Study H-821 October 19, 2006

Memorandum 2006-43

Mechanics Lien Law
(Analysis of Comments: Private Work of Improvement)

INTRODUCTION

The Commission has circulated a tentative recommendation on *Mechanics Lien Law* (June 2006). The tentative recommendation proposes a complete revision of the California mechanics lien law and associated construction remedies. The recommendation was posted on the Commission's website and widely circulated for comment, with a request for responsive comments by September 30, 2006.

We have received a substantial number of comments on the tentative recommendation. The comments are attached as an Exhibit to Memorandum 2006-39. We are most grateful to the many commenters, who have devoted substantial time and effort in an attempt to help the Commission produce the best final recommendation possible.

Our next objective is to revise the tentative recommendation as appropriate in light of the comments, with the goal of a final recommendation to the 2007 Legislature.

ORGANIZATION OF MEMORANDA

Summary and analysis of comments received by the Commission will be presented to the Commission in two memoranda, and corresponding supplements.

This first memorandum analyzes general comment, and comments on much of the part of the draft statute relating to a private work of improvement. Supplements to this memorandum will continue and conclude analysis of comments relating to a private work, including the lien release procedure, stop payment notices, and payment bonds.

The second memorandum (Memorandum 2006-44) will analyze comments on the part of the draft statute relating to public work contracts, overarching issues, and conforming revisions.

Each memorandum references comments received by citing to pages in the Exhibit attached to Memorandum 2006-39.

The staff has made a small number of non-substantive technical changes to the language of the tentative recommendation. If statutory text appearing in a

memorandum differs from the tentative recommendation, the Commission should rely on the text appearing in the memorandum.

Many commenters have described their personal experience in this subject area in an introduction to material submitted. This experience is generally not repeated within a memorandum. However, the Commission may find a review of this information helpful in evaluating individual comments.

Independent of submitted comments, the staff has also discovered a number of issues raised by the draft statute that warrant Commission consideration. These matters will be presented in conjunction with comments from commenters, but will be identified as staff comments.

GENERAL COMMENTS

Virtually all commenters commend the Commission on its work on this study. Most commenters express the view that, at least overall, the draft statute makes the law in this area far more clear.

Preliminary Part of Tentative Recommendation

Sam K. Abdulaziz, an attorney with Abdulaziz, Grossbart & Rudman in North Hollywood, suggests two editorial revisions to the narrative portion of the tentative recommendation. Exhibit p. 14.

Page 2 of the recommendation states that "The practice in the [construction] industry is to extend credit readily and rely on prompt payment. …. Ultimately, the improved property stands as security for the entire project."

Mr. Abdulaziz disagrees that credit is extended "readily." Mr. Abdulaziz further suggests the recommendation should indicate that "if the claimant acts appropriately, the improved property stands as security," since perfecting a lien "clearly is not a slam dunk."

The staff recommends that **the quoted phrase above be modified as follows**: "The practice in the [construction] industry is to extend credit ~~readily~~ and rely on prompt payment. …. Ultimately, <u>if the claimant acts appropriately,</u> the improved property stands as security for the entire project."

Relocation of Public Works Statute to Public Contract Code

The majority of commenters also agree with the proposed separation of the public works statutes from those relating to private works of improvement, as well as relocation of the public works statutes into the Public Contracts Code.

One exception is Howard B. Brown, a Manhattan Beach attorney with significant experience in this area. (Mr. Howard B. Brown will hereinafter referred to as "Mr. Brown." With no disrespect intended to either, commenter Michael Brown, who has submitted a single comment, will be referred to as "Michael Brown.")

Mr. Brown believes separation is not needed, and that the duplication of provisions necessitated by the separation will cause a significant degree of confusion. Exhibit p. 23. He suggests it is inevitable that down the road only one of a pair of duplicate sections will be amended, which could lead to inconsistency in interpretation, and more confusion. He further notes that renumbering may require briefs and judicial opinions to reference sections in the statute not only by number, but with an additional tag "previously section ABC that was previously XYZ." Exhibit p. 22.

J. David Sackman, an attorney with Reich, Adell, Crost & Cvitan, a law firm in Los Angeles that represents employee benefit funds in California, expresses no objection to the separation of the two parts. Exhibit p. 62. However, Mr. Sackman stresses the importance of maintaining consistency between the reproduced common sections. He urges the inclusion of a Comment in the draft statute along the following lines:

> By separating the provisions for remedies under public works into a different Code from the provisions for remedies under private works, it is not the intent of this legislation that they be interpreted differently. Rather, the intent of this legislation is to continue current law, in which the provisions for remedies under public works are interpreted identically with the corresponding provisions for private works, to the greatest extent possible. Both arise from the same mandate, under the California Constitution, Art. XIV § 3, to provide such remedies for unpaid laborers and material suppliers. See, e.g., N.V. Heathorn, Inc. v. County of San Mateo, 126 Cal.App.4th 1526, 1534-35, 25 Cal.Rptr.3d 400, (1st. Dist. 2005) ("lien rights of those who provide labor and materials is protected through constitutional mandate in both the public and private spheres."); Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric, 247 F.3d 920, 928-29 (9th Cir. 2001) (remedies for public and private works part of the same "integrated statutory scheme" to be interpreted the same).

The comments expressed by Mr. Brown relating to separation and renumbering are not without merit. However, the Commission's conclusion on this point was that the differences between a private work of improvement and a

public works contract are sufficient that it may well be appropriate to allow the law governing each to evolve in its own direction. The staff recommends that **the Commission continue to endorse the current organization of the draft statute.**

The concern raised by both Mr. Brown and Mr. Sackman as to differing future interpretations of identical provisions is arguably a distinct issue. There are currently many individual sections in the mechanics lien statute intended to apply to both private works of improvement and public works projects. The Commission proposes to reproduce the provisions of these sections in two separate codes. At present, it appears many of these provisions were intended to have identical application to both private and public works.

However, there are also individual sections in the existing mechanics lien statute for which identical application to both private and public works does *not* appear to have been contemplated. (See i.e., Civ. Code § 3086, relating to completion of a work of improvement.) Moreover, provisions of many existing individual sections, once made applicable to only a private *or* a public work, may *require* independent interpretation or application in the future, in order to effectuate a developing policy applicable only to one of the types of work.

The staff recommends that **the draft statute not include a Comment indicating duplicate provisions are intended to have identical interpretation.**

Numbering of Private Work Statute

The draft statute relocates the sections relating to private works of improvement within the Civil Code, and assigns the provisions different section numbers.

Gibbs, Giden, Locher & Turner LLP ("GGLT"), a law firm in Los Angeles, approves of the relocation. Exhibit p. 131. However, GGLT notes that the section numbers in the Civil Code proposed for the placement of the private works part of the statute correspond to section numbers in both the Business and Professions Code and the Public Contracts Code that generally relate to construction remedies. GGLT suggests selecting a different series of numbers in the Civil Code for the private work part of the draft statute, so as to eliminate ambiguity or confusion when shorthand references are made to section numbers in the respective codes.

The overlapping run of section numbers in the Business and Professions Code extends from Section 7000 to Section 7191. The overlapping run of section numbers in the Public Contract Code extend from Section 7100 to Section 7200.

GGLT's suggestion, which the staff believes has merit, could be relatively easily implemented.

The staff recommends that **the part of the draft statute addressing private works of improvement, currently proposed as Civil Code Sections 7000 through 7848, be relocated to Civil Code Sections 8000 – 8848.** That would also make it unnecessary to displace existing Civil Code Sections 7100 – 7106, which could be left in place.

Alternatively, we could swap places with our proposed relocation of the common interest development statutes. Currently we are planning to locate those statutes beginning at Civil Code Section 4000. We see no reason they couldn't instead start at Section 7000.

PRIVATE WORK OF IMPROVEMENT (CIVIL CODE SECTIONS 7000 - 7848)

Definitional Issues

GGLT proposes that in each section in the draft statute in which a specially defined term is used, the first letter of the defined term be capitalized. Exhibit p. 148. GGLT suggests that this capitalization will make clear to readers that the term has been given a special definition by the Legislature.

While perhaps commendable in theory, GGLT's suggestion runs counter to established legislative practice. We do include in the Comment to each section a cross-reference to the definitions of each defined term used in that section.

The staff recommends that **this suggestion not be implemented.**

New Proposed Section 7001 ("Claim")

GGLT notes that various sections in the draft statute make reference to the term "claim," "rights," and "lien," sometimes together and sometimes individually, citing several illustrations in the draft statute. Exhibit p. 143. GGLT suggests this usage is redundant and/or confusing. It suggests the word "claim" be used exclusively throughout the statute as a substitute for each of these terms.

In conjunction with this suggestion, GGLT suggests the inclusion in the statute of a statutory definition of the term "claim," in a new proposed Section 7001. GGLT suggests the term should be defined as "a claim of lien, a stop payment notice, and/or a claim against a payment bond…."

The staff believes that any ambiguity that might exist in a particular section relating to the use of these terms can be addressed, if necessary, by a

modification to that section. While the draft statute does propose to identify and define a *person* having any rights under the draft statute as a "claimant," the rights themselves are not coextensive. Reference to all such rights with a single term would likely generate more confusion, rather than less.

The staff recommends that **this suggestion not be implemented**.

Section 7002 ("Claimant")

> **§ 7002. Claimant**
>
> 7002. "Claimant" means a person that has or exercises a right **under this part** to record a claim of lien, file a stop payment notice, or assert a claim against a payment bond.

The staff is concerned this definition may be overbroad. The statutory "part" referenced in Section 7002 contains the provisions that allow a design professional to record a design professional lien. Section 7002 therefore defines a design professional recording a design professional lien as a "claimant."

The existing body of law that allows a design professional to record a lien for design work performed before the commencement of a work of improvement is *not* currently incorporated within existing mechanics lien law. See Civ. Code §§ 3081.1 to 3081.10. Moreover, the sections governing a design professional lien are narrowly drawn, and do not impose the same obligations nor grant the same rights or remedies as does the mechanics lien law.

The Commission has previously decided to incorporate the sections governing design professional liens into the draft statute, while still attempting to retain existing distinctions between the two types of liens as to obligations, rights, and remedies.

However, if a design professional recording a design professional lien is defined by the draft statute as a "claimant," these distinctions would be largely obliterated. The term "claimant" is referenced in sections of the draft statute setting forth the rights and responsibilities of mechanics lien claimants as to contracts (Section 7160), progress payments (Section 7170), preliminary notice requirements (Section 7202), lien claim requirements (Section 7418), consequences of recording a false lien claim (Section 7424), payment bonds (Section 7428), time for commencement of enforcement action (Section 7460), release petitions (Section 7480), stop payment notices (Section 7502), and other subjects.

Consistent with the Commission's decision not to make the provisions of mechanics lien law generally applicable to design professional liens, the staff recommends **modifying the definition of "claimant," as well as making a technical change in the definition, as follows:**

> **§ 7002. Claimant**
>
> 7002. "Claimant" means a person that has ~~or exercises~~ a right ~~under this part~~ to record a claim of lien under Chapter 4 (commencing with Section 7400) of this part, file a stop payment notice, or assert a claim against a payment bond.

Section 7003 ("Commencement")

> **§ 7003. Commencement**
>
> 7003. A work of improvement "commences" when either of the following occurs:
>
> (a) **Material or supplies that are used, consumed, or incorporated in the work of improvement are delivered to the site**.
>
> (b) There is actual visible work of a permanent nature on the site.
>
> **Comment**. Section 7003 is new. It codifies case law. See, e.g., Walker v. Lytton Sav. & Loan Ass'n, 2 Cal. 3d 152, 159, 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).

Mr. Abdulaziz agrees that this definition accurately states existing law. Exhibit p. 14. However, Mr. Abdulaziz notes that until material or supplies delivered to a site are *actually* used, consumed, or incorporated in the work of improvement, the provider of the material or supplies does not have a lien right. He wonders whether the definition provided by this section, without further clarification, might cause confusion.

GGLT notes that a determination of when "commencement" of a work of improvement occurs is an important matter, as all mechanics liens "relate back" to the date when a work of improvement "commences." Exhibit p. 140. However, GGLT asserts that case law on the issue is fairly well developed, and is not sure why codification of the term is needed. If it is codified, GGLT suggests that subdivision (a) as drafted is confusing, as it does not make clear whether "commencement" occurs when materials or supplies are *delivered*, or when they are *used*. Exhibit p. 132.

GGLT urges that subdivision (a) be modified to instead read: "Materials or supplies *intended to be* used, consumed or incorporated in the work of improvement, are delivered to the site." Exhibit p. 140. GGLT notes that an important aspect of "commencement" is notice, and requiring a retrospective review of materials delivered to a site in order to determine whether materials were ultimately used in the work of improvement would tend to frustrate that objective.

On the other hand, GGLT suggests that a lender, certainly an entity needing notice whether a work of improvement has "commenced," would not likely engage in this retrospective review in any event. GGLT asserts the practice of most responsible lenders is to inspect a site immediately prior to recordation of a deed of trust. GGLT believes that the mere presence of delivered materials on the site will normally be enough to cause the lender to refrain from recording.

The staff continues to believe that a codification of when delivery of materials to a site results in "commencement" would be helpful to practitioners. A lengthy discussion in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1240-1241, 8 Cal. Rptr. 2d 298 (1992) suggests that this particular issue is *not* well settled, an assessment perhaps confirmed by GGLT's proposed substantive revision of the section. However, in order to achieve this codification, a substantive issue must be resolved — if materials delivered to a site are *intended* to be used in the construction, but ultimately are not *actually* used, should the delivery constitute "commencement" of the work of improvement, or not?

There is no dispute, as Mr. Abdulaziz states, that if delivered material or supplies are not *actually* used, consumed or incorporated in a work of improvement, the *deliverer* of the material or supplies has no lien right. However, "commencement" of the work of improvement, which governs the rights of *all* potential lien claimants, is a separate question.

Although somewhat technical (and perhaps primarily hypothetical), this issue is not trivial. The exact "commencement" of a work of improvement is a very important date in mechanics lien law. It affects not only the priorities of recorded encumbrances, but also the effect of an owner's recorded payment bond, and the extinguishment of a design professional lien.

GGLT apparently urges that if material is "intended" to be used, but is ultimately *not* used, the delivery of the material should still mark commencement. However, the staff is not convinced GGLT's suggested formulation would be a workable statutory standard. First, whose "intent"

would govern — the supplier, the supplier's contractor, some other person, or some objective standard? Moreover, the staff is concerned that unverifiable and possibly less than objective testimony as to anyone's "intent" would not be a reliable means of resolving a potentially significant dispute over whether or when "commencement" had occurred.

In order to clarify the section, the staff recommends that **the section and its accompanying Comment be modified, as follows:**

> **§ 7003. Commencement**
>
> 7003. A work of improvement "commences" ~~when~~ on either of the following ~~occurs~~ events:
>
> (a) Delivery to the site of material ~~Material~~ or supplies that are thereafter used, consumed, or incorporated in the work of improvement ~~are delivered to the site~~.
>
> (b) ~~There is actual visible~~ Visible work of a permanent nature on the site.
>
> **Comment**. Section 7003 is new. It codifies case law. See, e.g., Walker v. Lytton Sav. & Loan Ass'n, 2 Cal. 3d 152, 159, 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).
>
> Although mere delivery of material or supplies to a site can mark "commencement" of the work of improvement, the person delivering the material or supplies has no lien right until the material or supplies are actually used, consumed, or incorporated in the work of improvement.
>
> See also Section 7038 ("site" defined).

Section 7004 ("Construction lender")

> **§ 7004. Construction lender**
>
> 7004. "Construction lender" means either of the following:
>
> (a) A mortgagee or beneficiary under a deed of trust lending funds for payment of construction costs for all or part of a work of improvement, or the assignee or successor in interest of the mortgagee or beneficiary.
>
> (b) An escrow holder or other person holding funds provided by an owner, lender, or another person as a fund for payment of construction costs for all or part of a work of improvement.
>
> **Comment.** Section 7004 continues former Section 3087 without substantive change.

GGLT questions whether the "construction security escrow account" referenced in the draft statute's proposed Section 7726 (relating to escrow accounts in specially defined "large projects") would be included with the

definition of "construction lender" provided by this section. Exhibit p. 148. GGLT urges that the definition of "construction lender" in Section 7004 be modified to provide that it is not.

The staff believes this issue is better addressed as a consideration of a modification of Section 7726, and will be discussed in that section of this memorandum.

Section 7006 ("Contract")

> **§ 7006. Contract**
>
> 7006. "Contract" means an agreement between an owner and a direct contractor that provides for all or part of a work of improvement. The term includes a contract change.
>
> **Comment.** Section 7006 continues former Section 3088 and adds a reference to a contract change. The term "contract change" replaces "written modification of the contract" as used in former Section 3123. This codifies the effect of *Basic Modular Facilities, Inc. v. Ehsanipour*, 70 Cal. App. 4th 1480, 83 Cal. Rptr. 2d 462 (1990).
>
> There are instances in this part where the term is not used in its defined sense. See, e.g., Sections 7028 (contract of purchase), 7130 (subcontract). See also Section 7000 (application of definitions).
>
> ….

Mr. Abdulaziz believes this definition may cause some confusion, as the term "contract" is often afforded different meanings in different contexts, including court decisions. Exhibit p. 15.

The Commission has gone back and forth on this issue. A significant problem is that many existing statutes are ambiguous in their use of the term. If we attempt greater precision in drafting, we are likely to generate problems that don't exist now, as well as opposition from those who read the existing provision differently.

The staff believes the section (including the Comment) sufficiently clearly indicates that the term has been given a special statutory meaning, solely for purposes of this part of the draft statute.

The staff recommends that **Section 7006 be retained as drafted**.

Section 7012 ("Direct contractor")

> **§ 7012. Direct contractor**
>
> 7012. "Direct contractor" means a person that has a direct contractual relationship with an owner.

Mr. Abdulaziz questions the use of the term "direct contractor" in place of "prime contractor," the term he indicates is commonly used in the industry. Exhibit p. 14. Mr. Brown also suggests the term "prime contractor" is nearly universally used in the trade to refer to the contractor hired by an owner, and urges that it continue to be used. Exhibit p. 24.

Mr. Brown also asserts that the Commission's definition for the term is ambiguous. He believes it would allow for anyone with an *implied* "direct contractual relationship" with an owner (such as an employee of the owner) to be considered a "direct contractor." Mr. Brown suggests that the definition, if it is retained, be modified to read:

> **§ 7012. Direct contractor**
>
> 7012. "Direct contractor" means a person that has ~~a direct~~ entered into a written or oral contractual relationship with an owner.

