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0081 Mechanics' Liens on Real Estate

Colorado Legislative Council

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MECHANICS' LIENS

ON

REAL ESTATE IMPROVEMENTS

Legislative Council

Report To The

Colorado General Assembly

Research Publication No. 81
December, 1963

COLORADO GENERAL ASSEMBLY

LEGISLATIVE COUNCIL

ROOM 341, STATE CAPITOL
DENVER 2, COLORADO
222-9911—EXTENSION 2285

December 6, 1963

To Members of the Forty-fourth Colorado General Assembly:

As directed by H.J.R. No. 25, 1963 session, the Legislative Council submits the accompanying progress report on Mechanics' Lien Laws prepared by the Committee on Lien Laws.

The Committee has recommended that the items in this report be included on the Governor's list of items to be considered during the second regular session.

This report was reviewed by the Legislative Council at its meeting on December 6, 1963. At that time the report was approved for transmittal to the Forty-fourth General Assembly and to the Governor.

Respectfully submitted,

C. P. Lamb

Representative C. P. (Doc) Lamb
Chairman

COLORADO GENERAL ASSEMBLY

LEGISLATIVE COUNCIL

ROOM 341, STATE CAPITOL
DENVER 2, COLORADO
222-9911—EXTENSION 2285

December 6, 1963

Representative C. P. Lamb
Colorado Legislative Council
341 State Capitol
Denver, Colorado

Dear Representative Lamb:

Transmitted herewith is the report of the Legislative Council Committee on Mechanics' Lien Laws, appointed pursuant to House Joint Resolution No. 25 (1963). This report is limited to mechanics' lien laws as they apply to real estate improvements and the committee's recommendations thereon. Still to be considered are mechanics' liens which relate to medical service, automotive repairs, and other supplies and services.

Respectfully submitted,

Representative John W. Nichols
Chairman, Committee on
Mechanics' Lien Laws

JWN/cg

FOREWORD

This study was authorized by House Joint Resolution No. 25 (1963). This resolution directed the Legislative Council to appoint a committee to study Colorado's general mechanics' lien laws, including all phases of such laws and their application and an examination of similar laws of other states.

The Legislative Council Committee appointed to make this study included: Representative John Nichols, Simla, chairman; Senator William Bledsoe, Hugo; Senator Donald Kelley, Denver; Senator Floyd Oliver, Greeley; Senator Dale Tursi, Pueblo; Representative Arthur Andersen, Ault; Representative Lowell Compton, La Junta; Representative John Kane, Northglenn; Representative James O'Donnell, Denver; Representative John Vanderhoof, Glenwood Springs; and Representative Arthur Wyatt, Durango. Representative C. P. Lamb, chairman of the Legislative Council, served as an ex officio member of the committee. Harry O. Lawson, Legislative Council senior research analyst, had the primary responsibility for the staff work on this study.

Five meetings were held by the Legislative Council Committee on Mechanics' Lien Laws. At three of these meetings the committee heard from representatives of lending institutions and the home construction industry, including contractors and suppliers. The committee also heard from a representative of a group of home owners who have had mechanics' liens problems in connection with residential remodeling and improvements.

The committee decided to concentrate initially on mechanics' liens relating to real property and improvements thereon. The complexity of this facet of the lien laws study and time limitations precluded committee consideration of liens relating to hospital and medical service, automotive repairs, and other supplies and services. These subjects also require considerable study and will be undertaken by the committee during the coming year.

The committee wishes to express its appreciation to those representatives of lending institutions and the home construction industry, including builders and suppliers, who provided extensive information, consultation, and suggestions during the study. In particular the committee would like to thank Donald M. Lescher and the members of the special sub-committee of the Colorado Bar Association appointed by Mr. Lescher to provide the committee with legal assistance and consultation on the drafting of proposed statutory changes. The members of this committee included: Warren K. Robinson (Denver), chairman; Henry Hutchinson (Boulder); Ray Hagerty (Denver); Edward I. Holigman (Denver); and A. Thad Smith (Denver).

November, 1963

Lyle C. Kyle
Director

TABLE OF CONTENTS

MECHANICS' LIEN LAWS

(As Applied to Real Estate Improvements)

History of Mechanics' Lien Laws

Origin and Purpose

Mechanics' lien laws were neither recognized in common law nor allowed in equity. Therefore, in this country the right to acquire and enforce such a lien is a creature of and dependent on statute. Such statutes created a new means of securing the claims of a particular class of creditors and are based on the equity of paying for work done or materials delivered.[1]

The purpose of mechanics' lien statutes is to permit a lien upon premises where benefit has been received by the owner and where the value or condition of the property has been increased or improved by the furnishing of labor and materials. The principle upon which the mechanics' lien rests is that of unjust enrichment.[2] In other words, "the legislative purpose is to prevent one from enjoying the results of another man's industry under circumstances which the law makers regard as imposing a duty on the former to see that the latter is paid therefore."[3]

With respect to subcontractors, mechanics, laborers, and suppliers, who have no direct contractural relationship with the owner of the property improved, a lien has an operation somewhat in the nature of an attachment or garnishment of the fund in the owner's hands, with the property as security therefor.[4]

Generally, mechanics' lien statutes provide that contractors, subcontractors, and suppliers must perfect their liens by filing notice of liens within specified times after the completion of work or the last furnishing of materials.

The first mechanics' lien law was enacted in Maryland in 1791. Almost all states passed mechanics' lien laws shortly after their admittance to the union, and most of these laws have not been changed substantially since their enactment.

Two Classifications of Lien Statutes

Generally, lien statutes fall into one of two categories: 1) derivative or dependent, or 2) direct or independent. These two classifications are also known as the New York and Pennsylvania systems.

