

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1263 Real Property
SPONSOR(S): Civil Justice Subcommittee; Wood
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1618

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 0 N, As CS	Robinson	Bond
2) Business & Professions Subcommittee	10 Y, 2 N	Anderson	Anstead
3) Judiciary Committee			

SUMMARY ANALYSIS

Local governments may impose liens on real property for improvements, services, utilities, or fines and penalties related to code violations. Under current law, only a small class of such liens must be recorded in the official records of the county in which the property is located, thereby giving notice of the lien to other creditors and subsequent purchasers of the property. Specifically, liens for taxes, non-ad valorem or special assessments, and utilities are exempt from the recording requirement. The bill:

- Eliminates the exemption from recording requirements for governmental or quasi-governmental utility liens and non-ad valorem or special assessment liens unless collected pursuant to a statutory uniform method.
- Directs counties and certain municipalities to provide an Internet based procedure for furnishing estoppel certificates certifying the amount of a lien for unpaid gas, water, or sewer service and to record notice of the procedure in the official records.
- Specifies requirements for the form and delivery of the estoppel certificate.
- Provides that failure to record notice of the Internet based procedure or to provide the estoppel certificate before the property is transferred to another owner waives any lien imposed.

The bill also provides for the renewal of building permits issued by local governments and revises and creates statutory forms related to the issuance of such building permits.

The bill does not appear to have a fiscal impact on state government, but may have an indeterminate, minimal fiscal impact on local governments.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Local Government Liens (Sections 1-3)

A lien is a charge on property for payment of some debt, obligation, or duty.¹ Liens include mortgages, construction liens, and other liens authorized judicially, statutorily or consensually. In general, a lien or other encumbrance against real property is legally binding against the owner of the property from the time the lien is created.² However, because Florida is a "notice" state, a lien against property normally is not effective against the rights of another lienholder or subsequent purchaser for value unless such person has notice of the lien.³

Section 695.01(1), F.S., provides in pertinent part:

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.

Notice can be either actual or constructive unless statutes specifically require the filing of certain liens.⁴ Recording the lien in the official records, which are retained by the clerk of court in the county where the property is located, constitutes constructive notice of a prior encumbrance on the property which is the subject of the instrument.⁵ The law recognizes the date a lien is recorded as the presumptive date the lien becomes effective against other parties, determining priority of the lien, i.e., "first in time, first in line."⁶

The primary function of Florida's "notice" recording statute is to protect subsequent purchasers against claims arising from prior unrecorded instruments.

"Hidden Liens"

Local governments may impose liens on real property for improvements, services, utilities, or fines and penalties related to code violations.⁷ Liens for improvements or services are generally known as "non-ad valorem" or "special assessments." Unlike taxes, these assessments are directly linked to a particular service or benefit. Examples of special assessments include fees for garbage disposal, sewer improvement, fire protection, and rescue services.⁸ Counties and municipalities have the authority to levy special assessments based on their home rule powers and general law. Special districts derive their authority to levy these assessments through general law or special act.

¹ *Black's Law Dictionary*, 5th Ed.

² *Id.*

³ *Argent Mortg. Co., LLC v. Wachovia Bank, N.A.*, 52 So. 3d 796, 799 (Fla. 5th DCA 2010).

⁴ "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.

⁵ *City of Palm Bay v. Wells Fargo Bank*, 57 So. 3d 226 (Fla. 5th DCA 2011); *Argent Mortg. Co., LLC v. Wachovia Bank, N.A.*, 52 So. 3d 796, 799 (Fla. 5th DCA 2010); s. 695.11, F.S.; s. 28.222, F.S.

⁶ *City of Palm Bay v. Wells Fargo Bank*, 57 So. 3d 226 (Fla. 5th DCA 2011).

⁷ 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.

⁸ See *Harris v. Wilson*, 693 So. 2d 945 (Fla. 1997); *City of Hallandale v. Meekins*, 237 So. 2d 318 (Fla. 4th DCA 1970); *South Trail Fire Control Dist., Sarasota County v. State*, 273 So. 2d 380 (Fla. 1973); and *Sarasota County v. Sarasota Church of Christ*, 641 So. 2d 900 (Fla. 2d DCA 1994).

