. 2d at 440; *Cain*, 549 So. 2d at 1163; *Melisi*, 440 So. 2d at 585.

52. *Pelecanos v. City of Hallandale Beach*, 914 So. 2d 1044, 1047 (Fla. 4th Dist. App. 2005); *Miskin v. City of Ft. Lauderdale*, 661 So. 2d 415, 416 (Fla. 4th Dist. App. 1995).

53. *Pelecanos*, 914 So. 2d at 1047.

54. Fla. Stat. § 222.01 (providing a manner to establish homestead for purposes of debt protection prior to a levy); *id.* at § 222.02 (providing for filing of an affidavit to establish homestead for purposes of debt protection after a levy has been made). However, in *Schaller v. Bruce N. Balk, A.I.A., P.A.*, the homestead status of certain real property was litigated and determined by a circuit court civil case. 708 So. 2d 299 (Fla. 2d Dist. App. 1998). By reason of a final judgment that litigated whether the real property was homestead, the status of the real property was already determined, even when thereafter a subsequent owner filed a Notice of Homestead. *Id.* at 301. Under such circumstances, an after-acquired status of homestead did not affect the prior lien that attached to the subject real property, which at the time was not homestead exempt. *Id.*

55. Fla. Stat. § 162.09(3).

not foreclose a code enforcement lien because it does not fall within one of the three limited exceptions of Article X, Section 4(a), of the Florida Constitution.[56]

In filing an action against a real property owner for the amount of a code enforcement lien, a local government should consider filing a two-count complaint: (1) Count I should claim that a foreclosure is appropriate on the subject real property because it does not constitute homestead real property and there exists a code enforcement lien that attaches to the subject real property; and (2) Count II should allege that if the real property is exempt homestead, the court should enter a money judgment against the owner for the amount of the lien.[57] If a judgment for damages is entered against the owner for the amount of the code enforcement fine after it is determined that the real property is homestead, a certified copy of the judgment should be recorded with the clerk of the court in the county where the real property is located for the judgment to become a lien on any of the owner's nonhomestead real property.[58] If the practitioner follows this procedure, the judgment could become a general lien on all nonhomestead real property in the county where the certified copy of the civil court judgment is recorded.[59] At a later date, the creditor can determine if the homestead character of the real property has been lost by the owner due to a permanent abandonment or change of character of the real property from homestead to nonhomestead real property.[60] If the owner remains the owner of the subject real property or owns other real

56. *Id.* Code enforcement liens are not one of the specified exceptions of Article X, Section 4(a)(1), of the Florida Constitution. *Mathieu v. City of Lauderdale Lakes*, 961 So. 2d 363, 364–365 (Fla. 4th Dist. App. 2007); *Pelecanos*, 914 So. 2d at 1046; *Miskin*, 661 So. 2d at 416; *Demura*, 618 So. 2d at 756.

57. Fla. Stat. §§ 162.125, 162.09(3)(A); *Mathieu*, 961 So. 2d at 364.

58. Florida Statutes Section 55.10 requires recording of a certified copy of a judgment with the clerk to become a lien on the owner's real property in that county. After a judgment is entered in favor of the judgment–creditor against the judgment–debtor, the judgment–creditor may obtain a lien against the judgment–debtor's real property by recording a certified copy of the judgment in the county in which the judgment–debtor owns real property. Fla. Stat. § 55.10. This should be distinguished from personal property that has a different set of rules in accordance with the Department of State database. Fla. Stat. §§ 55.201–55.209.

59. Fla. Stat. § 55.10(1); *Sanchez v. Black, Srebnick, Kornspan, & Stumpf, P.A.*, 911 So. 2d 201, 202 (Fla. 3d Dist. App. 2005).

60. *Sanchez*, 911 So. 2d at 201; *Co. of Pinellas v. Clearwater Fed. Sav. & Loan Ass'n*, 214 So. 2d 525, 527 (Fla. 2d Dist. App. 1968); Fla. Att'y Gen. Op. 93-77, 1993 WL 483296 at *1 (Nov. 4, 1993).

property, then a judgment for damages can attach to nonhomestead real property within twenty years of the date of the judgment and any actions for renewal.[61]

IV. PRIORITY OF A MORTGAGE OR CODE ENFORCEMENT LIEN

If the financial institution holding a mortgage files a mortgage foreclosure action, Florida law acknowledges that a lis pendens can be filed for the purpose of alerting creditors, prospective purchasers, and the public at large that title to specified real property is involved in litigation.[62] The filing of a lis pendens is the initial step of a mortgage foreclosure action after the mortgagee determines that foreclosure of the owner's interest needs to be adjudicated on account of the owner's failure to pay the mortgage.[63] But what if there has been a code enforcement lien recorded in the public records before a lis pendens is filed and recorded? Does it matter when a mortgage or code enforcement lien has been filed, and if so, which recorded instrument takes precedence? A certified copy of an order imposing a fine recorded with the clerk of the court in the public records is a lien against the real property on which the violation exists.[64] However, Florida Statutes Section 162.09(3) fails to determine the priority of a code enforcement lien.[65]

There are questions that must be answered in determining the priority of a code enforcement lien as distinguished from a recorded mortgage. Does the recording of a notice of lis pendens pursuant to the filing of a foreclosure action take precedence over a later filed and recorded code enforcement lien? What about a mortgage securitizing certain real property that is filed and recorded before a later filed and recorded code enforcement lien? In one of the early opinions on these conflicting claims, the Attorney General in Opinion Number 93-77 opined that the

---

61. Fla. Stat. § 95.11(1); *Marsh v. Patchett*, 788 So. 2d 353, 355 (Fla. 3d Dist. App. 2001); *Corzo Trucking Corp. v. West*, 61 So. 3d 1285, 1287 n. 1 (Fla. 4th Dist. App. 2011).

62. Fla. Stat. § 48.23; *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 (Fla. 1993); *U.S. Bank Nat'l Ass'n v. Quadomain Condo. Ass'n, Inc.*, 103 So. 3d 977, 978–979 (Fla. 4th Dist. App. 2012).

63. *Supra* n. 62.

64. Fla. Stat. § 162.09(3).

65. Fla. Att'y Gen. Op. 93-77, *supra* n. 60, at *1.

recording of a notice of lis pendens pursuant to Florida Statutes Section 48.23 barred the foreclosure of a code enforcement lien recorded after the notice of lis pendens where the proceeding for which the notice of lis pendens was recorded was prosecuted to judicial sale and the property sold to a good faith purchaser.[66]

Section 695.11 of the Florida Statutes codifies the common law rule "first in time, first in right," so that an instrument recorded earlier takes priority over a later recorded instrument.[67] This Section provides that any instruments required to be recorded—mortgages, judgments, liens—are deemed recorded once the official register number has become affixed.[68] In a decision concerning the priority between a recorded mortgage as distinguished from a code enforcement lien, the district court of appeal in *City of Palm Bay v. Wells Fargo Bank, N.A.*[69] held that a local government ordinance providing that code enforcement liens recorded in the public record were liens coequal with the liens of all state, county, district, and municipal taxes and that such liens were superior in dignity to all other liens, titles, and claims until paid, was a violation of Article VIII, Section 2(b), of the Florida Constitution.[70] The district court certified the following question of great public importance:

> Whether under Article VIII, [S]ection 2(b), Florida Constitution, [S]ection 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?[71]

The question of priority is of paramount interest to real estate practitioners, title owners, title examiners, mortgagees, and local governments because some local governments adopted ordinances

66. Fla. Stat. § 48.23; Fla. Att'y Gen. Op. 93-77, *supra* n. 60, at *1.

67. Fla. Stat. § 695.11.

68. *Id.*; *Lamchick, Glucksman, & Johnston, P.A. v. City Nat'l Bank of Fla.*, 659 So. 2d 1118, 1119–1120 (Fla. 3d Dist. App. 1995); *Recupero*, 949 So. 2d at 276; *Argent Mortg. Co., LLC v. Wachovia Bank, N.A.*, 52 So. 3d 796, 800 (Fla. 5th Dist. App. 2010).

69. 57 So. 3d 226, 227 (Fla. 5th Dist. App. 2011) [hereinafter *City of Palm Bay* 5th DCA].

70. *Id.*

71. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 67 So. 3d 271, 271 (Fla. 5th Dist. App. 2011).

under which their code enforcement liens had superpriority status and were on par with taxes, and therefore were superior over a previously filed and recorded mortgage.[72]

In a long awaited decision, the Florida Supreme Court in *City of Palm Bay v. Wells Fargo Bank, N.A.*[73] answered the question in the negative and held that the superpriority provision of the Palm Bay ordinance was invalid because it conflicted with state law.[74] The Florida Supreme Court decided that when a local government ordinance conflicts with a state statute, the state statute takes priority over the local government ordinance in the absence of legislative authority permitting deference to a local government or joint and dual authority over subject matter.[75] The Florida Supreme Court indicated that the preemption doctrine of the Florida Constitution provides that laws at the state level take precedence over local laws.[76] In the matter of the recording of instruments that is provided by Florida Statutes Section 695.11, the Florida Supreme Court stated:

> It is undisputed that the Palm Bay ordinance provision establishes a priority that is inconsistent with the priority established by the pertinent provisions of chapter 695 [Fla. Stat. 695.01, 695.11]. In those statutory provisions, the Legislature has created a general scheme for priority of rights with respect to interest in real property. Giving effect to the ordinance superpriority provision would allow a municipality to displace the policy judgment reflected in the Legislature's enactment of the statutory provisions.[77]

The Florida Supreme Court rejected Palm Bay's contentions that home rule authority granted local governments the right to carve out exceptions to statutory schemes where the legislature has spoken on a subject.[78] A municipality may not contradict a state statute and the policy decision behind the legislature's enactment of a statute, and, if there is concurrent legislation by a state and a municipality, the municipality cannot conflict with the state law

72. *City of Palm Bay* 5th DCA, 57 So. 3d at 227.
73. 114 So. 3d at 929.
74. *Id.*
75. *Id.* at 928.
76. *Id.* at 929.
77. *Id.* at 928.
78. *Id.* at 927–929.

in the absence of a specific provision authorizing municipalities to do so.[79] The basis of the ruling relied upon Article VIII, Section 2(b), of the Florida Constitution and statutory preemption under state law.[80] The only way a local government can act concurrently with a state statute on the same topic is if the local government's ordinance is permitted to coexist under state law. Priority of state law flows from Article VIII, Section 2(b) and its critical words, "except as otherwise provided by law."[81] Accordingly, the superpriority provision of the municipal ordinance of Palm Bay was invalid because it conflicted with state law and Article VIII, Section 2(b). Priority of liens, absent a specific statutory variation, is governed by Florida's recording act.[82]

Real estate practitioners frequently face the question of priority of liens in the framework of a mortgage foreclosure action. After the Florida Supreme Court's decision in *City of Palm Bay v. Wells Fargo Bank, N.A.*, where a local government code enforcement lien is recorded before a lis pendens but after a mortgage, the local government code enforcement lien can be named in the foreclosure action by the foreclosing mortgage lender to eliminate or at least substantially minimize the lender's liability for previous fines and penalties for code enforcement liens that are recorded after the lender's mortgage.[83] As a subordinate lien, it would be subject to the provisions of Florida Statutes Section 48.23(1)(d) requiring the holder of an unrecorded interest or lien to intervene in the proceeding within thirty days after recording of the lis pendens.[84] Whether or not Florida remains a "notice state" or has been converted into a "race state" seems to be left open for future consideration.[85]

V. UNRECORDED CODE VIOLATIONS ON REAL PROPERTY

Not only can recorded code enforcement liens present a problem for a real property owner, but unrecorded code violations

79. *Id.* at 928–929.
80. *City of Palm Bay* S. Ct. of Fla., 114 So. 3d at 928–929.
81. Fla. Const. art. VIII, § 2(b); *City of Palm Bay* S. Ct. of Fla., 114 So. 3d at 927.
82. Fla. Stat. §§ 695.01(3), 695.11; *City of Palm Bay* S. Ct. of Fla., 114 So. 3d at 927–928.
83. Fla. Stat. § 48.23(1)(d).
84. *Id.*
85. *City of Palm Bay* S. Ct. of Fla., 114 So. 3d at 927–928.