1. American Jurisprudence, Volume 36, p.18.
2. Ibid.
3. Mechanics' Liens in Colorado, George W. Lane, Colorado Springs, Colorado, 1948, p.8.
4. American Jurisprudence, op.cit.

New York System. The lien of a subcontractor or a supplier depends on and is limited by the amount remaining due the contractor at the time of, or which may become due after, the service on the owner by the subcontractor or supplier of notice that he has furnished labor or material. Such statutes provide a derivative lien, under which the rights of the subcontractors and suppliers are substituted to the rights of the contractor.

Pennsylvania System. The lien of a subcontractor or supplier does not depend on the contract between the owner and the principal contractor, nor the state of the account between the two. Under this system a subcontractor or a supplier is entitled to a direct lien against the property if he supplied labor or materials and is unpaid.

Mechanics' Lien Laws in Colorado

The New York system was in effect in Colorado prior to the mechanics' lien act of 1889. In 1889, the New York system was abandoned for the Pennsylvania system, but further changes in 1893 and 1899 reintroduced some of the features of the New York system.

George W. Lane, Mechanics' Liens in Colorado, made the following comments regarding the changes in 1889, 1893, and 1899:

> In the act of 1889, the legislature definitely decided to abandon the New York system for the Pennsylvania system and gave the sub-contractor a direct lien to the full amount of the contract price stipulated in the owner's contract with his contractor, regardless of the state of the account between the owner and his contractor. That act dispensed with the notice of intention on the part of the sub-contractor or material man or notice of any kind, except the copy of the lien statement to be served upon the owner at or before the time of filing the lien statement for record. The act limited the owner's liability to the amount of the contract price between the owner and his contractor. All the sub-contractor or material man had to do was to file his lien statement for record and serve his copy and bring his suit to foreclose within the time required, and all payments made before the time expired for such filing were made at the owner's peril and, when such lien statement was filed, the lien related back to the commencement of the work. The burden of watchfulness was thus shifted to the owner.
>
> The laws of 1893 and 1899 repeal all prior acts but reintroduce some of the features of the New York system... and give the sub-contractor and material man the same direct lien as the law of 1889,...and follow the law of 1889 in giving the lien regardless of the state of the account between the owner and the principal contractor subject, however, to the owner's right to limit his liability, where the contract price exceeds $500, by entering into and filing the statutory contract and subject also to the obligation on the sub-contractor or material man to serve his notice of intention in such cases.

It is only where the contract should comply with the statute and be filed with the county recorder that the owner may limit his liability and it is only where the owner is permitted to and does so limit his liability that any notice of intention is necessary to be served on the owner.

...gives the owner the privilege (not accorded in the act of 1889) to make payments as the work progresses without fear of liens under the conditions above set forth; then, the owner having complied with the statute and thus having given the data to the prospective lien claimant, the privilege is then given to the claimant whereby he may stop those payments or enable the owner to do so, by serving on the owner his notice of intention... upon which the owner may still protect himself by retaining the money payable to his principal contractor necessary to satisfy the claim or the subsequent lien.

This provision, permitting the owner to file his contract with the county recorder, is for the owner's benefit and was inserted in order to extend (not reserve) to the owner a method of limiting his liability and enabling him, in complying therewith, to safely make his payments.

Problems With Present Statutory Provisions and Their Application

While Colorado's mechanics' lien laws relating to building construction and real property have not been altered substantially since 1899, the nature of the building construction industry and the methods of financing real estate and real estate improvements has changed considerably, especially since World War II. Significant among these changes, because of its bearing on mechanics' lien legislation, is the substantial increase in tract housing or subdivision development. The tract owner is usually a builder (and as such may also be the principal contractor) who is improving the property for commercial purposes. Consequently, a purchaser of a completed house might find the property subject to liens of which he had no prior knowledge for the provision of services and materials to which he was not a party.

The increased role of lending agencies also has an important bearing on the application of mechanics' lien laws. The provision of both construction and home purchase loans is central to the functioning of the construction industry and involves these agencies in the construction process to a degree not forseen when mechanics' lien legislation was originally enacted.

Criticism of mechanics' lien laws (both in Colorado and in other states) centers on the failure of this legislation to meet present day needs and conditions, although there is considerable difference of opinion on the modifications needed. On some matters there is general agreement among those affected the most by mechanics' lien

laws as they apply to real estate improvements: lending institutions, home builders, subcontractors, and suppliers. With respect to other provisions of the mechanics' lien laws, there has been substantial disagreement, both as to whether a problem exists and as to proposed solutions.

The business concerns and individuals directly connected with the financing and construction of real estate improvements are not the only ones who have a stake in the development of adequate lien law legislation and its proper application. Adequate protection for home owners and prospective home purchasers is also a matter of great concern.

The major problem areas examined by the committee include: 1) secret or silent liens; 2) definition of completion date; 3) blanket liens; 4) substitution of security; 5) priorities between lenders and lien holders; 6) commencement date; 7) false affidavits; 8) proper crediting of accounts; and 9) off-site improvements. An explanation of these problems and a summary of the different views toward them is presented below.

Secret or Silent Liens

The problem of secret or silent liens can arise under either of two situations:

1) An owner who pays a contractor with whom he has dealt (either for complete construction or for remodeling or additions) cannot be certain that a lien will not be brought by an unpaid subcontractor or supplier who has dealt only with the contractor. Even if he knows who were the principal subcontractors and suppliers, he usually cannot be certain that all of their subcontractors and suppliers have been paid. This situation arises because under Colorado's mechanics' lien laws, all persons who supply labor and/or material involved in real estate improvement are entitled to a lien against the property for the agreed to or reasonable value of their labor and materials. This lien right applies not only to those who have dealt directly with the owner but also to anyone who supplies material or performs services for a contractor or subcontractor. Several cases were cited for the committee in which the owner paid the contractor in full and assumed his obligations to be satisfied, only to find at a later date that several liens had been filed against his property because the contractor had failed to pay subcontractors or suppliers.