Sections 153.67 and 159.17, F.S. also provide counties and certain municipalities⁹ that construct and provide water, sewer, and gas systems with a lien on properties served for the unpaid balance of service charges. Liens for water, sewer, and gas service charges under ss. 153.67 and 159.17, F.S., are “super priority liens” on par with tax liens. If the lien is delinquent for more than 30 days, the lien may be foreclosed in the manner for the foreclosure of mortgages.

Historically, such local government liens were known as “hidden liens” because, although legally enforceable, the liens were not required to be recorded in the official records of the county in which the property was located. When liens are unrecorded, a general title or public records search will not reveal that a lien is attached to the tile of the property. In 2013, the Legislature amended s. 695.01, F.S., to require governmental entities and quasi-governmental entities to record most “hidden liens.” Section 695.01(3), F.S. provides in pertinent part:

A lien by a governmental entity or quasi-governmental entity that 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 in law or equity against creditors or subsequent purchasers for a valuable consideration only if the lien is recorded in the official records of the county in which the property is located.

The exemption to the recording requirement for non-ad valorem or special assessment liens¹⁰ and utility liens has led to ongoing issues with “hidden liens.” The accessibility of unrecorded lien information varies from jurisdiction to jurisdiction and can be difficult to discover for property owners, title insurance companies, and real estate attorneys.¹¹ The result is that such liens often go unpaid for extended periods, and through successive mortgages and transfers of ownership, with the burden of the liens falling on innocent purchasers. Non-record liens are not covered by Florida title insurance policies, except in rare instances.¹²

Effect of the Bill – Local Government Liens

The bill amends s. 695.01(3), F.S., to eliminate the exemption from recording requirements provided for a lien for utilities or a lien for a non-ad valorem or special assessment if the assessment is not collected pursuant to the uniform method under ch. 197, F.S. Thus, such unrecorded liens from a governmental entity or quasi-governmental entity are unenforceable against creditors or subsequent purchasers of the property for value. The elimination of lien rights will not affect liability for the underlying debt. That is, where a hidden lien is prohibited and the entity elects not to record a lien, the underlying debt is still owed and remains collectible.

The bill also amends ss. 153.67 and 159.17, F.S. to require that a district or municipality imposing a lien for gas, water, or sewer service provide an Internet based procedure for furnishing an estoppel certificate¹³ to the owner of the property subject to the lien certifying the total amount due. Notice of the Internet based procedure must be recorded in the official records of the county. If the district or municipality fails to record the notice, the district or municipality waives any lien imposed. The lien for all amounts due from the property as of the date of delivery is the lesser of the actual amount owed or

⁹ The municipality must have issued revenue bonds pursuant to ch. 159, F.S. to construct the system.

¹⁰ Although not required to be recorded in the official records, non-ad valorem or special assessments are generally collected on the annual ad valorem tax bill under the uniform method in ch. 197, F.S. Thus, such assessments may be identified through a search of the property records maintained by the property appraiser or tax collector. However, the “uniform method” of collection is optional and local governments may bill property owners directly for special assessments for which no public record is created.

¹¹ The 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).

¹² *Id.*

¹³ An estoppel certificate is a signed statement by a party certifying for another's benefit that certain facts are correct. A party's delivery of this statement estops that party from later claiming a different state of facts. *Black's Law Dictionary*, 10th Ed. Estoppel certificates are necessary in real estate closings to ensure transfer of title free of encumbrances.

the amount of the lien in the estoppel certificate. The estoppel certificate shall be processed and provided as follows:

Estoppel Certificate Request Received Prior to Foreclosure of Lien:

- Certificate must be furnished within 5 business days after the request.
- Fees for preparation and delivery of the certificate may not exceed \$25.
- The certificate must be dated as of the date of delivery.
- The certificate must list all fees, rates, and charges due as of the delivery date.

