CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - #08-008

TO: Honorable Marc Sarnoff, Commissioner
District 2

FROM: Julie O. Bru, City Attorney

DATE: October 7, 2008

RE: Legal Opinion - Code Violation enforcement not related to real property

You have requested a legal opinion on the following questions:

1. WHETHER THE CITY OF MIAMI CAN ENFORCE CODE VIOLATIONS THAT ARE NOT RELATED TO REAL ESTATE BY PLACING LIENS ON REAL PROPERTY OWNED BY THE VIOLATOR WITHIN OR OUTSIDE THE JURISDICTION OF THE CITY OF MIAMI?

2. IF THE ANSWER TO NUMBER ONE ABOVE IS NO, THEN WHAT IS THE LEGAL PROCESS AVAILABLE TO THE CITY OF MIAMI TO ENFORCE CODE VIOLATIONS THAT OCCUR ON PUBLIC PROPERTY AND DO NOT RELATE TO REAL PROPERTY OWNED BY THE ALLEGED VIOLATOR (*IN PERSONAM* MUNICIPAL ORDINANCE VIOLATIONS).

In sum:

1. The City may only place a lien against the land on which the violation exists.

2. The City has numerous options for enforcement of municipal code violations: the code enforcement board/special master mechanisms in Parts I and II, Chapter 162, Florida Statutes; interlocal agreements; direct enforcement through the county courts, and combinations of these methods.

Question One

The City of Miami enforces civil violations of its code and ordinances through the code enforcement process. The City's code enforcement process is codified as section 2-811 through 2-830 of the Code of the City of Miami, Florida (hereinafter "City Code"). The City Code provisions are derived from Chapter 162 of the Florida Statutes. The Florida Statutes provide

that a municipality may utilize the provisions of the statute to enforce its codes or it may adopt an alternative code enforcement system, or use both. (See Section 162.03 Fla. Stat.)

Both the City Code and the Florida Statute provide for the placement of a lien when a fine imposed by the Code Enforcement Board remains unpaid. Section 2-817(e) provides:

> "A certified copy of an order imposing a fine shall 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* and upon petition to the circuit court such order may be enforced in the same manner as a court judgment by the sheriffs of this state, including levy against personal property, but shall not be deemed otherwise to be a judgment of a court except for enforcement purposes...." (Emphasis added)

Section 162.09 (3) Fla. Stat. provides, in relevant part, that: "[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).

Both the City Code section and the Florida Statute indicate that the lien shall exist against the land on which the violation exist and upon any other real or personal property owned by the violator. The operative word in both provisions is the word "and."

It appears that the Legislature intended to use the word "and" in a conjunctive sense. The Legislature had the choice to use the term "and' or "or" and it chose the prior. Thus the words: "shall constitute a lien against the land on which the violation exists *and* upon any other real or personal property owned by the violator" means that the lien shall be placed on the land on which the violation exists, but if the violator owns other land or property the lien may be placed on it too. It does not mean that the lien can be placed on either the land on which the violation exists or any other land owned by the violator.

Florida Courts have long struggled with the interpretation of statutes where the use of the words "and" and "or" create ambiguities. In *Pompano Horse Club v. State*, 93 Fla. 415, 111 So. 801, 52 A.L.R. 51 (1927), the Florida Supreme Court observed:

> "In its elementary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that'; a connective that marks an alternative. 29 Cyc. 1502. It often connects a series of words or propositions, presenting a choice of either. Webster's New Int. Dict. (1925 Ed.). There are, of course, familiar instances in which the conjunction 'or' is held equivalent in meaning to the copulative conjunction 'and,' and such meaning is often given the word 'or' in order to effectuate the intention of the parties to a written instrument or of the Legislature in enacting a statute, when it is clear that the word 'or' is used in a copulative, and not in a disjunctive, sense. In statutes of this nature, however, the word 'or' is usually, if not always, construed

> judicially as a disjunctive unless it becomes necessary in order to conform to the clear intention of the Legislature to construe it conjunctively as meaning 'and.' In ascertaining the meaning and effect to be given the word 'or' when construing a statute, the intent of the Legislature is the determining factor. * * *" (Emphasis added.) 93 Fla. at 425, 111 So. at 805.

In an apparent attempt to end the ambiguity, the staff of the Florida Legislature prepares an annual publication entitled "Guideline to Bill Drafting." This publication includes a section entitled "Be Aware of the Ambiguities Inherent in "and" and "or." The section explains:

> "And" usually implies that the elements are to be considered jointly, that all listed requirements must be met or all conditions apply. "Or" implies that the listed elements may apply individually, although it is generally understood they can also be taken together. Thus, a requirement that an applicant "be 21 years of age, a veteran of the armed forces, and a college graduate" means that all three qualifications are required. A requirement that an applicant "be 21 years of age, a veteran of the armed forces, or a college graduate" means that an applicant meeting any one or more of the requirements is qualified.
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> In a given context either term may be ambiguous, particularly when modifiers are being joined. For example, does "charitable and educational institutions" mean institutions that are both charitable and educational, or does it mean those that are either charitable or educational? In spite of these problems, avoid falling back on the use of "and/or." Make your meaning clear by using repetition or clarifying words such as "or both" or "either," if necessary.