can be problematic also. If a code enforcement proceeding has been filed, the proposed seller must disclose the proceeding to the proposed purchaser.[86] Failure to do so creates a rebuttable presumption of fraud.[87] Should the real property be transferred during an administrative proceeding, the new owner is not immunized from the pending code enforcement proceeding. Rather, the new owner must be provided with a reasonable time period to correct the violations before a hearing is held.[88] While the Legislature understood that a new owner must be provided with notice in accordance with fundamental due process, the existing violations will run with the land, making the new owner responsible for correction of the violations on the land. The new owner will retain the right to file a lawsuit against the seller for failure to comply with Florida Statute Section 162.06(5), but he or she remains responsible to remedy the code violations or suffer the possibility of per diem fines.[89]

Many properties exist with improvements that have been completed without the issuance of a building permit and approval after inspections by the local government. Such improvements affect property insurance, flood insurance, and attempts to transfer title or refinance mortgages.[90] Property improvements that were begun and completed without the issuance of a building permit and approval by the local government are subject to current building code regulations.[91] This includes improvements made to buildings, structures, and properties that must comply with the current regulations of the Florida Building Code (FBC) and local code provisions and applies to the construction, alteration, modification, repair, equipment, use and occupancy, location, maintenance, removal and demolition of buildings,

86. Fla. Stat. § 162.06(5)(a)–(d); Fla. Att'y Gen. Op. 93-77, *supra* n. 60. The last full paragraph of Florida Statutes Section 162.06(5)(d) provides as follows: "A failure to make the disclosures described in paragraphs (a), (b), and (c) before the transfer creates a rebuttable presumption of fraud. If the property is transferred before the hearing, the proceeding shall not be dismissed, but the new owner shall be provided a reasonable period of time to correct the violation before the hearing is held."

87. Fla. Stat. § 162.06(5)(d).

88. *Id.*

89. *Id.*

90. *Jensen v. Bailey*, 76 So. 3d 980, 981–982 (Fla. 2d Dist. App. 2011); Carolyn A. Dehring, *The Value of Building Codes*, Regulation 10, 11, 12, 13 (2006) (available at http://object.cato.org/sites/cato.org/files/serials/files/regulation/2006/7/v29n1-2.pdf).

91. *Jensen*, 76 So. 3d at 982.

structures, or facilities, and any appurtenances connected to them.[92]

If an improvement or modification to a building was never applied for and approved by the local government, the unpermitted change can become costly and even may result in confiscation from the owner if the local government prosecutes the violation pursuant to Chapter 162.[93] Examples are when a current or prior owner added a room as living space, a storage bin, changed the interior or exterior of a building, or when the building was altered making the property a multi-family rather than a single-family residence.[94] The changes can subject the current owner to fines and a lien if the changes have not been approved by the local government and are discovered and prosecuted.[95] Not only will code enforcement prosecution subject the owner's real property to a growing per diem fine and lien along with a reduction in any equity, the prosecution can effectively reduce the value of the real property due to the local government's code enforcement proceeding, even if the subject real property is returned to the way it was before it was altered.[96] Where an owner assumed that he or she owned a multi-family triplex residence, and it turns out that only a single-family residence or duplex is a permissible use, the residence may have to be returned to its prior original lawful use as a single-family residence or duplex, resulting in removal of the tenants living in the unpermitted portion of the residence and lost income to the

92. *Id.*; Peter Bober et al., *Policies Governing Department of Community and Economic Development Housing Programs* 13–14, http://www.hollywoodfl.org/DocumentCenter/View/2793, 13–24 (June 2013); Miami-Dade Co., *My Neighborhood—Help: Code Violation*, http://gisims2.co.miami-dade.fl.us/MyNeighborhood/Help_Code_Violations.asp (accessed May 14, 2014).

93. *Manatee Co. v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1130 (Fla. 2d Dist. App. 2012); *City of Venice v. Gwynn*, 76 So. 3d 401, 404 (Fla. 2d Dist. App. 2011); *Monroe Co. v. Carter*, 41 So. 3d 954, 956 (Fla. 3d Dist. App. 2010).

94. *1187 Upper James of Fla.*, 104 So. 3d at 1119; *Carter*, 41 So. 3d at 956.

95. *Henley*, 971 So. 2d at 1000.

96. Schilling, *supra* n. 3, at 116, 114; *see* C. Tyler Mulligan, *Toward a Comprehensive Program for Regulating Vacant or Abandoned Dwellings in North Carolina: The General Police Power, Minimum Housing Standards, and Vacant Property Registration*, 32 Campbell L. Rev. 1 (2009) (advocating for increased use of the state's police power to help avoid foreclosures and subsequent home abandonment); U.S. Conf. of Mayors, *Vacant and Abandoned Properties: Survey and Best Practices*, http://www.usmayors.org/bestpractices/vacantproperties08.pdf (2008) (explaining the impact of abandoned homes).

owner if the local government refuses to approve the alteration and change in use after the fact.[97]

An owner of the real property has several options if he or she purchased the real property with changes never permitted and approved by the local government and these modifications have been discovered by the purchaser. First, the owner may apply for and obtain a building permit from the local government for already completed workmanship and changes that are consistent with the FBC, zoning regulations, and the local government code.[98] Second, the owner may return the building to the status quo ante before the unpermitted changes were made to avoid a fine and lien.[99] Third, the owner may consider appearing before the special magistrate and circuit court upon appeal.[100] If the owner does not prevail before the special magistrate and argue that equitable estoppel and laches apply to the owner's real property in the local government's code enforcement proceeding.[101] These defenses can be considered, but they are

97. *Carter*, 41 So. 3d at 956.

98. *Bd. of Co. Comm'rs of Brevard Co. v. Snyder*, 627 So. 2d 469, 471 (Fla. 1993); Fla. Bldg. Code § 105.1 (2013). Local governments nationwide assume that their housing stock contains illegally converted residential space without issuance of a permit and approval of the building officials. It is difficult to determine the existing extent of secondary unit stock because of the widespread prevalence of unpermitted secondary units. Chhaya Community Dev. Corp., *Illegal Dwelling Units: A Potential Source of Affordable Housing in New York City*, 3, http://www.chhayacdc.org/pdf/Chhaya_reportHPD.pdf (Aug. 14, 2008); Jake Wegmann & Alison Nemirow, Inst. of Urb. and Reg'l Dev., *Secondary Units and Urban Infill: A Literature Review* 2, http://www.iurd.berkeley.edu/publications/wp/2011-02.pdf (Feb. 2011); Gen. Code, *Information Made Civil—Sample Legislation: Overcrowding and Illegal Occupancies*, http://www.generalcode.com/codification/sample-legislation/overcrowding-illegal-occupancy (accessed May 14, 2014).

99. *3M Nat'l Advert. Co. v. City of Tampa Code Enforcement Bd.*, 587 So. 2d 640, 641 (Fla. 2d Dist. App. 1991).

100. Fla. Stat. § 162.07. Under Section 162.11 of the Florida Statutes, an appeal of a code enforcement board's order to the circuit court "'shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board.'" *Sarasota Co. v. Bow Point on Gulf Condo. Developers, LLC*, 974 So. 2d 431, 432 n. 3 (Fla. 2d Dist. App. 2007). When the circuit court in its appellate capacity reviews local governmental administrative action, "three questions are asked: whether due process was afforded, whether the administrative body applied the correct law, and whether its findings are supported by competent substantial evidence." *Lee Co. v. Sunbelt Eqs., II, L.P.*, 619 So. 2d 996, 1003 (Fla. 2d Dist. App. 1993). The circuit court is not permitted to reweigh the evidence presented to the administrative agency. *Carter*, 41 So. 3d at 957.

101. *Verizon Wireless Personal Commc'ns, L.P. v. Sanctuary at Wulfert Point Community Ass'n, Inc.*, 916 So. 2d 850, 856 (Fla. 2d Dist. App. 2005); *Smith v. City of Clearwater*, 383 So. 2d 681, 686 (Fla. 2d Dist. App. 1980); *Monroe Co. v. Hemisphere Eq. Realty, Inc.*, 634 So. 2d 745, 748 (Fla. 3d Dist. App. 1994); *Corona Props. of Fla. v. Monroe Co.*, 485 So. 2d 1314, 1317–1318 (Fla. 3d Dist. App. 1986); *Town of Lauderdale-by-the-Sea v. Meretsky*, 773 So. 2d 1245, 1249 (Fla. 4th Dist. App. 2000).

infrequently sustained.[102] Most of the time, there is no notice provided to the local government of the de facto change in use of the real property, and accordingly, the local government will argue that it had no notice of the change and that zoning regulations prohibit a change in use.[103]

Conversion of a single-family dwelling to a multi-family dwelling and conversion of a commercial or industrial property to a single-family dwelling are usually nonallowable improvements.[104] Illegal conversions of dwellings are common alterations that are subject to code enforcement prosecution. Not only do zoning differences support prosecutions against illegal conversions, there are also safety risks attendant to conversions that include owners who decide to cut corners by hiring a cousin to install the electrical wiring, air conditioning, or heating in an illegally converted structure so that low income tenants can pay the title owner. These dwelling units are more vulnerable to fire and safety hazards that arise from lack of government regulation, and on this ground alone, local governments have the authority to prohibit these conversions when they are not "up to code" in an unpermitted zoning district.[105] Even if the owner provided notice to the local government of the change or the local government communicated with the owner and was aware of the change but failed to object, this will not necessarily be adequate to sustain an estoppel and laches claim because the owners are on constructive notice of an ordinance's contents.[106] Still, if the facts and circumstances are sufficiently compelling and the dwelling

102. *Supra* n. 101 and accompanying text.

103. *Supra* nn. 98–99 and accompanying text.

104. City of Hallandale Beach Code of Ordinances Section 32-311(c) provides that "[n]o plans may be permitted that allow illegal conversions, that create a greater density than that allowed under the [city's] applicable [zoning] regulations." This permits "two outside entrances and easily partitioned interiors" in single-family and duplex units and "other similar circumstances." *Id.* Under such circumstances, upon discovery and prosecution the owner will be required to obtain all required permits and convert the dwelling units back to a single-family home and comply with the city's current zoning and land development code. *Id.* The Florida Building Code Section 105.1 is also a basis to prosecute illegal conversions should the owner fail to apply for and obtain local government permits to modify a building. Florida local government ordinances as concerns illegal conversions can be located online. *See* Municode, *Municode Library: Florida*, http://www.municode.com/Library/FL (accessed May 14, 2014).

105. Fla. Bldg. Code § 105.3.1; Helen M. Marshall, *Fighting Illegal Conversions: A Comprehensive Guide for Communities*, http://www.queensbp.org/content_web/housing/illegal_apts.shtml (accessed Apr. 10, 2014).

106. *See supra* n. 101 and accompanying text.

is built up to code, equitable estoppel should be raised as a legitimate defense to a code enforcement proceeding[107] or a lien foreclosure action in civil court.[108] When the local government knew or should have known about the violations and it did nothing while the real property owner built, rezoned, or substantially changed its position in reliance on the local government's acquiescence, assent, or representations to the change in use, years have passed without a code enforcement proceeding by the local government, and the building is up to code, estoppel and laches may be raised as defenses to code enforcement prosecutions.[109] If the real property owner reasonably relied upon and changed his or her position on account of the local government action, as distinguished from inaction, then estoppel or laches should be raised.[110] In making these arguments, the owner has an uphill battle as every presumption and inference will be made against estoppel and laches. Regardless of the local government's action or inaction, an argument can be made by the local government that there are legitimate health, safety, and welfare concerns about the change in use and habitation of the building or dwelling because such code violations are continuing ones that violate a local government's code.[111] The local government can also argue that it had no authority to approve changes in the use of the real property without notice to the public of a public hearing; therefore, estoppel and laches should not apply.[112] While there is no silver lining in any of these options, approval of the charges may be permitted if the charge is "up to code," or the charge can become code compliant in the existing zoning district.[113]

---

107. *Council Bros., Inc. v. City of Tallahassee*, 634 So. 2d 264, 267 (Fla. 1st Dist. App. 1994); *Alachua Co. v. Cheshire*, 603 So. 2d 1334, 1337 (Fla. 1st Dist. App. 1992); *Franklin Co. v. Leisure Props., Ltd.*, 430 So. 2d 475, 480 (Fla. 1st Dist. App. 1983); *Castro v. Miami-Dade Co. Code Enforcement*, 967 So. 2d 230, 233, (Fla. 3d Dist. App. 2007).

