

Memorandum 2016-24

Common Interest Developments: Mechanics Liens and Common Area

The Commission¹ has done extensive work on two different aspects of real property law, common interest developments and mechanics liens. In the course of that prior work, the Commission noted a number of questions that could arise when a mechanics lien right is asserted against property in a common interest development.

A number of those issues were discussed in Memorandum 2016-16. The Commission tabled most of the possible reforms discussed in the memorandum, but authorized the staff to work on the following matters:

- Provide that the association is the agent for receipt of mechanics lien related notices and claims for a work of improvement on common area within a common interest development. Consider the extent to which the association should be required to notify its members on receipt of such notices and claims.
- Generalize Civil Code Section 4615(b) (authorization of work on common area in condominium project) so that it applies to all common interest developments and not just condominiums.
- Generalize Civil Code Section 8448 (defining “separate residential unit”) so that it applies to all common interest developments and not just condominiums.²

A staff draft tentative recommendation is attached for the Commission’s review. It addresses the first two of the items listed above, but not the third. The omission of the third item is discussed further below.

King Hall law student Meredith Hankins provided assistance in preparing the attached draft, but her externship ended before the work could be finished. In

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Minutes (April 2016), p. 4.

the interest of completing the work in time for possible introduction of legislation in 2017, the staff completed the draft.

OMISSION OF CIVIL CODE SECTION 8448

Civil Code Section 8448 provides a special set of rules for a work of improvement in a condominium project that consists of more than one “separate residential unit:”

8448. (a) As used in this section, “separate residential unit” means one residential structure, including a residential structure containing multiple condominium units, together with any common area, garage, or other appurtenant improvements.

(b) If a work of improvement consists of the construction of two or more separate residential units:

(1) Each unit is deemed a separate work of improvement, and completion of each unit is determined separately for purposes of the time for recording a claim of lien on that unit. This paragraph does not affect any lien right under Section 8402 or 8446.

(2) Material provided for the work of improvement is deemed to be provided for use or consumption in each separate residential unit in which the material is actually used or consumed; but if the claimant is unable to segregate the amounts used or consumed in separate residential units, the claimant has the right to all the benefits of Section 8446.

That section provides useful clarity with regard to two questions that can arise when a work of improvement affects a condominium project that consists of more than one separate residential structure:

- (1) Paragraph (b)(1) makes clear that there can be a different “completion” date (an important milestone in the process of enforcing a mechanics lien)³ for each of the separate residential structures.
- (2) Paragraph (b)(2) provides guidance as to the mechanics lien rights of material providers, with respect to materials delivered to a work of improvement that includes more than one separate residential structure.

Those issues are probably not limited to condominium projects. They could arise in any CID that is designed to include separate residential structures (e.g., two or more separate multi-unit residential buildings, each with its own separate common area). It is easy to imagine that design approach being used in a

³. See Civ. Code §§ 8412, 8414 (time for recording claim of lien).

community apartment project or a stock cooperative. It is conceivable that it would be used in a planned development, although that seems much less likely.

Because the issues addressed by Section 8448 *could* arise in any type of CID, the staff had proposed that the section be generalized to apply to all types of CIDs.

On preparing implementing legislative language, the staff had second thoughts about applying Section 8448 to a planned development. While it is possible that a planned development could be structured to include two or more multi-unit structures, it is much more likely that a planned development would consist of numerous detached single-family homes. The application of Section 8448 to such a development could produce confusing or unintended results. For example, each separate home would have its own “completion” date. The implications of that are unclear.

There might be ways to fine-tune a generalization of Section 8448, so that it would not produce problematic results when applied to CIDs that do not share the development model that the section was intended to address. **But the staff feels that the more prudent course would be to table the proposed reform.**

If the Commission would rather do further work on this issue, the staff could bring back a more fully developed analysis at a future meeting. **How would the Commission like to proceed on this point?**

NEXT STEP

The Commission needs to decide whether to approve the attached draft for circulation as a tentative recommendation.