The First District Court of Appeals in *Patterson v. Union Correctional Inst.*, 697 So.2d 993 (Fla. 1st DCA 1997) referred to the publication in a case where they were interpreting a statute relating to a claim for Workers' Compensation Benefits:

> "We reject claimant's interpretation on the grounds that it is at variance with the plain language of the statute. The use of the word "and" clearly indicates that all of the enumerated provisions must be satisfied to prove entitlement to supplemental benefits. The Florida Legislature's *Guideline for Bill Drafting* at 91 confirms that the use of the word "and" indicates the Legislature's intent to make all parts of the sentence applicable in the conjunctive. *See also Florida Birth-Related Neurological Injury Compensation Assn. v. Florida Div. of Administrative Hearings,* 686 So.2d 1349, 1355 (Fla. 1997); *Lansford v. Broward County Bd. of County Comm'rs,* 485 So.2d 845, 846-47 (Fla. 1st DCA 1986)."

Further evidence of the Legislature's intent to use the word "and" in the conjunctive sense is found in a previous version of the statute. Section 162.09, F.S., was amended by s. 2, Ch. 85-150, Laws of Florida, effective July 1, 1985. At that time the statute read as follows:

> "The enforcement board, upon notification by the code inspector that a previous order of the enforcement board has not been complied with by the set time or, upon finding that the same violation has been repeated by the same violator, may order the violator to pay a fine not to exceed $250 for each day the violation continues past the date set for compliance. 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 or, if the violator does not own the land, upon any other real or personal property owned by the violator..." (Emphasis added)

Pursuant to that version of the statute the lien could have been placed on property where the violation exists or on any other property owned by the violator. Unfortunately, the Legislature amended the statute and changed the word "or" to the word "and."

Finally, the Florida Attorney General has opined in at least three instances that a code enforcement violation may not be enforced against property other than where the violation exists. In Op. Att'y Gen. Fla. 81-62 (1981) the Florida Attorney General considered whether the lien was valid only against the property on which the violation occurred. The relevant portion of the opinion states that:

> "The [statute] quoted above specifically provides that 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*. It is a general principle of statutory construction that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned. *Thayer v. State*, 335 So.2d 815 (Fla. 1976); *Ideal Farms Drainage District v. Certain Lands*, 19 So.2d 234 (Fla. 1944). By the Legislature's statement that the recorded order shall constitute 'a lien against the land on which the violation exists,' the implication is that the recorded order cannot constitute a lien against any other property other than on the 'land on which the violation exists.'"

In Op. Att'y Gen. Fla. 87-14 (1987) the Florida Attorney General considered the proper enforcement authority responsible for enforcing weight and load limitations on county bridges. The Attorney General determined that a Code Enforcement Board did not have the authority to enforce the provisions of any ordinance lowering the load and weight limits on county bridges because such boards only had the power to place a lien against the land on which the violation exists.

In Op. Att'y Gen. Fla. 88-36 (1988) the Florida Attorney General considered whether properties with different physical addresses or locations, but owned by one property owner could be aggregated into one action for a code violation. The Attorney General opined that Chapter 162 apparently contemplated that each code violation should be treated as a separate cause of action

and does not authorize a municipality to consolidate all properties with violations owned by one person into a single action. More importantly, the Attorney General indicated that "in the event a violation remains uncorrected, the administrative fine and lien which may be imposed reflect a relationship between the violation *and the particular property upon which the violation has occurred.* Emphasis added.

Question Two

The Florida Legislature answered question two above when it enacted Section 162.22, Fla. Stat. (2008) which specifically provides:

> "The governing body of a municipality may designate the enforcement methods and penalties to be imposed for the violation of ordinances adopted by the municipality. These enforcement methods may include, but are not limited to, the issuance of a citation, a summons, or a notice to appear in county court or arrest for violation of municipal ordinances as provided for in chapter 901. Unless otherwise specifically authorized and provided for by law, a person convicted of violating a municipal ordinance may be sentenced to pay a fine, not to exceed $500, and may be sentenced to a definite term of imprisonment, not to exceed 60 days, in a municipal detention facility or other facility as authorized by law."

While the above-referenced statute provides that a municipality may issue a citation, a summons, or a notice to appear in county court, the reality is that Miami Dade County does not accept such citations. In fact, several years ago the County Clerk's Office called a meeting of municipalities to indicate that they would not accept nor process such citations, summonses, etc. This might be a good time to contact the Administrative Judge for the County Court to discuss a reconsideration of this policy. Absent such a change, there are not a lot of effective enforcement options for the City to enforce *in personam* code violations.

