Study H-820 November 29, 1999

First Supplement to Memorandum 99-85

Mechanic's Liens: Commencement of Study (Additional Material)

Attached to this supplement is a letter we have just received from Mr. James Stiepan of the Irvine Company commenting on parts of the Hunt Report attached to Memorandum 99-85. We will discuss the general comments at the meeting and consider the technical comments when detailed reform proposals are prepared and circulated for a future meeting.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

THE IRVINE COMPANY

James L. Stiepan
Vice President and
General Counsel
Irvine Office Company

November 29, 1999

Mr. Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Mechanic's Lien Law Revisions

Dear Stan:

Thank you for forwarding the initial report of Gordon Hunt. I wish to commend Mr. Hunt for his thoughtful analysis. Recognizing that his preliminary recommendations are intended to be more clarification than substantive reform, I shall try to respond in kind. I may wish to provide further comments upon issuance of Part 2 of his report or upon the formulation of tentative proposals by the Commission.

In Section 10 of his report, Mr. Hunt recites in detail the problems created by Civil Code Section 3262 as presently drafted. Because of the ambiguities and limitations in the progress payment forms embodied in that Section, the entire lien release process with respect to progress payments is little more than a meaningless exercise.

The revised progress payment forms proposed by Mr. Hunt are certainly a step in the right direction. However, I am still concerned about possible ambiguities in the third paragraph of those two forms. I would suggest that the reference to "mechanic's lien, stop notice or bond rights" in the first paragraph be defined collectively as "Lien Rights". I would then revise the first sentence of the third paragraph as follows:

> "This document does not release any rights or remedies other than Lien Rights as provided above, nor does it release Lien Rights for: (a) any retentions existing as of the

P.O. Box 6370, Newport Beach, California 92658-6370 (714) 720-2323

release date, (b) Work furnished in connection with any other job, or (c) Work furnished after the release date."

In Section 13 of his report, Mr. Hunt proposes an additional subdivision (q) be added to Civil Code Section 3097. There are a number of problems with that suggested addition:

(i) The analysis and suggested language presume that an unrecorded bond may limit lien rights, despite the fact that Section 3235 et seq of the Civil Code refers only to recorded bonds. Under the circumstances, the reference to unrecorded bonds is confusing at best.

(ii) The requirement that a copy of the bond must be provided within ten days after the Preliminary Notice is needlessly restrictive. It should not matter when the information is provided as long as the claimant is not prejudiced.

(iii) The reference to the "owner and contractor" should instead be to the "owner or contractor".

(iv) The entire thrust of the provision that a copy of the bond "must" be furnished is inappropriate. Rather, the subdivision, if needed at all, should merely recite that if a copy of the bond is not provided in time to avoid prejudicing lien rights, then the claimant shall retain those lien rights.

In Section 15 of his report, Mr. Hunt recommends that the claimant be protected from his own errors in preparing the Preliminary Notice. Of all the proposed recommendations, this is easily the most troubling. First, as a practical matter, my experience is that minor non-substantive errors that would not prejudice the recipient are not deemed by the courts to vitiate lien rights. Second, the proposed language imposes a sweeping burden on the recipient of the Preliminary Notice to perform a clinical analysis of that Notice within ten days, regardless of whether any inaccuracy should have been known to the claimant or could have been discovered with reasonable care. Note that the proposed language requires that any inaccuracy must be identified by the recipient even if such inaccuracy is not patent on the face of the Preliminary Notice. In short, this proposal is one that needs to be quickly jettisoned.

One issue that is not addressed in Mr. Hunt's report is the definition of "completion" in the Mechanic's Lien Law. Because the lien periods are keyed to the date of completion of the project, as is the validity of a recorded Notice of Completion, it is essential that the date of completion be ascertainable with some confidence. Unfortunately, conflicting case law and ambiguous code provisions make that determination more of a crap shoot.

Without proposing specific language at this time, I believe that the Code should reflect the following principles:

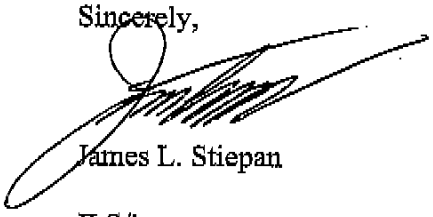
(i) The date of completion should be tied to the standard real estate concept of substantial completion, exclusive of minor punch list items that do not materially adversely affect use or occupancy. This is consistent with the practice in most construction contracts to effect final payment with a specified time after such substantial completion. However, as a matter of fairness to the "mechanic" who is actually performing a portion of the remaining punch list work, the date of completion for that claimant would occur upon the later completion of the portion of the work for which that claimant is responsible.

(ii) The date of issuance of a certificate of occupancy, if applicable, may be used as a proxy for substantial completion. Perhaps this is what is intended by reference to "acceptance by any public entity" in Section 3086, although that is not sufficiently clear.

(iii) Rather than requiring that a Notice of Completion must be recorded within a narrow window of ten days, Civil Code Section 3093 should provide that the lien filing period would be extended on a day-for-day basis for any later (i.e., after ten days) recordation of the Notice.

Thank you in advance for your consideration of these comments. I look forward to hearing of any further developments.

Sincerely,



James L. Stiepan

JLS/js

U:\USERS\SEARS\WPERF\LTRS\ULRICH.WPD