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Memorandum 2009-45

Report on SB 189 (Lowenthal)

This memorandum reports on the status of Senate Bill 189 (Lowenthal), which would implement the Commission's recommendation on *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007).

BRIEF REVIEW OF COMMISSION STUDY

In 1999, the Assembly Judiciary Committee requested that the Commission undertake a comprehensive review of mechanics lien law, and make suggestions for possible reform. Following initial efforts to substantively revise specific aspects of existing law, the Commission began studying a general revision of mechanics lien law in 2004.

Much of mechanics lien law in California is statutory. See Civ. Code §§ 3082-3267. The existing mechanics lien statute contains language dating back to 1872, and since the last recodification of the statute in 1969, individual provisions have been amended more than 70 times.

It was the Commission's view that over this time period the existing mechanics lien statute had become increasingly difficult to use, generating litigation over confusing provisions, and often leaving participants unsure of their rights and obligations. The Commission therefore decided that its primary objective in this study would be to revise the statute in a way that would make it easier for all practitioners, including occasional practitioners such as unrepresented owners and laborers, to use and understand.

The Commission placed its highest priority on drafting a nonsubstantive reorganization of the existing mechanics lien statute that would modernize and clarify existing law, but without making any polarizing or controversial substantive changes. While certain significant substantive changes may have been viewed as desirable in the abstract, the consensus was that major changes to

existing law would be best considered in future studies that could build upon the largely nonsubstantive reorganization.

As a general rule, the Commission included substantive changes to existing law in the legislation it eventually proposed only when the reform fell into one of two categories:

(1) Substantive reforms that were believed to bring about an overarching improvement to the statute as a whole, thereby benefiting *all* persons affected by the statute. An example of this type of improvement was the standardization and modernization of all notice requirements in the statute. See proposed Civ. Code §§ 8100-8118, proposed Pub. Cont. Code §§ 42110-42190.

(2) Substantive reforms that, although primarily benefiting one group of persons affected by the statute more than others, were perceived not to *unduly* burden any other group. An example of this type of improvement was the addition of a requirement that certain bonds referenced in the mechanics lien statute be issued by a licensed surety. See proposed Civ. Code §§ 8510, 8606.

The proposed recodification was developed through an extensive public deliberative process. The Commission received and discussed many comments on drafts of proposed legislation, submitted by a wide variety of stakeholders from all aspects of the construction industry, over a period of nearly four years.

The legislation proposed by the Commission was introduced in 2008, as SB 1691 (Lowenthal). Because introduction in the second year of the two-year legislative session allowed limited time for legislative analysis of the lengthy bill, most substantive reforms were removed from the bill for fuller consideration in the 2009-2010 legislative session. In its final form, SB 1691 would have recodified the existing mechanics lien statute, but with few significant substantive changes to existing law.

SB 1691 was approved by both houses of the Legislature, and enrolled. However, due to the historic delay in passing the 2008-2009 State Budget, the Governor vetoed the bill, indicating in his veto message that the delay had left him unable to sign any bill enrolled near the end of the legislative session that was not of the highest priority.

In 2009, the Commission's proposed legislation was again introduced, as SB 189 (Lowenthal). All substantive reforms that had been removed from SB 1691 were included in this second bill, with the exception of a handful of changes that were made "for cause" (rather than merely as a way of simplifying the bill to

facilitate enactment in a single year process). See discussion in Memorandum 2008-11, pp. 21-29; Second Supplement to Memorandum 2008-12, pp. 4-5.

SB 189 is presently pending before the Legislature as a two-year bill. It will be considered by the Legislature in 2010.

CURRENT WORKING GROUP PROCESS

While SB 189 is pending, Commission staff has arranged with legislative staff to conduct a series of working group meetings relating to the bill. The objective of the meetings is to afford stakeholders an opportunity to raise and explain any remaining objections to the bill, so that those concerns can be addressed before full consideration of the bill by the Legislature in January 2010.

On September 17, 2009, the first of these meetings was held, with approximately 15 stakeholder representatives in attendance. Among the groups represented at the meeting were the Associated General Contractors, California (AGC), the Surety & Fidelity Association of America (SFAA), the California Professional Association of Specialty Contractors (CALPASC), the Building Industry Credit Association (BICA), and the National Electrical Contractors Association (NECA).

At that first meeting, discussion was limited to concerns that SB 189 would make problematic changes to existing law. The objections, most of which were not previously presented to the Commission, are discussed in this memorandum. Some persons at the meeting also expressed general concern about the merits of recodifying the existing mechanics lien statute.

A second working group meeting is scheduled for November 4, 2009. That meeting will focus on (1) any new perceived defects in SB 189, (2) the general merits of recodification of the existing mechanics lien statute, and (3) new substantive reforms suggested by stakeholders that are *not* presently contained in SB 189.

CONCERNS ABOUT EFFECT OF SB 189

At the first working group meeting, stakeholders described a number of specific concerns they have about the effect of SB 189. It is likely that these concerns will translate into opposition to the bill, if they are left unaddressed.

This memorandum describes the specific stakeholder concerns, discusses the technical and policy merits of the concerns, and sets out revisions that should

address the concerns. In each case, the Commission will need to decide whether the revisions would be compatible with the overall purpose of the Commission's recommendation. Once the Commission has decided which of the proposed revisions would be acceptable, those decisions will be related to Senator Lowenthal, who will decide the extent to which to amend SB 189 to address the stakeholder concerns.

As a general matter, the staff would recommend that the Commission accept a proposed revision (with or without changes), if the Commission concludes that the stakeholder concern has significant merit and that the proposed change would not significantly undermine the overall value of the proposed law. In making these determinations, the Commission should bear in mind the principles that were applied in developing the proposed law. The primary focus was on achieving recodification and cleanup. Substantive improvements were generally only added if they were seen as being universally beneficial or otherwise noncontroversial. If the Commission would have decided to omit a substantive change due to stakeholder opposition while developing the proposed law, the same considerations would seem to apply when deciding whether to remove a substantive change that is prompting significant stakeholder opposition.

STAKEHOLDER CONCERNS

The following matters were discussed at the working group meeting on September 17, 2009.

"Commencement" of Work of Improvement

"Commencement" of a work of improvement is an important marking point, essential to establishing the priorities of mechanics liens relative to other encumbrances on the property. As a general rule, all lien claims for work provided after commencement of a work of improvement have equal priority with each other (regardless of when during the project the work is provided), and all such lien claims have priority over any other encumbrance on the property that was not recorded prior to commencement of the work of improvement. Civ. Code § 3134.

No definition of "commencement" is provided in the existing mechanics lien statute. Believing that a statutory definition of the term would be helpful to

practitioners, the Commission attempted to codify what appears to be black letter case law defining the term:

> **§ 8004. "Commencement"**
>
> 8004. A work of improvement "commences" on either of the following events:
>
> (a) Delivery to the site of rental equipment, material or supplies that are thereafter used, consumed, or incorporated in the work of improvement.
>
> (b) Visible work of a permanent nature on the site.
>
> **Comment.** Section 8004 is new. It codifies case law. See, e.g., Walker v. Lytton Sav. & Loan Ass'n, 2 Cal. 3d 152, 159, 465 P.2d 497, 84 Cal. Rptr. 521 (1970); Halbert's Lumber, Inc. v. Lucky Stores, Inc., 6 Cal. App. 4th 1233, 1240-1241, 8 Cal. Rptr. 2d 298 (1992).

