

Homestead, code enforcement liens

Number: INFORMAL

Date: August 27, 2002

The Honorable Mitch A. Needelman
Representative, District 31
Post Office Box 1656
Melbourne, Florida 32901

Dear Representative Needelman:

You ask whether there is a conflict between the provisions of Article X, section 4, Florida Constitution, and section 162.09, Florida Statutes.

The Florida courts have stated that Article X, section 4, of the Florida Constitution does not invalidate the lien created under section 162.09, Florida Statutes, but merely renders it unenforceable.

Article X, section 4(a), Florida Constitution, provides that homestead property "shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty[.]"

Chapter 162, Florida Statutes, is the "Local Government Code Enforcement Boards Act," and authorizes local code enforcement boards to "impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective and inexpensive method of enforcing any codes and ordinances in force in counties and municipalities." [1] Section 162.09(3), Florida Statutes, provides in part that

"a certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator. Upon petition to the circuit court, such order shall be enforceable in the same manner as a court judgment by the sheriffs of this state, including execution and levy against the personal property of the violator, but such order shall not be deemed to be a court judgment except for enforcement purposes. . . . *No lien created pursuant to the provisions of this part may be foreclosed on real property which is a homestead under s. 4, Art. X of the State Constitution*". (e.s.)

The language emphasized above was added in 1985. [2] Prior to the statute's amendment in 1985, this office has concluded that a lien created pursuant to section 162.09, Florida Statutes, was not enforceable against homestead property. [3]

In *Miskin v. City of Fort Lauderdale*, [4] the Fourth District Court of Appeal considered the impact of Article X, section 4, Florida Constitution, on section 162.09, Florida Statutes, stating:

"Initially, it must be noted that the instant lien was created pursuant to a code enforcement board order rather than pursuant to a 'judgment, decree or execution' which are prohibited by the constitution. Art. X, § 4, Fla. Const. More importantly, contrary to Miskin's assertion, the prohibition of the constitutional provision is a prohibition against the use of process to force sale of homestead property and does not invalidate the debt or lien. . . . Thus, the constitutional prohibition takes priority over the debt or lien and renders the same unenforceable. . . . The legislature recognized this fact in determining that an enforcement board order should not be considered a judgment except for enforcement proceedings. . . . Accordingly, the mere recording of the order in the instant case does not constitute a cloud upon Miskin's homestead property. . . . However, if Miskin's property somehow lost its homestead status, the City would be able to enforce the order as a lien against the property." (citations omitted)

Thus, the court concluded that the Florida Constitution did not invalidate the lien created under section 162.09, Florida Statutes, but merely rendered it unenforceable. A copy of the decision is enclosed for your review. I would note that the decision has been cited by other courts.[5]

I trust that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

Enclosures

[1] Section 162.02, Fla. Stat.

[2] Section 2, Chapter 85-150, Laws of Florida.

[3] Attorney General Opinion 85-26 (1985), a copy of which is enclosed.

[4] 661 So. 2d 415, 416 (Fla. 4th DCA 1995).

[5] See, e.g., *Monroe County v. McCormick*, 752 So. 2d 1239 (Fla. 3d DCA 2000); *Ergos v. State*, 670 So. 2d 1079 (Fla. 2d DCA 1996).