# INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

## Work Session: Code Enforcement Against Foreclosed Properties

## 'IT'S STATUTORY'

*by*
Presenter: Kelly Addy
Presenter's Title: Deputy City Attorney
Presenter's Office: City of Billings, Montana

@2008 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2008 Annual Conference, held September 14-17, 2008 in Las Vegas, Nevada. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

1. This is ‘A Tale Of Two (or more) Liens’.

2. On the one hand, you have the lien of the mortgagee or the beneficiary under a trust indenture.

3. On the other hand, you have your Code Enforcement lien.

4. Both liens are the creature of statutes.

    a. State laws regulate the manner in which liens may be created pursuant to a mortgage or the Small Tract Financing Act.

    b. State laws regulate the manner in which Code Enforcement liens can be created.

5. The procedures set forth in statutes have to be strictly complied with in order to create and/or foreclose upon your liens.

    a. The terms of the mortgage or trust indenture must be in conformity with state law.

    b. The terms of any code enforcement ordinance is analogous in this case to the terms of a mortgage or trust indenture, and it, too, must not conflict with state law regulating cities and towns.

6. Most liens are ‘first in time, first in right.’

    a. The oldest lien is entitled to be satisfied first out of the proceeds of any foreclosure sale, and the second oldest lien is entitled to be satisfied second, and the third gets satisfied third, etc.

    b. It is like standing in line to go to the movie.

7. But priorities are a subject of statutory treatment as well.

    a. Weeds are a common subject of local government activity and statutes may establish a tax lien priority for the costs of controlling them. §7-22-4101, MCA.

    b. Sewer and water charges may also be addressed. §7-13-4309, MCA.

    c. Regulation and abatement of nuisances may also be treated. §7-5-4104, MCA.

8. Tax liens, once perfected, have a super priority in many jurisdictions. §7-6-4422, MCA, although the opposite is true in other jurisdictions. See McQuillin, *Municipal Corporations,* §44.139, et seq.; *Broward County v. Recupero*, 949 So.

2d 274 (Fla. Dist. Ct. App. 4th Dist. 2007); *First Nat'l Bank v. Silva*, 200 Cal. 494, 495 (Cal. 1927).

9. Tax liens of various state and local government units are generally of equal priority, although some jurisdictions have a different rule. See McQuillin, *Municipal Corporations*, §44.143, et seq.

10. Liens for special assessments may or may not have the same priority as general tax liens. *Cascade County v. Weaver*, 108 M 1, 90 P2d 164 (1939); F*ederal Deposit Ins. Corp. v. New Iberia*, 921 F.2d 610, 611 (5th Cir. La. 1991)

11. The bottom line is: it's a matter of statute, and what the state legislature can enact, it can amend.

12. Cities may want to seek greater protections via legislative action.

    a. Be careful what you ask for, you might get a change you don't like.
    b. Assess the lobbying strength of your municipal association.
    c. Take on only those causes on which you can prevail.

13. Municipal government is the red-headed stepchild of the legislature.

*'I think local government is the hardest job in the country because it is one thing to be at the federal level where you can talk grand thoughts, talk about things in policy terms, and encourage legislation that channels your decision making into certain goals; it is another thing to pick up the garbage, to plow the snow, to sweep the street, to make sure your signal lights are working. Local government is really hard. That is where the rubber meets the road, and it is much harder than federal government.'*

- Pauline Schneider, formerly of White House Office of Intergovernmental Affairs during the Carter administration and the District of Columbia Office of Intergovernmental Relations under Mayor Marion Barry, and the first African American woman president of the District of Columbia Bar, 1994-95.

14. One final point: You may be subject to collateral pressure from lobbying of senior administration officers or elected officials.

    a. The point of the lien is to establish a priority for the municipality.

    b. The nature of the exercise is to protect the interests of all who bear the burden of the expense the city goes through to enforce its ordinances and to provide municipal services to the people of the entire city.

    c. Promises from people who owe for code enforcement activities or basic municipal services need to be verified.