The Commission has previously decided to use the new term "direct contractor" to encompass *all* contractors that have a direct contractual relationship with an owner, replacing the variously used terms "prime contractor," "original contractor," and "general contractor." However, the Commission's new term "direct contractor" is broader than the term "prime contractor." The latter term is generally understood to indicate the *one* contractor with principal responsibility for an entire project, including primary or sole responsibility for hiring all other contractors and suppliers. In an owner-builder project, as well as on some traditional construction projects, there could exist *many* "direct contractors." The staff recommends that **the Commission continue to use the term "direct contractor" in the draft statute.**

As for Mr. Brown's suggested revision of the definition, the staff notes that the language Mr. Brown challenges is taken verbatim from the definition of "original contractor" that has been a part of existing law since 1971. Civ. Code § 3095. Absent an indication that the language presents anything other than a theoretical problem, the staff recommends that **this portion of the definition of "direct contractor" remain as drafted**.

However, the staff notes that another part of the definition is unintentionally inconsistent with existing law's definition of the term "original contractor." Section 3095 provides that an "original contractor" means "any *contractor* [as

compared to any *person*] who has a direct contractual relationship with the owner.

The distinction between the two italicized terms is significant, as the draft statute's definition of "direct contractor" would include a *material supplier* that has a direct contractual relationship with an owner. However, in *Vaughn Materials Co. v. Security Pacific National Bank*, 170 Cal.App.3d 908, 216 Cal. Rptr. 605 (1985), the court held that a material supplier (formerly, a "materialman") has historically never been considered a "contractor," and that a material supplier with a direct contractual relationship with an owner is therefore *not* an "original contractor."

(The term "contractor" is not defined either in the existing mechanics lien statute, or in the new draft statute. However, this appellate exclusion of material suppliers from the definition of "contractor," although seemingly at odds with the common sense definition of the word, appears to be completely consistent with usage in the industry.)

The Commission's new term "direct contractor" has been used throughout the draft statute as a substitute for the term "original contractor." The Commission's definition of "direct contractor" would therefore unintentionally abrogate the holding of *Vaughn*, and substantially change the status of certain material suppliers.

The staff recommends that **Section 7012 be modified as follows**:

> **§ 7012. Direct contractor**
>
> 7012. "Direct contractor" means a ~~person~~ contractor that has a direct contractual relationship with an owner.

Section 7014 ("Express trust fund")

> **§ 7014. Express trust fund**
>
> 7014. "Express trust fund" means a laborers compensation fund to which a portion of a laborer's total compensation is to be paid pursuant to an employment agreement or a collective bargaining agreement for the provision of benefits, including, but not limited to, employer payments described in Section 1773.1 of the Labor Code and implementing regulations.

Mr. Sackman has provided the Commission with an extensive discussion of the legislative history and judicial review of sections of the mechanics lien law that seek to define or confer rights on what are generally known as employee

benefit funds. Exhibit p. 53. For reasons that relate to possible preemption by the federal Employment Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 et seq), Mr. Sackman urges substantial revision of a number of sections in the draft statute, including this section.

A revision of this section, as well as several other related revisions, is discussed in a subsequent section of this memorandum entitled "Laborers Compensation Fund Issues."

Section 7016 ("Labor, service, equipment, or material")

> **§ 7016. Labor, service, equipment, or material**
>
> 7016. "Labor, service, equipment, or material" **includes but is not limited to** labor, skills, services, material, supplies, equipment, appliances, transportation, power, surveying, construction plans, and construction management provided for a work of improvement.
>
> **Comment.** Section 7016 is a new definition. It is included for drafting convenience. The phrase is intended to encompass all things of value provided for a work of improvement, and replaces various phrases used throughout the former law, including "labor or material," "labor, services, equipment, or materials," "appliances, teams, or power," and the like. The definition applies to variant grammatical forms of the phrase used in this part, such as "labor, service, equipment, *and* material."
>
> See also Section 7046 ("work of improvement" defined).

Mr. Abdulaziz urges that if this new section is intended to be all-inclusive, it should include specific references to temporary services, such as fences, power, scaffolding, and equipment rentals, all of which are routinely the subject of lien claims. Exhibit p. 15.

The staff notes that some question exists whether the provision of temporary fencing can form the basis for a lien claim. See *Lambert Steel Co. v. Heller Financial, Inc.*, 16 Cal.App.4th 1034, 1043, 20 Cal. Rptr. 2d 453 (1993). The staff recommends that **the section be retained as drafted, but that the section Comment be modified as follows:**

> **Comment.** Section 7016 is a new definition. It is included for drafting convenience. The phrase is intended to encompass all things of value ~~provided for~~ that contribute to a work of improvement, and replaces various phrases used throughout the former law, including "labor or material," "labor, services, equipment, or materials," "appliances, teams, or power," and the like. The definition applies to variant grammatical forms of the

phrase used in this part, such as "labor, service, equipment, *and* material."

See also Section 7046 ("work of improvement" defined).

The Association of California Surety Companies urges that this section should exclude from its application persons who merely advance funds for labor, citing *Primo Team Inc. v. Blake Construction Co.*, 3 Cal. App. 4th 801, 4 Cal. Rptr. 2d 701 (1992). Exhibit p. 113. The Association further urges that the section should exclude persons who are not licensed contractors, and which only supply workers for the project, pay wages and employment benefits, provide workers' compensation insurance, and are responsible for tax withholding, citing *Contractors Labor Pool, Inc. v. Westway Contractors, Inc.*, 53 Cal. App. 4th 152, 61 Cal. Rptr. 2d 715 (1997).

The suggestions of the Association are not truly criticism of this section's definition, but rather represent contentions that certain entities should be statutorily excluded from all remedies under the mechanics lien law. Because the entitlement to any such remedies generally flows from an application of proposed Section 7400 (Persons entitled to lien), **the suggestions of the Association will be discussed in the section of this memorandum addressing Section 7400.**

The American Insurance Association, National Association of Surety Bond Producers, and Surety & Fidelity Association of America (hereinafter "joint surety commenters") wonder whether this section's definition will lead to unintended results. Exhibit p. 90. Specifically, the group asks whether the reference to "skills," "surveying," and "construction plans" would allow claims by design professionals and others who do not work on the construction site.

Assuming a person otherwise qualifies as a claimant entitled to one or more mechanics lien remedies, the staff is not aware of any provision in existing law that requires a claimant's *physical presence* at the site of a work of improvement, as seems to be suggested by the joint surety commenters. **The staff solicits input on this point from practitioners.**

Pending such input, however, the staff recommends that **Section 7016 be retained as drafted**.

Section 7018 ("Laborer")

> **§ 7018. Laborer**
>
> 7018. "Laborer" means a person who, acting as an employee, performs labor, or bestows skill or other necessary services, on a work of improvement.

Mr. Brown urges that this definition is too broad, as it could include office personnel who do no work directly benefiting a work of improvement. Exhibit p. 25. He suggests the phrase "on a work of improvement" be modified to "*directly for and upon* the work of improvement," or that the section make some other reference to a physical connection to the work of improvement.

The language of Section 7018 is taken virtually verbatim from existing law. See Civ. Code § 3089(a). Consistent with the stated intent of the Commission to strive to avoid unintended substantive changes in this reorganization, the staff recommends that **the section be retained as drafted**.

Mr. Sackman urges revision of this section, for reasons relating to ERISA preemption. Exhibit p. 53. **His suggested revision is discussed in the section of this memorandum entitled "Laborers Compensation Fund Issues."**

Section 7020 ("Laborers compensation fund")

> **§ 7020. Laborers compensation fund**
>
> 7020. "Laborers compensation fund" means a person, including an express trust fund, to which a portion of the compensation of a laborer is paid by agreement with the laborer or the collective bargaining agent of the laborer.

Mr. Sackman urges revision of this section, for reasons relating to ERISA preemption. Exhibit p. 53. **His suggested revision is discussed in the section of this memorandum entitled "Laborers Compensation Fund Issues."**

Section 7026 ("Material supplier")

> **§ 7026. Material supplier**
>
> 7026. (a) "Material supplier" means a person that provides material or supplies to be used or consumed in a work of improvement.
>
> (b) Materials or supplies delivered to a site are presumed to have been used or consumed in the work of improvement. The presumption established by this subdivision is a presumption affecting the burden of proof.

> **Comment.** Subdivision (a) of Section 7026 replaces the term "materialman" with the term "material supplier" to conform to contemporary usage under this part. It continues former Section 3090 without substantive change.
>
> **Subdivision (b) is new. It reverses existing law.** See, e.g., Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc., 18 Cal. App. 3d 54, 58, 95 Cal. Rptr. 673 (1971).
>
> ☞ **Note.** Addition of subdivision (b), creating a presumption in favor of a material supplier, is contingent on development of a balanced package that provides offsetting benefits to other persons affected.

The joint surety commenters urge that subdivision (a) of this section should require that materials or supplies be "substantially consumed" in the work of improvement. Exhibit p. 96. For example, the group urges that the section should not apply to tools or forms that can be reused.

The staff is concerned that "substantial" consumption of material would not be a workable statutory standard, as the term seems too vague for practical use. How many pieces in a lot would have to be used to constitute substantial consumption? If the focus was only on provided tools or similar items, what percent of wear or depreciation would count as substantial?

The issue the joint surety commenters raise is also connected to a larger issue affecting many sections in the draft statute. In sum, there is much in existing mechanics lien law that is not codified, and is based either on common law principles, or on judicial interpretation of existing statutes. Since the draft statute for the most part seeks to continue existing law, many of these statutory gaps have also been continued.

Focusing on the joint surety commenters' specific contention, it may be that, as a matter of policy, the use of reusable tools or forms should not give rise to a claim under the mechanics lien law. It also may be that a court presented with this issue might hold, or has held, that such use *does not* give rise to such a claim. (The joint surety commenters cite no authority for their contention, and the staff is unaware of any appellate opinion directly on point.) What is relatively certain, however, is that no existing statute in the mechanics lien law provides a resolution of this issue, one way or another.

As the Commission's goal in this study has been largely to organize and clarify existing statutory law, rather than attempt to codify appellate decisions, **the staff does not recommend implementation of the joint surety commenters' suggestion**.

The Association of California Surety Companies objects to subdivision (b) of this section, urging that the presumption in the provision could facilitate dubious claims against payment bonds. Exhibit p. 113. It points out that material or supplies delivered to a site are not always used in a project, that a surety generally has no representative on site to verify use, and that claims against payment bonds generally arise when the contractor on site who *could* verify use has defaulted in its own obligation to pay the supplier. The Association argues that the burden imposed on suppliers under existing law to actually prove use is not excessive, if they keep competent records. Moreover, the Association argues that most non-fungible items supplied to a project do not require the presumption, as the use of these items can be easily demonstrated by reference to plans and specifications.

The joint surety commenters also assess the presumption in subdivision (b) as "significant." Exhibit p. 96. However, the joint surety commenters suggest that if the section was modified to require "substantial consumption" of material or supplies, a contractor or surety should be able to rebut the subdivision's presumption when necessary, by showing that the requisite consumption of the material or supplies had not occurred.

GGLT offers that the proposed revision is "a great change for material suppliers, but not good for owners and general contractors." Exhibit p. 150. It asserts that delivered materials are frequently not used, and on other occasions delivered to the wrong site. GGLT ultimately urges that, since lien claimants can record a lien based solely on an allegation that money is owed, "it would seem only fair" that the claimant supplier should have the burden of proving material was actually used in a work of improvement.

GGLT also urges that, if the presumption is to be retained, the section should specify whether the presumption is rebuttable or conclusive.

In the Staff Note accompanying this section, the Commission indicated that including the presumption of subdivision (b) in the draft statute, an inclusion that would constitute an addition to the existing statutory body of law, is contingent on the development of a balanced package that provides offsetting benefits to "other persons" affected. Sureties constitute such "other persons," and the contentions of the Association are not without merit.

In drafting a new mechanics lien statute, the Commission has for the most part steered away from codifying even generally settled aspects of mechanics lien law that do not appear in the existing statute. By including this presumption,

the Commission would not only be departing from that practice, but would be doing so in a manner that would *reverse* generally settled case law. In light of the many other challenges to the draft statute that may arise in the legislative process, the staff is wary about proposing a significant substantive change in the law, in the face of reasonable opposition.

The staff welcomes additional comment on this issue from practitioners. However, staff is now inclined to recommend that **the Commission delete subdivision (b) from the draft statute**.

New Proposed Section 7045 ("Work")

There are numerous instances throughout the draft statute in which the term "work" is used as a shorthand reference for a contribution to a work of improvement, in place of the longer phrase "labor, service, equipment, and material." In order to clarify that no distinction is intended between the two phrases, and that (unless otherwise specified) the provision of "labor and service" is not to be distinguished from the provision of "equipment or material," the staff recommends **the following new section be added to the statute, and that cross-references be added to Comments in the statute as appropriate**.

> **§ 7045. Work**
>
> 7045. "Work" means the provision of labor, service, equipment, or material to a work of improvement.
>
> **Comment.** Section 7045 is a new definition. It is included for drafting convenience.
>
> See also Sections 7016 ("labor, service, equipment, and material" defined), 7046 ("work of improvement" defined).

Section 7046 ("Work of improvement")

> **§ 7046. Work of improvement**
>
> 7046. (a) "Work of improvement" includes but is not limited to:
>
> (1) Construction, alteration, repair, demolition, or removal, **in whole or in part**, of, or addition to, a building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road.
>
> (2) Seeding, sodding, or planting of property for landscaping purposes.
>
> (3) Filling, leveling, or grading of property.
>
> (b) Except as otherwise provided in this part, "work of improvement" means the **entire** structure **or scheme** of improvement as a whole, and includes site improvement.

Mr. Brown contends the bolded language above is internally inconsistent, confusing, and probably unnecessary. Exhibit p. 27.

While Mr. Brown's contention may have some theoretical merit, the language at issue is taken verbatim from existing law. See Civ. Code § 3106. Absent an indication the language is causing a real world problem, the staff recommends that **the section be retained as drafted.**

Miscellaneous Provisions

Section 7052 (Jurisdiction and venue)

> **§ 7052. Jurisdiction and venue**
>
> 7052. The proper court for proceedings under **this part** is the superior court in the county in which a work of improvement, or part of it, is situated.

Mr. Brown urges that the reference in the section to "this part" is ambiguous. Exhibit p. 27.

Mr. Brown also urges it would be helpful to have separate sections identifying jurisdiction for a lien claim, a stop payment notice, and a payment bond claim. He suggests that if a stop payment notice or a claim against a payment bond were given in a county separate from the county where the work of improvement was located, jurisdiction would be unclear.

The staff has reviewed the section, and believes the language in the section is sufficiently clear and represents an accurate statement of existing law. The staff recommends that **the section be retained as drafted.**

Section 7056 (Filing and recording of papers)

> **§ 7056. Filing and recording of papers**
>
> 7056. (a) ….
>
> (b) If this part provides for recording a notice, claim 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) ….

Mr. Brown notes that under existing law, county recorders will record lien claims that are not acknowledged, but will insist on an acknowledgement for lien releases. Exhibit p. 28. Mr. Brown urges that subdivision (b) include an explicit reference to a "release of lien," to better assure consistent treatment.

The staff recommends that **the section be modified as follows**:

> **§ 7056. Filing and recording of papers**
>
> 7056. (a) ….
>
> (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) ….

Section 7057 (Effect of act by owner)

> **§ 7057. Effect of act by owner**
>
> 7057. No act of an owner in good faith and in compliance with a provision of this part shall be construed to prevent a direct contractor's performance of the contract, or exonerate a surety **on a performance or payment bond.**
>
> **Comment.** Section 7057 continues former Section 3263 without substantive change.
>
> **….**

The joint surety commenters recognize that this provision properly protects third parties, subcontractors, and suppliers against losing *payment bond* rights based on the act of an owner. Exhibit p. 96. However, the joint surety commenters argue that as a *performance bond* protects only an owner, if an owner breaches its contract then a surety or direct contractor should be able to assert the breach to the extent otherwise permitted by law.

Section 7057 continues Civil Code Section 3263, a section enacted in 1969, with no substantive change. The staff has not located a single annotation of the section since its enactment. Moreover, as the section on its face does not explicitly address an owner's breach of contract, it is far from clear the section would produce the result about which the joint surety commenters are concerned.

The staff recommends that **the section be retained as drafted**.

> **§ 7058. Co-owners**
>
> 7058. (a) An owner may give a notice or execute or file a document under this part on behalf of a co-owner if the owner acts on the co-owner's behalf and includes in the notice or document the name and address of the co-owner on whose behalf the owner acts.
>
> (b) **Notice to an owner of a leasehold or other interest in property that is less than a fee is not notice to an owner of the fee.** Nothing in this subdivision limits the effect of knowledge of an owner, or of notice to a reputed owner where that notice is authorized by statute.

GGLT points out two gaps in the coverage of subdivision (b) of this section. Exhibit p. 145. The issue GGLT raises is significant, as it substantially implicates the draft statute's provisions relating to preliminary notice, the cornerstone notice in mechanics lien law. The gaps have some relevance to *all* notices required to be given to owners (i.e., stop payment notices, stop work notices, notice of intent to record lien). However, as this section relates to the giving of preliminary notice, the gaps may be of constitutional dimension.

GGLT first notes that the draft statute defines an "owner" in proposed Section 7028, as follows:

> **§ 7028. Owner**
>
> 7028. "Owner" means:
>
> (a) With respect to a work of improvement, a person that contracts for the work of improvement.
>
> (b) With respect to property on which a work of improvement is situated or planned, a person that owns the fee or a lesser interest in the property, including but not limited to an interest as lessee or as vendee under a contract of purchase.
>
> (c) A successor in interest of a person described in subdivision (a) or (b).

Although subdivision (b) of Section 7058 provides that notice to an owner of *less* than a fee interest in property is not notice to owner of the fee, the subdivision does not address the *converse* issue — i.e., whether notice to a fee owner is notice to the owner of a leasehold interest.

GGLT asks how subdivision (b) would be interpreted in a scenario in which a lien claimant worked on leased property but gave preliminary notice only to the fee owner of the property. The subdivision is silent as to whether the preliminary

notice to the fee owner would constitute preliminary notice to the owner of the leasehold interest sufficient to allow recording and enforcement of a lien against *the leaseholder's* interest in the property. However, since the subdivision addresses only the reverse situation and indicates that in *that* situation "substitute" notice is precluded, an inference might be drawn that the statute is intended to allow substitute notice on a leaseholder.

Second, GGLT notes that the subdivision also does not consider the possibility of a *subtenant*, who also qualifies as an "owner" under Section 7028, and is referenced in subdivision (b) of Section 7058. In this context, GGLT notes that subdivision (b) is again silent as to whether preliminary notice given to *one* holder of a leasehold interest in property is effective notice as to *another* holder of a leasehold interest in the same property.

Finally, the staff also notes that subdivision (b) is silent as to whether preliminary notice given to a fee owner of property is effective as to *another fee owner* of the same property. (The subdivision also does not address whether a preliminary notice given to an "owner" defined by Section 7058(*a*) who only *contracted* for a work of improvement and has no ownership interest in the property at all would be effective notice as to any other "owner.")

GGLT takes no position on what the draft statute should provide, but urges clarification.