2) A person purchases a new home under the assumption that the title is free and clear, only to find at a later date that liens have been filed against the property because subcontractors and/or suppliers had not been paid.

As a consequence, an owner in both cases cited above may be subject to double payments.

The problem of secret or silent liens is compounded by the fact that present statutes impose no obligation upon any claimants (remote or otherwise) to identify themselves. Further, liens may be

filed as long as 90 days after final completion, and when so filed, these liens relate back to the commencement of work by the first laborer or supplier and have priority over the rights of all subsequent purchasers and lenders.

In certain situations an owner can protect himself from the effect of secret liens and potential double payment or payment in excess of the original contract price by following the provisions of the statutes with respect to the recording of the contract between the owner and the principal contractor. With the advent of large housing developments, the situation where a prospective home owner acquires a building site and enters into an agreement with a contractor for the construction of a residence has become an exception. Even in such instances, owners are not generally acquainted with the provisions of the mechanics' lien statutes and obligations and possible protection thereunder.

Although owners theoretically could protect themselves from double liability or payment by withholding payment to the direct contractor until after the time for filing liens have expired, few contractors could afford to wait until 90 days after completion of the project for payment. Further, the determination of completion date (as will be discussed in a subsequent section of this report) adds to the difficulties.

Often, the disburser of funds on a construction project, whether it be the owner himself, the maker of a construction loan, or an escrow agent, may withhold funds and make payment only upon receipt of lien waivers or receipts showing that subcontractors and suppliers have been paid. This procedure is effective protection only to the extent that the disburser of funds is able to learn the identity of the potential claimants from whom he should obtain releases or waivers. The disbursing agent is without a means of discovering, with certainty, the potential claimants.

Opposing Points of View. Lending institution and home builder representatives have expressed the most concern over silent or secret liens and have made several suggestions for statutory changes to alleviate the problem. On the other hand, representatives of suppliers and subcontractors do not think that this is a major problem nor do they feel statutory revision is necessary.

Generally, the major recommendation with respect to silent liens is that some kind of statutory notice provision be enacted which would place some obligation upon subcontractors and suppliers to make themselves known to owners and disbursing agents at an early stage in the construction process. It is argued that the right to file a lien is a special privilege and should require some obligation on the part of the potential lien claimant, such as the provision of notice. The imposition of a notice provision would also involve an obligation on the part of owners and disbursing agents. Their identity would also have to be known, so that subcontractors and suppliers would know where to send notices.

Representatives of the suppliers and subcontractors feel that it would be difficult to develop notice provisions which would be effective and which also would not impose a cumbersome burden upon the

construction industry. It is their opinion that silent liens are an exception and that the problem, to the extent that it exists, could be corrected if the lending agencies exercised more supervision over the disbursement of construction funds. Any legislation adopted on this matter, in their opinion, should be directed at the unlawful dispersion of funds and the giving of false affidavits by contractors.

The lending institutions point out in rebuttal that the imposition of greater responsibilities upon them will increase construction costs and that the statutes are inadequate because there is no way in which subcontractors and suppliers can be compelled to come forward. Some of their representatives are of the opinion that present lien rights make it possible for subcontractors and suppliers to deal with contractors with shaky financial status whose business they might otherwise refuse, because they know they can file liens if they do not receive payment. The counter statement is made that reliable suppliers and subcontractors have good credit practices, and liens are filed only as a last resort.

Another suggestion with respect to this problem is that the period for filing liens be shortened. Suppliers and subcontractors contend that a reduction in the time period for filing liens would interfere with established business practices and billing procedures.

A further recommendation is that either lien rights should not be extended to suppliers or subcontractors of subcontractors or, if they are, such liens should not exceed the balance owed under the direct contract or contracts. The opposing view is that this would work a hardship upon remote claimants who do not know the principal parties to the direct contract and who could not find out without considerable difficulty.

Determination of Completion Date and Blanket Liens

There is general agreement among the major interested parties that present statutory provisions relating to the determination of project completion are unsatisfactory. The statutes provide that the time for filing lien statements and for commencing actions for foreclosure of liens is tied to the date of completion. Problems constantly arise as to when the work was completed, what constitutes evidence of completion, and whether a relatively minor addition, such as a small plumbing part after the structure is finished, extends the official completion date.

Closely related to the determination of completion date is the present statutory provision relating to the filing of blanket liens. Recommendations to correct the completion date problem also relate to the blanket lien provisions.

Blanket Liens. The provisions of the last half of 86-3-3, CRS 1953, relate to the supply of materials or the performance of labor for the erection of two or more buildings when those buildings are constructed by the same person under the same contract. By this section the lien claimant is authorized to apportion the materials and labor among the buildings; however, he is not required to do so. On the contrary, he is specifically permitted to file one lien, without

apportionment, whenever the labor and materials "cannot be readily and definitely divided and apportioned among the several buildings...".

The application of this provision to present day tract housing and subdivision development has raised several problems. With no adequate provision or procedure for apportioning liens among the separate structures within a housing development, each structure potentially has a lien for the full amount of a claim against every other structure. There is the further problem that in a tract development the date of commencement for an individual house may relate back to the date of commencement of the entire project, and the date of completion may be the date of completion of the last house in the project. Also, there is the problem that liens for construction or installation of common facilities, such as streets, sewers, etc., may be involved.