Commenters at the meeting raised two concerns about the inclusion of this definition in the proposed legislation.

Requirement That Work Be "Visible"

One commenter suggested that the word "visible" should be deleted from proposed Section 8004(b), asserting that such visibility is not required by existing case law. The commenter asserted that work that improved the property but was not readily visible (e.g., some types of foundational work) would also constitute commencement of the work of improvement.

The common law definition of "commencement" of a work of improvement seems to be set forth in *Walker v. Lytton Sav. & Loan Ass'n*, 2 Cal. 3d 152, 157, 465 P.2d 497, 84 Cal. Rptr. 521 (1970), which states that a mechanics lien may not attach unless and until construction has been undertaken by the doing of "actual visible work on the land or the delivery of construction materials thereto." This quoted language was also used much more recently by the court in *D'Orsay Intern. Partners v. Superior Court*, 123 Cal. App. 4th 836, 838, 20 Cal. Rptr. 3d 399 (2004), in discussing when a mechanics lien right first arises on a work of improvement.

As a practical matter, the construction lending industry apparently also considers the visibility of an improvement to be an element of commencement. The staff has been informed that, before issuing a secured construction loan, a lender as a matter of course will have a representative "drive by" a proposed construction site, for the express purpose of making sure that commencement of the work has not yet occurred. The lender apparently relies on this street view

observation as assurance that its security for the proposed loan in the form of an encumbrance on the property will not be junior to any mechanics lien that might later be asserted against the property.

Delivery Of Material To A Site

Another stakeholder at the meeting argued that marking commencement of a work of improvement based on delivery of material to a construction site in Section 8004(a) would be problematic. However, once again, case law appears to provide that this event also constitutes commencement of a work of improvement. *Walker v. Lytton Sav. & Loan Ass'n*, 2 Cal. 3d 152, 157, 465 P.2d 497, 84 Cal. Rptr. 521 (1970), *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1240-41, 8 Cal. Rptr. 2d 298 (1992).

The stakeholder nevertheless urged that this aspect of the definition would conflict with another provision of the mechanics lien statute defining "completion" of a work of improvement, an event that typically triggers the time period for pursuing claimant remedies. In particular, the stakeholder was concerned about a possible conflict with proposed Civil Code Section 8150(a)(3), which provides that cessation of labor on a project for a continuous period of 60 days after commencement constitutes "completion" of that work of improvement. (Section 8150(a)(3) continues existing Civil Code Section 3086(c) without substantive change.)

The stakeholder posed a hypothetical in which material is delivered to a site, but labor then doesn't start on the project until at least 60 days later (at which time the material is used). The stakeholder suggested that if the delivery of the material in this scenario constitutes commencement of the work of improvement, the 60 day "cessation of labor" following this commencement would constitute statutory completion of the project (Civ. Code § 3086(c)), making all lien claims on the project due within the next 90 days. Civ. Code §§ 3115, 3116.

Although the staff has located no case law on the precise issue, it seems unlikely that delivery of material alone would ever be considered "labor" for purposes of determining statutory completion, meaning that the passing of 60 days following delivery of material to a site, standing alone, would never be considered "cessation of labor." However, to the extent a court might make such a finding, it would already do so based on existing common law, as described above.

Proposed Revision

The statutory definition of "commencement" that the Commission has included in the proposed legislation appears to be an accurate codification of existing case law. Nevertheless, the Commission included it only as a statutory aid, rather than as a responsive solution to any alleged problem or complaint. It is not integral to the proposed legislation as a whole, and its removal would not detract from the overall value of the legislation. Further, notwithstanding the apparent accuracy of the definition, the issues raised by stakeholders suggest that further study of the concept might be appropriate, before effectively casting the common law definition of the term in stone.

The proposed legislation does include two other provisions, both continued from existing law, that reference commencement of a work of improvement. See proposed Civ. Code §§ 8450, 8454. However, these provisions, like the provisions of the existing statute that they continue, do not require an accompanying statutory definition of "commencement." As at the present time, practitioners should be able to continue to look to case law for any needed definition of the term.

The staff suggests that proposed Civil Code Section 8004 be deleted from the proposed legislation.

Presumption That Material Delivered to a Site Is Used in Work of Improvement

Proposed Civil Code Section 8026(b) would add to existing law an evidentiary presumption that material delivered to the site of a private work of improvement was actually used in the work of improvement. This use is an essential element of a lien claim for that delivered material. *Consolidated Electrical Distributors, Inc., v. Kirkham, Chaon & Kirkham, Inc.*, 18 Cal. App. 3d 54, 58, 95 Cal. Rptr. 673 (1971).

The presumption would not apply to a public work, on which a lien claim is not available.

The presumption was added by the Commission to address a perceived inequity faced by material suppliers needing to perfect a lien claim for delivered material. Proof that delivered material was eventually used in a project is often unavailable to suppliers, who typically have no presence on a work site after delivery. Direct contractors on the other hand, representing the interests of the

owner, would seemingly be in a much better position to monitor whether or not delivered material was eventually used.

The statutory presumption would not be conclusive, but would affect the burden of proof on the issue. Under the proposed law, if a supplier claimed a lien based on material delivered to a work site, the supplier would still have to prove that the material had been delivered. But once that proof was made, the supplier would then not be required to offer further evidence that the material was actually used in the work of improvement. The supplier if it chose could instead rely on the statutory presumption as proof of such use, although the presumption could be rebutted by sufficient evidence to the contrary.

Various commenters at the meeting objected to the inclusion of the presumption in the proposed law. They suggested that, at minimum, the presumption should include a condition requiring a supplier to provide advance notice that the material was to be delivered, sufficient to allow someone at the jobsite to confirm delivery. Otherwise, they argued, a direct contractor might not know that material had been delivered, and would be unaware of a need to keep track of or document future use of the material.

There was some resistance to that modification from a material supplier at the meeting, who feared that the additional notice might be required for every delivery made by a material supplier.

The overall view of the stakeholders at the meeting seemed to be that existing law on this issue is not causing significant problems, and that the proposed change would do more harm than good.

Analysis

The Commission added this presumption to the proposed legislation based on general suggestions of consultants and commenters that the presumption would address an inequity in existing law. The Commission had not heard directly from a large number of affected material suppliers that the absence of this presumption had been adversely affecting their ability to pursue otherwise valid lien claims. Now, stakeholders against whom the presumption would be applied argue that the presumption would adversely affect their ability to contest invalid lien claims.

The staff agrees that, at minimum, adding an advance notice component to the presumption would be appropriate to fairly protect the interests of owners subject to a lien claim of a material supplier. As written, the presumption

effectively involuntarily transfers to an owner the responsibility for keeping track of delivered material, from the date it is delivered onward. If the law is to provide for this transfer, it seems reasonable to also provide that reasonable advance notice of the delivery be given to the owner, so the owner can take steps to protect the owner's interests when assuming this responsibility.