Respectfully submitted,

Brian Hebert
Executive Director

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Mechanics Liens in Common Interest Developments

June 2016

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN AUGUST 1, 2016.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF TENTATIVE RECOMMENDATION

The Commission sees two problems with the application of the mechanics lien remedy to a work of improvement in the common area of a common interest development:

- Mechanics lien procedures that require the delivery of a notice to the “owner” of improved property may be confusing where the improved property is common area.
- Special mechanics lien rules for the authorization of work in a condominium project (one type of common interest development) should also apply to other types of common interest developments.

The Commission recommends reforms to address those problems. This recommendation was prepared pursuant to Resolution Chapter 63 of the Statutes of 2014.

MECHANICS LIENS IN COMMON INTEREST DEVELOPMENTS

1 A mechanics lien is a special type of creditor’s remedy, which is established in
2 the state Constitution.¹ It provides a lien right for those who have “bestowed labor
3 or furnished material” on a work of improvement of real property.² Procedures to
4 implement the exercise of the lien right are provided in the Civil Code.³

5 A common interest development (“CID”) is a real property development
6 characterized by (1) separate ownership of a lot or unit (or a right of exclusive
7 occupancy of a unit) that is coupled with an interest in common property, (2)
8 covenants, conditions, and restrictions that limit use of both the common area and
9 separate ownership interests, and (3) management of common property and
10 enforcement of restrictions by an owners’ association. CIDs include
11 condominiums, community apartment projects, stock cooperatives, and planned
12 unit developments.⁴

13 The Commission sees two problems with the application of the mechanics lien
14 remedy to a work of improvement in the common area of a CID:

- 15 • Mechanics lien procedures that require the delivery of a notice to the
16 “owner” of improved property may be confusing where the improved
17 property is common area.
- 18 • Special mechanics lien rules for the authorization of work in a condominium
19 project (one type of common interest development) should also apply to
20 other types of common interest developments.

21 Those problems, and the Commission’s recommended reforms, are discussed in
22 detail below.

23 NOTICE TO “OWNER” OF COMMON AREA

24 In general, the enforcement of a mechanics lien claim is contingent on the
25 claimant having given timely “preliminary notice” to the owner of the improved

1. Cal. Const. Art XIV, § 3 (“Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.”).

2. *Id.*

3. Civ. Code §§ 8400-8494.

4. Common interest developments can be residential, mixed-use, entirely commercial or industrial. CIDs that include residential units are governed by the Davis-Stirling Common Interest Development Act. See Civ. Code §§ 4000-6150. CIDs that do not contain residential units are governed by the Commercial and Industrial Common Interest Development Act. See Civ. Code §§ 6500-6876. For ease of reference, the discussion in this tentative recommendation refers primarily to the first of the two Acts.

1 property.⁵ Mechanics lien law also requires that other important notices and claims
2 be delivered to or served on the improved property’s “owner.”

3 It will often be difficult for a mechanics lien claimant to determine who is the
4 “owner” of common area property in a CID. Depending on the form of CID, the
5 common area may be owned by a corporation formed for that purpose, by the
6 CID’s association, or by all separate interest owners as tenants in common.⁶
7 Determining the precise form of ownership of the common area would require
8 reference to complex governing documents that are held in the county recorder’s
9 office.

10 Uncertainty regarding the identity of the improved property’s “owner” could
11 lead to mistakes that could undermine the enforcement of an otherwise valid lien
12 claim. Moreover, if the common area is owned jointly by all separate interest
13 owners (who could number in the thousands), requiring notice to every owner
14 could be unduly burdensome.

15 A relatively straightforward solution would be to provide that a CID’s
16 association is the owner’s agent for receipt of mechanics lien notices and claims
17 relating to the CID’s common area. Delivery of a notice to the association would
18 be deemed to satisfy the requirement that notice be given to the “owner” of the
19 common area. The same would be true for claims that must be formally served on
20 the “owner.”⁷

21 This would eliminate uncertainty and error about who is the “owner” of the
22 common area. It would also eliminate burdensome mass mailings where the
23 common area happens to be owned by numerous separate interest owners, as
24 tenants in common.

25 Assigning this function to the association also makes practical sense. Under
26 existing law, the association is generally responsible for maintaining and
27 improving the common area.⁸ Consequently, the association will typically be the
28 party contracting and paying for a work of improvement on the common area.