To solve these problems it has been recommended that:

1) The date of completion for the purpose of determining the time period for filing liens should be related:

a) to each individual structure rather than to an entire project; and

b) to the last date of labor performed or materials supplied on an individual structure rather than to the date upon which the structure was finished.

2) The apportionment of liens among several structures in a subdivision development should be mandatory.

Substitution of Security

Colorado at present has no statutory provision which would make it possible for an owner to secure the release of his property from liens through the posting of an acceptable bond. While such a provision by itself would not provide a solution to the many problems connected with Colorado's mechanics' lien laws and their application, it would help considerably by providing a means by which title to property might be had free and clear, regardless of liens filed or lien foreclosure action.

There was general agreement among the various interest groups appearing before the committee that a substitution of security provision would be desirable. Such a provision could authorize the court in which the lien claim is being determined to accept a bond, a cash deposit, or such other security as it deems proper in an amount equal to the amount of the lien plus anticipated court costs. The lien or liens would then be transferred to the bond or other security and the property released from the claim or claims.

Priorities Between Lenders and Lien Holders and Determination of Commencement Date

One of the major areas of disagreement between lending institutions, on the one hand, and builders, subcontractors, and suppliers is whether a change is needed in the order of priorities as

provided by statute. The lending institution representatives object to the first priority rights given lien holders. Involved in this position is the "relation back" principle, which gives a priority to liens for all work performed and material supplied as of the commencement date of the project. Closely related is the determination of the completion date itself. In this connection, counsel appearing before the committee on behalf of several lending agencies made the following comments:[5]

> The courts have held that commencement of work includes architectural, design, survey, etc., work and since some architectural, design, or survey work nearly always precedes the making of the construction loan, whether or not the construction lender has knowledge of it, lenders who make loans for the construction of improvements in the belief that they will have a first lien on the improvement when completed, very often find that their funds have been used to create a structure upon which other (and later) claimants have a prior lien. Under the Colorado law, lien claims usually even have preference over the loan proceeds advanced by a construction lender which have been actually expended in payment of construction costs. In such a situation, the lien claimants have received not only the loan proceeds to apply upon (and reduce) the sums owed to them, but, in addition, have a lien as to their balance which has a priority over the lender who supplied the funds to pay them what they have already received.
>
> In addition to the problem of "relationship back" the present statute provides that where the mechanics lien is for work done or materials furnished for "an entire structure...", subsequent mechanics liens have priority as to the improvement in preference to a prior lien or incumbrance on the land on which the improvement is to be erected. Thus, under the literal language of the present statute, in the typical "new structure" situation, the construction lender, even at best, has a first lien only on the unimproved land, while the mechanics lien claimants have a prior lien as to any improvement erected upon the land with the construction lender's money. The drawing of a distinction between the land and the improvement placed thereon may make sense in the case of a pre-existing incumbrance for a loan made solely on the security of raw land but it cannot be justified in the case of a construction loan where the objective is the construction of an improvement to be given as security for the loan.

The position of the home builders with respect to any change in the present system of priorities was expressed by the representative

5. Written statement prepared by Robert Nagel, law firm of Law, Nagel, and Clark, and presented to the Legislative Council Committee on Mechanics' Lien Laws at its meeting on July 1, 1963.

of the Home Builders Associations of Metropolitan Denver, Boulder, Colorado Springs, and Pueblo.[6]

> The committee of the Home Builders Association has considered the problem of the relative priority of lenders and lien holders. It is the firm position of this committee that there should not be a change in the statute to provide a first priority for the lenders superior to the lien holders. It was felt that the security position of the sub-contractor and supplier requires a prior lien.
>
> However, this is not to say that the builders and lenders in the industry would not accept some modification in terms of a sharing of the priority between the lender and the lien holders based upon the funds advanced by the lender which have actually gone into the improvements in the property. The committee was not able to reach an agreement in this area, but does caution that the security position of sub-contractors and suppliers must remain essentially the same as it is under the present statute or the problems of volume production in the home building industry can be seriously affected.

The Council of Suppliers and Subcontractors also prepared and submitted its comments on lien practices to the Legislative Council Committee on Mechanics' Lien Laws:[7]

> THE FOLLOWING SHOULD NOT BE CHANGED OR DISTURBED BUT SPELLED OUT BY SPECIFICALLY INCORPORATING INTO STATUTES THAT WHICH NOW APPEARS BY COMBINED STATUTE AND CASE DECISION:
>
> 1. PRIORITIES - Certainly the Priorities as they exist today should not be changed. The laborer and supplier and subcontractor should have Mechanic's Lien protection in that they cannot repossess their efforts and material, and must rely on the law which gives them this protection through a Direct Lien. The labor and material which created the security is not repossessable.
>
>   The Mechanic's Lien Statute should spell out that such Mechanic's Lien:
>
>   A. Relates back to the date of the commencement of the construction.

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6. Written statement submitted by Johnny Green at the July 1, 1963 meeting of the Legislative Council Committee on Mechanics' Lien Laws.
7. Memorandum submitted to the Legislative Council Committee on Mechanics' Lien Laws prior to the Committee's meeting on August 29, 1963.

B. Is prior to any Deed of Trust as to improvements on land regardless of when the Deed of Trust on the new construction is recorded. The Deed of Trust should be prior as to the bare land.

C. Is second to a prior recorded Deed of Trust on repairs and improvements on existing old construction, and that an existing Deed of Trust is prior on repairs and improvements on existing old construction.

2. DIRECT LIEN - The Direct Lien system has been in effect in Colorado since 1889 and should not be disturbed. To abandon this system in effect would be to rob the many laborers and suppliers and subcontractors of their protection under the law and place their fate in the hands of the money lenders, when the laborer, materialmen and subcontractor has created the security.