Unfortunately, drafting such an advance notice provision at this juncture would be problematic. The primary difficulty would be in specifying in some detail the amount and type of advance notice that would be required as a condition of the presumption, in a manner agreeable to all affected interest groups. This detail would be important, as a new lien protection for suppliers conditioned on providing an inadequately described advance notice before delivery could inhibit prompt deliveries, and increase the litigation of material supplier lien claim disputes.

Proposed Revision

Comment contributed by stakeholders at the meeting suggests that, at minimum, the proposed presumption may be flawed as written. However, appropriately revising the provision at this time would be a difficult task, which the Commission would have to undertake without its usual contribution from stakeholders and other interested parties.

On the other hand, removal of the presumption from the proposed legislation would simply continue existing law on the issue. Given the general lack of support for this proposed reform, concern that it would cause new problems, and the likely impossibility of finding a compromise approach at this time that would be acceptable to all stakeholder groups, **the staff suggests that proposed Section 8024(b) be deleted from the proposed legislation**.

Notarization as Condition of Document Recordation

Under existing law, as a general rule, before a document may be recorded in a county recorder's office, the signature of the person executing the document must be notarized. Gov't Code § 27287.

Two mechanics lien documents are statutorily exempted from this requirement: a lien claim, and a notice of completion. Gov't Code § 27287, Civ. Code §§ 3084, 3093. All other documents for which the mechanics lien statute provides for recordation — a lien claim release, a lien release bond, a notice of

cessation, a notice of nonresponsibility, a payment bond, and a lis pendens — must be notarized before recordation.

The exemptions for the lien claim and the notice of completion in existing law appear to be based on convenience and cost considerations outweighing any clear benefit that notarization of these particular documents would provide.

Provisions in proposed Civil Code Section 8058 and Public Contract Code Section 42250 would exempt *all* mechanics lien documents in both private and public works from the Government Code notarization requirement, in order to standardize recordation requirements under the proposed law.

A stakeholder at the meeting argued against making that change in the law, expressing particular concern that allowing a lien claim release (a document executed by a lien claimant, releasing a previously recorded lien claim) to be recorded without notarization would increase the risk of fraud. An unscrupulous owner of liened property could forge and record a release of a previously recorded lien claim, and then quickly transfer the property to a bona fide purchaser, thereby circumventing the lien.

Other stakeholders also noted that many county recorders throughout the state require all documents presented for recordation to be notarized, notwithstanding the exceptions provided in existing law. These stakeholders argued that the inclusion of proposed Section 8058 in the proposed legislation would therefore have no practical effect.

Analysis

The staff agrees that proposed Civil Code Section 8058 could cause a problematic increase in the fraudulent recordation of lien claim releases.

The two mechanics lien documents that are presently permitted to be recorded without notarization do not present the same problem, as the nature of those documents do not create a similar incentive for fraudulent recordation. A fraudulently recorded lien claim would inconvenience an owner, by clouding title to the owner's property for some period of time. However, the fraudulent recordation would not provide any affirmative *benefit* to the person perpetrating the fraud, since any actual recovery on the fraudulently recorded claim would be effectively impossible.

Similarly, a notice of completion recorded by someone who was not the lawful owner of a work of improvement could cause confusion, but it is not clear how anyone could affirmatively benefit by perpetrating this kind of fraud. The

only person that normally stands to gain from recordation of a notice of completion is the owner, who is the person entitled to record the notice.

The fraudulent recording of lien claim release, however, *could* work to the direct financial benefit of an owner who perpetrates such a fraud. The release would create an appearance of clear title that could allow for a quick transfer of the property to a bona fide purchaser. The lien claimant might still be able to pursue fraud based remedies against the owner, but the claimant would no longer have a security interest in the transferred property.

Proposed Revision

The proposed reform on this issue was intended to improve efficiency, by standardizing document recordation procedures. The Commission did not anticipate that the proposed change would cause any new problems, as existing law already permits two mechanics lien documents to be recorded without notarization.

However, the staff is now persuaded that the proposed change would create an increased risk of fraud, as discussed above. That risk probably outweighs any efficiency gains that the proposed change might achieve.

The staff suggests that the proposed law relating to recordation be revised to conform to existing law on the issue, by revising and adding provisions in both the private and public work parts of the proposed law, as follows:

> **§ 8058. Filing and recordation of papers**
>
> 8058. (a) If this part provides for filing a contract, plan, or other paper with the county recorder, the provision is satisfied by filing the paper in the office of the county recorder of the county in which the work of improvement or part of it is situated.
>
> (b) If this part provides for recording a notice, claim of lien, release of lien, payment bond, or other paper, the provision is satisfied by filing the paper for record in the office of the county recorder of the county in which the work of improvement or part of it is situated. ~~A paper in otherwise proper form, verified and containing the information required by this part, shall be accepted by the recorder for recording and is deemed duly recorded without acknowledgment.~~
>
> (c) The county recorder shall number, index, and preserve a contract, plan, or other paper presented for filing under this part, and shall number, index, and transcribe into the official records, in the same manner as a conveyance of real property, a notice, claim of lien, payment bond, or other paper recorded under this part.

(d) The county recorder shall charge and collect the fees provided in Article 5 (commencing with Section 27360) of Chapter 6 of Part 3 of Division 2 of Title 3 of the Government Code for performing duties under this section.

Comment. Subdivisions (a) and (b) of Section 8058 are new. They generalize a number of provisions of former law. ~~The provision of subdivision (b) for recordation without acknowledgment is drawn from former Sections 3084 and 3093; it is an exception to the general rule of Government Code Sections 27280 and 27287~~. See also Section 1170 (recordation), Gov't Code §§ 27280, 27287 (recordation of documents).

Subdivisions (c) and (d) continue former Section 3258 without substantive change.

See also Sections 8008 ("contract"), 8024 ("lien"), 8030 ("payment bond"), 8050 ("work of improvement").

§ 8153 (added). Recordation of notice of completion

8153. A notice of completion in otherwise proper form, verified and containing the information required by this part, shall be accepted by the recorder for recording and is deemed duly recorded without acknowledgment.

Comment. Section 8153 continues a portion of former Section 3093 without substantive change.

See also Sections 1170 (recordation); 8058 (filing and recordation of papers), 8150 (notice of completion), 8154 (notice of completion of contract for portion of work of improvement), 8156 (notice of recordation by owner); Gov't Code §§ 27280, 27287 (recordation of documents).

§ 8417 (added). Recordation of claim of lien

8417. A claim of lien in otherwise proper form, verified and containing the information required by this part, shall be accepted by the recorder for recording and is deemed duly recorded without acknowledgment.

Comment. Section 8417 continues subdivision (b) of former Section 3084 without substantive change.

See also Sections 1170 (recordation); 8058 (filing and recordation of papers); Gov't Code §§ 27280, 27287 (recordation of documents).