GGLT's contentions have merit, and the staff agrees that clarification of the issue is needed. However, resolution of the issue will also impact the sections of the draft statute relating to preliminary notice.

The provision in the draft statute relating to notice to co-owners has evolved over time. Until recently, the section contained a provision that stated:

> Notice to the owner of an interest in property is effective as to a co-owner of that interest.

Memorandum 2006-03, Exhibit p. 16.

After doing additional research however, the staff became concerned this provision may not be an accurate statement of existing law. See *Frank Pisano & Associates v. Taggart*, 29 Cal. App. 3d 1, 105 Cal. Rptr. 414 (1972), discussion in Memorandum 2006-20, at page 9. (In the *Pisano* case, the court seemed to indicate that preliminary notice to one fee owner of property did *not* constitute effective preliminary notice to another fee owner sufficient to enforce a lien against the second owner's interest.)

As an alternative resolution of the issue, the staff then proposed and the Commission agreed that this provision could be deleted, believing its objective could be achieved through reliance on other provisions of the draft statute relating to a "reputed owner." As relates to the giving of preliminary notice, those sections provide in pertinent part:

> **§ 7037. Reputed owner, direct contractor, or construction lender**
>
> 7037. (a) "Reputed owner" means a person that a claimant reasonably and in good faith believes is an owner.
>
> ….
>
> **§ 7202. Preliminary notice requirement**
>
> 7202. Before recording a claim of lien, giving a stop payment notice, or asserting a claim against a payment bond, the claimant shall give preliminary notice to the following persons:
>
> (a) The owner or reputed owner.
>
> ….

On further reflection however, it appears that reliance on these "reputed owner" provisions may not resolve all potential problems raised when preliminary notice is given to a single "owner," in a scenario in which co-owners exist.

These problems may ultimately be rooted in the failure of the draft statute to sufficiently distinguish and reconcile preliminary notice considerations important to a *claimant* (who wishes to satisfy a preliminary notice obligation as expeditiously as possible, in order to obtain remedies under the statute), and considerations important to an *owner* (who desires *actual* advance notice that a lien may be recorded, before the recording occurs).

Unfortunately, the considerations of both claimants *and* owners have arguable constitutional support. A claimant of course has a constitutional right to a mechanics lien and related remedies, and a substantial impairment of those rights would raise constitutional concerns. However, as indicated by the California Supreme Court in *Connolly Development v. Superior Court*, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976), an owner has a constitutional right to due process before a lien may be recorded against that owner's interest in property.

The draft statute as presently written may not adequately address these competing constitutional interests. For example, while under the draft statute preliminary notice given by a claimant to a "reputed owner" of property satisfies

the *claimant's* preliminary notice obligations under Section 7202, such notice would not appear to satisfy the arguable constitutional due process right of the *actual owner* of the property, who may know nothing about the ongoing work of improvement until well after a lien is recorded.

Under the draft statute, a lien claimant giving a single preliminary notice to any owner or "reputed owner" is permitted to record a lien against the property. This result appears to be a faithful continuation of existing law. See *Brown Co. v. Appellate Department*, 148 Cal. App. 3d 891, 196 Cal. Rptr. 258 (1983). However, if the lien claimant thereafter sought to *enforce* the recorded lien claim against the interest of an owner who had not been given preliminary notice (and who otherwise had no actual knowledge of the work of improvement), enforcement of the claim against that owner's interest in the property might be denied based on *Connolly*.

(Existing law appears to contain a judicially created equitable exception to the preliminary notice requirement, indicating that an owner who has actual knowledge of a claimant's work may not defeat a lien claim based on non-receipt of a preliminary notice. See *Kim v. JF Enterprises*, 42 Cal. App. 4th 849, 50 Cal. Rptr. 2d 141 (1996); *Truestone, Inc. v. Simi West Industrial Park II*, 163 Cal. App. 3d 715, 209 Cal. Rptr. 757 (1984).)

The result described above would of course not be satisfactory to the claimant, nor would the recording of the lien have been satisfactory to the owner. Precluding this outcome, however, is not an easy task. At bottom, there appears to be an unavoidable tension between a claimant's interest in obtaining a constitutionally afforded remedy without having to identify and provide notice to every individual who may have an ownership interest in a piece of property, and the *individual* interest each of these owners have in receiving advance notice of a lien, before their constitutionally protected property interest is impaired.

Existing statutory law does not resolve the issue. Most of the more recent appellate opinions addressing the issue seem to uphold a recorded lien if *any* "owner" or reputed owner has been given preliminary notice. However, in no case that the staff has located has the challenging owner put the constitutional issue front and center by alleging no knowledge of the work of improvement. The staff's conclusion is that the issue remains unresolved by the appellate courts.

Regardless of how (or whether) the Commission resolves this issue, however, the staff has found no support in existing law for different rules dependent on

the *type* of ownership interest involved. Therefore, unless the Commission wishes to promulgate such rules, the staff believes Section 7058 must be modified in some way to address the gaps in the section's application.

Because the law on the larger issue of when notice to one "owner" is effective as to another "owner" does not yet appear to have been resolved by the courts, the staff recommends that the entire issue be left for judicial interpretation. The staff therefore recommends that **subdivision (b) simply be deleted in its entirety from Section 7058**.

Section 7062 (Relation to other statutes)

> **§ 7062. Relation to other statutes**
>
> 7062. (a) This part does not apply to a transaction governed by the Oil and Gas Lien Act, Chapter 2.5 (commencing with Section 1203.50) of Title 4 of Part 3 of the Code of Civil Procedure.
>
> (b) This part does not limit, and is not affected by, improvement security provided under the Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7 of the Government Code.
>
> **Comment.** Subdivision (a) of Section 7062 restates former Section 3266(a) without substantive change. The substance of former Section 3266(b), which referred to former Streets and Highways Code Sections 5290-5297, is continued in Public Contract Code § 42010 (application of part). This part does not apply to a public work. See Section 7050 (application of part).
>
> Subdivision (b) is new. It clarifies the interrelation between this part and the Subdivision Map Act. For relevant provisions of that act, see Gov't Code §§ 66499-66499.10 (improvement security).

The Association of California Surety Companies requests clarification of new subdivision (b). Exhibit p. 115. It urges that the subdivision could be interpreted as either (1) granting rights to claimants on subdivision projects under *both* the draft statute *and* the Subdivision Map Act, or (2) indicating that, as to any conflict between the draft statute and the Subdivision Map Act, the latter controls. It urges that if the second interpretation is intended (as the staff believes it is), the section should provide it "has no application to the recovery on the payment security given under the Subdivision Map Act."

To avoid any confusion, the staff recommends that **the section be modified as follows:**

§ 7062. Relation to other statutes

7062. (a) This part does not apply to a transaction governed by the Oil and Gas Lien Act, Chapter 2.5 (commencing with Section 1203.50) of Title 4 of Part 3 of the Code of Civil Procedure.

(b) This part does not ~~limit, and is not affected by,~~ apply to or change improvement security ~~provided~~ under the Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7 of the Government Code.

Laborers Compensation Fund Issues

Mr. Sackman has provided the Commission with an extensive discussion of the legislative history and judicial review of the various sections of the mechanics lien law that seek to confer rights or status on what are generally known as employee benefit funds. Exhibit p. 53.

In summary, Mr. Sackman explains that these sections as originally drafted were declared by the California Supreme Court to be preempted by the Employment Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1001 et seq). See *Carpenters Southern California Administrative Corp. v. El Capitan Development Co.*, 53 Cal. 3d 1041, 811 P.2d 296, 282 Cal. Rptr. 277 (1991). Mr. Sackman explains that new legislation was thereafter carefully drafted and enacted in 1999 in an effort to avoid preemption, and that this new legislation — existing law — was subsequently upheld by both the Ninth Circuit Court of Appeals and the California Supreme Court as no longer preempted by ERISA. See *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric*, 247 F. 3d 920 (9th Cir. 2001), *Betancourt v. Storke Housing Investors*, 31 Cal .4th 1157, 82 P.3d 286, 8 Cal. Rptr. 3d 259 (2003).

Mr. Sackman indicates that a key rationale for these holdings was that, as contrasted with prior law, the new sections no longer "single[d] out" these funds for treatment under the mechanics lien law that differed in any way from treatment afforded similarly situated parties, such as the laborers themselves. Exhibit p. 59.

Mr. Sackman believes there is a significant risk that the draft statute, by again making use of sections that at least appear to provide separate statutory treatment for these funds, may again lead to a finding of ERISA preemption. He has proposed several revisions to various aspects of the draft statute that he suggests will minimize this perceived risk.

ERISA preemption is a complex area of law. In the context of this memorandum, the staff is unable to fully analyze all aspects of Mr. Sackman's

proposals. However, the revisions to sections relating to employee benefit funds that have been proposed by the draft statute were certainly not intended to effect any substantive change. Even without a complete analysis, the staff is sufficiently convinced by Mr. Sackman's presentation that there is little to be gained, and much to be risked, by making *any* revision (other than renumbering) to the sections that relate to these funds. Given that both the California Supreme Court and the Ninth Circuit Court of Appeals have indicated general approval of the language and format of the existing statutes, the staff recommends that **the draft statute generally reincorporate all such existing language.**

As a much less substantial modification (unrelated to ERISA), Mr. Sackman also suggests revising the newly created term "laborers compensation fund," used throughout the draft statute, to avoid confusion with the term "workers compensation fund." Exhibit p. 63. Mr. Sackman instead suggests use of the term "laborers benefit fund."

GGLT approves of the use of a new term for these funds to eliminate confusion over inconsistent use of other terms, but does not comment on specific phrasing. Exhibit p. 149.

Mr. Sackman's perception of possible confusion has merit. However, the staff instead suggests using "employee benefit fund," the term that appears to be generally used in the industry and in reported appellate opinions.

The staff therefore recommends that **the following sections of the draft statute be modified, as follows:**

> **§ 7014. Express trust fund**
>
> 7014. "Express trust fund" means ~~a laborers compensation~~ an employee benefit fund to which a portion of a laborer's total compensation is to be paid pursuant to an employment agreement or a collective bargaining agreement for the provision of benefits, including, but not limited to, employer payments described in Section 1773.1 of the Labor Code and implementing regulations.

> **§ 7018. Laborer**
>
> 7018. (a) "Laborer" means a person who, acting as an employee, performs labor, or bestows skill or other necessary services, on a work of improvement.
>
> (b) "Laborer" includes an employee benefit fund. An employee benefit fund that has standing under applicable law to maintain a direct legal action in its own name or as an assignee to collect any

portion of compensation owed for a laborer, has standing to enforce rights under this part to the same extent as the laborer.

(c) This section is intended to give effect to the long-standing public policy of the state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which the compensation is to be paid.

Comment. Section 7018 continues former Section ~~3089(a)~~ 3089 without substantive change. ~~"Laborer" is no longer defined to include a compensation fund, which is treated separately in this part. Cf. Section 7020 ("laborers compensation fund" defined).~~

See also ~~Section~~ Sections 7020 ("employee benefit fund" defined), 7046 ("work of improvement" defined).

§ 7020. ~~Laborers compensation~~ Employee benefit fund

7020. "~~Laborers compensation~~ Employee benefit fund" means a person, including an express trust fund, to which a portion of the compensation of a laborer is paid by agreement with the laborer or the collective bargaining agent of the laborer.

~~Article 3. Laborers Compensation Fund~~

~~**§ 7070. Standing to enforce laborer's rights**~~

~~7070. (a) A laborers compensation fund that has standing under applicable law to maintain a direct legal action in its own name or as an assignee to collect any portion of compensation owed for a laborer, has standing to enforce rights under this part to the same extent as the laborer.~~

~~(b) This section is intended to give effect to the long standing public policy of the state to protect the entire compensation of a laborer on a work of improvement, regardless of the form in which the compensation is to be paid.~~

§ ~~7072~~. 7103. Notice of overdue laborer compensation

~~7072~~ 7103. (a) A contractor or subcontractor that employs a laborer and fails to pay the full compensation due the laborer, including any employer payments described in Section 1773.1 of the Labor Code and implementing regulations, ~~or laborers compensation fund~~ shall~~,~~ not later than the date the compensation became delinquent, give the laborer, the laborer's bargaining representative, if any, and the construction lender or reputed construction lender, if any, notice that includes all of the following information:

(1) the name and address of any express trust fund to which employer payments are due.

(2) the total number of straight time and overtime hours on each job.

(3) the amount then past due and owing.

(b) Failure to give the notice required by subdivision (a) constitutes grounds for disciplinary action under the Contractors' State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

§ 7200. Preliminary notice prerequisite to remedies

7200. (a) Except as otherwise provided in this section, preliminary notice is a necessary prerequisite to the validity of a lien, stop payment notice, or claim against a payment bond.

(b) A laborer ~~or laborers compensation fund~~ is not required to give preliminary notice.

(c) A direct contractor is not required to give preliminary notice to an owner or reputed owner.

§ 7204. Contents of preliminary notice

7204. (a) Preliminary notice shall include the following statement in boldface type:

NOTICE TO PROPERTY OWNER

If the person or firm that has given you this notice is not paid in full for labor, service, equipment, or material provided or to be provided to your construction project, a lien may be placed on your property. Foreclosure of the lien may lead to loss of all or part of your property, even though you have paid your contractor in full. You may wish to protect yourself against this by (1) requiring your contractor to provide a signed release by the person or firm that has given you this notice before making payment to your contractor, or (2) any other method that is appropriate under the circumstances.

If you record a notice of completion of your construction project, you must within 10 days after recording send a copy of the notice of completion to your contractor and the person or firm that has given you this notice. The notice must be sent by registered or certified mail. Failure to send the notice will extend the deadline to record a claim of lien. You are not required to send the notice if you are a residential homeowner of a dwelling containing four or fewer units.

(b) If preliminary notice is given by a subcontractor that has not paid all compensation due to a laborer ~~or laborers compensation fund~~, the notice shall include the name and address of the laborer and any ~~laborers compensation~~ express trust fund to which payments are due.

(c) If an invoice for material or certified payroll contains the information required by this section and Section 7102, a copy of the invoice or payroll, given in the manner provided by this part for giving of notice, is sufficient.

§ 7216. Disciplinary action

7216. A licensed subcontractor is subject to disciplinary action under the Contractors' State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, if all of the following conditions are satisfied:

(a) the subcontractor does not pay all compensation due to ~~a laborers compensation~~ an express trust fund.

(b) the subcontractor fails to give preliminary notice or include in the notice the information required by subdivision (b) of Section 7204.

(c) the subcontractor's failure results in the ~~laborers compensation~~ express trust fund recording a claim of lien, filing a stop payment notice, or asserting a claim against a payment bond.

(d) the amount due the ~~laborers compensation~~ express trust fund is not paid.

Notice Provisions

GGLT commends the Commission on its efforts to streamline the notice provisions in mechanics lien law by generally consolidating all notice requirements into this Article. Exhibit p. 136. However, GGLT suggests cross references to appropriate sections in this Article be added to all other sections in the draft statute that contain individualized notice requirements. Exhibit p. 137.

The Comment to each section of the draft statute requiring notice generally advises that the section incorporates and additionally requires compliance with the general notice provisions of the draft statute. Nevertheless, multiple commenters have still inquired about the applicability of the general notice provisions to individual sections.

The staff does not recommend including cross references to each of the general notice provisions within the text of any other section. Such inclusion would cause many sections to be cumbersome and confusing. In addition, the failure to include such cross references across the board would allow for inferences that compliance with the general notice provisions was not required.

However, upon further reflection, the staff is convinced that some general proviso in each of these sections, solely relating to the *content* of required notice (Section 7102), would be helpful to readers and practitioners.

The staff therefore recommends **incorporating the following language, or substantially similar language, in each section of the draft statute that contains a specific notice requirement**:

> In addition to the information required by Section 7102, the notice shall state….

§ 7102. Contents of notice

7102. (a) Notice under this part shall, in addition to any other information required by statute for that type of notice, include all of the following information to the extent known to the person giving the notice:

(1) the name and address of the owner or reputed owner.

(2) the name and address of the direct contractor.

(3) the name and address of the construction lender, if any.

(4) A description of the site sufficient for identification, including the street address of the site, if any. If a sufficient legal description of the site is given, the effectiveness of the notice is not affected by the fact that the street address is erroneous or is omitted.

(5) the name, address, and relationship to the parties of the person giving the notice.

(6**) If the person giving the notice is a claimant**:

(i) A general statement of the labor, service, equipment, or material provided.

(ii) the name of the person to or for which the labor, service, equipment, or material is provided.

(iii) **A statement or estimate of the claimant's demand, after deducting all just credits and offsets.**

(b) **Notice is not invalid by reason of any variance from the requirements of this section if the notice is sufficient to substantially inform the person given notice of the information required by this section and other information required in the notice.**

Mr. Brown believes this new section as drafted is too long and complicated. Exhibit p. 29.

Mr. Abdulaziz notes that for certain notices sometimes recorded by a claimant, such as a notice of completion, there is no "demand" for the claimant to estimate. Exhibit p. 15.

GGLT suggests that subdivision (b) of this section represents a "gray area" that will create doubt and give rise to additional litigation. Exhibit p. 137. At the same time, it suggests that since many notices in the industry are given by persons who are not lawyers, some leeway is appropriate when technical noncompliance does not prejudice the person receiving notice.

This "substantial compliance" provision in the section is a continuation of existing statutory law, at least relating to stop payment notices. See Civ. Code

§ 3103. In addition, for the reason indicated by GGLT, the staff continues to believe the inclusion of the provision in this section is appropriate.

The staff recommends that **the section be retained as drafted, but with subparagraph (a)(6)(iii) modified as follows:**

> (iii) A statement or estimate of the claimant's demand, if any, after deducting all just credits and offsets.

Section 7104 (Manner of giving notice)

> **§ 7104. Manner of giving notice**
>
> 7104. Except as otherwise provided by statute, notice under this part may be given by any of the following means:
>
> (a) Personal delivery.
>
> (b) Mail in the manner provided in Section 7108.
>
> (c) Leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons and complaint in a civil action.

GGLT supports the Commission's standardization of requirements relating to the manner of giving notice. Exhibit p. 137.

The joint surety commenters also commend the Commission on its attempts to simplify notice requirements. Exhibit p. 89. However, the group asks the Commission consider further simplifying the required manner of giving notice. It suggests the possibility of adopting the notice provision of the federal Miller Act (40 U.S.C. §3133) (addressing the rights of persons furnishing labor or materials on a federal project). The Miller Act allows notice by "any means that provides written third party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence."

The joint surety commenters also urge that noncompliance with requirements relating to the manner of notice should be irrelevant unless timely receipt is contested.

