

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 671 Liens on Real Property

**SPONSOR(S):** Community & Military Affairs Subcommittee; Wood and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N	Cary	Bond
2) Community & Military Affairs Subcommittee	13 Y, 0 N, As CS	Gibson	Hoagland
3) Judiciary Committee	12 Y, 0 N	Cary	Havlicak

### SUMMARY ANALYSIS

Local governments have authority to attach liens to property for many purposes including to recover funds for improvements made, services rendered, or fines and penalties imposed.

Generally, liens against real property are not effective unless subsequent purchasers have notice of the lien. Notice can be actual notice or constructive notice. The filing of a lien in the county recorder's office provides constructive notice.

Many local governments elect not to record all liens in the county recorder's office and instead to maintain them in the office of the local government. Liens assessed and maintained in the office of a local government often go undetected when unrecorded due to the difficulty in finding the liens and knowing which units of government have the right to impose the lien and whom to contact to determine the existence of a possible lien. Often this can result in liens going undetected and unpaid through successive mortgages and transfers of ownership, and the burden of the lien falling on innocent purchasers.

The bill provides that a lien by a governmental entity or quasi-governmental entity, which attaches to real property for an improvement, service, fine, or penalty, other than a lien for taxes, non-ad valorem or special assessments, or utilities, is valid and effectual against creditors and subsequent purchasers only if the lien is recorded in the official records of the county in which the property is located. The bill requires the recorded notice of lien to contain: the name of the owner of record, a description or address of the property, and the tax or parcel identification number applicable to the property as of the date of recording.

The bill does not appear to have a fiscal impact on state government.

The bill may increase revenues for local governments that are able to more easily collect on liens that have been recorded, but any increase in revenues is indeterminate. The bill may have a minimal indeterminate cost to those local governments that do not currently record all liens. This cost is indeterminate and is likely to be offset or eliminated by collecting on costs incurred in the recording or satisfying of the lien. The bill may also have a positive, indeterminate impact on the private sector to the extent that the sale and purchase of real property will not be encumbered by hidden liens.

The bill provides an effective date of July 1, 2012.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

A lien is a charge on property for payment of some debt, obligation or duty.<sup>1</sup> Florida is a "notice" state, where a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage or the said real property will prevail against the prior mortgagee.<sup>2</sup> The primary function of a "notice" type of recording statute is to protect subsequent purchasers against claims arising from prior unrecorded instruments.<sup>3</sup> Furthermore, Florida is a "lien theory" state, where a mortgage is a specific lien on a property.<sup>4</sup> As a notice state and a lien theory state, liens are generally afforded precedence based on whether subsequent purchasers had notice of the lien.

Notice can be either actual or constructive unless statutes specifically require the filing of certain liens.<sup>5</sup> The act of recording an instrument in accordance with s. 695.01, F.S., constitutes constructive notice of a prior encumbrance on the property which is the subject of the instrument.<sup>6</sup>

Section 695.01(1), F.S., provides:

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

State<sup>7</sup> and local<sup>8</sup> governments are also authorized to impose liens on real property for improvements, services, fines or penalties. In some cases, the lien is legally effective even if it is not recorded in the public records of the county in which the real property is located.<sup>9</sup> This is known as a "hidden lien" because it is not readily determinable by searching the official records maintained by the clerk or county recorder relating to the property.

Chapter 162, F.S., covers the powers of counties and municipalities to enforce municipal and county codes. Counties and municipalities are authorized to appoint code enforcement boards with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method for enforcing local codes and ordinances, where a pending or repeated violation continues to exist.<sup>10</sup> The local government may record in the public records a

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<sup>1</sup> *Black's Law Dictionary*, 5th Ed.

<sup>2</sup> *Argent Mortg. Co., LLC v. Wachovia Bank N.A.*, 52 So.3d 796 at 799 (Fla 5th DCA 2010). See also s. 695.01, F.S.

<sup>3</sup> *Id.*

<sup>4</sup> Section 697.02, F.S.

<sup>5</sup> "Actual notice" is defined as "notice expressly and actually given, and brought home to the party directly," while "constructive notice" is defined by as "information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." *Black's Law Dictionary*, 5th Ed.

<sup>6</sup> *Lafitte v. Gigliotti Pipeline, Inc.*, 624 So.2d 844 at 845 (Fla. 2d DCA 1993).

<sup>7</sup> See, e.g., s. 589.13, F.S., which allows the state Division of Forestry or other governmental authority, to file a lien in the public records where the agency and the landowner enter into an agreement for the improvement of land.

<sup>8</sup> See, s. 162.09(3), F.S., which allows local governments to file a lien in the public records upon valid order imposing a code enforcement fine; and see s. 893.138(11), F.S., which allows local recorded orders on public nuisances to become liens against the real property subject to the order.