108. *Jones*, 870 So. 2d at 55.

109. *Id.* at 53; *Castro*, 967 So. 2d at 233; *Bennett D. Fultz, Co. v. City of Miami*, 2005 WL 5302110 at *2 (Fla. 11th Cir. June 7, 2005).

110. *Jones*, 870 So. 2d at 55.

111. *Supra* nn. 101–103 and accompanying text.

112. Fla. Stat. § 286.011(1); *Broward Co. v. Conner*, 660 So. 2d 288, 290 (Fla. 4th Dist. App. 1995); Fla. Att'y Gen. Op. 2013-30 (Dec. 30, 2013) (available at http://www.myfloridalegal.com/ago.nsf/Opinions/35194EDDB659E5E385257C52004EC973).

113. *Supra* nn. 98, 105 and accompanying text.

VI. STATUTE OF LIMITATIONS ON CODE VIOLATIONS UPON LOCAL GOVERNMENT ADJUDICATION

Does Chapter 95 apply to code violations? In *Sarasota County v. National City Bank of Cleveland, Ohio*,[114] a prior owner of the property renovated the home between 1980 and 1990 but failed to obtain a building permit.[115] In 2001, the county began a code enforcement proceeding against the current owner.[116] The District Court of Appeal overruled the special magistrate and circuit court and held that Chapter 95 did not apply because code enforcement proceedings are quasi-judicial administrative actions.[117] From a health, safety, and welfare standpoint, these proceedings are brought to protect the community's public interest, even if brought against current landowners to correct long-standing violations that a current owner had nothing to do with. The violations are ongoing and can pose a threat to human safety until they are corrected and become FBC and code compliant.[118]

The Florida Senate weighed in on this issue when it suggested that the statute of limitations does not apply to administrative proceedings, such as code enforcement proceedings, stating:

> This distinction between administrative proceedings designed to protect the public interest, and administrative proceedings that essentially act as substitutes for civil actions that may otherwise be subject to a statute of limitations, is important, as . . . actions taken by the sovereign in order to protect the public interest are not subject to civil or criminal statutes of limitation.[119]

The statute of limitations is inapplicable to code enforcement violations because these proceedings are quasi-judicial administrative actions, not civil actions.

---

114. 902 So. 2d 233 (Fla. 2d Dist. App. 2005).

115. *Id.* at 234.

116. *Id.*

117. *Id.* at 234–235.

118. Fla. Stat. § 162.02; *Verdi v. Metro. Dade Co.*, 684 So. 2d 870, 872 (Fla. 3d Dist. App. 1996).

119. Fla. Sen. Interim Project Rep. 2008-131, *Statute of Limitations for Administrative Actions* 3 (available at http://archive.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-131go.pdf) (Oct. 2007).

VII. OPTIONS OF A PROSPECTIVE PURCHASER IN SEEKING TO PURCHASE REAL PROPERTY

What options does a prospective purchaser have if he or she is interested in a particular piece of real property as it exists? The purchaser and attorney can perform their due diligence during the time frame imposed by the contract for the purchase and sale of the real property and any extensions agreed to between the parties.[120] The contract should specifically provide that good marketable title is required, which will include a title free and clear of code violations imposed by a local government. The contract should also provide that there are no existing code violations on the subject real property, known or unknown. Regardless, the purchaser should hire a reputable home inspector and appraiser during the inspection period in an attempt to determine if any code violations exist. It would also be a good idea for the seller to covenant in the contract the existing number of units on the real property, if there have been any alterations made on the real property including any permits applied and obtained, and that these units are lawful in the current zoning district.[121] These are just some of the provisions that should be placed into a contract for purchase and sale depending on the negotiating skills of the purchaser and his or her attorney.

Marketable title has been defined as title valid in fact; it can be sold to a purchaser or mortgaged to a person without a cloud that will affect its market value. There must also be no reasonable fear that title will be called in question.[122] If there are unpaid fines on the real property, this will subject the real property to future litigation, diminished market value, and create "an encumbrance on the [real] property that is a paradigm of unmarketability."[123] However, unless the contract specifically warrants against code violations by a local government, silence on the existence of code violations in the contract, as distinguished

120. *Prof'l Golfers Ass'n of Am. v. Bankers Life and Cas. Co.*, 166 So. 2d 488, 492–493 (Fla. 2d Dist. App. 1964); *Reamco Dev. Corp. v. 499 Corp.*, 992 So. 2d 431, 432 (Fla. 4th Dist. App. 2008); *Henley*, 971 So. 2d at 999.

121. *Bailey v. First Mortg. Corp. of Boca Raton*, 478 So. 2d 502, 504 (Fla. 1st Dist. App. 1985); *KJB Village Prop., LLC v. Craig M. Dorne, P.A.*, 77 So. 3d 727, 729 (Fla. 3d Dist. App. 2011); *Henley*, 971 So. 2d at 1000.

122. *Adams v. Whittle*, 135 So. 152, 155 (Fla. 1931); *KJB Village Prop.*, 77 So. 3d at 731; *Henley*, 971 So. 2d at 1000.

123. *Henley*, 971 So. 2d at 1000.

from pending code enforcement proceedings and existing fines, will not render the real property unmarketable.[124] It would be best if the purchaser knew whether the real property's use had been expanded, and if so, when expansion or alteration occurred, so that the purchaser can determine if the local government approved the modifications. If there is silence on this matter, and upon checking with the local government it appears that no permits were issued and approved for any modifications or workmanship, then the purchaser should strongly consider cancelling the contract within the due diligence time frame of the contract.[125] Illegal home conversions have become a significant and growing problem in Florida.[126] If the prospective purchaser and seller close the sales transaction, it will usually be the purchaser who is stuck with remedying future code enforcement prosecutions and paying the tab to remedy the violations.[127]

It should be apparent that most parties involved in real estate transactions are honorable and trustworthy, but some are not. The maxim "trust, but verify"[128] should be followed to make certain that the purchaser is receiving what he or she is supposed to receive in the sales transaction. Even if a seller provides a disclosure statement, the purchaser should be leery of the seller's warranties and representations. If the purchaser should fail to verify any warranties and representations, the purchaser, as the new owner upon closing, will have to deal with any future

124. *KJB Village Prop.*, 77 So. 3d at 731; *Chafetz v. Price*, 385 So. 2d 104, 106 (Fla. 3d Dist. App. 1980); *see also* Fla. Stat. § 162.06(5)(a)–(c) (requiring the current owner to provide notice of existing code enforcement proceedings to the successor owner during a purchase and sale).

125. *Reamco Dev. Corp.*, 992 So. 2d at 432.

126. Larry Tolchinsky, *Florida Illegal or Nonconforming Home Conversions Are Growing Problem: Florida Home and Condo Buyers Should Know Risks of Buying Home with Illegal Improvements*, http://aboutfloridalaw.com/2012/03/01/florida-illegal-or-nonconforming-home-conversions-are-growing-problem-florida-home-and-condo-buyers-should-know-risks-of-buying-home-with-illegal-improvements/ (Mar. 1, 2012).

127. Fla. Stat. § 162.06(5)(d).

128. A traditional Russian phrase, "trust but verify" (*doveryai, no proveryai*), was used by President Reagan at the signing of the Intermediate-Range Nuclear Forces Treaty between the United States and Russia that eliminated nuclear and conventional ground-launched ballistic and cruise missiles with intermediate ranges in 1987. William D. Watson, *Trust, but Verify: Reagan, Gorbachev, and the INF Treaty*, S. Hilltop Rev. 22 (2011). Secretary of State John F. Kerry echoed those same words when the United States and Russia agreed upon a disposal plan for Syria's chemical weapons in 2013. Henry Chu, *U.S., Russia Agree on a Disposal Plan for Syria's Chemical Weapons*, L.A. Times, http://www.latimes.com/world/worldnow/la-fg-wn-kerry-lavrov-syria-20130914,0,4340460.story#ixzz2nSRwMeZk (posted Sept. 14, 2013, 5:15 a.m.).

problems resulting from any illegal conversion, and the legal remedy will be to assert a claim against the seller for damages.[129] If the purchaser moves forward and closes the sale after having knowledge of the illegal conversion, then if suit is brought, the seller can legitimately argue that the purchaser knew of the illegal conversion and that the dwelling was bought with the knowledge of the illegal conversion.[130] The permitted use of the real property can be confirmed by obtaining necessary information from the local government code enforcement personnel in determining if the real property's current use conforms to the zoning and use regulations of the local government's code of ordinances.[131] If the residence's use is three families living in three separate residences in the form of a triplex, rather than the lawful use as defined by the local ordinance of two families as permitted in a duplex, then the prospective purchaser is on notice that the current or prior owners expanded the use beyond what is lawfully permitted.[132] The prospective purchaser can easily communicate with the local government code enforcement officials in determining what is lawfully permitted. He or she can determine whether the real property's use was lawfully or unlawfully altered and expanded according to the permits existing on the subject real property at the local government, and if not, whether an after-the-fact permit approval can be realistically obtained from the local government.[133]

It should be apparent that if there were no permits applied for and obtained to allow multi-family triplex zoning on the real property, and the zoning district permits only single- or double-family duplex residences, the existing triplex family occupancy and use is unlawful. In such an instance, a red flag is raised, and if the prospective purchaser looks at what is permitted—double family, duplex residential is permitted, whereas a multi-family, triplex residential is not permitted—then the prospective purchaser can expect a future code enforcement proceeding after a sale. Under such circumstances, the prospective purchaser has

129. Tolchinsky, *supra* n. 126.

130. *Id.*

131. *E.g.* Miami-Dade Co., *supra* n. 92.

132. *Jensen*, 76 So. 3d at 982; *Henley*, 971 So. 2d at 1000.

133. *1187 Upper James of Fla.*, 104 So. 3d at 1123; *A. Duda & Sons, Inc. v. St. Johns River Water Mgt. Dist.*, 22 So. 3d 622, 623 (Fla. 5th Dist. App. 2009); *see also* Miami-Dade Co., *supra* n. 92.

two options: one option is to assume the risk and go forward with the sale for reasons known to the purchaser, and the other option is to cancel the purchase and sale by walking away within the time constraints imposed by the due diligence clause of the contract and seeking a refund of any deposits.[134] In either event, if local government code enforcement becomes involved and determines that there has been an unlawful alteration and expansion in use, the rental income from at least one unit will be eliminated after the premises are returned to the status quo ante. The local government will argue that the health, safety, and welfare is at issue and will require modification of the current, unlawful use thereby reducing the number of tenants and income obtained from the real property use. Building regulations have been relied upon to protect the public from the hazards of substandard building materials and slipshod construction techniques. Local governments' concerns about the size of the lot in the zoning district, building structure size, fire safety hazards, placing of kitchenettes and appliances in the addition, and necessary parking spaces are among legitimate health, safety, and welfare concerns of a change in use.[135] In most instances, the local government will have an ordinance that refuses to expand the unlawful use after the fact, thereby necessitating a return to the status quo ante.[136] Whether a local government will allow an after-the-fact building code modification of the real property by allowing a triplex to exist rather than a duplex or single-family residence depends on the philosophy of the local government and any existing ordinances, but in most instances the local government will not allow an after-the-fact permit by the owner in an after-the-fact proceeding in a change in use.[137]

---

134. *Johnson v. Davis*, 480 So. 2d 625, 627, 629 (Fla. 1985); *Rodriguez v. Leonard*, 477 So. 2d 19, 20 (Fla. 3d Dist. App. 1985).