There are far more varied notices required under California mechanics lien law than under the federal Miller Act. **The staff does not believe the requirements in the draft statute relating to the manner of giving notice can be simplified any further and still accommodate the giving of all required notices.**

The "no harm, no foul" rule advocated by the joint surety commenters relating to noncompliance is an interesting proposition. However, in the context of this memorandum, the staff is unable to analyze the various means by which such a provision might be implemented. Further, the Commission has neither solicited nor received any other comments as to whether such a provision might be workable. **If the Commission so directs, the staff will analyze this proposal for inclusion in a future memorandum.**

Section 7106 (Address at which notice is given)

> **§ 7106. Address at which notice is given**
>
> 7106. (a) Notice under this part shall be given to the person to be notified at an address prescribed in this section. **If the person giving notice knows of more than one address for the person to be notified, notice shall be given at the last known address of the person to be notified.**
>
> (b) Notice under this part shall be given to the person to be notified **at the address of the person's residence or place of business, or** at any of the following addresses:
>
> (1) If the person to be notified is an owner, at the address shown on the contract, the building permit, or a construction trust deed.
>
> (2) If the person to be notified is a construction lender, at the address shown on the construction loan agreement or construction trust deed.
>
> (3) If the person to be notified is a direct contractor, at the address shown on the contract or building permit, or on the records of the Contractors' State License Board.
>
> (4) If the person to be notified is a claimant, at the address shown on the contract, preliminary notice, claim of lien, stop payment notice, or claim against a payment bond, or on the records of the Contractors' State License Board.
>
> (5) **If the person to be notified is the principal or surety on a bond, at the address provided in the bond for service of notices, papers, and other documents.**

GGLT supports the construction of this section. Exhibit p. 139.

Mr. Abdulaziz expresses a concern about subparagraph (b)(5) of this section. Exhibit p. 15. Mr. Abdulaziz notes that a subcontractor may not always have access to a copy of the bond, and therefore will not know the address provided in the bond for service of notices. Mr. Abdulaziz indicates that a subcontractor may know the address of the bond *broker* (as opposed to the surety on the bond), and suggests it would be appropriate to allow notice in such case to be given to the broker.

If Mr. Abdulaziz's suggestion were implemented, however, it would then be incumbent on the bond broker to pass on the notice to the appropriate recipient of the notice. If the broker failed to do so, either the designated recipient or the subcontractor would have to bear the consequence of non-delivery, and neither result would appear particularly fair. **The staff does not recommend implementation of this suggestion.**

The Association of California Surety Companies also asserts that in practice not all bonds even provide a place for inclusion of an address for service, and seldom is the principal's address provided on the bond, despite the fact that both are required by Code of Civil Procedure Section 995.320. Exhibit p. 115. The Association argues there should be a "safe harbor" provision in the section as provided in Civil Code Section 3227, which the staff interprets to mean a provision for an alternate address for service, if the address specified in the section is unknown.

(Section 3227 provides that if an individual is required to give notice to a surety whose address is unknown, notice may be given "in care of the clerk of the county in which the bond has been recorded.")

In response to this latter suggestion, staff notes that if either a principal or surety's address does not appear on the bond, the introductory text of subdivision (b) of this section allows notice to be sent to an alternative address. Staff suggests that, today, notice addressed to *anyone* "in care of" a county clerk is not particularly likely to reach its intended destination. **The staff does not recommend incorporation of this provision in Section 7106.**

The joint surety commenters generally support the construction of this section, but urge there should be a "backup or default provision" stating that if an address is missing from a prescribed document, the person giving the notice could rely on publicly available information. Exhibit p. 90. As examples, the joint surety commenters urge that for sureties, the "backup" address used could be the address listed with the California Department of Insurance, and for contractors, the Contractors State License Board, noting that both agencies post addresses on their websites.

In the case of notice to a contractor, the section already allows notice to the address indicated in the records of the Contractors State License Board. For sureties, **the staff supports the joint surety commenters' suggestion, and recommends that subparagraph (b)(5) be modified as follows:**

(5) If the person to be notified is the principal or surety on a bond, at the address ~~provided in~~ shown on the bond for service of notices, papers, and other documents, or on the records of the Department of Insurance.

The staff also has an independent concern about this section. As drafted, the section in conjunction with Section 7104 (allowing personal delivery of all notices) allows any person who knows where an intended recipient lives or works to deliver any notice at either location, at any time of the day or night, and allows the recipient no way to affirmatively direct otherwise. Given that many such notices may either bring bad news, or be delivered by someone in a less than cordial mood (i.e., notice of lien, stop work notice), this may be a recipe for trouble.

Moreover, this provision could contribute to mailed notices never reaching their intended destination, if sent to an address where the recipient did not expect to be receiving such notices. For example, an owner's "place of business" could be a large company, where personal mail is either discouraged or routed in a less than efficient manner.

The staff recommends that **the section be modified as indicated below:**

§ 7106. Address at which notice is given

7106. (a) Notice under this part shall be given to the person to be notified at ~~an address prescribed in this section. If the person giving notice knows of more than one address for the person to be notified, notice shall be given at the last known address of the person to be notified.~~

~~(b) Notice under this part shall be given to the person to be notified at the address of the person's residence or place of business, or at any of~~ the following addresses:

(1) If the person to be notified is an owner, at the address shown on the contract, the building permit, or a construction trust deed.

(2) If the person to be notified is a construction lender, at the address shown on the construction loan agreement or construction trust deed.

(3) If the person to be notified is a direct contractor, at the address shown on the contract or building permit, or on the records of the Contractors' State License Board.

(4) If the person to be notified is a claimant, at the address shown on the contract, preliminary notice, claim of lien, stop payment notice, or claim against a payment bond, or on the records of the Contractors' State License Board.

(5) If the person to be notified is the principal or surety on a bond, at the address ~~provided in~~ shown on the bond for service of

notices, papers, and other documents, or on the records of the Department of Insurance.

(b) If an address for the person to be notified is not shown on the document or record prescribed by subdivision (a), notice shall be given to the person to be notified at the person's place of business or residence.

Section 7108 (Mailed notice)

§ 7108. Mailed notice

7108. (a) Notice given by mail under this part shall be by (1) **first class registered or certified mail** or by (2) Express Mail or another method of delivery providing for overnight delivery.

(b) Proof that the notice was given in the manner provided in this section may be made by any of the following means:

(1) A return receipt, delivery confirmation, signature confirmation, or other proof of delivery or attempted delivery provided by the United States Postal Service, or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself.

(2) Proof of mailing certified by the United States Postal Service.

(3) A tracking record or other documentation certified by an express service carrier showing delivery or attempted delivery of the notice.

Mr. Brown offers that any mail sent registered or certified *is* "first class," and so language referencing "first class" in subdivision (a) is therefore not needed. Exhibit p. 29. Moreover, an implied comma after the phrase "first class" would allow all mailed notices to be given via first class *regular* mail, a practice not allowed under existing law. See *IGA Aluminum Products, Inc. v. Manufacturers Bank*, 130 Cal. App. 3d 699, 181 Cal. Rptr. 859 (1982) (preliminary notice must be sent by either registered or certified mail).

Mr. Brown further indicates his personal experience has been that service of notices is rarely an issue in the industry, and that the United States mail service is extremely reliable. He advocates that the Commission consider providing that notice by mail may be given via any type of mailing. Exhibit p. 30.

GGLT offers that its experience with the United States Post Office has been generally positive, and has found its record keeping (which could be needed to prove notice) to have a high level of accuracy and reliability. Exhibit p. 139.

On the other hand, William C. Last, Jr., an attorney with Last, Harrelson & Faoro in San Mateo, argues that proof of mailing must be demonstrated by some

type of documentary evidence. Exhibit p. 85. He does not find United States mail service to be sufficiently reliable, and is also concerned about unscrupulous individuals simply lying about service by regular mail.

Responding to the Commission's inquiry in the tentative recommendation, GGLT favors a reference to "express service carrier" rather than "overnight delivery," as it believes the latter term is somewhat ambiguous. Exhibit p. 138.

In response to Mr. Brown's contention about "first class" mail, cursory research by the staff reveals that current United States Post Office delivery classifications are less than clear. At the present time, it appears that registered and certified mail can be sent via "first class" mail *or* via "priority" mail. Priority mail is a more expensive service designed to provide faster (but not necessarily overnight) delivery. Mail weighing more than 13 ounces is automatically classified as priority mail; mail weighing 13 ounces or less can be sent via priority mail on request. And of course, postal regulations or classifications could always change at any time in the future.

Even if Mr. Brown's factual assertion may no longer be accurate, he raises an interesting issue. As presently drafted, this section would seem to prohibit sending a notice by "priority" registered or certified mail. A sender might want this option for faster delivery, and in the extremely unlikely event the notice weighed more than 13 ounces, there would be no possibility of sending the notice by "first class registered or certified mail."

Moreover, in addition to the possibility that a reader might infer a comma after the words "first class," it is theoretically possible a minor printing error could cause the same result.

The staff recommends that **the reference in the section to "first class" be deleted, and other technical changes to the section be made, as follows**:

> **§ 7108. ~~Mailed notice~~ Notice by mail**
>
> 7108. (a) Notice ~~given~~ by mail under this part shall be given by ~~(1) first class~~ registered or certified mail, ~~or by (2)~~ Express Mail, or ~~another method of delivery providing for~~ overnight delivery by an express service carrier.
>
> (b) Proof that the notice was given in the manner provided in this section may be made by any of the following means:
>
> (1) A return receipt, delivery confirmation, signature confirmation, or other proof of delivery or attempted delivery provided by the United States Postal Service, or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom

delivered, or in the event of nondelivery, by the returned envelope itself.

(2) Proof of mailing certified by the United States Postal Service.

(3) A tracking record or other documentation certified by an express service carrier showing delivery or attempted delivery of the notice.

Section 7110 (Electronic communication)

§ 7110. Electronic communication

7110. (a) As used in this section, "electronic record" has the meaning provided in Section 1633.2.

(b) A notice under this title may be given to a person in the form of an electronic record if the person has agreed to receive the record by electronic means.

(c) If a person that has agreed to receive a record by electronic means is a consumer within the meaning of Section 7006 of Title 15 of the United States Code, the person's agreement shall satisfy the requirements of Section 7001 of Title 15 of the United States Code relating to consumer consent to an electronic record.

Comment. Section 7110 is new. It combines the agreement requirement of the California Uniform Electronic Transactions Act (UETA) (Sections 1633.1-1633.17) with the consumer protections of the federal Electronic Signatures in Global and National Commerce Act (E-Sign) (15 U.S.C. § 7001 *et seq*.).

A consumer within the meaning of E-Sign is "an individual who obtains products or services used primarily for personal, family, or household purposes." 15 U.S.C. § 7006(1). The consumer consent requirements of E-Sign include (i) affirmative consent, (ii) disclosure, (iii) electronic access, (iv) software and hardware upgrades. See 15 U.S.C. § 7001(c)(1).

….

Mr. Brown does not believe any useful purpose would be served by permitting electronic notice. Exhibit p. 30. He notes the means for obtaining consent for such service is unspecified, and argues that the sender seeking such consent might as well simply serve the notice.

Mr. Abdulaziz supports electronic notice, but suggests the statute should require that the consent to receive electronic notice be in writing. Exhibit p. 15.

Joseph Melino, an attorney in San Jose, indicates that most major contractors are now using either transmission by facsimile or email transmission of "PDF" documents, but that communication with an owner remains mail or personal delivery. Exhibit p. 128.

GGLT also supports the inclusion of a provision for electronic notice. Exhibit p. 138. In fact, in order to better implement this provision, GGLT recommends that the draft statute require that email addresses be provided by the owner, direct contractor, and lender, on the contract for the work of improvement and/or on the building permit.

The staff continues to believe, as other commenters have also indicated, that electronic notice would be of some utility to practitioners in the industry. As to the form of consent required, the staff recommends that **the provisions of the California Uniform Electronic Transactions Act (UETA) should control**. See Civ. Code § 1633.5.

The staff further recommends that **the draft statute not require the provision of an email address on any document.** Agreement to accept notice by electronic record (as contrasted with other approved methods of notice) is intended to be voluntary. In the absence of consent to receive notice by electronic record, mandating disclosure of an email address on other documents would almost certainly lead to lost notices, as well as litigation over issues such as implied consent.

The staff does however recommend that **certain technical changes to the section be made, as follows:**

> **§ 7110. ~~Electronic~~ Notice by electronic communication**
>
> 7110. (a) As used in this section, "electronic record" has the meaning provided in Section 1633.2.
>
> (b) A notice under this ~~title~~ part may be given to a person in the form of an electronic record if the person has agreed to receive the ~~record by electronic means~~ notice in the form of an electronic record.
>
> (c) If a person that has agreed to receive a ~~record by electronic means~~ notice in the form of an electronic record is a consumer within the meaning of Section 7006 of Title 15 of the United States Code, the person's agreement shall satisfy the requirements of Section 7001 of Title 15 of the United States Code relating to consumer consent to an electronic record.

Section 7112 (Posting)

> **§ 7112. Posting**
>
> 7112. A notice required by this part to be posted shall be displayed in a conspicuous location at the site and at the main office of the site, if one exists.

Comment. Section 7112 is new. It generalizes and standardizes provisions found in former law. See, e.g., former Sections 3094 (notice of nonresponsibility), 3260.2 (stop work notice).

Mr. Brown objects to this section, suggesting it could be interpreted as providing that posting is an approved method of service for all notices. Exhibit p. 30. The staff has reviewed the section, and believes the section is sufficiently clear.

The staff recommends that **the section be retained as drafted**.

Section 7114 (When notice complete)

§ 7114. When notice complete

7114. Notice under this part is complete and deemed to have been given at the following times :

(a) If given by personal delivery, when delivered.

(b) If given by mail, when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure.

(c) If given by leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons in a civil action, five days after leaving the notice.

(d) If given by posting, when displayed.

(e) If given by recording, when filed for record in the office of the county recorder.

Comment. Section 7114 is new. It generalizes and standardizes provisions found in former law. **See, e.g., former Section 3097(f)(3) (service of preliminary notice).**

….

GGLT generally supports the inclusion of this provision in the draft statute. Exhibit p. 136.

Mr. Brown, likely due to the Comment, read this section as allowing a preliminary notice to be given by posting or recording. Exhibit p. 31. The reference in the Comment may be misleading, and the staff recommends that **the bolded language in the Comment be deleted.**

The staff also offers for consideration a significantly more substantive modification to this provision. However, as this proposed modification has not been circulated for comment, the staff offers the modification quite cautiously. The **staff solicits input from practitioners as to whether the modification would cause problems in practice.**

In summary, the staff proposes that varied extensions of time similar to that provided in the Code of Civil Procedure be allowed when notice is given by mail, with the amount of extension based on the type of mail service utilized, as well as the locations of the sender and of the recipient.

The proposal is premised on the assumption that the number of days notice specified in any notice statute is loosely based on the anticipated amount of time a recipient of the notice will need to engage in some responsive act, *once receiving the notice*. If the notice in question may be given by different means with varying expected delivery dates, extensions of time based on the type of service chosen would seem to be a logical adjunct to the notice provision.

The draft statute currently provides that several "responsive acts" must occur within 10 days of a notice being given, a relatively brief period of time. In each of these cases the notice in question may be sent by mail. This means that in many cases a recipient will not actually receive one of these notices until at least two or three days after it is "given." (Mr. Melino advises the Commission to expect mailed notice "to take a week." Exhibit p. 128.)

Moreover, in most cases mailed notice is required to be sent either registered or certified. Mail sent using one of these services may take several days *longer* to reach a recipient than would regular mail. Not only can the special handling delay delivery (at least according to the United States Post Office web site), but registered or certified mail often provides a recipient with only a post card requiring a special trip to the post office to retrieve the notice, during hours which may exactly coincide with the recipient's normal work hours.

The draft statute currently provides for only 10 days notice in the following situations:

- A design professional need give only 10 days notice before recording a lien. Proposed Civ. Code § 7302.
- An owner need give only 10 days notice demanding release of an alleged fraudulent lien before filing an action for damages. Proposed Civ. Code § 7426.
- An owner need give only 10 days notice demanding release of a lien before filing a lien release petition. Proposed Civ. Code § 7482.
- An owner need give only 10 days notice of hearing prior to the scheduled hearing on the owner's filed petition for an order releasing a lien. Proposed Civ. Code § 7486. (In this one instance, the draft statute provides for a five day extension of time if the notice is given by mail. However, the length of the

extension is not based on the type of mail service utilized, or the address of either the sender or the recipient.)

- A bonded stop payment claimant is given only 10 days notice to substitute a surety on the bond if the lender notices an objection to the surety (or the lender can disregard the notice). Proposed Civ. Code § 7534.
- An owner of a large project is given only 10 days notice to provide security after notice demanding security is given (or work can stop). Proposed Civ. Code § 7712.
- An owner must pay a contractor within 10 days of a stop work notice (or work can stop). Proposed Civ. Code § 7830.

In the public works arena, there are 10 and even *five* day notice provisions, in the summary proceeding relating to funds held pursuant to a stop notice. Proposed Pub. Cont. Code §§ 44230 and 44250.

In many of these situations, it seems likely a respondent receiving a notice will have insufficient time to properly investigate how to respond. And if the notice happened to be mailed either from or to an out of state location, the time for a recipient to act would be decreased further.

It is true that most of these deadlines are part of existing law, and the Commission has not received reports of any significant problems. However, this does not necessarily mean these short notice periods are not causing any difficulties. Rather, the nature of the construction business is such that, if and when such difficulties occur, parties affected may often just "work it out."

Given that the Commission is seeking to present an updated version of the mechanics lien statute, it may be appropriate to recognize that mailed notice simply takes longer than personal delivery, and that modern construction projects can often involve owners, lenders, and even contractors with out of state mailing addresses.

The staff cautiously recommends that **subdivision (b) of Section 7114 be modified to change when mailed notice is "complete," and that certain other changes to the section be made, as follows**:

> **§ 7114. When notice complete**
>
> 7114. Notice under this part is complete and deemed to have been given at the following times~~-~~:
>
> (a) If given by personal delivery, when delivered.
>
> (b) If given by mail, when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure. <u>However, any period of notice and</u>

any right or duty to do any act or make any response within any period or on a date certain after the giving of the notice, which time period or date is prescribed by statute or rule of court, shall be extended as follows:

(1) Two calendar days, if given by Express Mail, or another method of delivery providing for overnight delivery.

(2) Five calendar days, if given by registered or certified mail, and the place of address and the place of mailing is within the State of California.

(3) Ten calendar days, if given by registered or certified mail, and either the place of mailing or the place of address is outside the State of California.

(c) If given by leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons in a civil action, five days after ~~leaving the notice~~ mailing.

(d) If given by posting, when displayed.

(e) If given by recording, when ~~filed for record~~ recorded in the office of the county recorder.

(f) If given in the form of an electronic record, when the electronic record is transmitted.

The **staff also calls attention to the other changes proposed above, not relating to extensions of time.** While the staff believes each of these proposed changes is either a technical change or otherwise reflects the Commission's previously expressed determinations, practitioners might detect a problem with the proposed modifications.

Section 7116 (Proof of notice)

§ 7116. Proof of notice

7116. (a) Proof that notice was given to a person in the manner required by this part shall be made by the proof of notice affidavit provided in subdivision (b) and, if given by mail, shall be accompanied by proof in the manner provided in Section 7108.