False Affidavits

At the present time, according to lending agency representatives, it is fairly common practice for owners, and agents who disburse construction moneys on behalf of owners, to obtain statements under oath from the contractors, subcontractors, and suppliers to whom disbursements are made. These statements usually require the recipient of the funds to state the names of all subcontractors or suppliers with whom he (the recipient) has dealt in connection with performing duties on the given structure and to state whether or not any moneys are owed to the recipient's subcontractors or suppliers.

The lending institutions would like to see consideration given to specific statutory recognition of this practice in the mechanics' lien law, with the imposition of penalties upon those who obtain a disbursement of construction funds at the time of or in connection with the giving of a false statement or affidavit.

A further recommendation in this connection by the lending agencies is that consideration be given to a provision which would permit the owner, or his disbursing agent, to rely upon the correctness of the information contained in such a statement, at least as it would relate to the potential claims of remote claimants, unless the party whose claim has been disregarded in the affidavit has made his existence known to the owner or his disbursing agent.

The Suppliers and Subcontractors Council is in substantial agreement with the lending institutions in this matter. This Council recommended the following:[8]

The statute should prescribe a form with attached

8. Ibid.

affidavit to be completed by the owner, builder, subcontractor or materialmen at the time of drawing funds from the lender, owner, contractor or subcontractor during the period of construction and at the end of the construction setting forth the names of all contractors, subcontractors, laborers and/or materialmen remaining unpaid at the time of the draw. The lender and subsequent parties could rely on this and the statute should make the presentation of a false form and affidavit to the lender or other party in order to obtain funds a felony punishable by fine and imprisonment. This would also help builders develop better cost controls.

Proper Crediting of Accounts -- Diversion of Funds

Under certain circumstances it is possible that a lien might be filed by a supplier or subcontractor, even though the contractor has been paid by the owner, and the contractor in turn has paid the supplier or subcontractor. This could happen if the contractor has an open account involving several projects, and payment is applied to an old or delinquent balance rather than to the proper project.

The Suppliers and Subcontractors Council has recommended that a provision be adopted which would make it illegal for a contractor to divert funds and establish a penalty therefore. It is the council's opinion that such a provision would provide an effective means of control and reduce the possibility of liens being filed in such circumstances.

Off-site Improvements

Present mechanics' lien statutes do not provide lien rights for off-site improvements. The need for such lien rights has been expressed by home builders and suppliers and subcontractors. The home builders recommend, however, that lien rights for off-site improvements be limited. Their specific proposal is that no subcontractor or supplier of labor or materials for improvements physically located off the building site or sites shall be entitled to any lien on such building site or sites or any other property, except as created by specific agreement with the general contractor.

Committee Recommendations

The Legislative Council Committee on Mechanics' Lien Laws recommends several changes in and additions to the statutes providing for mechanics' liens on real estate improvements. The subjects covered by these recommendations include: 1) provision of notice (secret or silent liens); 2) elimination of blanket liens; 3) change in the definition of completion date; 4) false affidavits; 5) diversion of funds; and 6) substitution of security. The committee is of the opinion that this subject is sufficiently important to recommend that the Legislative Council request the governor to include it among those matters he will place before the 1964 session of the General Assembly.

Provision of Notice

The recommended legislation covering notice provisions is designed to improve communications between owners and lenders and contractors, subcontractors, and suppliers to the extent that secret or silent liens will be eliminated.

Under the proposed legislation, owners and lenders would be required to identify themselves by posting the property and by filing a notice with the clerk and recorder of the county where the property, or the major portion thereof, is located. The owner would be required to post the property prior to the first delivery of materials or the actual commencement of improvements on the property. The lender would be required to post the property within seven days after a contract to lend or disburse funds is made.

Contractors, subcontractors, and suppliers who perform services or furnish materials to any posted property would be required to notify the owner or lender of that fact on or before thirty days after the initial furnishing of services or materials. Through such notices, contractors, subcontractors, and suppliers would establish their lien rights. Conversely, any contractor, subcontractor, or supplier who did not comply with the notice provisions would lose his lien rights.

If an owner and/or a lender fail to post the property and file notice with the county clerk and recorder, contractors, subcontractors, and suppliers would not be required to notify the owner and lender in order to establish lien rights.

It is the committee's belief that through the proposed notice provisions, owners and lenders will know fairly soon after work has commenced those who have furnished services or supplies to the project and who, consequently, are potential lien claimants. This knowledge should preclude any possibility of secret or silent liens, assuming that the procedures established by the proposed legislation are workable and are complied with.

Elimination of Blanket Liens

The proposed legislation would eliminate blanket liens on residential buildings or structures on separate platted building sites by amending the present statute to provide that the commencement and completion dates shall apply to individual structures rather than to

the subdivision or project of which such structure is a part. As a consequence of this proposed change, the time limitation on the filing of liens would be tied to the completion of individual structures rather than entire projects. Further, such liens would apply only to specific buildings or structures, rather than to all buildings or structures in a project.

Definition of Completion Date

Under the proposed legislation, the date of completion for determining the time period for filing liens by a contractor, subcontractor, or supplier would be the last date on which he performs service on or delivered materials to a structure or building, rather than the date on which the structure or building is finished. The present time periods for filing liens (90 days for contractors, 60 days for subcontractors and suppliers, and 30 days for laborers) would still apply.