§ 42250. Recordation of notice

42250. (a) A notice of cessation or completion is recorded when filed for record in the office of the county recorder of the county in which the public works contract or part of it is performed. A notice of completion in otherwise proper form containing the information required by Section ~~42220 or~~ 42230 shall be accepted by the recorder for recording and is deemed duly recorded without acknowledgment.

(b) The county recorder shall number, index, and preserve a notice of cessation or completion presented for filing under this part, and shall number, index, and transcribe into the official records, in the same manner as a conveyance of real property, a notice of completion or cessation recorded under this part.

(c) The county recorder shall charge and collect the fees provided in Article 5 (commencing with Section 27460) of Chapter 6 of Part 3 of Division 2 of Title 3 of the Government Code for performing duties under this section.

Comment. ~~Subdivision~~ The first sentence of subdivision (a) of Section 42250 is new. It generalizes a number of provisions of former law. ~~The provision for recordation without acknowledgment is drawn from former Sections 3084 and 3093; it is an exception to the general rule of Government Code Sections 27280 and 27287~~ The second sentence of subdivision (a) continues a portion of former Section 3093 without substantive change. See also Civ. Code § 1170 (recordation), Gov't Code §§ 27280, 27287 (recordation of documents).

Subdivisions (b) and (c) restate former Civil Code Section 3258.

See also Sections 42220 (notice of cessation), 42230 (notice of completion), 42240 (notice of completion of contract for portion of work of improvement).

See also Section 41120 ("public works contract").

Finally, implementation of the staff suggestion would also require deletion of the proposed conforming revision to Government Code Section 27287.

"Completion" of Work of Improvement

"Completion" of a work of improvement is also an extremely important marking point on a work of improvement, generally triggering the time periods within which a claimant must pursue a remedy on either a private or public work.

Existing Civil Code Section 3086 identifies several circumstances that constitute the statutory completion of a private work of improvement. One of these circumstances is the "actual completion" of the work, a term not defined by the statute. In proposed Civil Code Section 8150(a)(1), the Commission attempted to clarify the meaning of this term by substituting the term "substantial completion," a term of art in the construction industry seemingly recognized by case law as the degree of completion necessary to constitute "actual completion" of a work of improvement. See cases collected in *Lewis v. Hopper*, 140 Cal. App. 2d 365, 366-67, 295 P.2d 93 (1956), see also *Eden v. Van Tine*, 83 Cal. App. 3d 879, 885, 148 Cal. Rptr. 215 (1978).

The term "substantial completion" is understood by most practitioners to mean the completion of all essential work contemplated by a contract for a work of improvement. The term is also the subject of a fairly well developed body of case law, as "substantial completion" marks the beginning of the limitation period for the filing of a construction defect action. See Code of Civ. Proc. §§ 337.1, 337.15.

At the stakeholder meeting, there seemed to be no clear consensus as to what constitutes "actual completion" under existing law. Nevertheless, multiple stakeholders asserted that substituting the term "substantial completion" for "actual completion" would change existing law and could cause problems.

Proposed Revision

What constitutes the statutory completion of a work of improvement is a complex and controversial subject. There is not a significant amount of case law on the issue, and the interplay between the various events that are deemed to constitute completion and the various remedies that are triggered by these events can be problematic. See Craig P. Bronstein, *Trivial(?) Imperfections: The California Mechanics' Lien Recording Statutes*, 27 Loy. L.A. L. Rev. 735 (1994).

In proposing the use of the term "substantial completion," the Commission sought only to clarify a term in the existing statute by substituting a term that was more familiar and seemingly more understandable to most practitioners. However, in light of the consensus view of practitioners at the meeting, the proposed change did not achieve that objective.

Given how significant the event of completion is to mechanics lien remedies, the staff believes that any controversy generated by a proposed revision should be sufficient to warrant the continued use of existing terminology in the context of this study.

The staff suggests that proposed Civil Code Section 8150 and its Comment in the proposed legislation be revised to refer to "actual" completion, as in existing law:

> **§ 8150. Completion**
>
> 8150. (a) For the purpose of this part, completion of a work of improvement occurs at the earliest of the following times:
>
> (1) ~~Substantial~~ Actual completion of the work of improvement.
>
> (2) Occupation or use by the owner accompanied by cessation of labor.
>
> (3) Cessation of labor for a continuous period of 60 days.

(4) Recordation of a notice of cessation after cessation of labor for a continuous period of 30 days.

(b) Notwithstanding subdivision (a), if a work of improvement is subject to acceptance by a public entity, completion occurs on acceptance.

Comment. Section 8150 restates former Section 3086 to the extent it applied to a private work. References to occupation or use by an owner include those actions by the owner's agent. See Section 8028 ("owner").

~~Subdivision (a)(1) replaces the term "actual completion" in former Section 3086 with "substantial completion," consistent with judicial interpretation of the former term. See cases collected in *Lewis v. Hopper*, 140 Cal. App. 2d 365, 367, 295 P.2d 93 (1956). This is a nonsubstantive change.~~

"Acceptance by the owner" is not continued as a form of completion.

The provision in subdivision (b) for acceptance by a public entity refers to acceptance pursuant to a legislative enactment of the public entity and not to inspection and approval or issuance of a certificate of occupancy under building regulations.

Subdivision (b) applies only to a private work of improvement. See Section 8052 (application of part).

See also Sections 8036 ("public entity"), 8050 ("work of improvement").

Advance Notice to Owner Prior to Recordation of Lien Claim

Two related substantive improvements to existing law in the proposed law would (1) require a lien claimant to provide an owner with specified advance notice prior to recording a lien claim, and (2) require proof of service of that notice to be provided to the county recorder, in conjunction with the recordation of the lien claim. See proposed Civ. Code §§ 8418, 8420.

However, AB 457 (Monning), another mechanics lien bill introduced this year, contains a similar advance notice requirement. AB 457 was recently enacted, with an effective date of January 1, 2011 (the same effective date as the proposed legislation in this study). 2009 Cal. Stat. ch. 109.

In light of this recent expression of the legislative view on this subject, **the staff suggests that the proposed legislation be revised to conform to and continue the law on this issue as enacted by AB 457**. Unless the Commission disagrees, the staff will confer with Assembly Member Monning's office, and develop appropriate amendment language.

Recordation of Lis Pendens Following Commencement of Lien Enforcement Action

Another substantive improvement in the proposed legislation would require that a lien claimant record a lis pendens within a specified number of days after filing a court action to enforce a lien claim. Proposed Civ. Code § 8460. This would provide record notice that an enforcement action has been filed within the statutory deadline for doing so, meaning that the lien had not expired by operation of law.

AB 457 (Monning) addresses this issue as well, with a similar requirement. Again, in light of the recent legislative action on this subject, **the staff suggests that the proposed legislation be revised to conform to and continue the law on this issue as enacted by AB 457.** The staff will consult with Assembly Member Monning's office in developing appropriate amendment language.