135. Although local governments in different states differ as to what may constitute an illegal conversion, a detailed discussion of the dangers of illegal conversions may be found in publications found on the Internet. City of Tustin Community Dev. Dep't, *Nonconforming Structures, Uses and Lots: A Discussion of the Intent, Application, and Practice of California Land Use and Planning Law Governing Nonconforming Structures, Uses and Lots*, http://www.tustinca.org/departments/commdev/documents/planningandzoning/NonconformingReport.pdf (Sept. 2011); Marshall, *supra* n. 105.

136. *3M Nat'l Advert. Co.*, 587 So. 2d at 631; *supra* nn. 101, 125 and accompanying text.

137. *Supra* n. 125 and accompanying text.

VIII. STATUTE OF LIMITATIONS ON THE VALIDITY OF LIENS, ORDERS, AND JUDGMENTS

There is a five-year limitation period for an action to foreclose a code enforcement lien that begins to run on the date a code enforcement lien has accrued, which is the date the code enforcement lien is recorded.[138] A local government is granted authority to file a foreclosure action in civil circuit court against the owner of real property, and as long as the action is timely filed, the local government may obtain a judgment of foreclosure against the owner's real property.[139]

An additional consideration is that if the real property is the owner's homestead, there can be no execution on the real property because there is no lien that attaches to the homestead real property.[140] However, this should not preclude the local government from obtaining a final judgment for damages against the owner for the amount of the fine attributable to the code enforcement violation that can be recorded with the clerk of the court for a future execution and sale of the real property.[141] No judgment, order, or decree of any court shall be a lien upon real or personal property within the state after the expiration of twenty years from the date of entry of such judgment, order, or decree.[142] After a twenty-year life span, the creditor has no recourse against the debtor, even if the real property loses its homestead character through sale or a change in status.[143] Yet if the real property loses its homestead character during the twenty-year life span, there is no reason why the real property cannot be executed upon by the judgment creditor and sold upon the owner's loss of the homestead character of the real property.[144] As always, it is important for the creditor to record a certified copy of the final

138. Fla. Stat. § 95.11(2)(c); *City of Riviera Beach v. Reed*, 987 So. 2d 168, 170 (Fla. 4th Dist. App. 2008); *Allen*, 650 So. 2d at 650.

139. Fla. Stat. § 162.09(3); *Jones*, 870 So. 2d at 55.

140. Fla. Stat. § 162.09(3); *Ilkanic*, 705 So. 2d at 1373; *Demura*, 618 So. 2d at 756. Florida Statutes Section 162.09(3) expressly prohibits enforcement and foreclosure of a code enforcement lien on homestead real property on account of Article X, Section 4(a), of the Florida Constitution.

141. Fla. Stat. §§ 162.09(3), 162.125; *Mathieu*, 961 So. 2d at 364.

142. Fla. Stat. §§ 55.081, 162.10.

143. Fla. Stat. § 162.10; *Golden v. City Nat'l Bank of Hallandale*, 16 B.R. 580, 582 (Bankr. S.D. Fla. 1981).

144. *Golden*, 16 B.R. at 582; *Corzo Trucking Corp.*, 61 So. 3d at 1289; *Burshan v. Nat'l Union Fire Ins. Co. of Pitt.*, 805 So. 2d 835, 839 (Fla. 4th Dist. App. 2001).

judgment with the clerk of the court in the county where the real property is located for there to be a judgment lien against the debtor.[145]

IX. FUNDAMENTAL DUE PROCESS: NOTICE AND AN OPPORTUNITY TO BE HEARD

A notice of violation must be sent by certified mail, return receipt requested, to the owner of the real property at the address listed in the tax collector's office, or any other address provided to the local government in writing by such owner for the purpose of receiving notice.[146] Absent a local government ordinance that broadens the notice requirement to those with a protected interest in the real property,[147] there is no requirement for notices to be sent to mortgagees, occupants or lessees, contract purchasers, agents with a power of attorney, or a person claiming an interest under a lis pendens.[148]

Does fundamental due process require that mortgagees and other protected parties be notified of pending code enforcement violations? Rather than go through a code enforcement proceeding with a remiss or lackadaisical real property owner who may fail

145. *Burshan*, 805 So. 2d at 838.

146. Fla. Stat. § 162.12(1)(a). *Little* was decided under the predecessor statute and suggested that the notice provisions of this statute must be strictly construed. 759 So. 2d at 19.

147. *See Head*, 797 So. 2d at 1267 (discussing Section 18-3 of the Panama City Municipal Code).

148. *Id.* Mortgagees and owners have the most to lose in any code enforcement proceeding. Should there be adjudication and noncompliance with the final order, the per diem fines accrue and can grow. Residential occupants and lessees have the right to remain on the subject real property as long as they remain current in their rent and act pursuant to the terms of a written lease. If someone enters into a written lease on residential real property before a foreclosure, then the new owner after sale takes the property subject to the rights of the tenant. If the written lease is for a specific term, the tenant gets to stay for that term, with one exception. If the new owner at the foreclosure auction intends to use the property as his or her principal residence, then the lease can be terminated on ninety days' notice. Protecting Tenants at Foreclosure Act 2009, 12 U.S.C. § 5201 (2012). When there is no written lease, or when the tenancy is at-will, the tenant can remain at least ninety days. *Id.* The tenant cannot be the borrower or his or her child, parent, or spouse. *Id.* The rent cannot be substantially less than fair market value. *Id.* Contract purchasers and agents with a power of attorney are usually not of record, but Florida Statutes Sections 162.06(5)(a)–(d) provides them with relief should the seller fail to advise the purchaser or his or her agent of any pending code enforcement proceedings. A person claiming an interest pursuant to a lis pendens will already be on notice of any existing liens or encumbrances because a title and lien search will have already been accomplished. *Id.*

or refuse to remedy the code violations, if the mortgagees are notified of code violations existing on the subject real property, it is in their best interest to remedy the code violations should the title owner fail to do so in lieu of discovering later that the local government has assessed substantial, accrued per diem fines against the title owner and the subject real property. Not only would there be long-term cost savings of time and energy to the local government,[149] the mortgagees would be on notice that their security interest is in jeopardy and that it is in their best interest to act to protect their security interest in the real property. If mortgagees remain unaware of code violations on their securitized real property, the per diem fines continue to grow thereby reducing the value of the real property. Equity existing in the real property will decline and perhaps even vanish when the mortgagee receives back the title to the real property in a foreclosure proceeding initiated by the mortgagee.[150] Over time, the entire neighborhood may be negatively impacted as the appearance of both the dwelling and the entire neighborhood diminishes resulting in a reduction of value for property tax assessment purposes.[151]

Currently, the mortgagee is not required to receive notice and be brought into a code enforcement prosecution, and therefore, the entire burden to remedy code violations lies with the title owner.[152] While the title owner is brought before the code enforcement proceeding, the failure to notice and join the mortgagee can have the effect of punishing the mortgage holder for the wrongdoing of the title owner. The threat of per diem fines

149. There is legitimate concern that if the Florida legislature and local governments enacted broadly worded notice ordinances to persons and entities possessing real property interests, additional staff would be needed to conduct title searches. Title examiners might be necessary to examine title to the real property that could cost local governments money without guaranteeing them the ability to recoup costs. Notice to interested parties, especially a mortgagee, may result in longer adjudicatory proceedings in the short term, but in the long term, notice of violations in code enforcement proceeding to a mortgagee would encourage a mortgagee and other interested parties to expedite corrections of code violations rather than learn for the first time after entry of a final order that fines and a lien have been assessed that effectively reduce the equity in the real property.

150. Fla. Stat. § 162.12(1)(a).

151. *Fulmore v. Charlotte Co.*, 928 So. 2d 1281, 1283 (Fla. 2d Dist. App. 2006); John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. Urb. Affairs 301, 303 (2000) (discussing the ramifications of vacant and abandoned property as a substantial barrier to the revitalization of neighborhoods).

152. Fla. Stat. §§ 162.12(1)(a), 162.06.

and a lien to a mortgage holder is not inconsequential or marginal. Levying punishment against a party who has done nothing wrong seems contrary to the concept of fundamental due process. Commanding fines against the interests of a third party, not a participant in an administrative proceeding, and without standing to contest any of the agency's rulings, but whose adjudication will have an effect on the third party's interest in the real property, is contrary to the concept of fundamental due process and fairness. In contrast, when a municipal tax is imposed, Chapter 173 of the Florida Statutes requires at least thirty days' notice by registered mail to the holder of the record title and the holder of each mortgage or lien before suit is filed.[153] In light of the existing statutes that provide a local government with the right to impress a lien on specific real property if there is nonpayment, these statutes should be used as a basis for code enforcement proceedings to follow so that a mortgagee is provided with notice and an opportunity to be heard.[154]

Although local governments have argued that providing notice to an interested party other than the title owner constitutes a substantial burden,[155] a mortgagee has a security interest in the real property making the mortgagee an interested party to protect its interest. The mortgagee, like the owner, has much to lose if fines and a lien are placed on the real property. In a perfect world, the title owner will remedy code enforcement violations. In the real world where financial considerations come into play, owners of real property can and do neglect and ignore code violations by failing to remedy them, even when they are notified by the local government.

There are pragmatic reasons to provide a mortgagee with notice of code violations and an opportunity to remedy them before they sizably grow and subject the mortgagee to a substantial lien that will effectively decrease the value of the real property. First, a mortgagee owns a security interest in securitized real property that should protect it from the imposition of large, accrued fines without notice of code violations. While the Florida Supreme Court's decision in *City of Palm Bay v. Wells Fargo Bank, N.A.*, suggests that a code enforcement lien perfected

153. Fla. Stat. § 173.04.
154. *Id.*; *supra* nn. 11–14, 16–19 and accompanying text.
155. *Head*, 797 So. 2d at 1268–1269.

after recordation of a mortgage is subordinate to the mortgage,[156] there are situations where a code enforcement lien might attach to the real property after a mortgage is filed and recorded in the public records. New statutes might be enacted by the legislature in the future when code enforcement liens are specifically made coequal with the liens of all state, county, district, and municipal taxes. This could have the effect of leap frogging code liens over a mortgagee's security interest regardless of the time each is recorded.[157]

Second, if the local government provides notice of code violations to the owner and the mortgagee of the real property, there is a greater prospect that at least one interested party will comply if faced with substantial and accrued per diem fines that can grow if the code violations are not remedied. A not uncommon occurrence in a mortgage foreclosure action is where a summary judgment is entered in favor of the mortgagee that in essence returns the subject real property to the mortgagee in its then-existing condition. If the mortgagee receives the real property as his or her own on account of the mortgagor/owner's default in payments, there are continuing and accruing code enforcement violations that will ultimately make the new owner responsible for remedying the violations as the fine accrues.[158] While some local governments have been known to work with the mortgagee after the entry of a summary judgment and clerk's sale, there is no guarantee that staff at local government code enforcement will necessarily do so. Many local governments will substantially discount monetary sanctions provided the violations are remedied.[159] But local government code enforcement authorities can just as easily refuse to compromise, or if an offer to compromise is

156. 114 So. 3d at 928–929.

157. *Id.* at 929–931 (Perry, J., dissenting).