29 The Commission recommends that the law be revised to designate the
30 association as the agent for receipt of mechanics lien notices for work on the
31 common area.⁹

32 In order to prevent surprise to separate interest owners if the recordation of a
33 claim of lien is imminent, the Commission also recommends that the association

5. Civ. Code §§ 8200, 8204, 8410. Some provisions authorize giving notice to the “reputed owner” of the improved property. That provides some flexibility but does not entirely cure the problem discussed here.

6. See Civ. Code §§ 4095 (“common area”), 4105 (“community apartment project”), 4125 (“condominium project”), 4175 (“planned development”), 4185 (“separate interest”), 4190 (“stock cooperative”).

7. See Civ. Code § 8416.

8. See, e.g., Civ. Code § 4775.

9. See proposed Civ. Code § 8119 *infra*.

1 have the duty of notifying the separate interest owners when a claim of lien is
2 served on the association.¹⁰

3 AUTHORIZATION OF WORK IN CONDOMINIUM PROJECT

4 Claimants only have a valid mechanics lien right for work that has been
5 authorized by the owner.¹¹ This presents a problem similar to the one discussed
6 above. How can a claimant determine who is the “owner” of common area in a
7 CID in order to secure the necessary authorization? If the common area is owned
8 by separate interest owners as tenants in common, mechanics lien rights could be
9 contingent on obtaining the express authorization of all separate interest owners
10 (who can number in the thousands).

11 Civil Code Section 4615 provides a solution to this problem, *but only for a work*
12 *of improvement in a condominium project*. It draws clear lines of authority for
13 authorization of a work of improvement:

14 4615. (a) In a condominium project, no labor performed or services or materials
15 furnished with the consent of, or at the request of, an owner in the condominium
16 project or the owners’ agent or contractor shall be the basis for the filing of a lien
17 against any other property of any other owner in the condominium project unless
18 that other owner has expressly consented to or requested the performance of the
19 labor or furnishing of the materials or services. However, express consent shall be
20 deemed to have been given by the owner of any condominium in the case of
21 emergency repairs thereto.

22 (b) Labor performed or services or materials furnished for the common area, if
23 duly authorized by the association, shall be deemed to be performed or furnished
24 with the express consent of each condominium owner.

25 (c) The owner of any condominium may remove that owner’s condominium
26 from a lien against two or more condominiums or any part thereof by payment to
27 the holder of the lien of the fraction of the total sum secured by the lien that is
28 attributable to the owner’s condominium.

29 The Commission sees no policy reason for limiting those beneficial rules to
30 condominium projects. With respect to the issues raised in Section 4615, there is
31 nothing that distinguishes a condominium project from any other type of CID.
32 Every type of CID has common area property, with some form of shared
33 ownership. Consequently, every type of CID will face questions about who can
34 authorize work on behalf of the development as a whole and about the resulting
35 mechanics lien liability. The answers provided in Section 4615 for condominium
36 projects make equal sense for all types of CIDs.

10. See proposed Civ. Code §§ 4620 & 6660 *infra*.

11. Civ. Code § 8404.

1 For those reasons, the Commission recommends that Sections 4615 and 6658
2 (the parallel provision that governs commercial and industrial CIDs) be
3 generalized to apply to all types of CIDs.¹²

4 REQUEST FOR PUBLIC COMMENT

5 The Commission seeks public comment on all of the proposed statutory changes
6 included in this tentative recommendation. Input from knowledgeable persons is
7 critical in the Commission's study process, and may cause the Commission to
8 substantially revise its proposal. Comments supporting the proposed approach are
9 just as important as comments suggesting changes to that approach or expressing
10 other views.

12. See proposed amendments to Civ. Code §§ 4615 & 6658 *infra*.

PROPOSED LEGISLATION

1 **Civ. Code § 4615 (amended). Mechanics liens**

2 SECTION 1. Section 4615 of the Civil Code is amended to read:

3 4615. (a) In a ~~condominium project~~ common interest development, no labor
4 performed or services or materials furnished with the consent of, or at the request
5 of, an owner in the ~~condominium project~~ common interest development or the
6 owners' agent or contractor shall be the basis for the filing of a lien against any
7 other property of any other owner in the ~~condominium project~~ common interest
8 development unless that other owner has expressly consented to or requested the
9 performance of the labor or furnishing of the materials or services. However,
10 express consent shall be deemed to have been given by the owner of any
11 ~~condominium separate interest~~ in the case of emergency repairs thereto.