(b) A proof of notice affidavit shall show all of the following:

(1) The type or description of the notice given.

(2) The time, place, and manner of notice and facts showing that notice was given in the manner required by statute.

(3) The name and address of the person to which notice was given, and, if appropriate, the title or capacity in which the person was given notice.

The staff notes that this section is missing any specific reference to how notice must be proved when notice is given in the form of an electronic record. After

reviewing various other statutory material on the issue, the staff recommends that **the following subdivision be added to the section**:

> (c) If notice is given in the form of an electronic record, the affidavit shall also state:
> (1) The electronic notification address of the person making the service.
> (2) The date and time of the electronic service.
> (3) The name and electronic notification address of the person served.
> (4) That the document was served electronically and the transmission was reported as complete and without error.

Reorganization of notice provisions

The staff also suggests a slight reorganization of the notice provisions in this part, intended to enhance clarity. The thrust of the proposed reorganization is to separate the *manner* in which each type of notice is given from the *proof of service* required for each type of notice.

The staff recommends, in addition to any other approved textual changes, that **Sections 7108 through 7116 be reorganized as follows**:

> **§ 7108. ~~Mailed notice~~ Notice by mail**
> 7108. ~~(a)~~ Notice ~~given~~ by mail under this part shall be given by ~~(1) first class~~ registered or certified mail, ~~or by (2)~~ Express Mail, or ~~another method of delivery providing for~~ overnight delivery by an express service carrier.
>
> **§ 7110. ~~Electronic~~ Notice by electronic communication**
> 7110. (a) As used in this section, "electronic record" has the meaning provided in Section 1633.2.
> (b) A notice under this ~~title~~ part may be given to a person in the form of an electronic record if the person has agreed to receive the ~~record by electronic means~~ notice in the form of an electronic record.
> (c) If a person that has agreed to receive a ~~record by electronic means~~ notice in the form of an electronic record is a consumer within the meaning of Section 7006 of Title 15 of the United States Code, the person's agreement shall satisfy the requirements of Section 7001 of Title 15 of the United States Code relating to consumer consent to an electronic record.
>
> **§ 7112. Posting of notice**
> 7112. A notice required by this part to be posted shall be displayed in a conspicuous location at the site and at the main office of the site, if one exists.

§ 7114. When notice complete

7114. Notice under this part is complete and deemed to have been given at the following times~~-~~:

(a) If given by personal delivery, when delivered.

(b) If given by mail, when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure. However, any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the giving of the notice, which time period or date is prescribed by statute or rule of court, shall be extended as follows:

(1) two calendar days, if given by Express Mail, or another method of delivery providing for overnight delivery.

(2) five calendar days, if given by registered or certified mail, and the place of address and the place of mailing is within the State of California.

(3) 10 calendar days, if given by registered or certified mail, and either the place of mailing or the place of address is outside the State of California.

(c) If given by leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons in a civil action, five days after ~~leaving the notice~~ mailing.

(d) If given by posting, when displayed.

(e) If given by recording, when ~~filed for record~~ recorded in the office of the county recorder.

(f) If given in the form of an electronic record, when the electronic record is transmitted.

§ 7116. Proof of notice

7116. (a) Proof that notice was given to a person in the manner required by this part shall be made by ~~the~~ a proof of notice affidavit ~~provided in subdivision (b) and, if given by mail, shall be accompanied by proof in the manner provided in Section 7108.~~

~~(b) A proof of notice affidavit shall show~~ that states all of the following:

(1) the type or description of the notice given.

(2) the time, place, and manner of notice, and facts showing that notice was given in the manner required by statute.

(3) the name and address of the person to which notice was given, and, if appropriate, the title or capacity in which the person was given notice.

(b) If notice is given by mail, the affidavit shall be accompanied by one of the following:

(1) A return receipt, delivery confirmation, signature confirmation, or other proof of delivery or attempted delivery provided by the United States Postal Service, or a photocopy of the record of delivery and receipt maintained by the United States

Postal Service, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself.

(2) Proof of mailing certified by the United States Postal Service.

(3) A tracking record or other documentation certified by an express service carrier showing delivery or attempted delivery of the notice.

(c) If notice is given in the form of an electronic record, the affidavit shall also state:

(1) The electronic notification address of the person making the service.

(2) The date and time of the electronic service.

(3) The name and electronic notification address of the person served.

(4) That the document was served electronically and the transmission was reported as complete and without error.

Construction Documents

Section 7130 (Contract forms)

§ 7130. Contract forms

7130. (a) A written contract entered into between an owner and a direct contractor shall provide a space for the owner to enter the following information:

(1) the owner's name and address, and place of business if any.

(2) the name and address of the construction lender if any. This paragraph does not apply to a home improvement contract or swimming pool contract subject to Article 10 (commencing with Section 7150) of Chapter 9 of Division 3 of the Business and Professions Code.

(b) A written contract entered into between a direct contractor and subcontractor, or between subcontractors, shall provide a space for the name and address of the owner, direct contractor, and construction lender if any.

Comment. Section 7130 continues the parts of former Section 3097(*l*)-(m) relating to the content of contracts, deleting the limitation to the owner's residence address. The reference to "written" contract is added to subdivision (b) for consistency with subdivision (a). The reference to "lender or lenders" in subdivision (a) is shortened to "lender" for consistency with subdivision (b). See Section 14 (singular includes plural, and plural includes singular). These and other minor wording changes are technical, nonsubstantive revisions. For the direct contractor's duty to provide information to persons seeking to serve a preliminary notice, see Section 7210.

See also Sections 7004 ("construction lender" defined), 7012 ("direct contractor" defined), 7028 ("owner" defined), 7044 ("subcontractor" defined).

Mr. Brown is concerned this section could be read as requiring any contract between an owner and a direct contractor to be in writing. Exhibit p. 31. He suggests changing the first word of the section from "A" to "any."

The staff believes the text of the section is sufficiently clear, but recommends that **the Comment to the section be augmented as follows:**

Comment. Section 7130 continues the parts of former Section 3097(*l*)-(m) relating to the content of contracts, deleting the limitation to the owner's residence address. The reference to "written" contract is added to subdivision (b) for consistency with subdivision (a). The reference to "lender or lenders" in subdivision (a) is shortened to "lender" for consistency with subdivision (b). See Section 14 (singular includes plural, and plural includes singular). These and other minor wording changes are technical, nonsubstantive revisions. For the direct contractor's duty to provide information to persons seeking to serve a preliminary notice, see Section 7210.

This section does not require that all contracts between an owner and a direct contractor be in writing.

See also Sections 7004 ("construction lender" defined), 7012 ("direct contractor" defined), 7028 ("owner" defined), 7044 ("subcontractor" defined).

Section 7132 (Designation of construction lender on building permit)

§ 7132. Designation of construction lender on building permit

7132. (a) A public entity that issues building permits shall, in its application form for a building permit, provide space and a designation for the applicant to enter the name, branch designation, if any, and address of the construction lender and shall keep the information on file open for public inspection during the regular business hours of the public entity.

(b) If there is no known construction lender, the applicant shall note that fact in the designated space.

(c) Failure of the applicant to indicate the name and address of the construction lender on the application does not relieve a person required to give the construction lender preliminary notice from that duty.

Mr. Brown notes there is no penalty imposed by this section if the public entity fails to comply. Exhibit p. 32. He concurs with the staff's research

indicating that many cities in fact do not comply with this section, and wonders whether this provision shouldn't be eliminated.

Mr. Abdulaziz suggests subdivision (c) should be deleted. Exhibit p. 15. He argues that if a lender exists at the time a permit is obtained, the lender should be listed.

This section continues language from Civil Code Section 3097(i) without substantive change. Moreover, Health and Safety Code Section 19825 also requires a building permit to provide for the identification of any construction lender on a construction project.

Implementation of Mr. Abdulaziz's suggestion could deprive the construction lender of preliminary notice based on the act of a third party over which the lender had no control.

The staff recommends that **the provision be retained as drafted**.

Bond Issues

Section 7140 (Application of Bond and Undertaking Law)

> **§ 7140. Application of Bond and Undertaking Law**
>
> 7140. The Bond and Undertaking Law, Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure, applies to a bond given under this part.
>
> **Comment.** Section 7140 is new. It is a specific application of Code of Civil Procedure Section 995.020 (application of Bond and Undertaking Law).

The Association of California Surety Companies concurs that this section is an accurate statement of the law. Exhibit p. 116. However, it suggests language be added to the section providing "Except to the extent this Part is inconsistent…." The Association cites by analogy to Probate Code Section 8487, a provision similar to Section 7140, that contains the suggested language.

The Association's suggestion raises the propriety of a "belt and suspenders" approach to drafting. Code of Civil Procedure Section 995.020, referenced in the Comment to Section 7140, provides:

> 995.020. (a) the provisions of this chapter apply to a bond or undertaking executed, filed, posted, furnished, or otherwise given as security pursuant to any statute of this state, **except to the extent the statute prescribes a different rule or is inconsistent**.
>
> ….

Code Civ. Proc. § 995.020 (emphasis added).

Nevertheless, to avoid any ambiguity, the staff recommends that **Section 7140 be modified as follows:**

> **§ 7140. Application of Bond and Undertaking Law**
>
> 7140. The Bond and Undertaking Law, Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure, applies to a bond given under this part, except to the extent this part prescribes a different rule or is inconsistent.

Section 7142 (Release of surety from liability)

> **§ 7142. Release of surety from liability**
>
> 7142. None of the following releases a surety from liability on a bond given under this part:
>
> (a) A change to a contract, plan, specification, or agreement for a work of improvement or for labor, service, equipment, or material provided for a work of improvement.
>
> (b) A change to the terms of payment or an extension of the time for payment for a work of improvement.
>
> (c) A rescission or attempted rescission of a contract, agreement, or bond.
>
> (d) A condition precedent or subsequent in the bond purporting to limit the right of recovery of a claimant otherwise entitled to recover pursuant to a contract, agreement, or bond.
>
> (e) In the case of a bond given for the benefit of claimants, the fraud of a person other than the claimant seeking to recover on the bond.
>
> **Comment.** Section 7142 restates former Section 3225 without substantive change. See also Section 7057 (effect of act by owner).
>
> ….

The Association of California Surety Companies takes issue with the proposed leadline of this section, noting that the section only provides what does *not* release a surety from liability. Exhibit p. 116. The Association also notes that the section on its face applies to all bonds that may be given on a private work of improvement. It questions whether it was the Commission's intention that the provision have such broad application, or whether the provision was intended to apply only to payment bonds.

Mr. Brown acknowledges that this section continues existing law, but contends that the section's provisions conflict with general suretyship law. Exhibit p. 28. In particular, he urges that Civil Code Section 2891 (likely intended to be 2819) provides that a surety is exonerated by any act of a creditor without

the surety's consent. Mr. Brown alleges a change in payment terms as described in subdivision (b) would constitute such an act. He also states that surety bonds generally contain a specific provision to this effect.

Section 7142 restates Civil Code Section 3225 without substantive change. Section 2819 provides as follows:

> 2819. A surety is exonerated, except so far as he or she may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended. However, nothing in this section shall be construed to supersede subdivision (b) of Section 2822.

In *R.P. Richards, Inc. v. Chartered Const. Corp.*, 83 Cal. App. 4th 146, 99 Cal. Rptr. 2d 425 (2000), the court held that when the specific circumstances described in Section 3225 exist, "section 3225 creates an exception to the general rule of exoneration under section 2819." *R.P. Richards, Inc.*, at 156 (emphasis added).

Mr. Brown further urges that Section 7142 should not be held to apply to a change in payment terms, unless additional security is offered or the surety affirmatively waives such additional security. Exhibit p. 28.

The joint surety commenters urge that if a basis for rescission of a bond exists, it would have to be based on fraud or misrepresentation, and "the statute should not bar rescission under those circumstances." Exhibit p. 97. The joint surety commenters therefore argue that subdivision (c) should be deleted from the section.

The joint surety commenters also argue that subdivision (d) should be deleted from the section. Exhibit p. 97. The group suggests that, as long as all applicable statutes are complied with, the parties should be free to include in a bond whatever conditions they choose.

The suggestions of Mr. Brown and the joint surety commenters may have some merit, but all would represent a significant substantive change in the balance that has been struck by existing law.

As for the inquiry by the Association of California Surety Companies about the section's breadth, the staff reads both existing law as well as this section as applying to all bonds that may be given relating to a private work of improvement, and believes that to have been the Commission's intention in drafting Section 7142.

The staff recommends that **the leadline of the section be modified as follows, but that the text of the section be retained as drafted:**

§ 7142. ~~Release~~ No release of surety from liability

Section 7144 (Construction of bond)

§ 7144. Construction of bond

7144. (a) A bond given under this part shall be construed most strongly against the surety and in favor of the beneficiary.

(b) A surety is not released from liability to the beneficiary by reason of a breach of the contract between the owner and direct contractor or on the part of the beneficiary.

(c) **The sole conditions of recovery on the bond are that the beneficiary is a person described in Article 1 (commencing with Section 7400) of Chapter 4 and has not been paid the full amount of the claim.**

Comment. Section 7144 restates former Section 3226 without substantive change.

….

The Association of California Surety Companies raises several concerns about subdivision (c) of this section, although it agrees the subdivision continues existing law. Exhibit p. 116. Common to all expressed concerns is the contention that the subdivision is squarely inconsistent with other provisions of both existing law and the draft statute.

First, the Association notes that this provision on its face applies to all bonds that may be given in a private work of improvement, including a bond given to a construction lender in conjunction with a bonded stop payment notice. See Civ. Code § 3083, proposed Civ. Code § 7532. The Association then argues that, based on the provisions of subdivision (c), a construction lender given such a notice would never be able to recover on the bond, as it is not "a person described in Article 1 (commencing with Section 7400) of Chapter 4…."

Second, the Association notes that if the "sole" conditions of recovery on any bond are that the beneficiary is "a person described in Article 1 (commencing with Section 7400) of Chapter 4 and has not been paid the full amount of the claim," then payment bond claimants who have not given the advance notice required by Civil Code Section 3242 (continued by proposed Civil Code Section 7612) will still be able to recover on the bond.

Finally, the Association notes there are other provisions in the mechanics lien law that impose conditions prior to allowing recovery on various bonds. For example, Civil Code Section 3142 (continued by proposed Civil Code Section 7428) conditions recovery on a mechanics lien release bond on payment of any judgment and costs the claimant recovers on the lien. Civil Code Section 3171 (continued by proposed Civil Code Section 7510) conditions recovery on a stop payment notice release bond on payment of any amount the stop payment notice claimant recovers on the claim, together with costs of suit.

The Association suggests existing Civil Code Section 3226 was simply poorly drafted. It urges that subdivision (c) of proposed Section 7144 be modified to instead indicate that "[t]he sole conditions of recovery on the bond are that the claimant has complied with all the provisions of Part 6 applicable to the claim and that the claimant has not been paid the full amount of the claim for labor, service, equipment or material."

The contentions made by the Association have some appeal, and the staff agrees that some clarification of subdivision (c) may be appropriate. It is also possible the Association may be misreading Civil Code Section 3226, and the section was intended only to specifying conditions for recovery *that may be stated in a bond*, rather than the conditions that may be provided for by statute.

Whether that was the Legislature's intent or not, the staff recommends that **Section 7144 be modified as follows**:

> **§ 7144. Construction of bond**
>
> 7144. (a) A bond given under this part shall be construed most strongly against the surety and in favor of the beneficiary.
>
> (b) A surety is not released from liability to the beneficiary by reason of a breach of the contract between the owner and direct contractor or on the part of the beneficiary.
>
> (c) ~~the~~ Except as otherwise provided by statute, the sole conditions of recovery on the bond are that the beneficiary is a person described in Article 1 (commencing with Section 7400) of Chapter 4 and has not been paid the full amount of the claim.

Completion Issues

Section 7150 (Completion)

> **§ 7150. Completion**
>
> 7150. (a) For the purpose of this part, completion of a work of improvement occurs at the earliest of the following times:

(1) Actual completion.
(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 completion 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.

Jeffrey R. Ward, an attorney with Wulfsberg, Reese, Colvig & Firstman in Oakland, asks the Commission to make clear that completion of a public works project is not governed by proposed Section 7150. Exhibit p. 49. **The staff believes this concern is sufficiently addressed by Section 7050 (Application of part).**

Mr. Brown suggests it is "redundant and tautological and meaningless" to define completion in subparagraph (a)(1) as "actual completion." Exhibit pp. 32-33. He urges that if the Commission accomplishes nothing more, it should modify this term to instead refer to "substantial completion," the term he states is used by almost all major contractors.

Mr. Brown urges that while the courts have struggled to define completion, the average contractor has no difficulty determining when a project is "substantially complete" — i.e., "when there is no more work to be performed in accordance with the contract documents, including change orders, except for punch-list, [re]medial or 'pick-up' work." Mr. Brown further notes that the term "substantial completion" is a term that is used and has been frequently analyzed in two statutes of limitation governing actions in construction matters — Code of Civil Procedure Sections 337.1, and 337.15.

Mr. Brown is not alone in urging the use of the term "substantial completion." A law review article written by Craig P. Bronstein, entitled *Trivial(?) Imperfections: The California Mechanics' Lien Recording Statutes*, 27 Loy. L.A. L. Rev. 735 (1994), provides a thorough historical analysis, and advocates exactly the same thing.

The staff concurs that defining completion as "actual completion" is at best ambiguous. At least one question raised by the definition is, "actual" as compared to what? The likely answer from the Legislature would be "actual" as compared to the various "equivalents" of completion set forth in proposed subparagraphs (a)(2) through (4). However, this interpretation of the term

"actual completion" is not intuitively obvious. An equally reasonable interpretation would be "actual" completion, *as opposed to* "substantial" completion.

However, as independently reported by Mr. Bronstein, it is the staff's conclusion that virtually all appellate decisions have historically conducted a "substantial completion" analysis when called on to determine whether "actual completion" has occurred.

The staff solicits input from practitioners as to whether "substantial completion" is in fact what is recognized in the industry as "completion," and whether a modification of Section 7150 explicitly incorporating the term would cause confusion or problems with interpretation. In the absence of such indication, staff recommends that **subdivision (a)(1) of this section be modified to read as follows:**

> (a) For the purpose of this part, completion of a work of improvement occurs at the earliest of the following times:
> (1) ~~Actual~~ Substantial completion of the work of improvement.

Subparagraph (a)(4) of Section 7150 provides an alternative equivalent of completion based on "recordation of a notice of completion after a cessation of labor for a continuous period of 30 days." The staff notes three potential problems raised by this construction.

First, in marking the date of completion based on the event of *recordation*, rather than the event of *cessation*, the phrasing appears to alter existing law. Current Civil Code Section 3086(c), on which this language is based, states "the following shall be deemed equivalent to a completion":

> (c) After the commencement of a work of improvement, **a cessation of labor thereon** … for a continuous period of 30 days or more **if** the owner files for record a notice of cessation.