<sup>9</sup> See *Dade County v. Certain Lands*, 247 So.2d 787 (Fla. 3d DCA 1971).

<sup>10</sup> See s. 162.02, F.S.

certified copy of an order imposing a code enforcement fine, thereby constituting a lien against the land where the violation exists and upon any other real or personal property owned by the violator.<sup>11</sup> No lien may continue for a period longer than 20 years after the certified copy of an order imposing a fine has been recorded, unless within that time an action is brought to foreclose on the lien or to sue to recover a money judgment for the lien plus interest.<sup>12</sup> The local government is also allowed to collect all costs incurred in recording and satisfying a valid lien.<sup>13</sup>

According to the Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL Section),<sup>14</sup> liens assessed and maintained by a municipality or branch of a municipality often go undetected because:

- They are difficult to find when unrecorded;
- There is confusion over which branch of government has the right to impose the lien; and
- There is confusion as to whom to contact to determine the existence of possible liens.

Unrecorded liens can be difficult to discover for property owners, title insurance companies, and real estate attorneys, and as a result, often go undetected and unpaid for extended periods and through successive mortgages and transfer of ownerships. As a result, the burden of such liens may unfairly fall on innocent purchasers of property.<sup>15</sup> Unrecorded liens are also not typically covered by Florida title insurance policies, except in rare instances.<sup>16</sup>

#### Effect of the Bill:

The bill amends s. 695.01, F.S., to provide that a lien by a governmental entity or quasi-governmental entity, which attaches to real property for an improvement, service, fine or penalty, is only valid and effectual against creditors and subsequent purchasers for a valuable consideration if the lien is recorded in the official records of the county in which the property is located. The bill specifies that it does not apply to liens for taxes, non-ad valorem or special assessments, or utilities. The bill requires the recorded notice of lien to contain: the name of the owner of record; a description or address of the property; and the tax or parcel identification number applicable to the property as of the date of recording.

The bill provides an effective date of July 1, 2012.

#### B. SECTION DIRECTORY:

Section 1 amends s. 695.01, F.S., relating to conveyances to be recorded.

Section 2 provides an effective date of July 1, 2012.

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<sup>11</sup> Section 162.09(3), F.S., provides in part that a lien arising from a fine imposed runs in favor of the local governing body, and the local governing body may execute a satisfaction or release of lien. After 3 months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body attorney to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest. However, no lien may be foreclosed on real property that is a homestead under s. 4, Art. X, Fla. Const.

<sup>12</sup> Section 162.10, F.S.

<sup>13</sup> *Id.*

<sup>14</sup> See Real Property, Probate, and Trust Law Section of the Florida Bar, White Paper, *Fair Notice of Governmental Liens* (on file with the Civil Justice Subcommittee). According to an unscientific poll of local governments by the RPPTL Section, only 60.8 percent of the responding local governments recorded all of their liens in the official county records.

<sup>15</sup> See Christin Erazo, *Homebuyer warns purchasers about unrecorded liens in Port St. Lucie*, Treasure Coast Palm, December 22, 2011, available at <http://www.tcpalm.com/news/2011/dec/22/homebuyer-warns-purchasers-about-unrecorded-in/?partner=RSS> (last accessed Jan. 20, 2012).

<sup>16</sup> See Real Property, Probate, and Trust Law Section of the Florida Bar, White Paper, *Fair Notice of Governmental Liens* (on file with the Civil Justice Subcommittee).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Some local governments may experience an increase in revenues as a result of increased collection on recorded liens, which are more easily detected by property owners and title insurance companies. However, the fiscal impact is indeterminate.

2. Expenditures:

Some local governments that do not currently record all liens may experience a small increase in expenditures resulting from recording costs. The fee to record most single-page liens is \$10, set by statute in s. 28.24, F.S. Any required expenditure relating to recording fees, however, is likely to be offset by collecting on costs incurred in the recording or satisfying of the lien.

Because of the nature of hidden liens, it is difficult to estimate how many local governments are currently not recording all liens, or how many additional liens will be recorded as a result of the bill. Therefore, the fiscal impact is indeterminate.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Purchasers of real property will no longer be liable for hidden liens. The bill may have a positive, indeterminate impact on the private sector to the extent that the sale and purchase of real property will not be encumbered by hidden liens. The bill may also have a positive indeterminate fiscal impact benefiting companies conducting real estate closings.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 25, 2012, the Community & Military Affairs Subcommittee adopted an amendment to specify that the bill does not apply to liens for taxes, non-ad valorem or special assessments, or utilities. The analysis has been updated to reflect this amendment.