Estoppel Certificate Request Received After Foreclosure of Lien:

- Certificate must be furnished within 20 days after the request.
- Fees for preparation and delivery of the certificate may not exceed \$250.
- The certificate must be dated as of the date of delivery.
- The certificate must list all fees, rates, charges, interest, attorney fees, and foreclosure costs due as of the delivery date.

If a district or municipality fails to timely provide the estoppel certificate and the property is transferred to a buyer within 30 days after the request, the district or municipality waives its right to a lien for sums due before the transfer. However, the district or municipality may pursue the sums owed in a civil action against the former parcel owner.

Local Government Permitting (Sections 4-6)

Part IV of ch. 553, F.S., is known as the “Florida Building Codes Act (Act).” The purpose and intent of the Act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single, unified state building code known as the Florida Building Code (code). Although the Legislature intends that the code be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction, flexibility is provided so that local governments may adopt amendments to the administrative provisions.¹⁴

Building Permits

Section 553.79, F.S., requires that a person, firm, corporation, or governmental entity obtain a permit from a local enforcing agency,¹⁵ or such persons delegated the authority to issue permits, before constructing, altering, modifying, repairing, or demolishing any building within this state. To obtain a permit, the applicant must file a written application on a form furnished by the local enforcing agency. The forms may be in a format prescribed by a local administrative board, but at a minimum, must comply with statutory forms in s. 713.135, F.S.¹⁶ If issued, the permit is construed as a license to proceed with the work.¹⁷ A building permit expires:¹⁸

- Six months after issuance if the work authorized by the permit has not commenced.
- Six months after work authorized by the permit is suspended or abandoned¹⁹ after work has commenced.
- When revoked by the local enforcement agency.

¹⁴ s. 553.73(4)(a), F.S.

¹⁵ “Local enforcement agency” means an agency of local government, a local school board, a community college board of trustees, or a university board of trustees in the State University System with jurisdiction to make inspections of buildings and to enforce the codes which establish standards for design, construction, erection, alteration, repair, modification, or demolition of public or private buildings, structures, or facilities. s. 553.71(5), F.S.

¹⁶ Section 105.3, of the Florida Building Code 5th Edition (2014), Building.

¹⁷ Section 105.4.1 of the Florida Building Code 5th Edition (2014), Building.

¹⁸ *Id.*

¹⁹ Work is considered to be in active progress when the permit has received an approved inspection within 180 days. This provision is not applicable in case of civil commotion or strike or when the building work is halted due directly to judicial injunction, order or similar process. Section 105.4.1.3., of the Florida Building Code 5th Edition (2014), Building.

Notice of Commencement

In addition to obtaining a building permit, an owner or the owner's agent must record a Notice of Commencement (NOC) before actually commencing to improve real property, or before recommencing completion of any improvement after default or abandonment.²⁰ A NOC gives actual and constructive notice to contractors and subcontractors that a construction lien may be recorded and will have priority over any conveyance, encumbrance, or demand not recorded against the real property prior to the time the notice is recorded. A construction lien is a statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real property.

A certified copy of the recorded notice or a notarized statement of filing and a copy must also be posted at the jobsite. The NOC must include the legal description of the property, the street address and the tax folio number, if available. It must also include a general description of the improvement, the name and address of the owner, the name and address of the contractor, the name and address of any person designated to receive notices, and the anticipated expiration date if different from one year. The statutory form for the NOC is provided in s. 713.13(1)(d), F.S.

Effect of the Bill – Local Government Permitting

The bill revises the conditions under which a building permit, including site-specific permits under s. 553.794, F.S.,²¹ expire. The bill provides that a building permit expires:

- One year after the date of issue if the permit has not been renewed by filing a notice of renewal before the expiration date. The bill provides a statutory form for the notice of renewal which is attached hereto as **Appendix A**. The owner or the owner's authorized agent, before the expiration of the permit and before continuing work, must record the notice of renewal in the clerk's office and post a certified copy of such notice or a notarized statement indicating the notice of renewal was filed for recording. At the time a notice of renewal is filed, the permit holder must also amend the notice of commencement for consistency.
- Six months after the date of issue if work has not commenced; has been suspended or abandoned for 6 months; or has not had the required inspection in 6 months.
- On the date a certificate of completion or certificate of occupancy is issued.
- On the expiration date of the notice of commencement.