Statutory Reference to "Beneficiary" of Payment Bond Rather Than "Obligee"

A part of existing Civil Code Section 3226 provides that a breach by any "obligee" named in a payment bond (on either a public or private work) may not be asserted by the surety on the bond as a defense to a claim against the bond. The Commission understood the term "obligee" to have the same meaning in this context as the more familiar term "beneficiary." Therefore, in an effort to clarify the provision, an early draft of the proposed legislation substituted the term "beneficiary" for "obligee" in both the proposed private and public work provisions that continued that portion of Civil Code Section 3226.

Subsequently however, after hearing comment on the draft language in proposed Civil Code Section 8144 (the private work provision), the Commission was persuaded that the "obligee" on a bond may be a different person than a "beneficiary." In order to more precisely continue the language of existing law, the Commission reversed the substitution it had made in proposed Civil Code Section 8144, and reinserted the term "obligee."

Through inadvertence, that same change was not made in the corresponding proposed public work section, proposed Public Contract Code Section 45040.

The staff suggests that proposed Public Contract Code Section 45040 be revised to parallel the language of proposed Civil Code Section 8144, and more precisely continue the language of existing Civil Code Section 3226:

§ 45040. Construction of bond

45040. (a) ….

(b) A surety is not released from liability to the beneficiary by reason of a breach of the public works contract between the public entity and the direct contractor or on the part of ~~the beneficiary~~ any obligee named in the bond.

(c) ….

Recordation of Notice of Completion Relating to Portion of a Public Work

Under existing law, an owner of a private work of improvement may record a notice of completion relating to a discrete aspect of the work of improvement, if that part of the project is covered by a separate contract. Civ. Code § 3117. For any claimant that contributed work under that contract, recordation creates a new and shorter deadline to pursue a mechanics lien remedy tied to completion of that aspect of the project, rather than of the project as a whole.

In response to a request from California State University ("CSU"), the Commission included a comparable provision in the proposed law that would allow a public entity to make the same type of recordation, and accomplish a similar result, on a public work. Proposed Pub. Cont. Code § 42240.

However, a stakeholder at the meeting expressed concern that this new provision could confuse subcontractors and suppliers on public works as to deadlines for pursuing public work remedies.

Analysis

The Commission received no adverse comment about this provision prior to the submission of its final recommendation to the Legislature. However, the new stakeholder concern does appear to have merit.

The proposed change is premised on the idea that if the procedure makes sense and increases efficiency in the private work context, then it would also be beneficial in the public work context. However, the private work and public work procedures are different in a significant way. Under existing law, the owner in a private work is required to mail notice to any claimant that gave the owner a preliminary notice, informing those claimants that a notice of completion has been recorded. Civ. Code § 3259.5. This provides those claimants with actual notice that recordation has occurred and that the time limits for mechanics lien remedies will be shortened.

That special notice is not required on a public work. Thus, if the public entity is allowed to record a notice of completion for a completed portion of a project, claimants may not realize that the deadlines for their mechanics liens remedies have been shortened. Given that work would be continuing on the project as a whole, the claimants might well believe that completion has not yet occurred with respect to the work that they provided. On a private work, that misconception would be dispelled by actual notice that a notice of completion had been recorded. Claimants on a public work would not receive such notice.

Therefore, extension of the "partial completion" option to public works could create prejudicial misunderstanding for claimants on those jobs, in a way that is less likely to occur on a private work.

Suggested Revision

As previously indicated, the Commission's overarching philosophy in drafting its final recommendation to the Legislature was to include a substantive improvement to existing law only when (1) the reform improved the legislation as a whole, or (2) the reform did not polarize competing interest groups. In this case, while the staff appreciates the benefit this reform would provide to public entities, comment received at the meeting indicates the reform could adversely affect the rights of all claimants on a public work, including subcontractors, suppliers, and laborers.

The staff suggests that proposed Public Contract Code Section 42240 be deleted from the proposed legislation.

Performance Bond on Private Work

Proposed Civil Code Section 8600 was intended by the Commission to restate the second sentence of Civil Code Section 3236 of the existing mechanics lien statute, without substantive change.

A stakeholder at the meeting suggested that the manner in which Section 8600 was drafted had obscured the meaning of that existing provision.

In order to understand Section 3236, it is first necessary to consider the text of existing Civil Code Section 3235, to which Section 3236 refers.

Section 3235 provides that an owner on a private work of improvement may be able to restrict the owner's exposure to lien claims on the project, by filing the original contract for the work of improvement in the county recorder's office, and recording a specified payment bond:

> 3235. In case the original contract for a private work of improvement is filed in the office of the county recorder of the county where the property is situated before the work is commenced, and the payment bond of the original contractor in an amount not less than 50 percent of the contract price named in such contract is recorded in such office, then the court must, where it would be equitable so to do, restrict the recovery under lien claims to an aggregate amount equal to the amount found to be due from the owner to the original contractor and render judgment against the original contractor and his sureties on such bond for any deficiency or difference there may remain between such amount so found to be due to the original contractor and the whole amount found to be due to claimants.

Section 3236, which immediately follows Section 3235 in the existing mechanics lien statute, provides:

> 3236. It is the intent and purpose of Section 3235 to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith his original contract and recorded a payment bond as therein provided. It shall be lawful for the owner to protect himself against any failure of the original contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond or other security as he may deem necessary.

The Commission understood the first sentence of Section 3236 to explain that the payment bond described in Section 3235 was intended to protect the owner *against financial liability to claimants*, in an amount in excess of the original contract price. The Commission understood the second sentence of Section 3236 to mean that, whether or not an owner elects to require a Section 3235 payment bond, an owner on a private work has an independent statutory right to protect *against a contractor breach of performance*, by requiring the contractor to provide any type of bond or security on a project that the owner deems necessary.

Based on this understanding, proposed Civil Code Sections 8600 and 8602 provide as follows:

> **§ 8600. Public policy of payment bond**
>
> 8600. An owner may require a performance bond, payment bond, or other security as protection against a direct contractor's failure to perform the direct contract or to make full payment for all work provided pursuant to the contract.
>
> **Comment.** Section 8600 restates the second sentence of former Section 3236 without substantive change.

….

§ 8602. Limitation of owner's liability

8602. (a) This section applies if, before the commencement of work, the owner in good faith files a direct contract with the county recorder, and records a payment bond of the direct contractor in an amount not less than 50 percent of the price stated in the direct contract.

(b) If the conditions of subdivision (a) are satisfied, the court shall, where equitable to do so, restrict lien enforcement under this part to the aggregate amount due from the owner to the direct contractor and shall enter judgment against the direct contractor and surety on the bond for any deficiency that remains between the amount due to the direct contractor and the whole amount due to claimants.

Comment. Subdivision (a) of Section 8602 restates the first part of former Section 3235 and the first sentence of former Section 3236 without substantive change. It makes clear that the bond, as well as the contract, must be recorded before the commencement of work.

….

Subdivision (b) restates the last part of former Section 3235 without substantive change.

....

The stakeholder asserts that Section 8600 should contain a reference to Section 8602, or it will have been stripped of the meaning it had as the second sentence in existing Civil Code Section 3236.

Suggested Revision

The meaning of the two existing provisions might be more precisely continued by adding a cross-reference, and reversing the order of the two provisions in the proposed law.