Under current law, if there existed a continuous cessation of labor from Day 100 through Day 130, and the owner thereafter recorded a notice of cessation on Day 145, Section 3086(c) at least appears to provide that the date of "completion" would be Day *130*. Under the formulation in the draft statute, the date of "completion" would be Day *145*.

This change in the law would also impact other sections in existing law that turn on when "completion" occurs.

For example:

- Proposed Section 7416 provides that an express trust fund may record a lien on a condominium unit up to 120 days after "completion."
- Proposed Section 7458(b) provides that a mortgage has priority over a site improvement lien, if a payment bond is recorded before "completion."
- Proposed Section 7460 provides that the outside limit for an extension of credit to file a lien enforcement action is one year from "completion."
- Proposed Section 7610 provides that the statute of limitations on an action against a payment bond recorded before "completion" is six months after "completion."

A second issue raised by the formulation of subparagraph (a)(4) is that it does not specify when recordation must occur in relation to the cessation of labor, in order to constitute completion. One might argue this question is answered by reference to the draft's statute's proposed Section 7152, which provides

> **§ 7152. Notice of completion**
>
> 7152. (a) On or within 15 days **after completion of a work of improvement** an owner may record a notice of completion.
>
> ….

However, since the 30 day cessation of labor under Section 7150(a)(4) would not constitute completion until recordation occurred, an argument could be made that the time requirement specified in Section 7152 (following completion) would not apply to the recordation referenced in Section 7150(a)(4).

Finally, the language in Section 7150(a)(4) does not indicate whether or not the cessation of labor must be continuous through the date of recordation in order to constitute completion. Existing law provides that it does. Civ. Code §§ 3086(c), 3092(b).

To address each of these issues, the staff recommends that **subparagraph (a)(4) of Section 7150 be modified as follows:**

> (a) For the purpose of this part, completion of a work of improvement occurs at the earliest of the following times:
>
> ….
>
> (4) ~~Recordation of a notice of completion after cessation~~ Cessation of labor for a continuous period of 30 days, if an owner thereafter records a notice of completion pursuant to Section 7152, and before labor recommences.

Section 7150 continues Civil Code Section 3086 to the extent it applies to a private work, but omits the provision of Section 3086 that alternatively defines completion as "acceptance" by the owner. Mr. Abdulaziz suggests that acceptance by the owner should be retained as an alternative form of completion. Exhibit p. 15. He indicates that often a contractor will have the owner sign a document indicating acceptance of the work, and believes such acceptance should also serve as completion.

The Building and Owners Managers Association ("BOMA") does not object to deletion of "acceptance by the owner," indicating that in practice there is "typically no moment of formal acceptance." Exhibit p. 111.

GGLT also approves of the deletion of this provision. Exhibit p. 141.

The reference to "acceptance by the owner" is in existing law. See Civ. Code § 3086(b). The Commission has proposed deleting the provision primarily based on an understanding that the provision was no longer used, and the fact that existing law makes no provision for how acceptance is to be communicated. If in fact contractors are soliciting and obtaining "acceptances" from owners, it may be appropriate to retain this provision, and possibly clarify its implementation.

The staff solicits additional comment from practitioners as to whether some type of formal "acceptance" by an owner is generally sought or obtained by a contractor at the end of a project. If so, the staff recommends that **Section 7050 be modified as follows:**

> **§ 7150. Completion**
>
> 7150. (a) For the purpose of this part, completion of a work of improvement occurs at the earliest of the following times:
>
> (1) Actual completion.
>
> (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 completion after cessation of labor for a continuous period of 30 days.
>
> (5) Written acceptance of the work of improvement by the owner.
>
> (b) Notwithstanding subdivision (a), if a work of improvement is subject to acceptance by a public entity, completion occurs on acceptance.

While not advocating continued incorporation of the "acceptance by owner" provision, BOMA does advocate for *some* "fixed moment" which an owner can rely on as a date of completion. Exhibit p. 111. BOMA suggests including as an

equivalent of completion when the "applicable authority" gives the owner approval to occupy the building. Such a provision, however, would contravene established case law, and **the staff does not recommend adding such a provision**. See *Howard A. Deason & Co. v. Costa Tierra Ltd.*, 2 Cal. App. 3d 742, 83 Cal. Rptr. 105 (1969).

On a related note, subdivision (b) of this section continues existing law providing that, in the event a work of improvement is subject to acceptance by a public entity, completion occurs on such acceptance. (This "acceptance" by a public entity refers to more than signing off on a building permit. *Howard A. Deason & Co.*, *supra*.)

GGLT believes this provision should be eliminated. Exhibit p. 141. It asserts that subdivision (b), by referencing public acceptance, implies that a claimant working on this type of project would have no lien rights.

The staff does not read subdivision (b) as precluding lien rights, and has received no word that the provision is causing any real world problem in that regard. Moreover, the provision in subdivision (b) has been part of existing statutory law since at least 1971.

The Regents of the University of California (UC) recommend, in order to achieve consistency with UC's recommended definition of completion in the public works context (proposed Public Contract Code Section 42210), that subdivision (b) be modified to state that if a work of improvement is subject to acceptance by a public entity, "completion occurs upon the date identified by the public entity in the notice of completion." Exhibit p. 82.

This recommendation from UC will be more fully analyzed in Memorandum 2006-44. However, at this time the staff notes that (1) the "acceptance" referenced in Section 7150 is not necessarily the same as the "acceptance" by a public entity of a pure public works project, and (2) a public entity is not required to record a notice of completion.

The staff recommends that **subdivision (b) be retained as drafted**.

Section 7152 (Notice of completion)

> **§ 7152. Notice of completion**
>
> 7152. (a) **On or within 15 days after completion of a work of improvement an owner may record a notice of completion**.
>
> (b) The notice of completion shall be signed and verified by the owner, and include all of the following information:

(1) If the notice is given only of completion of a contract for a particular portion of the work of improvement as provided in Section 7154, the name of the direct contractor under that contract and **a general statement of the kind of labor, service, equipment, or material provided pursuant to the contract**.

(2) If signed by the owner's successor in interest, the name and address of the successor's transferor.

(3) The nature of the interest or estate of the owner.

(4) The date of completion. **An erroneous statement of the date of completion does not affect the effectiveness of the notice if the true date of completion is on or before the date of recordation of the notice.**

(5) If the notice is based on cessation of labor, the date on or about which labor ceased, **and that cessation of labor has been continuous until recordation of the notice**.

(6) An affidavit of mailing in the manner provided in Section 1013a of the Code of Civil Procedure, showing all persons given notice under Section 7156.

Mr. Abdulaziz urges that subdivision (a) of Section 7152 should be modified so as to allow an owner's authorized agent to sign and verify the notice of completion. Exhibit p. 16.

The staff believes this contingency is addressed by proposed Section 7060 (Agency). However, the staff recommends that **a cross reference to Section 7060 be added to the Comment to Section 7152.**

California State University (CSU) requests clarification as to whether "15 days" refers to calendar days or business days. Exhibit p. 101. **The staff does not advise clarifying the reference in this section**. The draft statute contains numerous references to "days," and a clarification in one section could lead to confusion or contrary inferences in other sections. (Absent a specific modifier to the contrary, a reference to the term "days" in a statute means "calendar days." *Iverson v. Superior Court*, 167 Cal. App. 3d 544, 548, 213 Cal. Rptr. 399 (1985).)

However, in light of the numerous time requirements in the draft statute, the staff instead recommends that a new section be added to the statute, in Article 2 (Miscellaneous Provisions), reading as follows:

§ 7055. Calculation of time

7055. For purposes of this part, the term "day" means a calendar day.

Comment. Section 7051 is new. See also Sections 10 (computing time), 11 (holidays).

Mr. Abdulaziz urges that subparagraph (b)(1) should require a statement of the part of the work of improvement is complete. Exhibit p. 16. **The staff believes this suggestion has merit, and incorporates it in a proposed modification below.**

Mr. Brown suggests it would be helpful if subparagraph (b)(1) better identified the *location* of the work of improvement completed. Exhibit p. 33. **This suggestion is at least partly accommodated in a proposed modification below.**

The Association of California Surety Companies asserts that the information required by subparagraph (b)(1) — name of the direct contractor and a general statement of the work performed — should be required for all notices of completion. Exhibit p. 117. **This suggestion is generally addressed in the section of this memorandum entitled "Notice Provisions."**

In fact, part of the information required by subparagraph (b)(1) *is* required for all notices of completion (i.e., the name of the direct contractor). See proposed Section 7102.

As to requiring that all notices of completion contain a general statement of the work performed, staff believes disclosure of this information would appear to add little to a notice of completion (except in the situation described in subparagraph (b)(1)). Existing law does not require such disclosure, and the Association of California Surety Companies does not offer why the information would be needed or helpful. **The staff does not recommend adding this required disclosure.**

Mr. Abdulaziz also suggests subdivision (b)(6) should be augmented to read "to the extent notice is required," since certain categories of owners are not required to give any notice under proposed Section 7156. Exhibit p. 16. **The staff believes this suggestion has merit, and incorporates it in a proposed modification below.**

Granite Rock Company ("Graniterock"), a material supplier and contractor that holds California Contractor's License number 22, suggests that Section 7152 should explicitly state that a notice of completion that does not comply with the provisions of the section "is not effective." Exhibit p. 6. While Graniterock recognizes that such a provision may be implied, it points to the draft statute's phrasing of Section 7444 (notice of nonresponsibility), which provides as follows:

§ 7444. Notice of nonresponsibility

7444. (a) An owner of property on which a work of improvement is situated that did not contract for the work of improvement may give notice of nonresponsibility.

(b) A notice of nonresponsibility shall be signed and verified by the owner, and shall include all of the following information:

(1) The nature of the owner's title or interest.

(2) The name of a purchaser under contract, if any, or lessee, if known.

(3) A statement that the person giving the notice is not responsible for claims arising from the work of improvement.

(c) **A notice of nonresponsibility is not effective** unless, within 10 days after the person giving notice has knowledge of the work of improvement, the person both posts and records the notice.

Graniterock argues that a comparison of the two sections could support an argument that a late or otherwise defective notice of completion would be "deficient," but still nevertheless "effective."

Staff believes this suggestion has merit, and incorporates it in a proposed modification below.

Subdivision (a) of Section 7152 extends the period of time allowed an owner to record a notice of completion from 10 days in existing law to 15 days.

The Association of California Surety Companies believes the former 10 day period was too short, and believes 15 days may also not be long enough, suggesting that the section should instead provide a 20 day period. Exhibit p. 117. It asserts that Caltrans stopped recording notices of completion a number of years ago because it could not record within the 10 days.

The Commission has already discussed this particular issue at length, and approved 15 days as a reasonable compromise among competing interests. The Association does not raise any new issues suggesting reconsideration, and **the staff does not recommend that the 15 day period be changed**.

Mr. Abdulaziz suggests that subparagraph (b)(4), which he characterizes as a "change in the law," should be deleted, as he believes the provision will provide more grounds for litigation. Exhibit p. 16.

The staff believes subparagraph (b)(4) to be a restatement of existing law (see Civ. Code § 3093(a)) and recommends that **the subparagraph be retained**.

However, Mr. Brown urges that subparagraph (b)(4) could be read as excusing compliance with subdivision (a), and allowing an owner to record a notice of completion more than 15 days after actual completion. Exhibit p. 34. He posits that an owner could knowingly record more than 15 days after

completion, falsely allege in the notice that completion occurred the day before recordation, and then argue that since the true date of completion was still before the date of recordation, the owner's "erroneous statement" of the date of completion did not affect the effectiveness of the notice.

The staff believes that Mr. Brown's concern has merit, and addresses it in a proposed modification below.

Finally, the staff has a concern about subparagraph (a)(5) of this section.

As indicated in the previous section of this memorandum, proposed Section 7150 of the draft statute provides for *two* specified "equivalents" of completion that are "based on cessation of labor."

The equivalent described in Section 7150(a)(*4*) requires continuous cessation of labor through recordation. However, the equivalent described in Section 7150(a)(*3*), based on 60 days cessation of labor, does *not* appear to require continuous cessation of labor through recordation. See generally *Baird v. Havas*, 72 Cal. App. 2d 520, 164 P.2d 952 (1946) and cases collected therein; Civ. Code § 3086(c).

After consideration of each of the points raised above, staff recommends that **Section 7152 be modified as follows**:

> **§ 7152. Notice of completion**
>
> 7152. (a) An owner may record a notice of completion on ~~On~~ or within 15 days after completion of a work of improvement ~~an owner may record a notice of completion~~.
>
> (b) The notice of completion shall be signed and verified by the owner, and include all of the following information:
>
> (1) If the notice is given only of completion of a contract for a particular portion of the work of improvement as provided in Section 7154, the name of the direct contractor under that contract and a general statement of the ~~kind of~~ labor, service, equipment, or material provided pursuant to the completed contract.
>
> (2) If signed by the owner's successor in interest, the name and address of the successor's transferor.
>
> (3) The nature of the interest or estate of the owner.
>
> (4) The date of completion. An erroneous statement of the date of completion does not affect the effectiveness of the notice if the true date of completion is ~~on or~~ 15 days or less before the date of recordation of the notice.
>
> (5) If the notice is based on cessation of labor, the date on or about which labor ceased~~, and~~ .
>
> (6) If the notice is based on cessation of labor under paragraph (4) of subdivision (a) of Section 7150, that cessation of labor has been continuous until recordation of the notice.

~~(6)~~ (7) An affidavit of mailing in the manner provided in Section 1013a of the Code of Civil Procedure~~,~~ showing all persons given notice under Section 7156, if compliance with Section 7156 was required.

(c) A notice of completion that does not comply with the provisions of this section is not effective.

The staff also recommends that **a specific reference to this proposed section be added to the narrative part of the final recommendation, drawing attention to various changes from existing law.**

Section 7154 (Notice of completion of contract for portion of work of improvement)

§ 7154. Notice of completion of contract for portion of work of improvement

7154. If a work of improvement is made pursuant to two or more contracts, each covering a portion of the work of improvement:

(a) The owner may record a notice of completion of a contract for a portion of the work of improvement. On recordation of the notice of completion, for the purpose of Sections 7412 and 7414 a direct contractor is deemed to have completed the contract for which the notice of completion is recorded and a claimant other than a direct contractor is deemed to have ceased providing labor, service, equipment, or material.

(b) If the owner does not record a notice of completion under this section, the period for recording a claim of lien is that provided in Sections 7412 and 7414.

In a Staff Note to the draft statute, the Commission solicited comment on the policy of this section, and whether the section should be continued.

CSU approves of the provision, and in fact would like to see it made applicable to public works projects. Exhibit p. 102. **This suggestion will be discussed in Memorandum 2006-44.**

Mr. Moss, an attorney with Moss, Levitt and Mandell in Los Angeles, supports a continuation of the provision, as he indicates the law in this area has been well established for a long period of time. Exhibit p. 1.

Mr. Melino indicates this provision creates havoc in circumstances where the separate contracts are for work in one integrated work of improvement in which the owner cannot take possession until all contracts relating to that work of improvement have been completed. Exhibit p. 129.

GGLT believes that the provisions of existing Section 3117, from which Section 7154 is drawn, "should survive fully and be adopted fully" without change. Exhibit pp. 142-143. GGLT notes that while lien foreclosure mid-project is a risk, it is a circumstance that "hardly, if ever, occurs" because the lien claimant contractor is typically still on the project, and will not want to alienate the owner.

The consensus seems to be that the provisions of this section continue to have support, and the staff recommends that **the section be retained**.

Mr. Abdulaziz believes the section does not indicate how completion is to be determined for work performed pursuant to each contract. Exhibit p. 16. He urges that completion should be measured from the completion of the last contract. The staff believes that the section is sufficiently clear on this issue, and **does not recommend implementation of this suggestion**, as it would appear to effectively delete the provision.

Section 7156 (Notice of recordation by owner)

> **§ 7156. Notice of recordation by owner**
>
> 7156. (a) An owner that records a notice of completion shall **on recordation** give a copy of the notice to all of the following persons:
>
> (1) A direct contractor.
>
> (2) A claimant that has given the owner preliminary notice.
>
> (b) **If the owner fails to give notice to a person under subdivision (a)**, the notice of completion is ineffective to shorten the time within which the person may record a claim of lien under Sections 7412 and 7414. The ineffectiveness of the notice of completion is the sole liability of the owner for failure to give notice to a person under subdivision (a).
>
> (c) This section does not apply to any of the following owners:
>
> (1) A person that occupies the property as a personal residence, if the dwelling contains four or fewer residential units.
>
> (2) A person that has a security interest in the property.
>
> (3) A person that obtains an interest in the property pursuant to a transfer described in subdivision (b), (c), or (d) of Section 1102.2.

The Association of California Surety Companies asserts it is not clear whether notice under this section must comply with the draft statute's general notice provisions. Exhibit p. 117. The Association further urges that the requirement in subdivision (a)(1) that the owner "give" notice is strange, and should be changed to "shall provide notice of the recording of a notice of completion in accordance with § 7104 by providing a recorded copy to …."

This suggestion is addressed in the section of this memorandum entitled "Notice Provisions."

Mr. Brown urges that an owner should not have to bear the expense of any enhanced form of mail in order to give this notice. Exhibit p. 34. He also urges that providing the notice by regular mail should be sufficient. Mr. Brown suggests that, as contrasted with mailed notices sent by contractors, a false claim by an owner as to regular mail could be easily disproved by demonstrating that none of the other claimants who gave preliminary notice received notice in compliance with this section.

The Commission has previously decided to require an enhanced form of mail for all but the most minor of notices. This notice is far from a minor notice, as it controls when a lien needs to be recorded. Moreover, Mr. Brown's solution would prove problematic on small jobs, or where some other claimants *did* receive notice in compliance with this section.

The staff recommends that **no change be made to the type of mailing required by this section.**

Subdivision (a) of Section 7156 departs from existing law allowing an owner 10 days after recordation to give the specified notice, and would instead require the notice to be given "on recordation."

The Association of California Surety Companies asserts that this immediate mailing requirement will void many recorded notices, and will result in the notice provision not being followed. Exhibit p. 117.

Given that compliance or non-compliance with this section is determinative of the validity of the owner's notice of completion (which in turn determines the date a lien has to be recorded, which in turn determines the validity of a constitutionally protected lien), the staff also has two concerns about this provision.

First, the staff believes the phrase "on recordation" may be insufficiently precise. The phrase could be reasonably interpreted as "simultaneously with," "approximately the same time as," or simply "after." Although the Comment indicates the section requires "immediate" notice, even this phrasing is not particularly precise.

Further, in light of what the Commission has heard about how papers are recorded in a typical county recorder's office, no owner is likely to know when "recordation" actually occurred.

The Association of California Surety Companies suggests an owner should be given at least the 10 days provided by existing law to mail the recorded notice. Exhibit p. 117. However, the Association believes a better course would be to instead require the owner to *either* record the notice of completion (without sending notice of it at all), *or* give notice of the notice of completion (recorded or not).