158. Fla. Stat. §§ 162.06, 162.07(4).

159. In determining whether to reduce a fine that is authorized by Section 162.09(2)(c) of the Florida Statutes, the special magistrate may consider the factors listed in Section 162.09(2)(b). Some local governments provide guidelines for reduction of fines in mitigation proceedings after the violations have been remedied. Lee Co. Admin. Code for Hrg. Exam'r in Code Enforcement Hrgs. (2014) (available at http://www.leegov.com/gov/BoardofCountyCommissioners/Administrative%20Codes/AC-2-14.pdf); N. Lauderdale Code Enforcement Mitigation Or. (2011) (available at http://www.nlauderdale.org/departments/code_enforcement_division/lien_mitigation/index.php); Key West Code Enforcement Mitigation Proc. (2009) (available at http://www.keywestcity.com/egov/documents/1251923612_66955.pdf).

made, the code fines and lien may only be reduced slightly.[160] As the fines and lien grow, there must be compliance with all code violations before the local government will allow the new owner to seek an abatement or mitigation where the new owner can argue that the assessed fine should be reduced or eliminated.[161] If the mortgagee had received noticed as to the initial code violations, he or she could have attempted to persuade the owner to remedy the violations before a final order is entered, or alternatively, the mortgagee could attempt to remedy the code violations before the local government imposes fines and liens. If neither of these options work, then the mortgagee has the authority to file a foreclosure action against the owner and add amounts resulting from the title owner's failure to maintain the subject real property pursuant to the terms of the note and mortgage that can include contractual requirements for the mortgagor to pay for liens and costs incurred to prevent deterioration of the subject real property during foreclosure.[162] Obligations that are required to be paid by the mortgagor/owner include principal, interest, taxes, insurance, association costs and assessments, and liens resulting from the owner's failure to maintain the real property.[163] Failure to make all mortgage payments goes to the core of the agreement between the

160. While local government code enforcement divisions are not allowed to act as tax collectors, some have suggested that they can use code enforcement fines as a way to supplement their revenue in light of the demanding times. Local governments across the United States have struggled to raise revenue to pay for public services. Increased demands by citizens for more and better public services, the ever-rising costs of providing services, and an abundance of legal and political restrictions on raising tax revenue have left many local governments in ominous fiscal positions on account of decreasing revenue from existing taxes and dues. William F. Fox, *Can State and Local Governments Rely on Alternative Tax Sources?* 6 Fed. Reserve Bank of St. Louis Reg. Econ. Dev. 88, 92 (2010) (available at http://research.stlouisfed.org/publications/red/2010/01/Fox.pdf); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay for" Model of Local Government*, 56 Fla. L. Rev. 373, 375 (2004).

161. Fla. Stat. § 162.09(2)(c); *Cortes*, 995 So. 2d at 605; Fla. Att'y Gen. Op. 2002-62, *supra* n. 39; Fla. Att'y Gen. Op. 098-50 (Aug. 12, 1998) (available at http://www.myfloridalegal.com/ago.nsf/Opinions/AACFFFCC5950CED88525665E00653260); Fla. Att'y Gen. Op. 93-91 (Dec. 14, 1993) (available at http://www.myfloridalegal.com/ago.nsf/Opinions/103034D09FC31FFE852566520054E336).

162. Kevin F. Jursinski, *The Mortgage Foreclosure Crisis in Florida: A 21st Century Solution*, 84 Fla. B.J. 91, 92–93 (Jun. 2010). Florida law has held that the existing and applicable law is incorporated into every contract. *Indemnity Ins. Co. of N. Am. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536–537 (Fla. 2004); *Dep't of Ins. v. Teachers Ins. Co.*, 404 So. 2d 735, 741 (Fla. 1981); *Bd. of Pub. Instr. of Dade Co. v. Town of Bay Harbor Is.*, 81 So. 2d 637, 643 (Fla. 1955).

163. Jursinski, *supra* n. 162, at 91.

mortgagor and the mortgagee, and the failure to pay is not a mere technical breach of the mortgage's terms and conditions.[164] If the mortgagee is noticed of the code violations, these violations may be remedied sooner rather than later, making a future abatement proceeding unlikely and unnecessary once the real property violations have been remedied. If compliance with the final order occurs, this will also take away much of the discretion granted to the local government in determining how much of a reduction in the fines and lien should be granted to the mortgagee.[165] Local government authorities can be uncompromising or lenient for any number of reasons, including the title owner's responsiveness and efforts to correct the violations, the title owner's attitude as someone who flouts or obeys the law, whether there were previous violations committed by the owner, the gravity of the violations, cost if any upon the owner to correct the violations, the amount of time it took to correct the violations, current value of the property compared to the amount of the lien, the time and costs incurred by the local government to get the code violations corrected, documentation of compliance date if different from when the local government originally calculated the compliance date, whether the real property is owner occupied and constitutes the homestead of the owner or is an investment property, and any other factor to do justice under the circumstances of the case.[166]

While the present day code enforcement procedure is quick and expedient to determine if code violations exist—the primary emphasis is on compliance—there are some who suggest that the procedure lacks an important ingredient of fundamental due process and fairness that is part and parcel to the local government's main focus: to expeditiously obtain compliance with the final order by working with the owner and lender to minimize the harmful effects of foreclosure and vacancies in neighborhoods.[167] Those arguments suggest that without notification of the mortgagee at the same time the owner is notified, there is a greater likelihood that the dwelling or business premises will

164. Fla. Stat. §§ 697.02, 702.01; *David v. Sun Fed. Sav. & Loan Ass'n*, 461 So. 2d 93, 96 (Fla. 1984); *Pezzimenti v. Cirou*, 466 So. 2d 274, 276 (Fla. 2d Dist. App. 1985); *Reed v. Lincoln*, 731 So. 2d 104, 106 (Fla. 5th Dist. App. 1999).

165. Fla. Stat. §§ 162.09(2)(c), 172.04.

166. Fla. Stat. § 162.09; *Cortes*, 995 So. 2d at 605. Most local governments set forth guidelines for their mitigation proceedings, which can be found on the Internet.

167. Fla. Stat. § 162.02.

effectively deteriorate resulting in greater repair costs that will be paid by the mortgagee, which increases the possibility of a distressed neighborhood over the long term.[168] In addition, under current law, the mortgagee as a non-party to the code enforcement proceeding is exposed to unresolved and unknown fines that the mortgagee is not aware of that can effectively reduce the value of the securitized real property by reducing and even eliminating the equity in the real property existing before the fines and lien were assessed and grew.[169] Should the mortgagee decide to abandon his or her foreclosed real property on account of a substantial and long standing lien, then the local government may wind up filing a foreclosure action against the owner and mortgagee and become the new owner with all of the benefits and burdens that encumber real property owners. This is a last resort by the local government, but it needs to be considered because the earlier all interested parties are notified of code violations and become part of the adjudicatory process, the sooner there will be a result, and perhaps the sooner the real property violations will be remedied.

A local government is authorized to impose administrative per diem fines on the owner and the real property to enforce code compliance with existing violations of the local government code.[170] However, local government should not act as a tax collector, nor should it assess substantial fines if there are methods to obtain compliance without the assessment of uncapped fines.[171] Instead, the goal of local governments' code enforcement is to use the threat of per diem fines to obtain correction of code violations,

168. Accordino & Johnson, *supra* n. 151, at 312–313; *Developments*, *supra* n. 6, at 712–713.

169. Failing to notify the mortgagee presents a high stakes challenge to mortgage holders, who are not even parties to code enforcement proceedings, as code enforcement liens can involve substantial amounts of money. The local government seeks to collect against the interest of mortgage holders, who generally have no responsibility during a code enforcement proceeding, as they are not in a position to bring the real property into compliance with local codes. This raises a number of pragmatic and constitutional concerns with Chapter 162 of the Florida Statutes, including a contention that allows for the imposition of fines against nonviolators and non-parties contrary to the Florida Constitution, without providing any notice to satisfy the federal and state constitutions' Due Process Clauses, and perhaps even impairing contracts in a manner that could extend to the holders of mortgages in real property outside the county where the code violations and liens exist.

170. Fla. Stat. §§ 162.02, 162.09.

171. Fla. Stat. § 162.01; *City of Palm Bay* S. Ct. of Fla., 114 So. 3d at 927.

because if the owner fails to address the notice of violation, then the local government is authorized to assess five hundred dollar per diem fines depending on the severity of the code violations.[172] It is where the owner is served but fails or refuses to comply with the notice of violation that the local government may assess per diem fines that can grow ad infinitum based on the length of time and the severity of the code violations.[173] If there is ever any legislation or appellate court decision that requires the owner and the mortgagee to be noticed with code violations, then neither can later legitimately argue that they were unaware of the code violations. If an abatement or mitigation proceeding is requested, then any relief can still be considered if there are exceptional circumstances to support a reduction of the fines, but if none exists, then the request to abate and mitigate the fine can be denied, or the fine's amount can be slightly reduced if all interested parties sat by and did nothing without justification.[174] Since time should be of the essence in cleaning up and remedying code violations, there would also be less uncertainty about the effect of code enforcement liens. If all interested parties are notified, the major players and stakeholders would be on notice of the code violations and brought before the administrative agency making them potentially liable if there was no remedy.

X. CONSTITUTIONAL CONSIDERATIONS: DUE PROCESS TO INTERESTED AND PROTECTED PARTIES IN CODE ENFORCEMENT PROCEEDINGS

Due process of law imposes limitations on governmental decisions that deprive individuals and entities of property interests, notice, and an opportunity to be heard.[175] Whether a mortgagee is an interested and protected party mandating notice in code

172. Fla. Stat. § 162.09.

173. Fla. Stat. §§ 162.06(4), 162.09.

174. Fla. Stat. § 162.09(2)(c). An exceptional circumstance is when an owner refuses to permit a mortgagee's representative to enter onto the real property to remedy code violations in a gated or open community. If the cost to remedy code violations is large or excessive, and financing is not possible, this may be an exceptional circumstance. If the mortgagee became insolvent, then this could be an example. There are perhaps other examples of good cause or exceptional circumstances that could show why the violations were not remedied after notice, but the ones mentioned here are just a few.

175. Harry M. Hipler, *Special Magistrates in Code Enforcement Proceedings: Local Government Agents or Arbiters of Fairness and Justice?* 38 Stetson L. Rev. 519, 523–524 (2009) [hereinafter *Special Magistrates*].

enforcement proceedings on account of the Due Process Clauses of the United States and Florida Constitutions has not been expressly decided in Florida. At the present time, it is only the title owner who is required to be notified of code violations by the local government.[176] A fundamental question is whether the notice provision in Chapter 162 of the Florida Statutes should be modified to include other interested parties. Is providing notice only to title owners instead of owners and mortgagees contrary to the United States and Florida Constitutions? Is a mortgagee's security interest a "property interest" within the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Section 9, of the Florida Constitution requiring notice?[177]

The United States Supreme Court has weighed in on what constitutes adequate notice by virtue of the Due Process Clause of the Fourteenth Amendment. In *Mennonite Board of Missions v. Adams*,[178] the Court considered whether notice by publication and posting was sufficient to provide a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for the nonpayment of taxes. The Court ruled that a mortgagee whose mortgage would be divested by a tax sale is entitled to personal service of a notice of sale by virtue of the Due Process Clause of the Fourteenth Amendment.[179] The Court indicated that an interested party must receive notice through mail or other means that will ensure actual notice of a proceeding that will adversely affect the interest of a protected party.[180]

The Supreme Court carried the matter of notice further in *Jones v. Flowers*,[181] in which a notice of a tax sale served by certified mail was returned unclaimed by the owner. The majority held that the Fourteenth Amendment's Due Process Clause required the state to take "additional reasonable steps" to contact the title owner before it could sell the owner's real property.[182] In

176. Fla. Stat. § 162.12(1)(a); *Massey v. Charlotte Co.*, 842 So. 2d 142, 146 (Fla. 2d Dist. App. 2003); *Ciolli*, 59 So. 3d at 297–298.

177. *Shelden v. United States*, 7 F.3d 1022, 1026 (Fed. Cir. 1993); *Nev. Interstate Props. Corp. v. City of W. Palm Beach*, 747 So. 2d 447, 448 (Fla. 4th Dist. App. 1999).

178. 462 U.S. 791, 792 (1983).

179. *Id.* at 800.

180. *Id.* at 799.

181. 547 U.S. 220 (2006).