The staff therefore suggests that proposed Civil Code Sections 8600 and 8602 be renumbered and revised as follows:

~~8600~~ 8602. ~~An~~ Section 8600 does not preclude an owner ~~may require~~ from requiring a performance bond, payment bond, or other security as protection against a direct contractor's failure to perform the direct contract or to make full payment for all work provided pursuant to the contract.

~~8602~~ 8600. (a) This section applies if, before the commencement of work, the owner in good faith files a direct contract with the county recorder, and records a payment bond of the direct contractor in an amount not less than 50 percent of the price stated in the direct contract.

> (b) If the conditions of subdivision (a) are satisfied, the court shall, where equitable to do so, restrict lien enforcement under this part to the aggregate amount due from the owner to the direct contractor and shall enter judgment against the direct contractor and surety on the bond for any deficiency that remains between the amount due to the direct contractor and the whole amount due to claimants.

Claimants on Payment Bond

A claim against a payment bond is one of three primary mechanics lien remedies theoretically available to a contributor to a private work of improvement. On a public work, such a claim is one of two primary remedies, as a mechanics lien claim may not be made against public property. In either case, the payment bond is typically secured by the direct contractor on the project.

In the existing mechanics lien statute, a single section addresses a right to make a claim against a payment bond on either a private or public work of improvement. Civil Code Section 3267 provides (with emphasis added):

> Nothing contained in this title shall be construed to give to any person any right of action on any original contractor's private or public work payment bond described in Chapter 6 (commencing with Section 3235) or Chapter 7 (commencing with Section 3247), unless the work forming the basis for his claim was performed by such person for the principal on such payment bond, or *one of his subcontractors*, pursuant to the contract between the original contractor and the owner.

The intended meaning of the italicized phrase above is unclear. On large projects, subcontractors will often employ *other* subcontractors (also known as "sub-subcontractors"), resulting in a hierarchy of levels of subcontractors on a job, extending downward from the direct contractor. The phrase "one of his subcontractors" in Section 3267 might therefore refer only to the top tier of subcontractors that have a direct contractual relationship with the direct contractor. Or, because a direct contractor on a project is understood to have ultimate responsibility for all work provided on a project, the quoted phrase might refer to *any* subcontractor on the project.

The distinction is significant. If the phrase is afforded the first meaning, Section 3267 would limit the referenced right to make a payment bond claim to only those persons providing work either to the direct contractor, or to a subcontractor hired directly by the direct contractor. Under this interpretation,

any person providing work to a sub-subcontractor would have no statutory right to make a payment bond claim.

On the other hand, if the phrase is afforded the second meaning, then every person providing work to *any* subcontractor on a project may have a right to make a claim against that direct contractor's payment bond.

In *Union Asphalt, Inc. v. Planet Ins. Co.*, 21 Cal. App. 4th 1762 (1994), a public work case, the Court of Appeal was required to interpret the meaning and application of Section 3267. Based on policy considerations and the interplay of related statutes, the court held that Section 3267 did not limit the payment bond right referenced by the section to only those working for the direct contractor or a first tier subcontractor. Rather, the court held that the phrase "one of his subcontractors" was intended to refer to all sub-subcontractors on a job as well.

Based largely on this holding, the Commission clarified the ambiguous phrase when continuing Section 3267 in the proposed law. Because the proposed law separates provisions relating to private work from provisions relating to public work, Section 3267 was continued in two separate provisions, proposed Civil Code Section 8608(a) (private work) and proposed Public Contract Code Section 45090(a) (public work), which read as follows:

> 8608. (a) This part does not give a claimant a right to recover on a direct contractor's payment bond given under this chapter unless the claimant provided work to the direct contractor either directly or through one or more subcontractors, pursuant to a direct contract.
>
> ….
>
> 45090. (a) A claimant does not have a right to recover on a payment bond unless the claimant provided work to the direct contractor either directly or through one or more subcontractors pursuant to a public works contract.
>
> ….

Each section's Comment references the *Union Asphalt* decision, and indicates that the section restates existing Civil Code Section 3267, clarifying that "claimants providing work to subcontractors at every level have a right to recover against a direct contractor's payment bond as provided in this section."

At the meeting, some stakeholders objected to continuing Section 3267 in this manner, arguing that it would change existing law. With regard to the proposed public work provision, the stakeholders assert that *Union Asphalt*, while concededly on point, was wrongly decided. The stakeholders seek to preserve

the opportunity to obtain a different interpretation of Section 3267 from a different appellate court, and argue that this opportunity would be forever lost if the Legislature enacts a statute codifying the holding of *Union Asphalt*.

With regard to a private work payment bond claim, the stakeholders argue that the *Union Asphalt* decision is simply not controlling, because the case did not involve a private work, and because substantially different policy considerations apply to a private payment bond.

Analysis

A reasonable policy argument can be made that the *Union Asphalt* decision, addressing the statutory right to make a claim against a public work payment bond, should not be controlling with regard to the statutory right to make a private work payment bond claim.

On almost all public works, the direct contractor is statutorily required to obtain a payment bond. See Civ. Code § 3247. In addition to protecting the public entity, this payment bond serves as an effective substitute for the mechanics lien remedy, which is not available on a public work. If unpaid contributors on a public project who provide work to a sub-subcontractor were not able to make a claim against this payment bond, their only remaining mechanics lien remedy would be a stop notice, normally a far less effective remedy for compelling payment.

On a private project, however, contributors providing work to any subcontractor at any level have an unambiguous statutory right to make a mechanics lien claim. Civ. Code § 3110. Payment bonds on a private work are not required by law, and are typically not considered a primary remedy by contributors to a private work.

Notwithstanding this policy distinction, however, the court in *Union Asphalt* was charged with interpreting a statute that on its face expressly applied to both private and public work, and the court did not limit its holding to public work cases. Moreover, the *Union Asphalt* decision was later cited by the California Supreme Court, in a case involving a *private* work payment bond claim, for the following broad proposition:

> When a general contractor executes a statutory labor and material payment bond as principal, the obligation on the bond is not limited to the subcontractors and material suppliers with which the general contractor has executed valid contracts, but extends also to lower tier subcontractors and material suppliers with which

> the general contractor has no privity of contract, and to which the general contractor owes no payment obligation apart from the bond, provided only that they have valid lien claims for that project.

Wm. R. Clarke Corp. v. Safeco Ins. Co., 15 Cal. 4th 882, 896, 938 P.2d 372, 64 Cal. Rptr. 2d 578 (1997).

The application of Section 3267 to sub-subcontractors in public and private works is also supported by three other provisions in the existing mechanics lien statute. Existing Civil Code Section 3096, which applies to both public and private work, provides that:

> "Payment bond" means a bond with good and sufficient sureties that is conditioned for the payment in full of the claims of *all claimants* and that also by its terms is made to inure to the benefit of *all claimants* so as to give these persons a right of action to recover upon this bond in any suit brought to foreclose the liens provided for in this title or in a separate suit brought on the bond. ….

Civ. Code § 3096 (emphasis added).

