Municipalities--priority of liens

Number: INFORMAL

Date: November 07, 2001

Mr. John C. Dellagloria
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RE: TAXATION–LIENS–PRIORITY–MUNICIPALITIES–HOME RULE–authority of municipality to prescribe priority for its special assessments and code enforcement liens. ss. 162.09 and 166.021, Fla. Stat.

Dear Mr. Dellagloria:

You ask whether a city may amend its ordinances to make code enforcement and special assessment liens equal in rank and dignity to any ad valorem tax liens in the absence of statutory authorization. Attorney General Butterworth has asked me to respond.

Chapter 162, Florida Statutes, is designed to provide effective procedures and methods for enforcing local codes and ordinances. It authorizes a municipality to create boards that can impose administrative fines and other noncriminal penalties for violations of such codes.[1] Section 162.09(3), Florida Statutes, provides in pertinent part:

"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."

The chapter, however, is silent as to the priority of liens which are imposed under its terms.

In *Sarasota County v. Andrews*,[2] the court considered a county ordinance which provided that when a code enforcement order imposing a fine was recorded, it became a lien "superior to all other liens, except a lien for taxes." The court held that the priority provision impaired a mortgage company's preexisting mortgage lien. While the court made no finding on the facial constitutionality of the priority provision, it held that the ordinance was an unconstitutional impairment of the mortgagee's contract with the mortgagor creating a first-priority lien.

In light of the court's decision in *Sarasota County v. Andrews, supra,* and in the absence of a statute establishing such priority, it would appear questionable whether a city could adopt an ordinance making code enforcement liens equal to all ad valorem taxes taking priority over previously recorded liens.

Section 197.122(1), Florida Statutes, provides in part:

"All taxes imposed pursuant to the State Constitution and laws of this state shall be a first lien, superior to all other liens, on any property against which the taxes have been assessed and shall continue in full force from January 1 of the year the taxes were levied until discharged by payment or until barred under chapter 95."

The reference to taxes imposed pursuant to the Constitution and laws of Florida, however, is to state, county, and municipal governmental taxes, as distinguished from special assessments.[3] Special assessments are not taxes. While both taxes and special assessments are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a specific benefit upon the land burdened by the assessment. As stated by the Supreme Court of Florida in *City of Boca Raton v. State*,[4] there are two requirements which must be met to assure the validity of a special assessment: the property assessed must derive a special benefit from the service provided; and the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit.

While a lien for general state, county, or municipal taxes is superior to a lien for special assessments,[5] the courts have recognized the authority of the Legislature to regulate the status and priority of special assessments.[6] You have not specified the type of special assessments in question. I would, however, note that Chapter 170, Florida Statutes, represents a supplemental and alternative method of making local municipal improvements and authorizes the imposition of special assessments.[7] The activities for which special assessments may be levied and collected pursuant to Chapter 170, however, are strictly limited to those set forth therein.[8] For those assessments authorized under Chapter 170, section 170.09, Florida Statutes, provides:

"The special assessments shall be payable at the time and in the manner stipulated in the resolution providing for the improvement; shall remain liens, *coequal with the lien of all state, county, district, and municipal taxes*, superior in dignity to all other liens, titles, and claims, until paid; . . ." (e.s.)

Thus, the statute makes Chapter 170 liens equal in rank and dignity to other state and local tax liens.[9]

The courts have also recognized that a municipality has the authority under its home rule powers to impose special assessments. As the Supreme Court of Florida recognized in *City of Boca Raton v. State*,[10] special assessments may be the subject of independent, home rule legislation without reliance on Chapter 170, Florida Statutes. In addition, this office has recognized the home rule power of a municipality to impose liens on properties served by a municipal utility system for unpaid utility service fees or user charges and to provide for enforcement of such liens.[11]

I would further note that in *Gleason v. Dade County*,[12] the court recognized the validity and priority of unrecorded assessment liens for delinquent waste fees as imposed by county

ordinance. The ordinance provided that such special assessment liens were superior in rank and dignity to all other liens, encumbrances and titles and claims in, to, or against the real property involved. While declining to comment on the constitutionality of the ordinance since the issue had not been raised in the court below, the district court concluded that the ordinance made waste fees after a certain date superior in rank and dignity to an earlier recorded mortgage.

Based on its decision in *Gleason v. Dade County, supra,* the court in *Miami Shores Village v. Gibraltar Savings and Loan Association*,[13] subsequently upheld the authority of the village to impose a special assessment lien for unpaid waste fees that would be superior to a mortgage lien.

However, while a municipality possesses home rule powers, it may not act in conflict with the provisions of state law. For example, the court in *City of Miami Beach v. Rocio Corporation*,[14] while recognizing that concurrent legislation may be enacted by both the state and local government in areas not preempted to the state, concluded that such concurrent legislation enacted by municipalities may not conflict with state law. If such conflict arises, state law prevails.[15]

Thus, while the case law provides authority for a municipality to create special assessment liens superior to other liens, such powers must be exercised in a manner consistent with state law. Section 197.122(1), Florida Statutes, provides for the superiority of liens for general state, county and municipal taxes. In the absence of statutory authority such as that provided in section 170.09, Florida Statutes, therefore, it appears questionable whether a municipality, by ordinance, may require its special assessment liens to be equal in dignity and rank to liens imposed for state and county taxes.[16]

I trust the above informal comments, which should not be construed as a formal opinion of the Attorney General, may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

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[1] *And see* Op. Att'y Gen. Fla. 85-26 (1985), concluding that a lien created by s. 162.09, Fla. Stat., for administrative fines ordered by a code enforcement board was not enforceable against homestead property since the lien was not for the payment of taxes or assessments.

