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Insights

Quirk in Florida Code Enforcement Law Presents Potential Issues for Investors Buying Distressed Properties

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The Florida real estate market still offers investors many opportunities to acquire properties at bargain basement prices. One common business model calls for the investor to buy property at a foreclosure sale or from an owner in distress, fix it up if there is deferred maintenance, and then either sell it for a profit or rent it out. Some investors are acquiring multiple properties for those purposes. If a property has deferred maintenance, however, it may be subject to a code enforcement lien recorded by the local government on account of a code violation. In that case, due to a quirk in Florida law, the code enforcement lien will also automatically encumber other properties owned by the violator.

Section 162.09(3) of the Florida Statutes contains a little known provision that reads as follows: "*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* (emphasis added)." This means that a code enforcement lien recorded against one property will also be a lien on other properties in the same County that the violator owns.

Who is the violator? There is no question that the owner against whom the lien was recorded is a violator, and that the lien will therefore encumber other properties that person (or company) owns in the same County, even if those other properties comply with code.

What if someone purchases a property with a code enforcement lien recorded against it that has not yet been cured? Is the purchaser considered a violator because the property is still in violation of code when they buy it? The statute is not clear, and there is no case law on that subject, but it is possible for the local government to take that position.

This statute therefore presents issues for investors under two different scenarios:

1. If an investor purchases property from a seller, and there is a code enforcement lien recorded against a different property owned by that seller in the same County (but not the property being purchased), the lien will still encumber the property being purchased until the violation on the other property is cured, any fine is paid, and the lien is discharged.
2. If an investor purchases property from a seller, and the property being purchased has a code violation with a code enforcement lien recorded against it, upon concluding the closing the purchaser may be deemed to be the "violator," meaning that the lien would now also encumber the purchaser's other properties in that County.

Title insurance companies will generally not insure over lien claims by the local government under the first scenario. The problem that this scenario poses is that the investor (who purchases a property that is subject to a lien caused by the existence of a code violation on a different property owned by the seller) has no way to cure the violation, since he does not own the other property. Despite this, the local government can still foreclose its lien on the purchaser's new property. Some local governments may not do that, and it may be possible to negotiate with the local government to release your new property from its lien as long as it is not the property in violation. However, this would require some discussion with the local government.

Most title insurance companies (but not necessarily all) take the position that a code enforcement lien will not encumber an investor's other properties under the second scenario, on the theory that the purchaser is not the violator. Instead, they take the position (which seems reasonable) that the only violator is the seller (i.e., the person or company that owned the property in violation when the code enforcement lien was recorded). However, this has not been ruled upon by any Florida court.

How can you determine if one of these issues may affect a distressed property you are purchasing? Make sure you obtain a title insurance commitment listing all of the title exceptions affecting the property, and review the exceptions. This will disclose whether the title insurance company believes that the property is subject to a code enforcement lien under either scenario. Keep in mind that title insurance companies sometimes take a "kitchen sink" approach when listing exceptions in their title commitments... they may include some that are questionable, or that should not apply. If a code enforcement lien appears in your title commitment, it is useful to have a real estate lawyer review the status of title to determine if it truly belongs there. It may be possible to convince the title company to remove it.

Some local governments adopted code provisions stating that their code enforcement liens would be so-called "super" liens, meaning that they would be superior to all other liens (such as mortgages) even if the other liens were recorded before the code enforcement lien. However, in 2013 the Florida Supreme Court ruled that these types of "super" lien provisions violate state law by contravening the lien priority statutes passed by the Florida legislature. As a result, a local government code enforcement lien has priority only from the date it is recorded.

If the property that is subject to a code enforcement lien was the subject of a mortgage foreclosure and you are buying it afterwards, it is therefore possible that the foreclosure proceeding extinguished the code enforcement lien, but for that to be the case, certain procedures must have been followed in the foreclosure. The title insurance company should review the foreclosure case and determine if it was adequate to extinguish the code enforcement lien. Even if the lien was extinguished, if the property was in violation of code and the violation has not been cured when you buy it, the local government could record another code enforcement lien against it, this one naming you as the violator.

Once you have the facts, you can make an informed decision about whether to purchase the property, the risks you are willing to take, and the extent to which the presence (or possibility) of a code enforcement lien justifies an adjustment in the purchase price.

If you are buying a property that is subject to a code enforcement lien, or that has code violations that could result in such a lien being filed, consider acquiring it in the name of a single purpose entity. If you do this, then the lien will only affect other properties owned by that particular entity. Investors who acquire multiple distressed properties sometimes find it useful to form two different entities to hold title to their properties. One will hold title to "clean" properties (those with no code enforcement violations or liens), while the other will hold title to "problem" properties (those with code enforcement violations or liens). This different ownership will preclude the possibility that the problem properties will adversely affect the title to the clean properties by virtue of the statute quoted above.

Keep in mind that if you are financing your purchase, or intend to finance the property later, your lender may have a different view about the risks they are willing to accept. It is safe to say that lenders never want to see code enforcement liens against properties on which they are getting mortgages, so title insurance coverage over them will be required by the lender. If you can't get it, you may not be able to finance the property.

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