Who is a "claimant" referenced in Section 3096? Existing Civil Code Section 3085, another definition applicable to both private and public work, explains:

> "Claimant" means *any person entitled under this title to record a claim of lien* ….

Civ. Code § 3085 (emphasis added).

Finally, existing Civil Code Section 3110 identifies the persons referenced in Section 3085, entitled to record a claim of lien:

> Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, and draymen, *and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams, or power contributing to a work of improvement* shall have a lien upon the property upon which they have bestowed labor or furnished materials or appliances or leased equipment for the value of such labor done or materials furnished and for the value of the use of such appliances, equipment, teams, or power *whether done or furnished at the instance of the owner or of any person acting by his authority or under him as contractor or otherwise.* For the purposes of this chapter, *every contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of a work of improvement or portion thereof shall be held to be the agent of the owner.*

Civ. Code § 3110 (emphasis added).

The three sections together indicate that, under existing law, any "payment bond" referenced by the existing mechanics lien statute, whether for a public or a private work, must be conditioned for the payment in full of all persons furnishing work to *any* subcontractor on a work of improvement. And if all such payment bonds must be so conditioned, it would make little sense for the Legislature, in another provision of the same statute, to deny any of the required beneficiaries of these bonds the right to make a *claim* against such bond.

Suggested Revision

In drafting proposed Civil Code Sections 8608 and Public Contract Code Section 45090, the Commission was not attempting to substantively reform existing law. Rather, its goal was only to clarify confusing language in an existing provision, consistent with its overriding objective of making the existing mechanics lien statute easier to use and understand.

Given the obvious ambiguity of the phrase "one of his subcontractors" in existing Civil Code Section 3267, it would seem inappropriate for the Commission to continue the use of that language in the proposed legislation. Doing so would mean perpetuating a known problem on a significant point of law, in conflict with the Commission's primary goal in drafting the proposed legislation.

And if some clarification of this language is deemed necessary, the clarification chosen by the Commission appears to be the best available. It construes the language of the existing provision of law in the same manner that an appellate court did, in a decision that has not been contradicted by any other appellate authority in the 15 years since the decision. There is also some support in a later Supreme Court decision for that interpretation. Further, the clarification is logically supported by other provisions in the existing mechanics lien statute.

The staff suggests that no change be made to proposed Civil Code Section 8608 or Public Contract Code Section 45090. If the issue eventually becomes a sticking point in the Legislature, the staff could consult with the chair to discuss taking a different approach (perhaps reverting to the existing ambiguous language.)

New Grounds for Judicial Release of a Lien Claim

Under existing law, an owner may petition a court in a summary proceeding to release a recorded lien claim, if the claimant has failed to file an action to enforce the recorded claim within 90 days after recordation. Civ. Code § 3154.

In the proposed legislation, the Commission added four new grounds upon which an owner could petition for release of a lien claim in this summary proceeding:

(1) The claimant's demand stated in the claim of lien has been paid to the claimant in full.
(2) None of the work stated in the claim of lien has been provided.
(3) The claimant was not licensed to provide the work stated in the claim of lien for which a license was required by statute.
(4) There is a final judgment in another proceeding that the petitioner is not indebted to the claimant for the demand on which the claim of lien is based.

Proposed Civ. Code § 8480.

It was the Commission's belief that each of these allegations could also be proven with a simple and straightforward showing. The proposed new grounds were seen as providing an opportunity for an owner to seek release of a invalid lien claim without waiting 90 days from the recordation of the lien claim, potentially a long time when attempting to sell or refinance. At the same time, it appeared to the Commission that adding these new grounds to the proposed law would have no significant adverse impact on lien claimants.

At the meeting however, stakeholders expressed concern that none of these new grounds would be as straightforward as the Commission perceived, as each could require resolution of issues that are too complex for a summary proceeding.

Stakeholders also expressed concern that the new grounds could provide owners with unfair leverage over unsophisticated lien claimants. The nature of the proposed new allegations might force a lien claimant to incur legal expense to defend against unmeritorious petitions, expense which would be on top of anticipated legal costs for an enforcement action. Although an accompanying provision in the proposed legislation would award attorney's fees to the prevailing party at the summary proceeding, stakeholders still felt that the new proposal might inhibit claimants from even recording valid lien claims, based on a perception that doing so would ultimately cost too much in legal fees.

Analysis

Both of the concerns expressed by stakeholders appear to have some merit.

Under existing law, the sole basis on which a lien claim may be challenged in this summary proceeding is a failure on the part of the lien claimant to timely file an enforcement action. That ground turns on relatively simple facts that can be proven using easily obtained government records (the date of recordation of the claim of lien and whether or not an enforcement action has been filed). Summary adjudication should be sufficient when considering such facts.

The stakeholders are concerned that three of the proposed new grounds would not be so easy to prove:

(1) *How would one prove that the amount claimed has been paid in full?* Presumably, the petitioner would show canceled checks to prove the amount paid to the claimant. But what if those payments were for work other than the work at issue in the claim of lien? Proof that payment was made for specific work could involve complicated accounting records and disputed interpretation of those records.

(2) *How would one prove that none of the work stated in the claim of lien had been performed?* This would seem to require evidence on the condition of the property before and after the work was alleged to have been performed. Such proof could be difficult if the alleged work was not visually apparent or involved property that was not accessible to the claimant at the time of the summary proceeding. Proof would be further complicated if the petitioner concedes that work was done, but alleges that it was done by someone other than the claimant.

(3) *How would one prove that the claimant did not have a required license at the time the work was performed?* Proof would require access to the records of the licensing body, showing the claimant's status at the time the work was performed. Stakeholders commented that the time to obtain such records can exceed 90 days, in which case there is little practical benefit to adding the proposed new ground (i.e., the petitioner would be better off just waiting for the existing 90-day enforcement period to run). Further, stakeholders noted that some contracts require that a contractor have a specialty license. Such a contract term would further complicate proof of whether the contractor was adequately licensed to perform the work.

(4) *How would one prove that there is a final judgment in another proceeding that the petitioner is not indebted to the claimant for the demand on which the claim of lien is based?* Evidence of this fact would require interpretation of potentially complicated court documents. It may not always be clear that the court judgment and the lien claim are addressing the same issues. For example, the

> owner and the lien claimant may have been parties in a related construction action that involved, but arguably did not resolve, the validity of the pending lien claim. Moreover, the court in the summary proceeding might be forced to address complicated issues concerning the finality of the offered judgment.

Stakeholders suggested that the sorts of factual questions described above would be better addressed in a full trial, as opposed to a summary proceeding. If the petitioner were simply to wait 90 days, either an enforcement action will be filed and those grounds can be asserted as defenses in that action, or an enforcement action will *not* be filed and the owner can petition for release of the lien under the existing time-based ground.

Stakeholders also expressed concern that the new grounds could provide greater scope for intimidation of unsophisticated claimants. Under existing law, it should be a simple matter for a lien claimant to determine if an enforcement action was timely filed, and if so to defend the lien claim against a baseless allegation to the contrary.