[2] 573 So. 2d 113 (Fla. 2d DCA 1991).

[3] *See, e.g., Allison Realty Company v. Graves Investment Company,* 155 So. 745 (Fla. 1934), and *City of Sanford v. Dial*, 142 So. 233 (Fla. 1932).

[4] 595 So. 2d 25, 29 (Fla. 1992).

[5] *See, e.g., City of Tampa v. Lee*, 151 So. 2d 316 (Fla. 1933); *City of Lake Worth v. McLeod,* 151 So. 318 (Fla. 1933).

[6] *See, e.g.*, *Rorick v. Reconstruction Finance Corporation*, 198 So. 494 (Fla. 1940).

[7] *See* s. 170.21, Fla. Stat.

[8] *See, e.g.,* Op. Att'y Gen. Fla. 94-87 (1994) (Ch. 170, Fla. Stat., does not authorize the levy and collection of a special assessment by a municipality for the purpose of constructing a barrier wall to protect private property from the noise and sight of heavy traffic on an adjacent roadway).

[9] *Cf. State Adjustment Company v. Winslow,* 157 So. 507 (Fla. 1934) (statute making lien of city for special assessments equal to lien of state, county, and municipality for ad valorem taxes held valid only as respects lien for municipal ad valorem taxes); *City of Tampa v. Lee*, 151 So. 316 (Fla. 1933) (special act establishing city charter which provides that lien of special assessment shall constitute lien on property of same nature and to same extent as lien for general taxes does not make special assessment lien of equal dignity as lien for state and county taxes); *City of Miami v. Lee*, 151 So. 317 (Fla. 1933). *Compare* Op. Att'y Gen. Fla. 61-58, 1961-1962 Biennial Report of the Attorney General, at 97, stating that rule discussed in *Winslow, supra,* may not be applicable where a lien for special assessments is declared to be equal to the lien for state and county assessments by general and not special law.

[10] 595 So. 2d 25 (Fla. 1992).

[11] *See* Ops. Att'y Gen. Fla. 85-70 (1985) and 94-57 (1994) (while municipality may impose lien for unpaid utility service, it must perfect its lien by filing with the clerk of the circuit court in order for its claim to be effective against creditors and subsequent purchasers for consideration). *And see Stone v. Town of Mexico Beach,* 348 So. 2d 40 (Fla. 1st DCA 1977), *cert. den.*, 355 So. 2d 517 (Fla. 1978) (upholding the validity of a town ordinance imposing liens for the nonpayment of garbage collection charges); *City of Venice v. Valente*, 429 So. 2d 1241 (Fla. 2d DCA 1983); and *Stein v. City of Miami Beach*, 250 So. 2d 289 (Fla. 3d DCA 1971).

[12] 174 So. 2d 466 (Fla. 3d DCA 1965). *And see Dade County v. Certain Lands,* 247 So. 2d 787 (Fla. 3d DCA 1971).

[13] 561 So. 2d 27 (Fla. 3d DCA 1990).

[14] 404 So. 2d 1066 (Fla. 3d DCA 1981), *pet. for rev. den.*, 408 So. 2d 1092 (Fla. 1981). *And see Thomas v. State*, 614 So. 2d 468 (Fla. 1993) (municipal ordinances are inferior to state laws and must not conflict with any controlling provision of statute).

[15] *And see City of Casselberry v. Orange County Police Benevolent Association*, 482 So. 2d 336 (Fla. 1986) (if specific conflict arises, state statute will prevail); *City of Hialeah v. Martinez*, 402 So. 2d 602 (Fla. 3d DCA 1981), *pet. for rev. dismissed*, 411 So. 2d 380 (Fla. 1981); *Cf. Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972) (municipality cannot forbid what the

Legislature has authorized or required, nor may it authorize what the Legislature has forbidden); *Scavella v. Fernandez*, 371 So. 2d 535 (Fla. 3d DCA 1979) (county ordinance requiring claims against county be filed within 60 days was in conflict with and was superseded by state statute allowing 3 years for filing).

[16] *Cf.* s. 197.3632(1)(d), Fla. Stat. "'Non-ad valorem assessment' means only those assessments which are not based upon millage and which can become a lien against a homestead as permitted in s. 4, Art. X of the State Constitution."; and s. 197.252(5), Fla. Stat., providing:

"The taxes, *non-ad valorem assessments*, and interest deferred pursuant to this act *shall constitute a prior lien and shall attach as of the date and in the same manner and be collected as other liens for taxes*, as provided for under this chapter, but such deferred taxes, non-ad valorem assessments, and interest shall only be due, payable, and delinquent as provided in this act." (e.s.)

Compare s. 298.333, Fla. Stat. (all non-ad valorem assessments provided for in Ch. 298, together with all penalties for default and costs, constitute, from the date of assessment thereof until paid, a lien of equal dignity with the liens for county taxes and other taxes of equal dignity with county taxes upon all the lands against which such assessments have been levied and assessed, pursuant to s. 197.3632).