

**CITY OF MIAMI  
CITY ATTORNEY'S OFFICE  
MEMORANDUM**

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**TO:** Scott J. Simpson, Director  
Finance Department

**FROM:** Jorge L. Fernandez, City Attorney

**DATE:** June 13, 2005

**RE:** Request for Legal Opinion – Determining the Ultimate Responsible Party for Unpaid City of Miami Bills (MIA 05-00007)

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You have requested a legal opinion on substantially the following two questions:

- 1) **IS THE INDIVIDUAL BUSINESS OWNER (“TENANT”) OR PROPERTY OWNER (“PROPERTY OWNER”), ULTIMATELY RESPONSIBLE FOR UNPAID CITY CODE ENFORCEMENT (“CE”) VIOLATIONS WHICH ARISE FROM THE PROPERTY AND RELATE TO OCCUPATIONAL LICENSES, CERTIFICATES OF USE, ACCESSORY USE, OR BURGLAR ALARMS (“BILLS”)?**
  
- 2) **MAY THE CITY PREVENT THE TRANSFER OR SALE OF A PROPERTY BY THE PROPERTY OWNER UNTIL SUCH TIME BILLS ARE PAID IN FULL?**

**DISCUSSION**

AS TO QUESTION ONE

Generally, the Property Owner is responsible for unpaid Bills because the Property Owner, and not the Tenant, is ultimately responsible for bringing the property up to City Code. Furthermore, a municipality is authorized by state law to record liens against the property for outstanding Bills resulting from CE violations. Chapter 162, Florida Statutes, sets forth the CE process for creating such liens. In Particular, Section 162.09, F.S. (2004), provides in pertinent part:

- (3) 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).

In applying the above statutory section, the court in *Monroe County v. Whispering Pines Associates*, held that the “violator” is the person who is responsible for bringing the property up to Code and whose continued violation of the Code could result in a lien against the property.<sup>1</sup> The court went on to say that “by necessity and logic, there’s nothing unconstitutional in holding that as the party who has the power to bring the land into code compliance, the current owner should be charged with that responsibility.”<sup>2</sup> Furthermore, CE violations “run with the land” and subsequent Property Owners could be held responsible.<sup>3</sup>

However, notwithstanding state law authorizing the recordation of liens, the Property Owner’s responsibility for Tenant’s outstanding Bills is not totally unlimited. In cases where the Property Owner is not engaged in Tenant’s business, the City’s ability to charge the Property Owner for payment of Bills is curtailed by existing case law. Specifically, where the Bill accrued for Tenant’s failure to pay for an occupational license, the court has held in favor of the Property Owner and against the City for imposing such CE violations against Property Owner.<sup>4</sup>

## DISCUSSION

### AS TO QUESTION TWO

To secure payment of Bills arising from the property, the City is authorized by state law to record a lien against the property.<sup>5</sup> After three (3) months from the filing of any such lien which remains unpaid, the enforcement board may authorize the City attorney to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest.<sup>6</sup> Until such time the City obtains a judgment rendered in a lawsuit, the lien will continue to accrue and run in favor of the City. Such a lien becomes a lien against the land that is in violation, and shall continue to accrue until the violator comes into compliance or judgment is rendered, whichever

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<sup>1</sup> See *Monroe County, Florida v. Whispering Pines, Associates*, 697 So.2d 873 (3<sup>rd</sup> DCA 1997).

<sup>2</sup> Id.

<sup>3</sup> “A certified copy of an order imposing a fine shall be in the public records and thereafter shall constitute a *lien against the land* on which the violation exists...” Code § 2-817(e). (Emphasis added).

<sup>4</sup> In *Schonfeld*, the court affirmed the judgment, which restrained appellant City from prosecuting property owner for *failing to pay an occupational license fee*. The court found that the Code did not apply to property owner because the property owner was not engaged in or operating in a business. *City of Miami v. Schonfeld*, 197 So. 2d 559 (3<sup>rd</sup> DCA 1967). (Emphasis added).

<sup>5</sup> A certified copy of an order imposing a fine may be recorded in the public records and thereafter shall constitute a lien against the *land on which the violation exists*...§ 162.09(3), F.S. (Emphasis added).