182. *Id.* at 225.

its decision, the Court emphasized the extraordinary power of the state against owners, and ruled that certified mail was insufficient per se when there was a question on whether the owner ever received notice.[183] Although the Court did not set forth any required notice provisions, reasonable steps beyond certified mail could include posting a notice on the front door of the home or building that addressed the mail to the occupant, personal service if certified mail is returned, and advertising in a newspaper of general circulation.[184] The goal is not just to attempt to provide notice, but rather, when it is clear that notice was not received by the owner, there should be additional reasonable steps taken to notify the owner before the sale occurs that must be made to comply with the Due Process Clause.[185]

In a subsequent decision, the Court in *United Student Aid Funds, Inc. v. Espinosa*[186] suggested that the Due Process Clause did not require actual notice in an adversarial proceeding against the lender by the debtor to determine undue hardship, but that nominal actual notice is adequate as long as notice was received. The decision in *Espinosa* concerned a bankruptcy proceeding and whether a bankruptcy court must determine that a debtor suffers from undue hardship before it cancels a student loan debt in bankruptcy.[187] However, even if the bankruptcy court did not make such a determination in this decision's error-laden proceeding, its original order to cancel the debt may be enforced if the creditor knew of the bankruptcy proceeding but did not object by a given deadline even without an adversary proceeding.[188] The lender's right to due process was not violated without an adversarial proceeding by the debtor's intention to discharge the student loan interest in that the lender received notice of the bankruptcy proceeding when the bankruptcy court sent the lender a copy of the debtor's plan that satisfied the due process requirement.[189]

183. *Id.* at 234, 239.
184. *Id.* at 235.
185. *Id.* at 239.
186. 559 U.S. 260 (2010).
187. *Id.* at 264.
188. *Id.* at 272.
189. *Id.*

Although *Jones* did not address whether notice to a mortgagee was required in code enforcement quasi-judicial proceedings,[190] the Court acknowledged that the state has extraordinary power in taking and divesting property rights from owners in tax deed sales and eminent domain proceedings.[191] A local government, through a code enforcement proceeding not unlike tax deed and eminent domain proceedings, has extraordinary power in divesting property rights and interests as substantial fines accrue permitting the assessment accruing fines and a substantial lien against the real property, title owner, and the mortgagee that will subject them to a future foreclosure action and possible loss of property.[192] In a code enforcement proceeding, if the evidence supports a finding that there is substantial, competent evidence to support code violations, the hearing officer has the authority to decide the amount of per diem fines that will be assessed if the owner fails to comply with the finding of violations.[193] The judiciary defers to special magistrates' decisions on the amount of the fines. Florida decisions have held that fines from code enforcement proceedings must be grossly disproportionate or shock the conscience in relation to the severity of the offense before relief may be granted by the judiciary.[194] This rationale provides the owner and other interested parties with an almost insurmountable burden in moving to abate or mitigate the amount of the local government fines.[195] While an appeal can be filed in the circuit court after an adverse adjudication against the real property owner on whether violations were proven and the

190. *Jones*, 547 U.S. at 220.

190. *Id.* at 239.

191. *Id.*

192. *See Khan v. City of Orlando*, 16 Fla. L. Wkly. Supp. 608b (Fla. 9th Cir. App. Mar. 30, 2009) (affirming penalties totaling $155,750); *Fernandez v. City of Orlando*, 16 Fla. L. Wkly. Supp. 382a (Fla. 9th Cir. App. Dec. 1, 2008) (appealing a $132,750 penalty); *Dundale v. City of Miami*, 16 Fla. L. Wkly. Supp. 1017a (Fla. 11th Cir. App. Sept. 22, 2009) (reducing a $163,000 lien to $40,000 after the correction of violations).

193. Fla. Stat. §§ 162.07, 162.09.

194. *See Moustakis*, 2008 WL 2222101 at *1; *Riopelle v. Dep't of Fin. Servs., Div. of Workers' Compen.*, 907 So. 2d 1220, 1223 (Fla. 1st Dist. App. 2005); *Recupero*, 949 So. 2d at 277; *Resort Timeshare Resales, Inc. v. Off. of Att'y Gen.*, 766 So. 2d 382, 383 (Fla. 4th Dist. App. 2000); *Khan*, 16 Fla. L. Wkly. Supp. 608b; *Fernandez*, 16 Fla. L. Wkly. Supp. 382a; *Dundale*, 16 Fla. L. Wkly. Supp. 1017a.

195. Fla. Stat. § 162.11; *Kirby v. City of Archer*, 790 So. 2d 1214, 1215 (Fla. 1st Dist. App. 2001); *City of Sarasota v. Pleasures II Adult Video, Inc.*, 799 So. 2d 325, 327 (Fla. 2d Dist. App. 2001); *City of Deerfield Beach v. Boca Dominium*, 795 So. 2d 145, 146 (Fla. 4th Dist. App. 2001); *Special Magistrates*, *supra* n. 175, at 537–538.

amount of the per diem fines, there is great deference paid to the special magistrate's decision.[196] Upon receiving back the real property after a successful mortgage foreclosure proceeding against the owner, the mortgagee will remain liable for the full amount of the fines and lien, subject to the discretion of the local government special magistrate for any reduction in the size of the accrued fines in an abatement or mitigation proceeding.[197]

Code enforcement proceedings are not identical to eminent domain proceedings or a tax deed sale. However, the keystone event in all of these types of proceedings is notice to interested and protected parties that should be required by the Due Process Clauses of the United States and state constitutions that balance the power of the government to enforce and the right of interested and protected parties to contest and defend against known charges before adjudication occurs and any fines are assessed. If the goal of local government code enforcement is to remedy code violations expeditiously, then logically and constitutionally it would be best to expeditiously remedy code violations with a minimum amount of incursion, time, and energy by the local government. Otherwise, the violations will continue to exist and accrue as assessed fines grow, until the owner complies with the final order and remedies the code violations.[198] The larger the fines grow, the less net equity remains in the real property for the owner and the mortgagee, which is tantamount to a divestment of their interests resulting in a diminution of value.[199] A compelling argument can be made that the Due Process Clauses of the United States and Florida Constitutions require notice to a mortgagee as an interested and protected party to grant him or her an opportunity to contest, defend, and ultimately comply with a final order imposing code violations before the uncapped fines substantially accrue and reduce or eliminate the equity.[200] The next question in line with the Supreme Court decisions should be what sort of notice is required by the Due Process Clauses to insure that the mortgagee is aware of the code enforcement proceedings so that interested and protected parties are provided

196. *Special Magistrates, supra* n. 175, at 522.
197. Fla. Stat. § 162.09(2)(b)(c).
198. *Id.*
199. *Supra* nn. 182, 184.
200. *Supra* nn. 172, 175, 178, 182.

with an opportunity to contest the local government's claims and remedy the code violations in an adjudicatory process.[201]

The United States Supreme Court in *Christopher v. SmithKline Beecham Corp.*[202] and *FCC v. Fox Television Stations, Inc.*[203] ruled that the Due Process Clause of the Fifth Amendment requires that federal agencies provide "fair warning" or "fair notice" of required or prohibited conduct. Due process not only demands some level of clarity by the agency, but also that the standards must be sufficiently precise so as to not promote arbitrary or discriminatory enforcement. While these decisions do not deal with local governments, they do emphasize that administrative agencies cannot be allowed to act in a vague and open-ended manner, at least when it comes to defining and interpreting regulations. Private companies frequently battle with government agencies when a company disagrees with an agency's interpretation of law that the agency puts forth after the company acts in some form of business practice or decision without the benefit of knowing the agency's current interpretation, or when the government files an enforcement action against the company alleging violations of law, but the government fails to set forth its interpretation before the company engags in the allegedly unlawful conduct. While these decisions set forth what may be an important step toward a stricter sense of reasonable notice by agencies, code enforcement proceedings do provide guidance for compliance requirements in local codes that define violations and that are used as a basis to enforce local government codes and ordinances with the use of Chapter 162 of

201. Whether any required notice can be described as "nominal," "contact notice," or such other description of ample notice should be referred to the State to decide, but there should be reasonable steps made to contact the mortgagee so that he or she may take appropriate steps to remedy the code violations before the fines accrue. The United States Supreme Court decision in *Jones* mentioned a number of acceptable notice provisions but emphasized that no one type of notice is required. 547 U.S. at 234–238. Reasonable steps might include certified mail, posting a notice on the front door of the home or building, electronic mail, personal service if certified mail is returned unclaimed, regular mail, and advertising in a newspaper of general circulation. *Id.* Insofar as code enforcement proceedings are concerned, a mortgagee should receive notice in accordance with the reasonable steps that should be taken to advise interested parties of the proceedings to ensure that he or she has an opportunity to defend and contest a local government's claim that violations exist, and if they do, then to have an opportunity to remedy the violations before they accrue.

202. 132 S. Ct. 2156, 2167 (2012).

203. 132 S. Ct. 2307, 2317 (2012).

the Florida Statutes as an enforcement mechanism. However, Chapter 162 fails to require notice to a mortgagee of any code violations, thereby eliminating mortgagees from any requirement of "fair warning" and "fair notice," and consequently subjecting mortgagees as third parties to fines and penalties against a third party without notice.

No one should quarrel with the necessary physical intervention that is required by a local government to ensure the health, safety, and welfare of the local community in attempting to provide strategies for the orderly and balanced present and future economic, social, physical, environmental, and fiscal development of the local community.[204] A major purpose and strategy of code enforcement is to help maintain neighborhoods' aesthetics, stability, and growing property values.[205] If code enforcement violations remain unchecked and uncorrected, a once solid neighborhood can turn into a collection of poorly maintained and deteriorating dwellings with unpaid liens resulting in declining real property values and a reduction of tax revenue.[206] In as much as both the owner and the mortgagee have an interest in protecting their investments, when the local government provides notice of outstanding code enforcement violations to both the owner and the mortgagee, this provides a necessary balance between the mortgagee's right to due process to protect his or her security in the subject real property from the extraordinary power of the local government that flows from its power to ensure the health, safety, and welfare of the community. Notice to the mortgagee should be considered as both necessary and fundamental to provide a mortgagee with the right to safeguard his or her interest.[207] The additional step of providing notice to the mortgagee is not unduly burdensome, but it is part of a mechanism to protect the mortgagee from arbitrary action before her or she has an opportunity to protect the security interest in the real property. However, even if notice may constitute an additional burden, it is the extraordinary power of the local government that has the authority to place a lien on real property to ensure the

204. Fla. Stat. § 163.3177.

205. *See generally Developments*, *supra* n. 6, at 682–685 (explaining why some municipalities use code enforcement proceedings).

206. *Id.*

207. *Jones*, 547 U.S. at 220, 234; *Mennonite Bd. of Missions*, 462 U.S. at 799; *Shelden*, 7 F.3d at 1022; *Nev. Interstate Props. Corp.*, 747 So. 2d at 448.

health, safety, and welfare of the community that may ultimately permit the local government to divest private property interests of the owner and the mortgagee that jeopardizes the mortgagee's interest when it takes back the real property after a summary judgment. This additional step is part of a necessary balance in favor of providing notice to a mortgagee in code enforcement proceedings in order to provide the mortgagee with due process so that he or she may defend against the code enforcement prosecutions and any assessed fines that will have an adverse effect on the real property that is securitized by a mortgage.

One case in Florida that considers whether notice to a mortgagee in a code enforcement violation is constitutionally required is *City of Panama City v. Head*, where the First District Court of Appeal ruled that the Due Process Clauses of the United States and Florida Constitutions do not per se require notice to a mortgagee in a code enforcement violation proceeding.[208] The decision distinguished between a nuisance abatement action and a condemnation action, both of which drastically reduce the value of the security interest should notice not be provided, and a code enforcement proceeding, in which there is no immediate and drastic decline in the value of the mortgagee's security interest.[209] *Head* suggested that a code enforcement lien does not immediately and drastically diminish the mortgagee's security interest in a manner that would implicate a *Mennonite Board of Missions v. Adams* due process analysis, and the appellate court decision rejected a facial challenge to any notice provisions found in Chapter 162 of the Florida Statutes.[210] The court in *Head*,

208. 797 So. 2d at 1269–1271.

