Study H-821 January 17, 2008

First Supplement to Memorandum 2008-4

Mechanics Lien Law: Preliminary Part of Recommendation

We have received comment on the narrative part of the draft final recommendation in this matter from the California State Council of Laborers Legislative Department and Construction Laborers Trust Funds for Southern California ("Laborers Group"). The group's comment is attached as an Exhibit to this memorandum.

GENERAL INTENT OF RECOMMENDATION

Laborers Group suggests that the Comments in the proposed law should state that no change in existing law is intended, unless otherwise expressly indicated. Exhibit p. 2.

The Commission uses standardized language in its Comments that generally indicates whether or not a proposed section is intended to change existing law. See Prob. Code § 2 Comment.

However, the staff sees no harm in revising the private and public parts of the proposed law to include a standardized provision of text addressing this same issue that is also often used by the Commission. See Prob. Code § 2.

These revisions would also help make clear that appellate opinions interpreting existing mechanics lien law provisions remain applicable to provisions of the proposed law that continue those existing provisions. This would address another concern raised by Laborers Group, relating to preserving an appellate court's interpretation of existing payment bond provisions in the mechanics lien law. See Exhibit p. 3.

The staff therefore recommends **the following revisions to proposed Civil Code Section 8051 and Public Contract Code Section 42005:**

§ 8051. Application of former law

8051. (a) This part is operative January 1, 2010.

(b) Except as otherwise provided in this section, this part applies to a contract for a work of improvement executed before, on, or after the operative date.

(c) The effectiveness of a notice given or other action taken on a work of improvement before the operative date is governed by the applicable law in effect before the operative date and not by this part.

(d) A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment.

§ 42005. Application of former law

42005. (a) This part is operative January 1, 2010.

(b) Except as otherwise provided in this section, this part applies to a public works contract executed before, on, or after the operative date.

(c) The effectiveness of a notice given or other action taken on a public works contract before the operative date is governed by the applicable law in effect before the operative date and not by this part.

(d) A provision of this part, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment.

RELOCATION OF PUBLIC WORK PROVISIONS

Laborers Group advocates that the Comments in the proposed law should state that replication of certain existing provisions of law in both the Civil Code and the Public Contract Code is not intended to change existing law, or imply differing interpretation of those provisions. Exhibit pp. 2-3.

The Commission has already considered and declined to adopt this suggestion. See CLRC Memorandum 2006-43, pp. 5-6; Meeting Minutes (October 2006), p. 5.

DISCIPLINARY ACTION FOR FAILURE TO GIVE PRELIMINARY NOTICE

Laborers Group takes issue with a portion of the narrative part of the draft final recommendation that explains the rationale for the deletion of a disciplinary provision in existing law. Exhibit p. 3. The group suggests that the final

recommendation should describe the prior provision as "confusing and redundant."

A final recommendation explains why proposed law deletes an existing provision of law primarily to assist a reader in understanding the proposed law. The staff appreciates the expressed preference of the Laborers Group, but believes the narrative part of the draft final recommendation adequately explains the rationale for this deletion.

The staff recommends **no change to the text at issue**.

Respectfully submitted,

Steve Cohen
Staff Counsel

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January 15, 2008

Via E-Mail and U.S. Mail

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Comments from California State Council of Laborers Legislative Dept. and Construction Laborers Trust Funds for Southern California on Memorandum 2008-4

Dear Members of the Commission:

On behalf of the California State Council of Laborers Legislative Department (Laborers), and the Construction Laborers Trust Funds for Southern California (Laborers Funds), we present the following comments to Memorandum 2008-4. We understand this Memorandum to be the Commentary preceeding the Recommendation to be sent to the Legislature, the substance of which is in Memorandum 2007-58.

I am available for questions, discussion or further input, at the address, phone and e-mail listed here. The best way to contact me is at this e-mail address: jds@rac-law.com

Thank you for your consideration.

