Perfecting and enforcing local government liens

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Subject:
Perfecting and enforcing local government liens

April 27, 2020

Mr. Allan Weinthal
Town Attorney, Town of Davie
6591 Orange Drive
Davie, Florida 33314

Dear Mr. Weinthal:

On behalf of the Town of Davie ("Town"), you have requested an opinion on substantially the following questions:

1. After a new owner purchases property (other than in a tax deed sale)1 to which unpaid utility services were provided from a system financed by municipal revenue bonds issued under chapter 159, can the Town enforce the lien provided by section 159.17 against the property for the full amount owed without filing a lien in the county's official records?

2. If the unpaid utility balance can be enforced against such property without filing a lien, what limitations period governs its enforcement?

In sum:

1. Pursuant to section 695.01(3), Florida Statutes (2019), the Town may enforce its statutory liens for utility services from the new property owner without filing the liens with the county.

2. Because section 159.17 specifies that such utility liens, "when delinquent for more than 30 days, may be foreclosed by such municipality in the manner provided by the laws of Florida for the
foreclosure of mortgages on real property," and the statute of limitations applicable to mortgage foreclosure actions, under section 95.11(2)(c), is five years, a five-year statute of limitations applies to foreclosure of the Town's utility liens.

Factual Background

The Town has a water and sewer plant constructed and maintained with funds obtained through revenue bonds issued pursuant to section 159.08, Florida Statutes. Through this facility, the Town provides water and sewer utility services to certain residents. Some of its customers receive just one of these services; others receive both. If a certain outstanding balance threshold is reached, water services are shut off. However, even when the water is shut off, the subject account in arrears continues to accrue a monthly base charge for equipment, as well as late fees. The base fee for sewer services also continues regardless of whether the Town receives any payments due on a particular account.

Town records showing outstanding balances for delinquent accounts are public records available upon request. These account records reflecting past due balances are not recorded in the county's official records. You have indicated that subsequent purchasers of property to which outstanding utility charges apply sometimes fail to request utility records from the Town. As a result, such purchasers may acquire properties subject to outstanding water or sewer service account balances from the prior owner without ensuring that such balances are paid at or prior to closing.

Question 1: Collecting a Past Due Balance After a New Owner Acquires the Property

Section 159.17 (enacted in 1967) provides, in pertinent part, that, when a municipality issues revenue bonds for water or sewer systems under chapter 159, the municipality shall have a "lien on all lands or premises served by" such system "for all service charges for such facilities until paid." The statute provides such liens with the same priority as liens for state, county, and municipal taxes. It provides, further, that "[s]uch liens, when delinquent for more than 30 days, may be foreclosed by such municipality in the manner provided by the laws of Florida for the foreclosure of mortgages on real property."

Prior to 2013, it was not clear whether such section 159.17 liens could be enforced without first recording them in the official records of the county. *Cf*. *City of Riviera Beach v. Reed*, 987 So. 2d 168, 169-70 (Fla. 4th DCA 2008) (stating that a city's recording of its lien for delinquent utilities was the "last element constituting the cause of action" for triggering commencement of the limitations period). In 2013, the Legislature amended section 695.01, Florida Statutes, to specify which liens are required to be recorded to be "valid and effectual." *See* ch. 2013-241, Laws of Fla. Section 695.01(3) now provides:

> (3) A lien by a 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….

(Emphasis added.) Thus, section 695.01(3) expressly excludes section 159.17 utility liens (as liens by a "governmental entity…for…utilities") from the recording requirement otherwise imposed for liens to be "valid and effectual in law or equity against…subsequent purchasers for a valuable consideration." The Town can thus enforce its utility lien against a subsequent purchaser of property served by its water and sewer system without recording such lien in the

county's official records.

Question 2: The Limitations Period Applicable to Enforcement

The Town submits that, because utility liens created under section 159.17 continue to apply "until paid," "shall be prior to all other liens on such lands or premises except the lien of state, county and municipal taxes," and "shall be on a parity with the lien of such state, county and municipal taxes," the twenty year statute of limitations for tax liens in section 95.091(1)(b) should apply. Section 95.091(1)(b), Florida Statutes (2019), provides:

> (b) Any tax lien granted by law to the state or any of its political subdivisions for any tax enumerated in s. 72.011 or any tax lien imposed under s. 196.161 expires 20 years after the last date the tax may be assessed, after the tax becomes delinquent, or after the filing of a tax warrant, whichever is later. An action to collect any tax enumerated in s. 72.011 may not be commenced after the expiration of the lien securing the payment of the tax. But that reading of section 159.17 does not give effect to all its parts.3 Rather, it is clear from use of the words "prior" and "parity" 4 in the same sentence that, rather than suggesting an appropriate statute of limitations, the Legislature intended to specify the priority to be accorded the described liens. Further, a plain reading of section 95.091(1)(b) makes clear that it does not apply to municipal utility liens. Section 95.091(1)(b) applies to tax liens granted "for any tax enumerated in s. 72.011 or any tax lien imposed under s. 196.161." Section 72.011 neither mentions municipal utility liens nor references chapter 159. Nor is a municipal utility lien a "tax lien imposed under s. 196.161."
> Section 159.17 provides that a utility lien, "when delinquent for more than 30 days, may be foreclosed…in the manner provided by the laws of Florida for the foreclosure of mortgages on real property." In *Reed*, the district court determined that the five-year statute of limitations contained in section 95.11(2)(c), which is applicable to mortgage foreclosure actions, applies to an action to foreclose such utility lien.

Based on the foregoing, I am of the opinion that, pursuant to section 695.01(3), the Town may collect on its statutory liens for utility services from new property owners, under the circumstances described, without recording the liens in the official records of the county. And because section 159.17 specifies that liens created thereunder may be foreclosed in the manner provided "for the foreclosure of mortgages on real property," the five-year limitations period set forth in section 95.11(2)(c) (pertaining to actions to foreclose a mortgage) applies to enforcement of the Town's utility liens.

Sincerely,

Ashley Moody

Attorney General

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1 The Town did not ask, and this opinion does not address, how the Town's utility liens, if not recorded in the county official records, might be affected in the event of a tax deed sale under chapter 197, Florida Statutes (2019). Nor does this opinion address the Town's collection of delinquent service charges pertaining to rental property. *See* § 180.135, Fla. Stat. (2019) ("Utility services; refusal or discontinuance of services for nonpayment of service charges by former occupant of rental unit prohibited; unpaid service charges of former occupant not to be basis for lien against rental property, exception").

2 Section 95.091(1)(b), Florida Statutes (2019), provides:

> (b) Any tax lien granted by law to the state or any of its political subdivisions for any tax enumerated in s. 72.011 or any tax lien imposed under s. 196.161 expires 20 years after the last date the tax may be assessed, after the tax becomes delinquent, or after the filing of a tax warrant, whichever is later. An action to collect any tax enumerated in s. 72.011 may not be commenced after the expiration of the lien securing the payment of the tax.

3 *See generally Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole.").

4 "Prior" is defined as "[t]aking precedence <a prior lien>," and "parity" is defined as the "quality, state, or condition of being equal, esp. in pay, rights, or power." Black's Law Dictionary (11th ed. 2019).