The staff does not endorse the Association's suggestion to make recordation only an optional alterative, because the recordation date is a fixed event which can be easily and reliably verified. Nevertheless, given that an owner subject to this notice requirement will have already complied with another fairly strict procedural requirement (*recordation* of the notice within 15 days of completion), the staff agrees that requiring notice of the recordation to then be provided "on recordation" (whatever that might mean) is an unduly harsh requirement.

The staff recommends **reinstating the 10 day requirement in existing law.**

To address each of these issues, the staff recommends that **Section 7156 be modified as follows**:

> **§ 7156. Notice of recordation by owner**
>
> 7156. (a) An owner that records a notice of completion shall, ~~on recordation~~ within 10 days of the date the notice of completion is filed for record, give a copy of the notice to all of the following persons:
>
> (1) A direct contractor.
>
> (2) A claimant that has given the owner preliminary notice.
>
> (b) If the owner fails to give notice to a person ~~under~~ as required by subdivision (a), the notice of completion is ineffective to shorten the time within which ~~the~~ that person may record a claim of lien under Sections 7412 and 7414. The ineffectiveness of the notice of completion is the sole liability of the owner for failure to give notice to a person under subdivision (a).
>
> (c) This section does not apply to any of the following owners:
>
> (1) A person that occupies the property as a personal residence, if the dwelling contains four or fewer residential units.
>
> (2) A person that has a security interest in the property.
>
> (3) A person that obtains an interest in the property pursuant to a transfer described in subdivision (b), (c), or (d) of Section 1102.2.

Waiver and Release Issues

Section 7160 (Terms of contract)

> **§ 7160. Terms of contract**
>
> 7160. An owner or direct contractor may not, by contract or otherwise, waive, affect, or impair a claimant's rights under this part, whether with or without notice, and any term of a contract that purports to do so is void and unenforceable unless and until the claimant executes and delivers a waiver and release under this article.

Graniterock notes that this section restricts only *owners* and *direct contractors* from impairing a claimant's lien rights, except through use of specified waiver and release forms. Exhibit p. 5. Graniterock urges that the section should also apply to the impairment of a claimant's lien rights by any *subcontractor*. While recognizing that this provision continues existing law, Graniterock asserts there would appear to be no policy reason to exclude subcontractors from this provision, and suggests the failure to include subcontractors in the provision in existing law was a legislative oversight.

This section is a faithful continuation of Civil Code Section 3262(a). However, the staff agrees there would appear to be no policy reason why the provision should be inapplicable to subcontractors.

The staff solicits input from experienced practitioners as to whether any practical reason supports exclusion of subcontractors from the application of this provision. In the absence of any offered rationale, the staff recommends that **the section be modified as follows**:

> **§ 7160. Terms of contract**
>
> 7160. An owner, ~~or~~ direct contractor, or subcontractor may not, by contract or otherwise, waive, affect, or impair a claimant's rights under this part, whether with or without notice, and any term of a contract that purports to do so is void and unenforceable unless and until the claimant executes and delivers a waiver and release under this article.

The joint surety commenters argue that this entire restriction on owners and contractors is too severe. Exhibit p. 97. The group urges that once a project is underway, the parties to a contract should be free to settle disputed claims in any manner they wish.

The staff believes that any wholesale curtailment of this provision would provoke significant political opposition, and **does not recommend any such revision in the context of this study**.

Section 7166 (Reduction or release of stop payment notice)

> **§ 7166. Reduction or release of stop payment notice**
>
> 7166. (a) A claimant may reduce the amount of, or release in its entirety, a stop payment notice. The reduction or release shall be in writing and may be given in a form other than a form of waiver and release prescribed in this article.
>
> (b) A claimant's reduction or release of a stop payment notice has the following effect:
>
> (1) The reduction or release releases the claimant's right to enforce payment of the claim stated in the notice to the extent of the reduction or release.
>
> (2) The reduction or release releases the person given the notice from the obligation to withhold funds pursuant to the notice to the extent of the reduction or release.
>
> (3) The reduction or release does not preclude the claimant from giving a subsequent stop payment notice that is timely and proper.
>
> (4) The reduction or release does not release any right of the claimant other than the right to enforce payment of the claim stated in the stop payment notice to the extent of the reduction or release.

New legislation effective January 1, 2006 (SB 130) added a provision to Civil Code Section 3262 excluding the release of stop payment notice claims from the application of existing waiver and release provisions. Although on its face the language added to Section 3262 is applicable to both private works of improvement as well as public work projects, an Assembly Judiciary Committee analysis suggested it may have only been intended to apply to public work projects. Although the draft statute presently includes the provision in both the private works part and the public works part of the statute, the Commission sought input from practitioners on the question.

Mr. Moss is so far the only commenter to respond to the Commission's inquiry. He believes a waiver form applicable to a mechanics lien claim should apply equally to a stop payment notice claim, and therefore believes the new legislation relates to public works projects. Exhibit pp. 1-2.

Mr. Brown did not directly respond to the Commission's inquiry, but indicates he does not see the need for this section, and finds it difficult to understand. Exhibit p. 35. He believes it should be obvious that a claimant

should be able to release a part of a claim without specific authorizing legislation. He also reads subdivision (b)(3) as effectively precluding anyone from making use of the section.

Absent substantially more comment, the staff cannot recommend deletion of this provision from the part of the draft statute relating to private works of improvement. As the staff has reviewed the section and believes it to be sufficiently clear, the staff recommends that **the section be retained as drafted**.

Language of waiver and release forms

Civil Code Section 3262 provides that a claimant may waive and release a mechanics lien right only by executing one of the four statutorily approved waiver and release forms in the section. The forms correspond to four different scenarios in which a waiver and release would be sought from a claimant: (1) in *exchange* for a check representing a progress payment, in which case the waiver and release is conditioned on the claimant eventually receiving funds from the payor's bank, (2) following a progress payment that has *already* been made, (3) in exchange for a check representing a *final* payment, in which case the waiver and release is again conditional on the claimant actually receiving funds from the payor's bank, and (4) following receipt of final payment already made.

The draft statute redrafts each of the four forms, and includes each form in individual sections, proposed Sections 7170 through 7176.

Mr. Brown notes that none of the new proposed forms in the draft statute provide a date line purporting to indicate the date the form is signed. Exhibit p. 35. This was an inadvertent omission, and the staff recommends that **the forms in Sections 7170 through 7176 be modified to include a date line.**

The two conditional waiver forms (contained in Sections 7170 and 7174) provide a space to identify the check being presented, and one of the points of identification is the identity of the maker of the check:

> This document is effective only on the claimant's receipt of payment from the financial institution on which the following check is drawn:
> Maker of Check: _____
> Amount of Check: $_____
> Check Payable to: _____

Graniterock offers that requiring the identity of the maker of the check on the forms can sometimes create problems, and suggests deleting this requirement.

Exhibit p. 10. Apparently, claimants are sometimes asked to fill out these forms themselves, and Graniterock notes that such claimants will not always know in advance the identity of the maker of the check they will be receiving.

Identification of the maker of the check is required under existing law. While this particular piece of information does not seem crucial in itself, the information is likely required in order to identify the *check*, in the event that problems or confusion thereafter occurs. Without an identification of the maker of the check, the other two pieces of information would be insufficient to accomplish this purpose, and **the staff therefore does not recommend the suggested deletion.**

The two conditional waiver forms also contain the following introductory language:

> NOTICE. This document waives the claimant's lien **and other rights** effective on receipt of payment. A person should not rely on this document unless satisfied that the claimant has received payment.

GGLT takes issue with two aspects of this language. Exhibit p. 143. It first suggests the phrase "and other rights" is vague and arguably incorrect, as the waiver forms expressly do *not* waive certain contractual rights of the claimant.

The staff agrees with the second contention, and recommends that **the language in both sections be modified as follows**:

> NOTICE. This document waives the claimant's lien and <u>certain</u> other rights effective on receipt of payment. A person should not rely on this document unless satisfied that the claimant has received payment.

GGLT also suggests the second sentence in the notice is misleading to the *claimant*, as it arguably advises the claimant not to rely on the document to induce the payment that is the subject of the release until the payment has already been received. Exhibit p. 144. GGLT suggests changing the second sentence to "A person should not rely on this document *as evidence of claimant's waiver and release* unless satisfied that the claimant has received payment."

The staff believes this aspect of the notice language is sufficiently clear, and that the suggested added language would make the intended simple notice wordier while providing no corresponding benefit. The staff recommends that **the suggested language not be incorporated**.

The two forms relating to waiver and release based on receipt of a progress payment (contained in Sections 7170 and 7172), call for the identification of a "Through Date," and indicate that the claimant waives the right to make claims for labor, service, equipment, and material provided through that "Through Date":

> **Identifying Information**
> Name of Claimant: _____
> Name of Customer: _____
> Job Location: _____
> Owner: _____
> Through Date: _____

BOMA suggests that these forms should instead specifically identify an ending date (the "Through Date") *and* a beginning date corresponding to the services being released. Exhibit p. 109. It argues that relying only on a "Through Date" could make the waiver and release ambiguous in certain situation. BOMA offers as an example a situation in which a claimant had a pending claim against someone other than the person demanding the release (for example, a since terminated direct contractor), for work performed early on in a project.

The "Through Date" language without a specified beginning date is part of existing law. This language is likely quite important to the recipient of the release, as it allows the recipient to know that (except for exceptions identified on the form), the recipient has obtained releases covering *all* work performed on the job, through the specified "Through Date."

The staff does not recommend incorporating BOMA's suggestion.

On a related note, the "Through Date" is also referenced in a narrative portion of the two conditional releases in Section 7170 and 7174:

> This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor, service, equipment, and material **provided** to the customer on this job through the Through Date of this document.

GGLT reports that "substantial confusion" exists in the industry as to the meaning of the word "provided." Exhibit p. 144. For example, it alleges that with regard to materials, disputes arise as to whether the word means "shipped to," "delivered to," or "invoiced."

This issue is not insignificant, as the waiver and release forms were amended slightly more than 10 years ago in an attempt to make clear that the forms were intended to apply to labor, service, equipment, and material identified by date, whether or not invoiced or compensated. See discussion in *J.A. Jones Construction Co. v. Superior Court*, 27 Cal. App. 4th 1568, 33 Cal. Rptr. 2d 206 (1994).

GGLT suggests the language instead read:

> This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for *labor and service provided, and equipment and material provided or delivered to the project* on this job through the Through Date of this document.

The staff agrees that the word "provided" could cause confusion when applied to equipment and material. The staff recommends that **the language in the two conditional releases be modified as follows**:

> This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor~~,~~ and service provided, and equipment~~,~~ and material ~~provided~~ delivered to the customer on this job, through the Through Date of this document.

Section 7172, relating to an unconditional waiver and release based on a progress payment, contains the following language:

> **Unconditional Waiver and Release**
> This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor, service, equipment, and material provided to the customer on this job through the Through Date of this document. The claimant has received the following payment:
> **Amount of payment**: $_____

GGLT suggests the phrase "Amount of payment" is ambiguous, as it is not clear whether it refers to the amount of the progress payment on which the waiver and release is based, or the amount of all payments received by the claimant to the date of execution of the waiver and release. Exhibit p. 144.

GGLT suggests the phrase be changed to "Amount of payment that is the subject of this release." GGLT also suggests adding an additional line that reads "Total amount of payments received by claimant: $_____."

The staff does not advise adding the additional line suggested by GGLT, as it does not appear to be relevant to the release, and an erroneous entry could give rise to a challenge to the waiver and release.

The staff instead recommends that **the language in this portion of the release in Section 7172 be modified as follows**:

> **Unconditional Waiver and Release**
>
> This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor, service, equipment, and material provided to the customer on this job through the Through Date of this document.
>
> **The claimant has received the following progress payment: $_____**
>
> ~~**Amount of payment**: $_____~~

Exceptions provided for in forms

Each of the four forms list exceptions to which the waiver and release described in the form do not apply. The stated exceptions vary depending on the form.

Mr. Brown urges that the provided for exceptions generally make the forms no more than the glorified receipt the Commission was trying to avoid. Exhibit p. 35. Apparently for this reason, Mr. Brown urges that the first two forms (in Sections 7170 and 7172), should be discarded entirely, as each form wholly excepts various items from their application without requiring even a specification of dollar amounts in dispute.

Mr. Brown suggests that any retained form at least require the claimant to state any amount claimed to be excepted from the waiver and release.

The release form in Section 7170 provides an exception clause that reads as follows:

> **Exceptions**
>
> This document does not affect any of the following:
>
> (1) Retentions.
>
> (2) Extras for which the claimant has not received payment.
>
> (3) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:
>
> Date of waiver and release: _____
>
> Amount remaining unpaid: $_____
>
> (4) Contract rights, including (i) a right based on rescission, abandonment, or breach of contract, and (ii) the right to recover compensation for labor, service, equipment, or material not compensated by the payment.

The form contained in Section 7172 contains the same language, but without the reference to progress payments (item (3)).

The staff believes Mr. Brown's contention has some merit. A primary purpose of a waiver and release form is to provide the recipient of the waiver and release knowledge that at least most exposure to future claims has been eliminated. Allowing wholesale exceptions of the broad categories of items listed in these two forms without any particularized identification of *actual* matters in dispute would provide very little if any peace of mind to any recipient.

At the same time, a claimant may not reasonably be able to fully identify every or even any disputed claim or amount allegedly owed, and may not at the time of executing one of the forms even be aware of certain claims that might be waived by executing a blanket release.

The blanket exception in the form for retentions would not appear to be a problem. To the extent retentions exist, their amounts should be known by (or at least independently available to) the recipient of the release. Further, the blanket exception for retained contractual rights without further identification appears necessary, as these rights are generally forward looking, and a claimant could not reasonably be expected to provide any further identification of this items.

However, each of these forms also allow a claimant a blanket exception for any unspecified (and undefined) "extras" for which the claimant claims not to have received full payment. This is a category that could substantially impact the scope of the release, and there would not appear to be a reason why a claimant could not be required to provide *some* identification of these items.

The staff seeks input from practitioners on this issue.

Pending such input, however, the staff recommends that **this portion of the forms in Sections 7170 and 7172 be modified as follows**:

> **Exceptions**
> This document does not affect any of the following:
> (1) Retentions.
> (2) ~~Extras~~ The following extras for which the claimant has not received payment~~.~~ : _____
> ….

The two conditional releases contained in Sections 7170 and 7174 contain an exception that reads as follows:

> **Exceptions**
> This document does not affect any of the following:

….

The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date of waiver and release: _____

Amount remaining unpaid: $_____

Mr. Abdulaziz suggests the following two modifications to this part of the two forms:

Exceptions

This document does not affect any of the following:

….

The following <u>requests for</u> progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date<u>(s)</u> of waiver and release: _____

Amount remaining unpaid: $_____

Exhibit p. 16.

The staff believes the first listed modification would add ambiguity to the form, as it would suggest what was being excepted from the waiver and release was a previous *request* for a progress payment, rather than the payment itself.

The staff does not recommend incorporating Mr. Abdulaziz's first suggested modification.

In response to Mr. Abdulaziz's second suggestion, the staff recommends that **this portion of the two forms be modified as follows:**

Exceptions

This document does not affect any of the following:

….

The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date<u>(s)</u> of waiver and release: _____

~~Amount remaining~~ <u>Amount(s) of</u> unpaid <u>progress payment(s)</u>: $_____

Release based on receipt of "payment"

The draft statute contains a number of provisions relating to claimant releases that refer to receipt of "payment" by the claimant, without referencing the *amount* of such payment. The staff believes these references could be problematic in situations in which a claimant is asked to execute a waiver and release in order

to receive payment, but a dispute exists as to the exact amount the claimant is due.

The staff seeks input from practitioners as to how this situation is typically resolved in the industry. It appears to the staff that a claimant in this situation could often be faced with a Hobson's choice. The claimant would be forced to either receive no payment *at all* by refusing to sign a presented release, or to obtain at least *partial* payment would be forced to release rights as to the disputed amount (based on having received *some* "payment").

Pending comments from commenters, the staff recommends **modifying references in the waiver and release provisions to an unspecified "payment" to incorporate reference to payment in a designated *amount*:**

> **§ 7162. Waiver and release**
>
> 7162. A claimant's waiver and release does not release the owner, construction lender, or surety on a payment bond from a claim or lien unless both of the following conditions are satisfied:
>
> (a) The waiver and release is in substantially the form provided in this article and is signed by the claimant.
>
> (b) If the release is a conditional release, there is evidence of payment to the claimant <u>of the amount for which the waiver and release is given</u>. Evidence of payment may be (1) the claimant's endorsement on a single or joint payee check that has been paid by the financial institution on which it was drawn or (2) written acknowledgment of payment by the claimant.

> **§ 7170. Conditional waiver and release on progress payment**
>
> 7170. If a claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a progress payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall be in substantially the following form:
>
> CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT
>
> NOTICE. This document waives the claimant's lien and other rights effective on receipt of payment <u>of the amount stated below</u>. A person should not rely on this document unless satisfied that the claimant has received payment <u>in that amount</u>.
>
> Identifying Information
> Name of Claimant: _____
> Name of Customer: _____
> Job Location: _____

Owner: _____
Through Date: _____

Conditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor, service, equipment, and material provided to the customer on this job through the Through Date of this document. This document is effective only on the claimant's receipt of payment of the amount stated below from the financial institution on which the following check is drawn:

Maker of Check: _____
Amount of Check: $_____
Check Payable to: _____

Exceptions

This document does not affect any of the following:

(1) Retentions.

(2) Extras for which the claimant has not received payment.

(3) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date of waiver and release: _____
Amount remaining unpaid: $_____

(4) Contract rights, including (i) a right based on rescission, abandonment, or breach of contract, and (ii) the right to recover compensation for labor, service, equipment, or material not compensated by the payment.

Signature

Claimant's Signature: _____
Claimant's Title: _____

§ 7172. Unconditional waiver and release on progress payment

7172. If the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been paid the progress payment, the waiver and release shall be in substantially the following form, with the text of the "Notice to Claimant" in at least as large a type as the largest type otherwise in the form:

UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

NOTICE TO CLAIMANT: This document waives and releases rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not been paid, use a conditional waiver and release form.

§ 7174. Conditional waiver and release on final payment

7174. If the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a final payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall be in substantially the following form:

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

NOTICE. This document waives the claimant's lien and other rights effective on receipt of payment of the amount stated below. A person should not rely on this document unless satisfied that the claimant has received payment in that amount.

