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Local Government Financing of Energy Conservation & Efficiency Improvements to Property

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Owners of improved property in Florida may obtain financing from their local governments (city or county) for qualified improvements that conserve energy, enhance energy efficiency, provide renewable energy, and/or enhance resistance to wind damage, pursuant to Florida Statutes, Section 163.08.

If approved, the construction of the proposed improvements can be financed by the owner's entry into a financing agreement with the local government that provides for the government to fund the cost of construction of the qualified improvement, with repayment to be made from new non-ad valorem tax assessments levied by the local government against the improved property. These assessments will constitute a first lien on the improved property (having the same priority as ad valorem real property taxes), which means that they will prime mortgage liens (even those previously recorded).

Any such financing agreement (or a memorandum thereof) upon execution must be recorded among the public records in the county where the property is located. Before entering into a financing agreement, the government is required to obtain a title search on the property in order to verify that there are no involuntary liens on the property, and that the owner is current on the payment of its real estate taxes and mortgages.

At least 30 days before entering into any financing agreement with a local government, the owner must notify all mortgagees of the owner's intention to do so, and inform them of the amount to be financed and the maximum new annual assessment necessary to repay it. If the value of the improvements to be funded pursuant to the financing agreement exceeds 20% of the county's appraised value of the property, any mortgagees of the property must consent, but if it is 20% or less then mortgagee consent is not required.

If an owner intends to sell property that is subject to a financing agreement under this statute, at or before entering into a contract for sale the owner must provide a notice of the existence of the financing to the

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prospective purchaser, the form of which is set forth in the statute.

Lenders have legitimate concerns that their existing mortgage lien can be primed by subsequent new assessments levied for the repayment of this kind of financing obtained after the lender's mortgage is recorded. The statute provides that any loan document provision purporting to make it a default for the borrower to enter into this kind of financing arrangement is unenforceable. However, the statute does not preclude lenders from making it a default if the Borrower fails to comply with its obligations under the statute or under any financing obtained pursuant to the statute. Additionally, the statute does not preclude lenders from increasing the amounts of their escrows or impounds for the payment of taxes and assessments if such financing is obtained.

This article is not an exhaustive analysis of the issues presented in the scenarios described above. As always with complex financing transactions, there are nuances and technicalities that are best addressed with the advice of an experienced real estate finance attorney.

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