209. *Id.* at 1268–1269. Although the decision in *Head* suggests that values of the fines and resulting lien matter, it fails to conclude that the mere imposition of a fine and lien will drastically impact the real property. *Id.* at 1268. While many of these violations might be considered relatively minor offenses that can be easily remedied, if the owner is contentious or lackadaisical, the per diem fines can grow to enormous sums, thereby leaving a negative equity in the value of the real property after the recorded mortgage and code enforcement lien are added. It would be more just for the state legislature and the courts to take into account the possible emergence of large, uncapped fines that accrue, until compliance occurs or a judgment is entered. The district courts of appeal defer to local governments on fines and any mitigation of those fines upon correction of the code violations, thereby leaving the owner and mortgagee to the sole discretion of the local government in an unenviable bargaining position between private and public parties. *See Moustakis*, 2008 WL 2222101 at *1; *Recupero*, 949 So. 2d at 276; *Resort Timeshare Resales*, 766 So. 2d at 383.

210. *Head*, 797 So. 2d at 1270–1271.

however, remained concerned about the size of a code enforcement lien, including costs and attorneys' fees, and whether the size of the lien would drastically diminish the value of the mortgagee's security interest in the subject real property in an "as-applied" analysis.[211] The court's concern was that if a code enforcement per diem fine grew into a large lien, this could be considered as a divestment of the owner's real property, as well as the mortgagee's security interest, on account of the adverse effect a large lien would have on the real property's value after a large lien was paid.[212] A large lien will effectively diminish the mortgagee's security interest by reducing the equity remaining in the real property if the mortgagee has to satisfy the lien upon a sale. Notice of a code enforcement proceeding is necessary to provide a mortgagee with ample opportunity to defend himself or herself against a local government's charges that code violations exist on the real property. If violations do exist, then the mortgagee should be provided with a right to remedy the code violations before they accrue and became substantial.

Mortgages are interests in property that are protected by the Fourteenth Amendment.[213] Notice can provide a mortgagee with an opportunity to contest and defend against prosecutions, and if adjudication occurs, to remedy the code violations and minimize the risk of a drastic decline of the real property value in which a mortgagee has a security interest if the owner fails or refuses to comply with the final order.[214] *Head* did not decide whether notice

211. *Id.* at 1271.

212. *Id.* at 1270–1271.

213. *Id.* at 1267–1268; *Andrews*, 573 So. 2d at 115.

214. There is no question that the size of a code enforcement fine and lien matter. What if the value of the real property is $185,000 and the mortgagee's security interest is $150,000? Assuming that the fines grow to $65,000 against the owner's interest before compliance occurs, any equity existing in the real property will have vanished on account of the fines and lien as the value falls to a negative equity. The code enforcement lien will attach to the nonhomestead real property and may ultimately require the mortgagee to either pay the total accrued fine or ask for an abatement or mitigation of the fines that have accrued. Even if the mortgagee successfully persuades the local government to reduce the lien to $25,000 in an abatement or mitigation proceeding, the lien mitigation process can have the effect of drastically reducing the net value of the real property. Had notice been provided to the mortgagee at the inception of the code enforcement proceeding, it is entirely possible that the mortgagee would have corrected the code violations without accrual of a large fine and lien on the real property. Mortgage documents generally provide that the owner must pay the monthly mortgage payments (principal, interest, taxes, and insurance), local government liens, and mortgage insurance if the lender requires it. Owners of condominiums, townhomes, and cooperatives should also expect to

of code enforcement proceedings was constitutionally required to a mortgagee where a code enforcement lien takes priority over a later recorded mortgage. However, it can be argued that if a later-recorded code lien leap frogs over an earlier recorded mortgage, or if a code enforcement lien is recorded before a mortgage, then the Due Process Clauses of the United States and Florida Constitutions should apply and require interested and protected parties to be provided with notice of code violations and proceedings.[215] The district court of appeal in *Head* remanded the case to the circuit court to determine if the amount of the lien award "as applied" to the mortgagee was confiscatory and drastically reduced the value of the security interest. In remanding the case, the circuit court was ordered to determine if the amount of the code lien constituted a violation of the mortgagee's constitutionally protected due process requirements of the United States and Florida Constitutions.[216]

Whether notice is required to a mortgagee and any other interested or protected parties may depend on whether the security interest or the code enforcement lien is prioritized. If home rule authority had been adopted in Florida, this could have placed the local government code enforcement lien ahead of a mortgage, making the *Mennonite Board of Missions* rationale

---

pay an additional monthly common area assessment or association fee to cover the costs of maintaining the shared features of the property. Failure by the owner to pay any of those expenses subjects the owner to a foreclosure action. If notice was provided to the mortgagee when the local government determined that code violations existed, and the mortgagee failed to correct the code violations without justification, then the mortgagee will have had the opportunity to correct the violations or file its own mortgage foreclosure action against the owner on account of an owner's nonpayment of these costs that are required to be paid by the mortgage documents. Notice to a mortgagee of code violations is a warning to the mortgagee that code enforcement violations exist and if they are not corrected, then the owner and the mortgagee will be subject to a final order imposing per diem fines if the violations are ignored. This would have the effect of prompting the mortgagee and the owner to comply and correct the code enforcement violations or else suffer the consequences of per diem fines. Should the owner refuse to comply, then such failure would be a red flag to the mortgagee of the owner's inability to maintain the property that would subject the owner to a mortgage foreclosure action. In such a scenario, the mortgagee is on notice of a default in the compliance of the mortgage and needs to be ready to correct the code violations should the owner fail to make the necessary corrections, or if the owner fails to correct the violations, then the mortgagee can demand that the owner correct the violations and file a foreclosure action rather than just sit back and do nothing as the real property deteriorates and the per diem fines accrue.

215. *Shelden*, 7 F.3d at 1022; *Head*, 797 So. 2d at 1270; *Nev. Interstate Props. Corp.*, 747 So. 2d at 448.

216. *Head*, 797 So. 2d at 1265.

apply as a due process analysis would come into play. If a code enforcement lien leap frogs over a mortgagee's security interest regardless of the time each was recorded, it can be argued that a mortgagee (and such other interested and protected party) is adversely affected by the code enforcement lien, and therefore interested parties should receive notice of code enforcement proceedings to protect their security interest from diminution of value and the payment of substantial fines and costs.

No one knows how large a code enforcement lien will grow before there is compliance with the final order. Assuming that the fines continue to accrue and a lien is ordered, then a mortgagee's security interest and equity remaining after payment of a lien could drastically reduce the value of the subject real property.[217] If a mortgagee is notified of code violations at the same time that the title owner is notified and is joined in the same proceeding, this would be well before any adjudication occurs and fines are assessed that may ultimately grow into substantial accrued fines. By providing notice to the owner and the mortgagee, the local government's health, safety, and welfare are protected, and the mortgagee's due process is protected as well.

On the other hand, if a code enforcement lien is not placed ahead of the mortgagee and remains subordinate to a prior-recorded mortgage in accordance with the "first in time, first in right" principle,[218] then the concerns raised in *Mennonite Board of Missions* may not come into play as notice to the mortgagee may not rise to the level of a constitutional due process deprivation.[219] In such an instance, the mortgagee can file a foreclosure action against the owner's interest in the subject real property and join the local government to foreclose a later recorded code enforcement lien. Upon the entry of a summary judgment in favor of the mortgagee on account of the owner's failure to comply with the mortgage documents, the mortgagee may reclaim the subject real property free and clear of the title owner's interest and that

217. *St. Rd. 7 Inv. Corp. v. Natcar L.P.*, 82 So. 3d 1013, 1015 (Fla. 4th Dist. App. 2011) (involving a mortgage foreclosure action where the principal amount due was $220,922.49, plus accrued interest, costs, and attorney fees, and a code enforcement lien by the City of Plantation that totaled $657,550).

218. Fla. Stat. § 695.11; *City of Palm Bay* S. Ct. of Fla., 114 So. 3d at 927.

219. *Sanchez*, 911 So. 2d at 201–202; *Argent Mortg. Co.*, 52 So. 3d at 798, 801.

of the local government code enforcement lien upon entry of the summary judgment and clerk's sale.[220]

XI. CITY OF PALM BAY v. WELLS FARGO BANK, N.A.: *FUTURE CONSIDERATIONS*

There are still some questions about priority between a recorded mortgage and a code enforcement lien after *City of Palm Bay v. Wells Fargo Bank, N.A.* Will the local governments strictly follow the ruling in *City of Palm Bay*, or will they take the position that the mortgage documents provide superpriority status to local government code liens on account of language in the mortgage that provides that the title owner must not only remain current in the payment of the mortgage (principal, interest, taxes, insurance), maintenance and assessment fees, but it must remain current and liable for local government liens? Florida law has recognized that existing law is incorporated into every contract.[221] Because the mortgagee will have prepared the mortgage documents to protect his or her security interest and ensure payment by the mortgagor of all encumbrances,[222] should the mortgagee become the new title owner after a clerk's sale? Does the mortgagee assume the original mortgage loan agreement, making the mortgagee liable for all encumbrances spelled out in the mortgage documents? What if a bona fide assignment or assumption occurs between the mortgagee and another financial institution that is common in the world of finance?[223] If there is an assumption of a bona fide debt by the assignee after a bona fide purchase of the mortgage at fair market value, will the new owner of the security interest step into the shoes of the predecessor mortgagee to include all of the obligations imposed onto the mortgagor by the mortgage documents?[224] It is still possible for a purchaser and a future

220. *Clearwater Fed. Sav. & Loan Ass'n*, 214 So. 2d at 527–528; *Co. Collection Servs., Inc.*, 789 So. 2d at 1110–1112; *Argent Mortg. Co.*, 52 So. 3d at 799–800.

221. *Bd. of Pub. Instr. of Dade Co.*, 81 So. 2d at 643.

222. 59 C.J.S. *Mortgages* § 335 (WL current through Dec. 2013) ("[T]he recording of a mortgage is exclusively for the benefit and protection of the mortgagee.").

223. *See Argent Mortg. Co.*, 52 So. 3d at 801 (departing from the principle of "first in time, first in right" to protect a second mortgage that had been recorded after an earlier mortgage because the second mortgagee did not have notice of the first mortgage).

224. *See Clearwater Fed. Sav. & Loan Ass'n*, 214 So. 2d at 529 (opining that a welfare lien was not extinguished by a property foreclosure, but rather that lien laid dormant and

mortgagee to take the real property subject to the code enforcement lien regardless of the time the mortgage was initially recorded and regardless of the decision in *City of Palm Bay*.[225] While all parties and their counsel are presumed to have acted in good faith, if the code lien is large, the new owner or mortgagee may be required to hire an attorney to obtain a release of the lien or negotiate the lien down to an affordable amount regardless of the fact that code liens do not have superpriority status. The cost of removing the code lien can be high, and if the local government refuses to negotiate a release or provide a "no action" or estoppel letter from the local government attorney, then a declaratory judgment action against the local government for judicial determination of the priority of the mortgage or the code lien is the next step along with the costs and attorney fees attendant to any litigation.

In returning to the "first in time, first in right" principle,[226] the mortgagee's security interest should take priority if it was recorded before the code enforcement lien regardless of whether there is an assumption or assignment.[227] As long as the local government and the owner are joined by the mortgagee in a mortgage foreclosure action, and the foreclosure is merged into a summary judgment of foreclosure, the code enforcement lien should be extinguished from the chain of title upon sale to a bona fide purchaser or the mortgagee as the new owner.[228] From the perspective of a private party, the local government will have to

---

reattached to the property when the welfare recipients subsequently repurchased the property from the mortgagee).

225. *City of Palm Bay* did not decide whether a mortgagee assumes the terms and conditions of a contract, especially a mortgage document that requires the mortgagor to discharge all municipal fines and liens. Most mortgage documents require the borrower to maintain the real property free and clear of all liens. At least one brief filed by the Florida League of Cities in support of the local government's position in favor of upholding the ordinance suggested that superpriority status of the ordinance could be inferred from the mortgage documents. *See* Amicus Curiae Br. of Fla. League of Cities in Support of Petr., *City of Palm Bay v. Wells Fargo Bank, N.A.*, http://www.law.fsu.edu/library/flsupct/sc11-830/11-830ACIniFLC.pdf at 2 (No. SC11-830, 114 So. 3d 924 (2013). Although the argument made by the Florida League of Cities suggested that the mortgagee adopted superpriority status of code enforcement liens, that argument was not considered. Additionally, the Florida Supreme Court did not decide that the Due Process Clauses of the federal and state constitution required a mortgagee to receive notice of code violations, which suggests that this argument has been left open for another day and time.