<sup>6</sup> Id.

comes first.<sup>7</sup> However, no lien may be foreclosed on real property which is a homestead under the Florida Constitution.<sup>8</sup>

Other than the authority to impose a lien against the property, the statutory provisions and City Code are devoid any authority allowing the City to prevent the sale or transfer of property by Property Owner, to another. To the contrary, the City Code contemplates the effect of liens against subsequent purchasers for valuable consideration.<sup>9</sup> In the absence of legislative authority, the City may not prevent the sale or transfer of property to another, as a mechanism for collecting Bills from Property Owners. In preventing the transfer or sale of property to another, the City would necessarily interfere with a person's right to contract. In addition to violating an individual's right to contract, the City's obtrusive actions without the prerequisite legislative approval, would likely be deemed by a court of competent jurisdiction, an unreasonable restraint on the alienation of property.

The right to make contracts of any kind is an element of civil liberty possessed by all persons. Both, the U.S. and Florida Constitutions prohibit laws impairing the obligation of contracts.<sup>10</sup> Hence, the freedom of contract is the general rule; restraint is the exception, and when it is exercised to place limitations upon the right to contract, the power, when exercised, must not be arbitrary or unreasonable, and it can be justified only by exceptional circumstances.<sup>11</sup> The freedom to contract is subject to restrictions *passed by the legislative branch of the government* in the exercise of its power to protect the safety, health and welfare of the people.<sup>12</sup> The *exercise of legislative authority* to abridge freedom to contract can be justified only by the existence of exceptional circumstances.<sup>13</sup> Furthermore, the right to convey property is one of the incidents of ownership, and the law will not permit the rights of ownership to be fettered by the imposition of restraints.<sup>14</sup> The Fourteenth Amendment of the U.S. Constitution prevents state interference with property rights except by due process of law.<sup>15</sup> In the present case, neither the Florida Statutes nor the City Code provides the requisite legislative authority to permit the City to abridge the freedom to contract and to impose restraints on the alienation of property, for the aim of collecting Bills.

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<sup>7</sup> *Deluca Properties, Inc. v. City of Wildwood*, 830 So. 2d 206, (Fla. Dist. Ct. App. 2002).

<sup>8</sup> § 162.09(3), F.S. (Emphasis added).

<sup>9</sup> The continuation of a lien affected by the commencement of the action shall not be good against creditors or *subsequent purchasers for valuable consideration* without notice..., Sec. 2-817(f), City Code. (Emphasis added).

<sup>10</sup> U.S. Const. art. I, §10, and Fla. Const. art. I, § 10.

<sup>11</sup> *In the Matter of the Florida Bar*, 349 So. 2d 63 (Fla. 1977).

<sup>12</sup> *McLean v. State of Arkansas*, 211 U.S. 539 (1908). (Emphasis added).

<sup>13</sup> *Advance-Rumely Thresher Co., Inc. v. Jackson*, 287 U.S. 283 (1932). (Emphasis added).

<sup>14</sup> *Chianese v. Culley*, 397 F. Supp. (S.D.Fla. 1975).

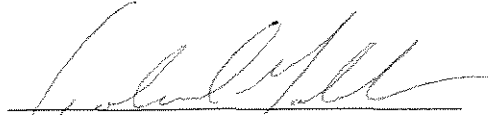
<sup>15</sup> *Buchanan v. Warley*, 245 U.S. 60 (1917).

CONCLUSION

As to question one, the Property Owner is generally responsible for Bills resulting from unpaid CE violations. This is because the Property Owner, and not the Tenant, is ultimately responsible for bringing the property up to Code and, more importantly, any liens as a result of unpaid Bills are recorded against the Property Owner's property. Such liens impact the Property Owner and not the Tenant, because the lien is against the property on which the violation exists. Furthermore, there is case law holding that CE violations run with the land, which would affect current and future Property Owners, as opposed to Tenants.

As to question two, there are no statutory or Code provisions authorizing the City to prevent the transfer or sale of property by the Property Owner, to another. Absent permitting statutory language, the City may not obstruct, impair or destroy a contract to transfer or sell property to another, as a collection mechanism to recover outstanding Bills from Property Owners. To do so without legislative approval may expose the City to legal claims based on the infringement of the right to contract and for devising unreasonable restraints on the alienation of property. However, as previously stated, the City is permitted by state law to record liens on properties to effectuate payment of Bills arising from CE violation. Such liens will continue to accrue until the violator comes into compliance or judgment is rendered, whichever comes first.

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