12 (b) Labor performed or services or materials furnished for the common area, if
13 duly authorized by the association, shall be deemed to be performed or furnished
14 with the express consent of each ~~condominium separate interest~~ owner.

15 (c) The owner of any ~~condominium separate interest~~ may remove that owner's
16 ~~condominium separate interest~~ from a lien against two or more ~~condominium~~
17 separate interests or any part thereof by payment to the holder of the lien of the
18 fraction of the total sum secured by the lien that is attributable to the owner's
19 ~~condominium separate interest~~.

20 **Comment.** Section 4615 is generalized to apply to all types of common interest developments.

21 **Civ. Code § 4620 (added). Notice of claim of lien**

22 SEC. 2. Section 4620 is added to the Civil Code, to read:

23 4620. If the association is served with a claim of lien pursuant to Part 6
24 (commencing with Section 8000), the association shall give general notice to the
25 members, pursuant to Section 4045.

26 **Comment.** Section 4620 is new. It requires general notice of a mechanics lien claim for work
27 on the common area.

28 **Civ. Code § 6658 (amended). Mechanics liens**

29 SEC. 3. Section 6658 of the Civil Code is amended to read:

30 6658. (a) In a ~~condominium project~~ common interest development, no labor
31 performed or services or materials furnished with the consent of, or at the request
32 of, an owner in the ~~condominium project~~ common interest development or the
33 owners' agent or contractor shall be the basis for the filing of a lien against any
34 other property of any other owner in the ~~condominium project~~ common interest
35 development unless that other owner has expressly consented to or requested the
36 performance of the labor or furnishing of the materials or services. However,

1 express consent shall be deemed to have been given by the owner of any
2 ~~condominium~~ separate interest in the case of emergency repairs thereto.

3 (b) Labor performed or services or materials furnished for the common area, if
4 duly authorized by the association, shall be deemed to be performed or furnished
5 with the express consent of each ~~condominium~~ separate interest owner.

6 (c) The owner of any ~~condominium~~ separate interest may remove that owner's
7 ~~condominium~~ separate interest from a lien against two or more ~~condominium~~
8 separate interests or any part thereof by payment to the holder of the lien of the
9 fraction of the total sum secured by the lien that is attributable to the owner's
10 ~~condominium~~ separate interest.

11 **Comment.** Section 6658 is generalized to apply to all types of common interest developments.

12 **Civ. Code § 6660 (added). Notice of claim of lien**

13 SEC. 4. Section 6660 is added to the Civil Code, to read:

14 4620. If the association is served with a claim of lien pursuant to Part 6
15 (commencing with Section 8000), the association shall give notice to the
16 members.

17 **Comment.** Section 6660 is new. It requires general notice of a mechanics lien claim for work
18 on the common area.

19 **Civ. Code § 8119 (added). Agent for receipt of notice in common interest development**

20 SEC. 5. Section 8119 is added to the Civil Code, to read:

21 8119. (a) With respect to a work of improvement on common area within a
22 common interest development, the association is deemed to be an agent of the
23 owners of separate interests in the common interest development, for all notices
24 and claims required by this part. Any provision of this part that requires the
25 delivery or service of a notice or claim to or on the owner of common area
26 property may be delivered to or served on the association.

27 (b) For the purposes of this section, the terms "association," "common area,"
28 "common interest development," and "separate interest" have the meanings
29 provided in Article 2 (commencing with Section 4075) of Chapter 1 of Part 5 and
30 Article 2 (commencing with Section 6526) of Chapter 1 of Part 5.3.

31 **Comment.** Section 8119 is new. It establishes the association of a common interest
32 development as an agent for receipt of notices and claims for a work of improvement, but only
33 with respect to work affecting the common area. See Section 8066 (agents). This section does not
34 make the association an agent of a separate interest owner for work performed on the owner's
35 separate interest.