226. *City of Palm Bay* 5th DCA, 57 So. 3d at 227.

227. *Id.*

228. *Id.*; Fla. Att'y Gen. Op. 93-77, *supra* n. 60, at 1.

initiate a new code enforcement proceeding against the new owner, because its earlier recorded code enforcement lien will have been merged and extinguished in the summary judgment of foreclosure upon sale.[229] If the code violations are not remedied by the new owner, then the new owner should be served with a notice of code violations by the local government, and the new title owner will have to be afforded fundamental due process in any code enforcement proceeding.[230]

XII. ONE CODE ENFORCEMENT PROCEEDING OR SEVERAL TO OBTAIN ADMINISTRATIVE FINALITY

Beside the constitutional question of due process that should apply to interested parties, there is the question of whether code enforcement proceedings should be bifurcated between proceedings against owners in one instance and against mortgagees in another proceeding. There are strong policy reasons why the use of one proceeding should exist where the parties, facts, and the forum are identical rather than several proceedings to obtain a result. For one, code enforcement proceedings involve prosecutions of code violations that should serve to obtain a final result in what should be a single, expedited proceeding after notice and an opportunity to be heard are provided to interested parties. These practical realities to administratively litigate code enforcement violations in one rather than several proceedings are necessarily required so that the issues can be fully litigated at one time between the local government and all interested and protected parties. If the owner and the mortgagee are joined in the same proceeding and required by statute to be provided with notice, the administrative proceeding can determine if code violations exist with no duplicitous work by the local government

229. *Supra* n. 228 and accompanying text.

230. Florida Statutes Section 162.06(5) was enacted before the decision in *City of Palm Bay*. Florida Statutes Section 162.06(5) states: "If the property is transferred before the [code enforcement] hearing, the proceeding shall not be dismissed, but the new owner shall be provided a reasonable period of time to correct the violation before the hearing is held." Nothing contained in this statute requires an amended notice to the new owner, whether it is done through a sales transaction, foreclosure, or any other means. Rather, this statute suggests that the hearing if set is continued for a "reasonable period of time to correct the violation." Fla. Stat. § 162.06(2). After the decision in *City of Palm Bay*, a new owner should be served with an amended notice of code violations to comply with this decision.

in a subsequent proceeding. Of course, this assumes that either the legislature or the state or federal courts decide that code enforcement proceedings must notify a mortgagee as an interested and protected party to comply with the Due Process Clauses of their respective constitutions. In *Horne v. Department of Agriculture*,[231] the United States Supreme Court decided that where there are similar facts and parties, there should be a single proceeding allowing issues to be fully litigated at one time rather than several proceedings.[232] No constitutional arguments were raised in this decision. The Court considered whether a plaintiff could retain the option to file a claim under the Tucker Act[233] or the Agricultural Marketing Agreement Act (AMAA) of 1937[234] without being required to raise the issues in one proceeding that were initially brought by the federal agency.[235] The Court seemed motivated by the practical realities of the claim in this case, stating that it did not make sense to make a person challenge a regulatory fine, pay it, and then file a "takings" claim under the Tucker Act to recover the fine when a single proceeding permitted the issues to be entirely litigated.[236] The small business farmer in *Horne* argued that requiring multiple proceedings for the same underlying claim can be costly and burdensome to small businesses and ordinary citizens, and that litigation can take years to resolve, which adds even more costs to litigation.[237] While most code enforcement proceedings are relatively quick, and they do not necessarily fall within the concerns that were made by the business community and private organizations in *Horne*, no one can legitimately deny that claims made in a single proceeding by interested parties, rather than in several proceedings involving the same facts and parties is more cost effective, quicker, and will not prejudice the rights of any of the parties.

This decision, while decided in the context of government regulation of farming, may have an expansively broader impact to other areas of law, including local government law. When lower courts and administrative agencies review the Supreme Court's

231. 133 S. Ct. 2053 (2013).
232. *Id.* at 2063.
233. 28 U.S.C. § 1491 (2012).
234. 7 U.S.C. § 608(c) (2012).
235. *Horne*, 133 S. Ct. at 2062–2063.
236. *Id.* at 2056.
237. *Id.*

opinion in different factual settings and scenarios, the agencies may take the position that single proceedings are best for the parties and the local government rather than piecemeal or multifaceted proceedings that inevitably cost more and result in longer, protracted proceedings before administrative finality and certainty is reached.[238]

XIII. CONCLUSION

Code enforcement violations "run with the land" and are significant concerns for real estate purchasers and practitioners to consider before deciding whether to purchase real property. Although owners are the only parties who must be served with notice of code violations at this time, there are compelling reasons why mortgagees and other interested parties, such as title owners, also should be served. First, the impact of code enforcement liens can reduce the equity in the real property as the per diem fine accrues, thereby reducing or eliminating the equity in the real property. Both owners and mortgagees are impacted by code liens entered in code enforcement proceedings. Fundamental fairness—due process—should require that the mortgagee be served with a notice of code violations, so that the interested party can defend and remedy any code violations before the lien becomes large to protect property interests. Second, uncorrected code violations can have adverse consequences on the value of the real property and entire neighborhoods in which the real property is located and may ultimately result in blight and decay on account of the failure to remedy and comply with code violations orders. Third, unchecked and uncorrected code violations can turn a once solid and vibrant neighborhood into a depressed area containing vacant buildings and foreclosed properties. If the buildings and dwellings, as well as the land they are built upon, are not kept code violation free, real property values can dim and fade, resulting in a drop "in tax revenue and spending for schools, nonschool services, and local development" that will result in less funding for local development.[239]

---

238. *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So. 2d 679, 681 (Fla. 1979); *Wood v. Dep't of Prof'l Reg., Bd. of Dentistry*, 490 So. 2d 1079, 1081 (Fla. 1st Dist. App. 1986); *Delray Med. Ctr., Inc. v. St. Agency for Health Care Admin.*, 5 So. 3d 26, 29 (Fla. 4th Dist. App. 2009).

239. *Developments*, *supra* n. 6, at 683; *see e.g. Fulmore*, 928 So. 2d at 1283.

Although local governments provide abatement and mitigation procedures to reduce the amount of code enforcement liens, there is no guarantee that a local government will reduce the size of the code enforcement lien. Even if there is a reduction in the lien, the owner of the premises has probably ceased paying the monthly mortgage payments. This will effectively increase the debt and obligation of the owner that are owed to the mortgagee, who will seek to obtain a summary judgment of foreclosure but will never receive the actual amount that is owed. Regardless of whether the code enforcement lien is reduced or not, the owner and more likely the mortgagee will remain liable for the imposition of any lien assessed and recorded upon adjudication until payment is made to the local government, regardless of the amount that is ultimately determined is due and owing. What this means is that if the owner/mortgagor fails to remedy the code violations and timely pay the code enforcement lien, the mortgagee will ultimately be liable after a summary judgment of foreclosure and writ of possession is entered by the circuit court. Of course, during the entire time, the fines accrue and place the mortgagee in the unenviable position of looking in from the outside without any right to safeguard his or her rights against the local government code proceedings.

The Florida Supreme Court in *City of Palm Bay* rejected local governments' attempts to make code enforcement liens superpriority liens by enactment of local ordinances.[240] After the decision in *City of Palm Bay*, the priority of liens is governed by Florida's recording act,[241] in the absence of a specific statutory exception that does not exist at this time.[242] Local governments do not have the authority to deviate from the statutory framework provided under the Florida Constitution and the statutes and give their liens superpriority. The unsuccessful attempt by local governments to superprioritize their code enforcement liens cannot be accomplished by enactment of a local ordinance and has turned out to be inferior to the mortgagee's prior recorded mortgage.[243]

240. *City of Palm Bay* S. Ct. of Fla., 114 So. 3d at 928.
241. Fla. Stat. §§ 695.01, 695.11.
242. *City of Palm Bay* S. Ct. of Fla., 114 So. 3d at 927–928.
243. *Id.*; *supra* n. 225.

Regardless of the decision in *City of Palm Bay*, much of the bickering and squabbling between the owner/mortgagor, mortgagee/financial institution, and the local government code enforcement staff could be avoided if a mortgagee/financial institution were considered an interested and protected party and was provided with notice of code violations so that finality existed in these cases.[244] If the mortgagee fails to remedy the code violations after notice and a final order assessing a fine, the uncapped code fine could grow until code compliance occurs. The local government could still retain the right to assess a per diem fine and a lien along with the option to file a foreclosure action in the future against the owner, his or her real property, and the mortgagee by requesting a judgment for the amount of the lien and attorney fees and costs. Under such circumstances, a mortgagee's complaint that there was no notice of code enforcement violations would have no merit, absent exceptional circumstances.

Before a purchaser decides to invest money and time into a piece of real property, it is best to run a title and lien search at a minimum to determine if the real property has good marketable title. Failure to do so can result in harsh and detrimental consequences to the owner where there is a pending code enforcement lien, as well as code violations that have not been prosecuted, that may show up sometime in the future in a code

244. Fundamental due process applies in quasi-judicial proceedings, so why not provide notice to an interested and protected party that has a security interest for money lent to the purchaser? This could be provided by a statute providing for notice to a mortgagee by electronic, regular, or certified mail. Compliance to the mortgagee's registered agent in Florida by electronic, certified, or regular mail could alleviate this issue where a mortgagee could be required to provide an address to a local government for the purpose of receiving notice for those mortgagees securitizing its loans. A less difficult option might be that each month the local government could specifically compile a list of code violations and attendant hearings by posting the notice of code violations at city hall of the addresses where there exists a code violation proceeding. In accordance with fundamental due process, a state statute could mandate that local governments require all mortgagees to provide each local government in Florida with an address for service of notice by the local government for a nominal fee, where notice of code violations could be served on mortgaged real property of mortgagees doing business in Florida so that the local government would have contact information in a registry for this purpose. If the mortgagee did not provide an address of the mortgagee to the local government's registry, then no notice would be required. If the mortgagee provided notice of an address to the local government registry, then fundamental due process would require notice to the mortgagee. In administrative, quasi-judicial proceedings there is only a requirement of fundamental due process, and therefore, the requirements are far less stringent than what is required in civil and criminal court proceedings. Due process does not require actual notice and there is room to be flexible for the type of notice required to the mortgagee.

enforcement proceeding making the current owner liable to pay for costs to repair the real property, as well as any fines and liens that are ordered. Whether or not warranties are provided by the owner/seller of the real property in the contract for purchase and sale, the Latin phrase "caveat emptor"[245]—let the buyer beware—should be considered as the law before the purchase of any real property. The burden is on the purchaser to perform his or her due diligence regardless of any warranties by the owner/seller. It is only prudent to research and look for any code enforcement liens and existing code violations and check to avoid the aggravation and future costs that may turn into protracted future proceedings resulting in a reduction in equity and fair market value of the real property.

245. *See Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n*, 127 So. 3d 1258 (Fla. 2013) (explaining the principle of caveat emptor ("let the buyer beware") was the germane "rule of law governing disputes arising from the sale of real property"). Under this doctrine, in the

> absence of an express agreement to the contrary, the seller of real property was not liable or responsible to the buyer for a defective condition in the real property that existed at the time the seller transferred possession to the buyer. Essentially, a purchaser bought real property at his or her own risk.

This doctrine required the purchaser to inspect the premises before the seller transferred title, relieving seller of any liability for defective conditions that existed at the time of transfer. Caveat emptor provided no duty to the seller to convey to the purchaser the existence of hidden defects in the real property unless the seller, by act or implication, represented that such a defect did not exist. *Id.* at 1263.