Sincerely,

J. David Sackman, of
Reich, Adell & Cvitan

following: Comments (attached as separate files with e-mail).

cc: Mike Quevedo, Southern California District Council of Laborers
Jose Mejia, Cal. State Council of Laborers
Ric Quevedo, Construction Laborers Trust Funds for Southern California
John Miller, Cox Castle & Nicholson
Alexander Cvitan, Reich, Adell & Cvitan

EX 1

1. General Intent of Recommendation

The overiding theme which has pervaded the proceedings of this Project of the Commission has been to avoid substantive change in the law. This should be made explicit in the Comments for purposes of legislative intent. In other words, the presumption of legislative intent should be that no change in the law is intended by this enactment, unless expressly described as a change in the comments.

2. Relocation of Public Works Provisions (page 14)

The emphasis in the Commentary here is in the differences between remedies on public and private works. However, these remedies currently share a large common base of provisions which apply to both. This is because all of these remedies, public or private, derive from the Constitutional mandate, currently in Art. XIV § 3. *See, e.g.*, *French v. Powell*, 135 Cal. 636, 639, 68 P.2d 92 (1902) (intent of Bond Act for public works was to fill gap left by removing public property from mechanic liens).

Most notably, the definitions of who may assert these remedies, in Civil Code §§ 3110 to 3112 are common to both private and public remedies, as is the important definition of a "laborer" in Civil Code § 3089. The Courts have thus interpreted these common provisions the same for public works and private works. Indeed, the unity of the public works and private works provisions was important in upholding the law from preemption by federal law. *See Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric*, 247 F.3d 920, 928 n. 13 (9th Cir. 2001) (public works bond and stop notice remedies, at issue in that case, were part of same legislative scheme as private mechanic liens).

We fear that the splitting of the public works from the private works provisions, together with the emphasis on their differences in the Comments, will be an invitation to interpret those provisions differently which have always been interpreted the same. For example, there are separate definitions of a "Laborer" in the private works provisions (Civil Code § 8020) and public works provisions (Public Contract Code § 41070). As far as we can tell, these are identical. Yet their separation could be an invitation to interpret them differently.

There should be a disclaimer in the Comments to the effect that any split of currently uniform provisions into private and public components is not meant to change the law, or the interpretation of those common provisions, unless expressly so stated. To wit:

> *Many provisions are currently common to both private and public works remedies. By separating them into different codes, no change in the law, or the interpretation of these provisions, is intended, unless that intent is expressly stated. Throughout, the intent is to avoid a substantive change in the law, unless that change is clearly pointed out as such.*

3. Disciplinary Action for Failure to Give Preliminary Notice (page 29)

The Comments state that current Civil Code § 3097(h) requires a subcontractor give preliminary notice if the contract price is over $400, or face disciplinary action. Although this subsection can be read that way, it was meant to require a subcontractor to include the information in subsection (c)(6), regarding money owed to laborers, in any notice. This is confusing, and also redundant of the requirement of Civil Code § 3097(k).

The Comments should point out that these provisions are confusing and redundant, and that the changes are meant to clarify these requirements.

4. Claimants on Bond (page 45)

It should be noted that this provision of California law has been expressly distinguished from the federal Miller Act (40 U.S.C. § 3133(b)(2)), which has been interpreted to limit recovery to those dealing with the direct contractor and first tier subcontractors. *See* *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163 (1944). California courts have distinquished *MacEvoy*, in holding that the remedy is available to laborers and suppliers to all tiers:

> "We are unconvinced the United States Supreme Court's interpretation of the Miller Act should be applied to California statutes. Unlike the Miller Act, California Civil Code section 3104 expressly defines the term subcontractor. Unlike the definition given to the term in MacEvoy, section 3104 defines subcontractor broadly, without limitation as to tier." *Union Asphalt, Inc. v. Planet Ins. Co.*, 21 Cal.App.4th 1762, 1768-1769, 27 Cal.Rptr.2d 371 (2nd Dist. 1994)

It should be noted that this distinction from federal law is meant to be carried over into these revisions.

We thank you for your consideration.