The bill also:

- Requires that a person, firm, corporation, or governmental entity that applies for a building permit for the construction of improvements or for the alteration or repair of improvements on or to real property apply for the permit using the current statutory form required under s. 713.135 for all other permit applications.²²
- Revises the statutory form of a notice of commencement to include the building permit number, applicable local enforcement agency, and the issuance date and expiration date of the building permit.

B. SECTION DIRECTORY:

Section 1 amends s. 153.67, F.S., relating to unpaid fees to constitute lien.

Section 2 amends s. 159.17, F.S., relating to lien of service charges.

²⁰ s. 713.13(1)(a), F.S.

²¹ A builder is required to obtain a site-specific building permit for each individual site-specific building intended to be constructed, even if the builder expects to build multiple identical structures on a repetitive basis.

²² This provision appears to be a re-statement of current law. Section 713.135(7), F.S., provides: "This section applies to every municipality and county in the state which now has or hereafter may have a system of issuing building permits for the construction of improvements or for the alteration or repair of improvements on or to real property located within the geographic limits of the issuing authority."

Section 3 amends s. 695.01, F.S., relating to conveyances and liens to be recorded.

Section 4 amends s. 553.79, F.S., relating to permits; applications; issuance; inspections.

Section 5 amends s. 713.13, F.S., relating to notice of commencement.

Section 6 amends s. 713.135, F.S., relating to notice of commencement and applicability of lien.

Section 7 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

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:

Districts and municipalities may require an initial expenditure of funds to revise or create a website for the purpose of furnishing estoppel certificates.

Governmental entities and quasi-governmental entities that do not currently record all liens for non-ad valorem or special assessments may experience a small increase in expenditures for recording costs. The fee to record most single page liens is \$10.²³ Any required expenditure relating to recording fees, however, is likely to be offset by collecting on costs incurred in recording or satisfying the lien.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

²³ s. 28.24, F.S.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 26, 2016, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments incorporated an unnumbered provision of the bill into an existing section of law and revised the conditions under which a building permit expires. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

Appendix A

Tax Folio No. _____

BUILDING PERMIT NOTICE OF RENEWAL

Permit Number: _____

Local Enforcement Agency: _____

Issuance Date of Building Permit: _____

Date of Last Inspection: _____

Notice is hereby given of the renewal of the building permit listed above. I certify that all work will be performed to meet the standard of all laws regulating construction in this jurisdiction. I understand that a separate notice of renewal must be recorded for a permit for electrical work, plumbing, signs, wells, pools, furnaces, boilers, heaters, tanks, and air conditioners, etc.

OWNER'S AFFIDAVIT: I certify that all of the foregoing information is accurate and that all work will be done in compliance with all applicable laws regulating construction and zoning.

WARNING TO OWNER: YOUR FAILURE TO RECORD A CURRENT NOTICE OF COMMENCEMENT MAY RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND POSTED AT THE JOB SITE BEFORE CONTINUING WORK. IF YOU INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN ATTORNEY BEFORE CONTINUING WORK OR RECORDING YOUR NOTICE OF COMMENCEMENT OR NOTICE OF RENEWAL.

(Signature of Owner or Agent)

(including contractor)

STATE OF FLORIDA
COUNTY OF _____

Sworn to (or affirmed) and subscribed before me this ____ day of ____, ____ (year) ____, by ____ (name of person making statement) ____.

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ____ OR Produced Identification ____
Type of Identification Produced _____

(Signature of Contractor)

STATE OF FLORIDA
COUNTY OF _____

Sworn to (or affirmed) and subscribed before me this ____ day of ____, ____ (year) ____, by ____ (name of person making statement) ____.

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ____ OR Produced Identification ____
Type of Identification Produced _____

(Certificate of Competency Holder)

Contractor's State Certification or Registration No. ____
Contractor's Certificate of Competency No. ____

NOTICE OF RENEWAL APPROVED BY
____ Permit Officer