False Affidavits

The proposed legislation would make it a felony for any person intentionally to make or furnish an affidavit containing a false statement in connection with the performance of services or the furnishing of materials for the improvement of real property. This legislation also provides that at the time any payment is to be made to a contractor, subcontractor, or supplier, the owner, lender, or disbursing agent making such payment may demand a statement under oath covering the status of the account and the nature of the services performed or the supplies furnished. Failure to provide such statement within 10 days after such demand is made or the provision of a false or fraudulent statement would deprive a contractor, subcontractor, or supplier of his lien rights (in addition to possible prosecution for commission of a felony if a false statement is given).

Diversion of Funds

The proposed legislation would make it illegal for anyone to divert funds paid for improvement to real property with the intent to defraud. For example, a contractor who received payment for a specific project would be required to use such funds to pay for services performed on and/or material supplied to that project. If he did not and intent to defraud was established, he would be guilty of a felony.

Substitution of Security

The proposed legislation would make it possible for an owner to transfer a mechanics' lien against his property to other security by depositing cash or such acceptable security with the clerk of the district court in the county in which his property is located. Such security would be required in an amount sufficient to cover the amount demanded on the lien, plus interest and court costs.

This provision would make it possible for an owner to clear the title to his property, even though liens may have been filed against it.

Text of Proposed Legislation

Following is the text of the legislation recommended by the committee:

A BILL FOR AN ACT

CONCERNING GENERAL MECHANICS' LIENS.

Be It Enacted by the General Assembly of the State of Colorado:

SECTION 1. 86-3-3, Colorado Revised Statutes 1953, is hereby amended to read:

86-3-3. Attaching of lien - apportionment of lien claims. (1) The liens granted by this article shall extend to and cover so much of the lands whereon such building, structure, or improvement shall be made as may be necessary for the convenient use and occupation of such building, structure, or improvement, and the same shall be subject to such liens. In case any such building shall occupy two or more lots, or other subdivisions of land, such several lots or other shall be deemed one lot for the purposes of this article, and the same rule shall hold in cases of any other such improvements that shall be practically indivisible, and shall attach to all machinery and other fixtures used in connection with any such lands, buildings, mills, structures, or improvements. When the lien is for work done or material furnished for any entire structure, erection, or improvement, such lien shall attach to such building, erection, or improvement for or upon which the work was done, or materials furnished, in preference to any prior lien or encumbrance, or mortgage upon the land upon which the same is erected, or put, and any person enforcing such lien may have such building, erection, or improvement sold under execution and the purchaser at any such sale may remove the same within thirty days after such sale. Any lien provided for by this article shall extend to and embrace any additional or greater interest in any of such property

acquired by such owner at any time subsequent to the making of the contract or the commencement of the work upon such structure and before the establishment of such lien by process of law, and shall extend to any assignable, transferable, or conveyable interest of such owner or reputed owner in the land upon which such building, structure, or other improvement shall be erected or placed.

(2) Whenever any person shall furnish any materials or perform any labor, or both, for the erection, construction, addition to, alteration, or repair of two or more buildings, structures, or other improvements, when they are built and constructed by the same person, and under the same contract, it shall be lawful for the person so furnishing such materials, or performing such labor, to divide and apportion the same among the buildings, structures, or other improvements in proportion to the value of the materials furnished for, and the labor performed upon or for each of said buildings, structures, or other improvements and to file with his lien claim therefor a statement of the amount so apportioned to each building, structure, or other improvement, which said lien claim when so filed may be enforced under the provisions of this article in the same manner as if said materials had been furnished and labor performed for each of said buildings, structures, or other improvements separately; but if the cost or value of such labor and materials, or either, cannot be readily and definitely divided and apportioned among the several buildings, structures, or other improvements, then, IN ALL CASES, EXCEPT IN THE CASE WHERE TWO OR MORE SEPARATE RESIDENTIAL BUILDINGS OR STRUCTURES ARE BEING SO CONSTRUCTED OR ERECTED ON SEPARATE PLATTED BUILDING SITES, SUCH AS IN THE CASE OF A SUBDIVISION OR DEVELOPMENT PROJECT, one lien claim may be made, established, and enforced against all such buildings, structures, or other improvements, together with the ground upon which the same may

be situated, and in such case, for the purposes of this article, all such buildings, structures, and improvements shall be deemed one building, structure, or improvement, and the land on which the same are situated as one tract of land.

(3) IN CASE OF THE CONSTRUCTION, ERECTION, ADDITION TO, ALTERATION, OR REPAIR OF TWO OR MORE SEPARATE RESIDENTIAL BUILDINGS OR STRUCTURES ON SEPARATE PLATTED BUILDING SITES, THE DATE OF COMMENCEMENT OF WORK AND THE DATE OF COMPLETION, AS SUCH TERMS ARE DEFINED AND USED IN THIS ARTICLE, SHALL, FOR THE PURPOSES OF THE APPLICATION OF THIS ARTICLE, AS TO A GIVEN BUILDING OR STRUCTURE, BE THE DATE OF COMMENCEMENT OR COMPLETION OF THAT PARTICULAR BUILDING OR STRUCTURE, AND NOT THE DATE OF COMMENCEMENT OR COMPLETION OF THE ENTIRE SUBDIVISION OR PROJECT OF WHICH SUCH BUILDING OR STRUCTURE IS A PART.

SECTION 2. 86-3-9, Colorado Revised Statutes 1953, is hereby amended to read:

86-3-9. Lien statement. (1) SUBJECT TO THE PROVISIONS OF SECTION 86-3-26, any person wishing to avail himself of the provisions of this article shall file for record, in the office of the county CLERK AND recorder of the county wherein the property, or the principal part thereof, to be affected by the lien is situated, a statement containing:

(a) The name or names of the owner or reputed owner of such property, or in case such name be not known to him, a statement to that effect.