However, if the new grounds are added, with their more complicated factual grounds, the claimant's uncertainty of prevailing will increase. That would arguably make it riskier to defend against a release petition brought on the proposed new grounds. Sophisticated owners might exploit that dynamic, filing motions to dismiss simply to intimidate an unsophisticated claimant, in the hopes that the claimant will back down.

Suggested Revision

While it was originally perceived that this substantive reform could be achieved without unduly burdening lien claimants, the new stakeholder comment suggests otherwise.

Deletion of this reform would not detract from the overall value of the proposed legislation, as it would simply restore and continue existing law.

The staff suggests that proposed Civil Code Section 8480 be revised to delete the new proposed grounds for release of a lien claim in a summary proceeding:

> **§ 8480. Petition for release order**
>
> 8480. (a) The owner of property subject to a claim of lien may petition the court for an order to release the property from the claim of lien ~~for any of the following causes:~~ if

~~(1) The~~ the claimant has not commenced an action to enforce the lien within the time provided in Section 8460.

~~(2) The claimant's demand stated in the claim of lien has been paid to the claimant in full.~~

~~(3) None of the work stated in the claim of lien has been provided.~~

~~(4) The claimant was not licensed to provide the work stated in the claim of lien for which a license was required by statute.~~

~~(5) There is a final judgment in another proceeding that the petitioner is not indebted to the claimant for the demand on which the claim of lien is based.~~

(b) This article does not bar any other cause of action or claim for relief by the owner of the property, including, but not limited to, the filing of a complaint with the Contractors' State License Board. A release order does not bar any other cause of action or claim for relief by the claimant, other than an action to enforce the claim of lien that is the subject of the release order.

(c) A petition for a release order under this article may be joined with a pending action to enforce the claim of lien that is the subject of the petition. No other action or claim for relief may be joined with a petition under this article.

(d) Notwithstanding Section 8054, Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil Procedure does not apply to a proceeding under this article.

Comment. Subdivision (a)~~(1)~~ of Section 8480 restates former Section 3154(a) without substantive change. ~~Subdivisions (a)(2)-(6) are new. The owner need not wait until expiration of the time to commence an enforcement action before bringing a petition to release an invalid claim of lien under this section. *Cf.* Section 8422 (forfeiture of lien for false claim).~~

~~Subdivision (a)(2) includes payment in full to an assignee of the claimant.~~

….

Mechanics Lien Remedies Available to a Design Professional

Existing Civil Code Section 3097 generally addresses the giving of preliminary notice on a private work.

Subdivisions (a) and (b) of Section 3097 specify which contributors on a private work are required to give preliminary notice, and to whom that notice must be given. Subdivision (d) of Section 3097 specifies when this notice must be given:

> The preliminary notice referred to in subdivisions (a) and (b) shall be given not later than 20 days after the claimant has first furnished labor, service, equipment, or materials to the jobsite. If labor, service, equipment, or materials have been furnished to a

> jobsite by a claimant who did not give a preliminary notice, that claimant shall not be precluded from giving a preliminary notice at any time thereafter. The claimant shall, however, be entitled to record a lien, file a stop notice, and assert a claim against a payment bond only for labor, service, equipment, or material furnished within 20 days prior to the service of the preliminary notice, and at any time thereafter.

Appearing just before subdivision (d) in Section 3097 is the following provision, relating to when *design professional* claimants must give the preliminary notice required by subdivisions (a) and (b) of Section 3097:

> A certificated architect, registered engineer, or licensed land surveyor who has furnished services for the design of the work of improvement and who gives a preliminary notice as provided in this section not later than 20 days after the work of improvement has commenced shall be deemed to have complied with subdivisions (a) and (b) with respect to architectural, engineering, or surveying services furnished, or to be furnished.

This special rule for design professionals may have been perceived to be necessary because these claimants often provide design work prior to commencement of a work of improvement, at a time when required recipients of the preliminary notice (e.g., the direct contractor or construction lender) may not yet be involved in the project.

In the proposed legislation, proposed Civil Code Section 8204 restates all portions of existing Civil Code Section 3097 that relate to when preliminary notice must be given, by any claimant required to give such notice. The proposed section therefore continues both subdivision (d) of Section 3097, as well as the paragraph preceding subdivision (d), as follows:

> **§ 8204. Effect of preliminary notice**
>
> 8204. (a) A claimant may record a claim of lien, give a stop payment notice, or assert a claim against a payment bond only for work provided within 20 days before giving preliminary notice or at any time thereafter.
>
> (b) Notwithstanding subdivision (a), a certificated architect, registered engineer, or licensed land surveyor that has furnished services for the design of the work of improvement may record a claim of lien, give a stop payment notice, or assert a claim against a payment bond for design professional services provided for the design of the work of improvement, if the architect, engineer, or land surveyor gives preliminary notice not later than 20 days after the work of improvement has commenced.

Comment. Subdivision (a) of Section 8204 supersedes former Section 3097(d). The provision is simplified so that it refers only to the effect of giving preliminary notice.

Subdivision (b) restates the unnumbered paragraph preceding former Section 3097(d).

….

At the meeting, a stakeholder expressed concern that subdivision (b) of proposed Section 8204 could be interpreted as expanding a design professional's right to a mechanics lien remedy beyond that authorized under existing law. The stakeholder suggests that the recast provision appears to affirmatively grant a design professional a right to any of the listed remedies in all circumstances, contingent only on giving the preliminary notice described.

Analysis

In drafting Section 8204 as it did, the Commission did not intend to change existing law. Its goal was only to simplify two lengthier provisions of existing law discussing the timing of preliminary notice, so the provisions would be easier to understand.

However, the recast provisions could arguably be interpreted as having a different substantive meaning than the existing provisions, particularly when read or cited out of context. Given that a stakeholder who has substantial familiarity with mechanics lien law misconstrued the Commission's intended meaning, it would probably be prudent to forego some modernization of the two provisions in order to unambiguously continue existing law.

Suggested Revision

The simplest and surest way to address the stakeholder concern would be to delete proposed Section 8204 entirely, and replace it with a new provision that more closely tracks the structure and language of existing law, thus:

8204. (a) The preliminary notice referred to in Section 8200 shall be given not later than 20 days after the claimant has first furnished work on the work of improvement. If work has been provided by a claimant who did not give a preliminary notice, that claimant shall not be precluded from giving a preliminary notice at any time thereafter. The claimant shall, however, be entitled to record a lien, give a stop payment notice, and assert a claim against a payment bond only for work performed within 20 days prior to the service of the preliminary notice, and at any time thereafter.

(b) A certificated architect, registered engineer, or licensed land surveyor who has furnished services for the design of the work of improvement and who gives a preliminary notice not later than 20 days after the work of improvement has commenced shall be deemed to have complied with Section 8200 with respect to architectural, engineering, or surveying services furnished, or to be furnished.

Comment. Subdivision (a) of Section 8204 continues former Section 3097(d) without substantive change.

Subdivision (b) continues the unnumbered paragraph preceding former Section 3097(d) without substantive change.

The staff recommends that this change be made.

Respectfully submitted,

Steve Cohen
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