It is true that a law enforcement officer may make an arrest for a violation of a municipal ordinance. However, the officer may only make a warrantless arrest for the violation of a municipal ordinance if the violation occurs in the presence of the officer.[1] This means that the law enforcement officer must actually witness the violation of the municipal ordinance as it occurs. Whenever an officer makes an arrest for a municipal violation the City must pay a $10 filing fee to the Clerk of the Courts, up to $50 an hour to the State Attorney's Office to prosecute the case and, if the arrestee is indigent, the City must pay up to $50 an hour to the Public Defender's Office for the defense of the case.[2]

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[1] Section 901.15 Fla. Stats. (2008)

[2] These costs are imposed pursuant to Sections 27.34 and 27.54 Fla. Stats. and result from the 1998 amendment to the Florida Constitution entitled "LOCAL OPTION FOR SELECTION OF JUDGES AND FUNDING OF STATE COURTS." The payments to the State Attorney's Office have averaged approximately $28,000 per quarterly reporting period. The Public Defender's bills have averaged approximately $8,500 per quarterly reporting period.

It appears that some other jurisdictions enforce municipal ordinance violations through the county court. In *Goodman v. County Court in Broward County, Fla.,* 711 So.2d 587 (Fla. 4th DCA 1998) the petitioner was charged by information in the county court with violations of the municipal housing code of the City of Ft. Lauderdale. The petitioner filed a petition for writ of prohibition in the circuit court alleging that the county court lacked jurisdiction to hear the charges because violations of the municipal housing code were within the exclusive jurisdiction of the local government code enforcement board. The Fourth District Court of Appeals held:

> "the provisions of [Section 162.122] are "clear and unambiguous and fully address the petitioner's arguments. The City may elect either method of prosecution. The creation of the code enforcement board and the assignment to it of the enforcement of housing code violations does not prohibit the City from bringing a charge in county court for a municipal code violation. The Legislature has provided that the code enforcement board procedure is supplemental to other means of securing code compliance. The City was therefore authorized to bring the county court action, and the trial court did not depart from the essential requirements of law."

In Op. Att'y Gen. Fla. 2004-50 (2004) the Florida Attorney General indicated that:

> "a municipality has numerous options for enforcement of municipal code violations: the code enforcement board/special master mechanisms in Parts I and II, Chapter 162, Florida Statutes; interlocal agreements; direct enforcement through the county courts, and combinations of these methods."[3]

But, the Attorney General also indicated that if municipality elects to utilize the code enforcement mechanism found in Chapter 162 of the Florida Statutes then it must take them as a whole.[4]

> "a local government or its governing body derives no delegated authority from Chapter 162, Florida Statutes.[5] Further, municipalities derive no home rule power from Article VIII, section 2(b), Florida Constitution, or section 166.021, Florida Statutes, to regulate the code enforcement boards or to impose any duties or requirements on such boards or to otherwise regulate the statutorily prescribed enforcement procedure.[6] Thus, once a municipality has adopted the procedures of Chapter 162 to enforce its municipal codes and ordinances, it may not alter or

[3] *See, Deehl v. Weiss,* 505 So. 2d 529 (Fla. 3d DCA 1987) (municipality could determine which code violations would be heard by code enforcement board and mere establishment of board did not require municipality to make it the enforcement arm of all of its codes.) *Cf., Metropolitan Dade County v. Hernandez*, 708 So. 2d 1008 (Fla. 3d DCA 1998) (county enforcement scheme utilizing both Parts I and II of Ch. 162, Fla. Stat., *approved*); *Verdi v. Metropolitan Dade County,* 684 So. 2d 870 (Fla. 3d DCA 1996) (county may use any combination of Chapter 162 methods for code enforcement procedures).

[4] Sections 2-811 through 2-830 of the Code of the City of Miami, Florida ("City Code") provide the enforcement method for imposing fines on properties where the violation exists on property owned by the violator.

[5] *See, e.g.,* Ops. Att'y Gen. Fla. 01-77 (2001) and 00-53 (2000).

[6] *See* Ops. Att'y Gen. Fla. 00-53 (2000); 97-26 (1997), 86-10 (1986), 85-84 (1985), 85-27 (1985), 85-17 (1985), and 84-55 (1984).

amend those statutorily prescribed procedures but must utilize them as they are set forth in the statutes.[7]" *Op. Att'y Gen. Fla.* 2004-50 (2004)

CONCLUSION

Therefore, unless legislatively or judicially determined otherwise, the City may only place a lien against the land on which the violation exists *and* upon any other real or personal property owned by the violator. Meaning that such a lien may only be placed on the land in which the violation exists, but if the violator owns other land or property, the lien may be placed on it too. However, if the violation does not relate to the violator's property, then a lien cannot be placed on it or any other real or personal property owned by the violator.

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c: Honorable Mayor and Members of the City Commission
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[7] *See* Op. Att'y Gen. Fla. 01-77 (2001) (Legislature's code enforcement procedures are additional or supplemental means of securing compliance with local codes and do not preempt or otherwise operate to prevent city from enforcing its codes by other means; however, if city seeks to utilize provisions of Ch. 162, Fla. Stat., to authorize an administrative agency such as code enforcement board or special master to impose fines, it may not change the procedures prescribed therein).