(b) The name of the person claiming the lien, the name of the person who furnished the material or performed the labor for which the lien is claimed, and the name of the contractor when the lien is claimed by a subcontractor or by the assignee of a subcontractor, or, in case

the name of such contractor is not known to a lien claimant, a statement to that effect.

(c) A description of the property to be charged with the lien, sufficient to identify the same; and,

(d) A statement of the total amount of the indebtedness, the amount of the credits thereon, if any, and the balance or amount due or owing such claimant.

(2) Such statement shall be signed and sworn to by the party, or by one of the parties, claiming such lien, or by some other person in his or their behalf, to the best knowledge, information, and belief of the affiant; and the signature of any such affiant to any such verification shall be a sufficient signing of the statement. In order to preserve a lien for work performed or materials furnished by a subcontractor, there must be served upon the owner or reputed owner of the property or his agent at or before the time of filing with the county clerk and recorder the statement above provided for, a copy of such statement; but if neither the owner, or reputed owner, nor any agent of the owner or reputed owner can conveniently be found in the county where the property, or the principal part thereof, is situated, an affidavit to that effect shall be filed for record with the aforesaid statement and thereupon no such service shall be required.

(3) All such lien statements claimed for labor and work by the day or piece, but without furnishing material therefore, must be filed for record after the last labor OR WORK for which the lien claimed has been performed and at any time before the expiration of ~~one-month~~ THIRTY DAYS next after the ~~completion-of-the-building,-structure,-or other-improvement~~ DAY ON WHICH THE LAST LABOR OR WORK WAS PERFORMED BY THE CLAIMANT. All lien statements of all other subcontractors and of all material men whose claims are either entirely or principally

for materials, machinery, or other fixtures, must be filed for record after the last labor OR WORK is performed or the last material furnished for which the lien is claimed and at any time before the expiration of ~~two-months~~ SIXTY DAYS next after the ~~completion-of-such-building, structure, or other improvement~~ DAY ON WHICH THE LAST LABOR OR WORK WAS PERFORMED, OR THE LAST MATERIAL WAS FURNISHED, BY THE CLAIMANT. The lien statements of all other principal contractors must be filed for record after the completion of their respective contracts and at any time within ~~three-months~~ NINETY DAYS next after the ~~completion of the building, structure, or other improvement~~ DAY ON WHICH THE LAST LABOR, WORK, OR SERVICES WERE PERFORMED, OR THE LAST MATERIAL WAS FURNISHED, BY THE CLAIMANT. New or amended statements may be filed within the periods above provided, for the purpose of curing any mistake, or for the purpose of more fully complying with the provisions of this article.

(4) ~~Any~~ NO trivial imperfection in, or omission from the said LABOR OR work, OR FURNISHING OF MATERIALS, or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall ~~not~~ be deemed ~~such~~ A lack of completion OF ANY LABOR, WORK, OR SERVICES, OR FURNISHING OF MATERIALS, ~~as to~~ NOR SHALL SUCH IMPERFECTION OR OMISSION prevent the filing of any lien STATEMENT. ~~In case of contractors,~~ The occupation or use of the building, improvement, or structure by the owner, or his representative, or any other person with the consent of the owner or his agent, or the acceptance by said owner or his agent of said building, improvement, or structure, for the purpose of this article shall be deemed conclusive evidence of completion. For the purposes of this article, cessation ~~from~~ OF ALL labor, WORK, SERVICES, AND FURNISHING OF MATERIALS for thirty days upon any unfinished contract or upon any unfinished building,

improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof.

(5) Subject to the prior termination of the lien under the provisions of section 86-3-10, no lien hereafter claimed by virtue of this article shall hold the property longer than one year from the filing of such lien, unless within thirty days ~~from~~ AFTER each annual anniversary of the filing of said lien STATEMENT, there be filed in the office of the recorder of the county wherein the property is located an affidavit by the person, or one of the persons, claiming the lien, or by some person in his behalf, stating that the improvements on said property have not been completed. Upon the filing of the notice required and the commencement of an action, within the time and in the manner required by said section 86-3-10, no annual affidavit need be filed thereafter.

SECTION 3. Article 3 of chapter 86, Colorado Revised Statutes 1953, as amended, is hereby amended BY THE ADDITION OF NEW SECTIONS to read:

86-3-25. Transfer of liens to security. (1) Any lien claimed under this article may be transferred by any person, having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by either depositing in the office of the clerk of the district court of the district wherein the property, or the principal portion thereof, is located a sum of money, or filing in such clerk's office a bond executed as surety or by a surety insurer licensed to do business in this state, either of which shall be in an amount equal to the amount demanded in such statement of lien plus simple interest thereon at six per cent per annum for three years, plus one hundred

dollars, to apply on any court costs which may be taxed in any proceeding to enforce said lien. Such deposit or bond shall be conditioned on the payment of any judgment or decree which may be rendered for the satisfaction of the lien for which such statement of lien was recorded, together with costs not exceeding one hundred dollars. Upon making such deposit or filing such bond, the clerk shall make and record a certificate showing the transfer of the lien from the real property to the security and shall mail a copy thereof by registered or certified mail to the lienor named in the statement of lien, at the address stated therein. Upon filing the certificate of transfer, the real property shall thereupon be released from the lien claimed and such lien shall be transferred to said security. The clerk shall be entitled to the recording fee for such certificate and a fee of two dollars for making and serving the certificate. Any number of liens may be transferred to one such security.

(2) Any excess of the security over the aggregate amount of any judgments or decrees rendered, plus costs actually taxed, shall be repaid to the person depositing or filing such security, or to his successor in interest. Any deposit of money shall be considered as paid into court and shall be subject to the provisions of law relative to any other payment of money into the court and the disposition of the same.

(3) Any person having an interest in such security or the property from which the lien was transferred or any lien claimant may, at any time, file a complaint or motion in the district court where such security is deposited or filed for an order to require additional security, reduction of security, change or substitution of surety or sureties, payment or discharge thereof, or any other matter affecting said security.

(4) If no action to enforce a transferred lien is commenced within the time specified in section 86-3-10, the clerk of the district court shall return said security deposited or filed with such clerk upon request of the person depositing or filing the same, or his successor in interest, or the surety.

86-3-26. Notice of owner and lender posted, filed - notice of lien right. (1) Prior to the first delivery of materials or the actual commencement of improvement, construction, addition to, alteration, or repair of any property on the construction site, the owner or his authorized agent or representative shall post a notice in a conspicuous place upon the property which shall state the name and address of the owner of the property and the address or legal description of the property. In addition, any person, association, partnership, or corporation lending or disbursing moneys for such improvement, construction, addition, alteration, or repair shall likewise post a notice within seven days after a contract to lend or disburse moneys has been made, with its name and address thereon, together with the address or legal description of the property. In addition and within three days after such posting, the owner or his agent or representative and the lending or disbursing agency shall file a similar notice with the clerk and recorder of the county wherein such property, or the principal portion thereof, is located. Any owner, lender, or disbursing agent, in his posted and filed notices, may designate some other person as his agent to whom the notice provided for by subsection (2) of this section shall be sent, in lieu of being sent to such owner, lender, or dusbursing agent. If there are two or more owners, or two or more lenders or disbursing agents, the posted and filed notices shall designate not more than one owner or agent as the representative of all the owners, and not more than

one lender, disbursing agent, or other agent as the representative of all the lenders and disbursing agents to whom the notice provided for by subsection (2) of this section shall be sent.

(2) On or before thirty days after the initial furnishing of materials by any material man or of services by any contractor or subcontractor, except laborers or mechanics defined in section 86-3-8, each material man and contractor or subcontractor shall send a notice of lien right to the owner and to each lending or disbursing agency posting and filing a notice pursuant to subsection (1) of this section. Such notice of lien right shall state the name and address of such material man, contractor, or subcontractor, the fact that materials or services are being furnished for such improvement, construction, addition to, alteration, or repair of such property, and that such material man, contractor, or subcontractor thereby establishes a right to have a lien upon such property pursuant to the provisions of this article. Such notice of lien right shall be sent by certified mail, return receipt requested. No lien granted by this article shall attach to any property in this state unless the notice of lien right has been sent as provided in this subsection (2); provided, that if any notice required to be posted and filed, pursuant to the provisions of subsection (1) of this section, has not been so posted and filed, the provisions of this subsection (2) shall not apply and no notice of lien right shall be required.

(3) No notice filed in the office of the clerk and recorder pursuant to the provisions of subsection (1) of this section shall have any effect on the title to or any interest in any real or personal property in this state other than being a condition precedent to the requirement of a notice of lien right.

(4) No notice filed pursuant to subsection (1) of this section shall be effective for any purpose under this article after two years after the date of filing thereof, unless within thirty days prior to the end of such two year period there shall be filed with the clerk and recorder a statement under oath signed by the owner, the lending or disbursing agency, or any person asserting a lien under the provisions of this article, and stating that such improvement has not been completed, or that the time for filing lien statements has not expired, or that an action to enforce any lien is pending and unresolved or may still be commenced. The effectiveness of such notice shall be extended six months by such statement, and successive six month extensions may be obtained by the filing of similar statements within thirty days prior to the end of any extension. At the end of such two year period or any extension thereof, the clerk and recorder may remove and destroy all such notices and statements, unless otherwise ordered by any court of competent jurisdiction.

(5) Any person who intentionally removes, destroys, or knocks or tears down any notice posted pursuant to the provisions of subsection (1) of this section is guilty of a misdemeanor and, on conviction, shall be punished by imprisonment in the county jail for not more than ninety days, or by a fine of not more than one hundred dollars, or by both such fine and imprisonment.

86-3-27. False affidavit in support of payment - falsified lien release - penalty. (1) The owner, or the lending or disbursing agency, at the time any payment is to be made by him to the contractor or directly to a subcontractor or material man, may demand of any such possible lien claimant a written statement under oath of his account showing the nature of the labor, work, or services performed, or of the materials furnished, the amount paid on account to date, the amount

due, and the amount, if any, to become due. Failure or refusal to furnish such statement within ten days after such demand or the furnishing of a false or fraudulent statement shall deprive the person so failing or refusing or so furnishing the false or fraudulent statement of his lien rights under this article.

(2) Any person who intentionally makes or furnishes to another person an affidavit containing a false statement in connection with the labor, work, or services performed, or materials furnished, for the improvement of real property, knowing that the person to whom it is furnished may rely on it and may part with any thing of value relying on the truth of such statement as an inducement to do so, or any person who, with intent to defraud any lien claimant or to defeat his lien rights when such lien claim has not been satisfied, or without authority of the lien claimant, falsifies, executes, and delivers or files for record a release of any lien granted under this article, is guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary not less than one year nor more than fourteen years.

86-3-28. Diversion of funds - penalty. Any person who, with intent to defraud, uses the proceeds of any payment made to him on account of improving certain real property, for any purpose other than to pay for labor, work, or services performed or materials furnished for such improvement is guilty of a felony, and on conviction shall be punished by imprisonment in the penitentiary for not less than one year nor more than ten years.

SECTION 4. Effective date - application of act. This act shall take effect on July 1, 1964; provided, that the provisions of this act shall not apply in any case where the commencement of any erection, construction, addition to, alteration, or repair of any

building, structure, or other improvement shall occur prior to such effective date.

SECTION 5. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.