Identifying Information
Name of Claimant: _____
Name of Customer: _____
Job Location: _____
Owner: _____
Date: _____

Conditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for all labor, service, equipment, and material provided to the customer on this job. This document is effective only on the claimant's receipt of payment of the amount stated below from the financial institution on which the following check is drawn:

Maker of Check: _____
Amount of Check: $_____
Check Payable to: _____

Exceptions

This document does not affect any of the following:
(1) Disputed claims for extras in the amount of $_____
(2) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date of waiver and release: _____
Amount remaining unpaid: $_____

Signature

Claimant's Signature: _____
Claimant's Title: _____

Preliminary Notice Issues

Organization of Sections Relating to Preliminary Notice

Civil Code Section 3097 governing preliminary notice in a private work of improvement is an extraordinarily long and convoluted section. The draft statute separates most of the Section 3097's provisions into new proposed sections.

Mr. Ward believes that the breakup of Section 3097 is excessive. Exhibit p. 52. He suggests most of each section should be retained in single sections, or if continued in separate sections, at least presented in sequential order.

Pure formatting issues are often a matter of subjective preference. While the staff recognizes Mr. Ward's view as one such preference, it would clearly be impossible to accommodate all such preferences. Staff has endeavored to present the provisions of Section 3097 in as understandable a manner as possible, and recommends **continuation of the current organization of the draft statute**.

Section 7200 (Preliminary notice prerequisite to remedies)

Section 7202 (Preliminary notice requirement)

> **§ 7200. Preliminary notice prerequisite to remedies**
>
> 7200. (a) Except as otherwise provided in this section, preliminary notice is a necessary prerequisite to the validity of a lien, stop payment notice, or claim against a payment bond.
>
> (b) A laborer or laborers compensation fund is not required to give preliminary notice.
>
> (c) A direct contractor is required to give preliminary notice only to a construction lender.
>
> **§ 7202. Preliminary notice requirement**
>
> 7202. Before recording a claim of lien, giving a stop payment notice, or asserting a claim against a payment bond, the claimant shall give preliminary notice to the following persons:
>
> (a) The owner or reputed owner.
>
> (b) The direct contractor or reputed direct contractor.
>
> (c) The construction lender or reputed construction lender, if any.

Mr. Abdulaziz suggests language should be added to this section indicating "Except as exempted under this Chapter," to reflect the existence of various exceptions to the preliminary notice requirement (i.e., proposed Sections 7200, 7612). Exhibit p. 16.

The staff generally agrees with this suggestion.

The staff also has additional suggestions intended to clarify the relationship of these sections to each other and to other sections in the draft statute.

First, subdivision (c) of Section 7200 is phrased inconsistently with subdivision (b), and may therefore be confusing.

Second, depending on how the Commission resolves a definitional issue relating to the term "direct contractor," the use of the term in Section 7200 may conflict with existing law. See discussion in the section of this memorandum entitled "Section 7012 ("direct contractor").

In the section of this memorandum that discusses proposed Section 7012, the staff has recommended that the definition of "direct contractor" be modified, to conform with industry usage. Under the modified definition, a "direct contractor" would not include a material supplier having a direct contractual relationship with an owner.

However, existing law provides that, "Except one **under direct contract** with the owner," certain specified claimants must give the owner preliminary notice. Civ. Code § 3097(a) (emphasis added). This phrase "one under direct contract with the owner" in Civil Code Section 3097(a) has been judicially construed as *including* material suppliers with a direct relationship with an owner. See *Kim v. JF Enterprises*, 42 Cal. App. 4th 849, 50 Cal. Rptr. 2d 141 (1996); *Truestone, Inc. v. Simi West Industrial Park II*, 163 Cal. App. 3d 715, 209 Cal. Rptr. 757 (1984).

If the Commission approves the proposed modification of Section 7012 and excludes material suppliers from the definition of "direct contractor," material suppliers would then be excluded from the exception specified in subdivision (c) of Section 7200, contrary to existing law.

To address all of these issues, the staff recommends that **Sections 7200 and 7202 be modified as follows:**

> **§ 7200. Preliminary notice prerequisite to remedies**
>
> 7200. ~~(a)~~ Except as otherwise provided ~~in this section~~ by statute, ~~preliminary notice is~~ as a necessary prerequisite to the validity of a lien, stop payment notice, or claim against a payment bond, a claimant shall give preliminary notice to the following persons:
>
> (a) The owner or reputed owner.
>
> (b) The direct contractor or reputed direct contractor.
>
> (c) The construction lender or reputed construction lender, if any.
>
> ~~(b) A laborer or laborers compensation fund is not required to give preliminary notice.~~

~~(c) A direct contractor is not required to give preliminary notice to an owner or reputed owner.~~

§ 7202. ~~Preliminary~~ Exceptions to preliminary notice requirement

7202. ~~Before recording a claim of lien, giving a stop payment notice, or asserting a claim against a payment bond, the claimant shall give preliminary notice to the following persons:~~

~~(a) The owner or reputed owner.~~

~~(b) The direct contractor or reputed direct contractor.~~

~~(c) The construction lender or reputed construction lender, if any.~~

(a) A laborer is not required to give preliminary notice.

(b) A direct contractor or material supplier with a direct contractual relationship with an owner or reputed owner is not required to give preliminary notice to the owner or reputed owner.

Comment. ….

A claimant described in subdivision (b) is required to give preliminary notice to the construction lender or reputed construction lender, if any.

Section 7204 (Contents of preliminary notice)

§ 7204. Contents of preliminary notice

7204. (a) Preliminary notice shall include the following statement in boldface type:

NOTICE TO PROPERTY OWNER

If the person or firm that has given you this notice is not paid in full for labor, service, equipment, or material provided or to be provided to your construction project, a lien may be placed on your property. Foreclosure of the lien may lead to loss of all or part of your property, even though you have paid your contractor in full. You may wish to protect yourself against this by (1) requiring your contractor to provide a signed release by the person or firm that has given you this notice before making payment to your contractor, or (2) any other method that is appropriate under the circumstances.

If you record a notice of completion of your construction project, you must within 10 days after recording send a copy of the notice of completion to your contractor and the person or firm that has given you this notice. The notice must be sent by registered or certified mail. Failure to send the notice will extend the deadline to record a claim of lien. You are not required to send the notice if you are a residential homeowner of a dwelling containing four or fewer units.

(b) If preliminary notice is given by a subcontractor that has not paid all compensation due to a laborer or laborers compensation fund, the notice shall include the name and address of the laborer and any laborers compensation fund to which payments are due.

(c) If an invoice for material or certified payroll contains the information required by this section and Section 7102, a copy of the invoice or payroll, given in the manner provided by this part for giving of notice, is sufficient.

Comment. ….

The information required in this notice is in addition to the information required by Section 7102 (contents of notice).

….

Mr. Brown urges that Section 7204 is confusing, in that except for special circumstances described in subdivisions (b) and (c), the section appears to provide that only one item need be included in the preliminary notice. Exhibit p. 24. Mr. Brown recommends that Section 7204 make some direct reference to Section 7102 as containing additional matters that must be contained in a preliminary notice.

This suggestion is discussed in the section of this memorandum entitled "Notice Provisions."

GGLT points out that, in conjunction with Section 7102(a)(6)(iii), a claimant giving a preliminary notice is required to include a "statement or estimate of the claimant's demand, after deducting all just credits and offsets." Exhibit p. 147. GGLT argues that this requires more of a claimant than does existing law, which mandates only "an estimate of the total price [of the labor, service, equipment, or materials furnished, or to be furnished]." As GGLT notes, under *Rental Equipment, Inc. v. McDaniel Builders, Inc.*, 1 Cal. App. 4th 445, 109 Cal. Rptr. 2d 922 (2001), this estimate requires only a statement of the "probable cost of [the work provided or to be provided]…, arrived at through a reasonable and logical attempt to determine the final number." *Rental Equipment*, *supra* at 449.

GGLT also argues that the phrasing in Section 7102(a)(6)(iii) is confusing, and the call for inclusion of any kind of "demand" in a preliminary notice is not appropriate.

What GGLT may have overlooked, although perhaps quite reasonably, is the introduction to Section 7012, which reads as follows:

§ 7102. Contents of notice

7102. (a) Notice under this part shall, in addition to any other information required by statute for that type of notice, include all of the following information **to the extent known to the person giving the notice**:

….

It would appear that a claimant giving a preliminary notice would not have knowledge of any "demand," and would therefore be excused from providing it in the preliminary notice.

However, this may be an insufficient answer to the contention raised by GGLT, as it may be that most readers of the two sections would not locate the caveat bolded above.

To better address the issue, the staff recommends **augmenting the Comment to Section 7204 to note that only an estimate of the claim need be provided in the preliminary notice.**

Mr. Brown also urges that the preliminary notice include language allaying owner's concerns due to the mention of liens and claims. Exhibit p. 36. He suggests language he indicates was proposed for inclusion in existing law (but rejected), along the lines of "This notice is required by law to be served by the undersigned as a statement of your legal rights. This notice is not intended to reflect upon the financial condition of the contractor or the person employed by you on the construction project."

The staff likes this language, and recommends that **the language be included verbatim as an introduction to the boldface statement in the section, just under "NOTICE TO PROPERTY OWNER."**

Mr. Brown also suggests that the notice include a statement advising the owner of a requirement to serve notice of a recordation of a notice of cessation. Exhibit p. 36.

A notice of cessation is not continued in the draft statute, having been subsumed by the notice of completion. Moreover, it is arguable whether an owner is "required" to serve notice of a recordation of a notice of completion (Section 7156), as the only consequence for failing to do so is the ineffectiveness of the notice of completion. Further, any advisement along the lines of Mr. Brown's suggestion would also require an advisement of what a notice of completion *is*, and providing this information would substantially dilute the preliminary notice.

The staff does not recommend that such advisement be included in the preliminary notice.

Section 7206 (Effect of preliminary notice)

> **§ 7206. Effect of preliminary notice**
>
> 7206. (a) A claimant may record a claim of lien, file a stop payment notice, or assert a claim against a payment bond only for labor, service, equipment, or material provided within 20 days before giving preliminary notice or at any time thereafter.
>
> (b) Notwithstanding subdivision (a), a design professional may record a claim of lien, file 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 design professional gives preliminary notice not later than 20 days after the work of improvement has commenced.

The joint surety commenters believe that subdivision (b) of this section "could lead the reader to believe that a regular payment bond of the contract would cover the design professional when in fact it may not." Exhibit p. 98. The group instead suggests a revision of subdivision (b) indicating that a design professional that has satisfied certain specified requirements "shall be deemed to have complied with subdivision (a)."

The staff does not understand this comment, and is seeking further clarification from the group. At this time, the staff believes the section's meaning is a sufficiently clear and accurate statement of existing law, and recommends that **the section be retained as drafted**.

Section 7208 (Coverage of preliminary notice)

> **§ 7208. Coverage of preliminary notice**
>
> 7208. (a) Except as provided in subdivision (b), a claimant need give only one preliminary notice to each person to which notice must be given under this chapter with respect to all labor, service, equipment, and material provided by the claimant for a work of improvement.
>
> (b) If a claimant provides labor, service, equipment, or material pursuant to contracts with **more than one subcontractor**, the claimant shall give a separate preliminary notice with respect to labor, service, equipment, or material provided **to each contractor**.
>
> (c) A preliminary notice that contains a general description of labor, service, equipment, or material provided by the claimant through the date of the notice also covers labor, service, equipment, or material provided by the claimant after the date of the notice

whether or not they are within the scope of the general description contained in the notice.

Subdivision (b) of this section requires a claimant providing work on a job pursuant to contracts with more than one subcontractor to give each a separate preliminary notice. Graniterock suggests the subdivision be extended to encompass a situation in which a potential claimant provides work on a job to more than one *direct* contractor. Exhibit p. 10.

This proposed modification may represent a change from existing law. Section 3097(g), the source of this provision, does specify "subcontractor," apparently distinguishing from a reference to "original contractor" earlier in the same subdivision.

Nevertheless, the staff believes Graniterock's suggestion should be implemented. As contrasted with an "original contractor," there could be many "direct contractors" on a single job, and the policy underlying the provision would seem to have equal application in that scenario.

The staff recommends that **subdivision (b) of Section 7208 be modified as follows**:

> (b) If a claimant provides labor, service, equipment, or material pursuant to contracts with more than one <u>direct contractor or</u> subcontractor, the claimant shall give a separate preliminary notice with respect to labor, service, equipment, or material provided to each <u>direct</u> contractor <u>or subcontractor</u>.

The joint surety commenters advise that the last word in subdivision (b) should be "subcontractor," not "contractor." Exhibit p. 98.

While the staff believes the meaning of the term "contractor" is reasonably clear from context, the staff would recommend the change, in order to avoid any confusion the staff recommends that the change be made. However, the modification proposed immediately above, if approved, would independently resolve any confusion (and make the revision suggested by the joint surety commenters inappropriate).

On the other hand, if the Commission does not approve the modification to subdivision (b) recommended immediately above, the staff then recommends that **the bolded term "contractor" at the end of subdivision (b) be changed to "subcontractor."**

§ 7210. Direct contractor's duty to provide information

7210. A direct contractor shall make available to any person seeking to give preliminary notice the following information:

(a) The name and address of the owner.

(b) The name and address of the construction lender, if any.

Graniterock urges that one of the most significant problems for lower tier subcontractors and suppliers in protecting lien rights is obtaining the information required to give a preliminary notice in a timely fashion. Exhibit p. 10. It urges that the best and most reliable source of this information is the direct contractor, who is obligated to provide this information by Section 7210. However, Graniterock points out that Section 7210 does not require a direct contractor to provide this information within any particular time period, and also imposes no consequence for failing to provide the information.

Graniterock urges that the Commission put more "teeth" into this section, by adding a time requirement and imposing consequences on a non-complying direct contractor.

This section continues existing law. See Civ. Code § 3097(*l*)-(m). While the staff agrees that the provision as written appears to be largely directory, the staff does not believe that this study, largely intended as a reorganization and clarification of existing law, is the appropriate vehicle for Graniterock's suggested revision. **The staff suggests the proposed revision would be better directed, at least initially, to the Contractors State License Board for its consideration.**

Mr. Melino argues it is unfair that a subcontractor's lien rights should be at risk for failing to give preliminary notice to a construction lender, when the subcontractor is the participant in the process least likely to know the identity of the lender. Exhibit p. 130. He suggests this section should be expanded to also require the owner and lender to provide the information specified to all subcontractors. He further suggests that, if the information is not provided, the subcontractor's preliminary notice obligations should be at least partly waived.

Mr. Melino does not suggest how imposing a requirement on owners and lenders to provide identifying information to all workers on a job could be implemented. As drafted, the section (and existing law) appears only to require a direct contractor, who is presumably generally on the job site, to provide

specified information to any claimant (also presumably on the job site) *who asks for it*. The section does not appear to impose a proactive obligation on the direct contractor to affirmatively distribute information.

Extending the obligation imposed on the direct contractor to owners and lenders would appear to be unworkable, given that neither owners nor lenders generally have significant contact with most potential claimants.

The staff recommends that the section be retained as drafted.

Section 7216 (Disciplinary action)

> **§ 7216. Disciplinary action**
>
> 7216. A licensed subcontractor is subject to disciplinary action under the Contractors' State License Law, Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, if all of the following conditions are satisfied:
>
> (a) The subcontractor does not pay all compensation due to a laborers compensation fund.
>
> (b) The subcontractor fails to give preliminary notice or include in the notice the information required by subdivision (b) of Section 7204.
>
> (c) The subcontractor's failure results in the laborers compensation fund recording a claim of lien, filing a stop payment notice, or asserting a claim against a payment bond.
>
> (d) The amount due the laborers compensation fund is not paid.

Under existing law, the failure of a contractor to give a preliminary notice for work valued in excess of $400 is grounds for discipline. The draft statute would change existing law, providing for disciplinary action only if a contractor's failure to protect its construction remedies results in a loss to laborers. The Commission sought input from practitioners as to this proposed revision.

Mr. Moss concurs in the change, indicating his belief that there is no reason to penalize a contractor for failing to give preliminary notice if the contractor chooses not to pursue a remedy requiring such notice. Exhibit p. 2.

Mr. Brown concurs, stating he is not aware of any contractor ever being disciplined by simply for failing to give the notice. Exhibit p. 36.

Mr. Abdulaziz also concurs in the change. Exhibit pp. 16-17. However, Mr. Abdulaziz further believes it should be a ground for discipline when a person serves a preliminary notice and thereafter refuses to provide an unconditional waiver and release on final payment. Given the goal of this study, the staff does

not recommend that **the draft statute add any additional ground for contractor discipline.**

Based on comments received to date, the consensus opinion appears to be that the revision proposed by the draft statute is appropriate. The staff recommends that **Section 7216 be retained as drafted**.

Mr. Sackman urges that this section should not "single out" laborers benefit funds. Exhibit p. 53. **This suggestion is addressed in a section of this memorandum entitled "Laborers Compensation Fund Issues."**

Section 7218 (Notices filed with county recorder)

> **§ 7218. Notices filed with county recorder**
>
> 7218. The county recorder may cause to be destroyed all documents filed under subdivision (*o*) of former Section 3097.

Existing law permits the filing of a preliminary notice with a county recorder, and imposes on the county recorder a "good faith" obligation to serve copies of recorded notices of completion on all parties that previously recorded a preliminary notice. Civ. Code § 3097(o). However, existing law also provides that a county recorder's failure to fulfill its obligation has no consequence, and the Commission had been advised that many county recorders were in fact not performing this function. As such, particularly in light of budgetary considerations likely further adversely impacting the county recorders' fulfillment of this obligation, the draft statute does not continue the provision. Further, in Section 7218 the draft statute allows county recorders to destroy any notices that are recorded.

Mr. Abdulaziz takes issue with the draft statute's deletion of the provision in existing law allowing preliminary notices to be recorded in the country recorder's office, suggesting that such recording should still be allowed. Exhibit p. 17. However, Mr. Abdulaziz's request raises no new issues for the Commission's consideration.

The staff recommends that **this section be retained as drafted, and that the deletion of the provision in existing law relating to the recording of preliminary notices be continued.**

Design Professional Liens

Special definition of "owner"

Existing law requires, as a prerequisite to a design professionals lien, that the design professional contract with the "landowner" of a site, as distinguished from an "owner." Civ. Code § 3081.2. The explicit use of term "landowner" suggests a distinction was intended between a design professionals lien and a mechanics lien, since the latter may be based on work contracted for by a lessee of a site, or even a lessee of a building on a site. Civ. Code §§ 3128, 3129.

There would appear to be significant policy justification for restricting a design professionals lien to only work done pursuant to a contract with the actual fee owner of property on which a work of improvement is planned.

Since by statute (Civ. Code § 3081.4) a design professionals lien may be enforced only for design work done prior to the commencement of the work of improvement, the design work provides no visible evidence at the site of the prospective work of improvement that would warn of a potential lien claim. If a design professionals lien could be based on a contract with anyone other than the fee owner of the property, the fee owner might have no notice at all as to a potential lien claim.

The draft statute seeks to continue the requirement that a design professionals lien be based only on a contract with the fee owner of property, by requiring a contract with a "landowner" in the proposed definition of "design professional." See proposed Section 7010. Nevertheless, other sections in the draft statute that actually govern the design professionals lien (Sections 7010 through 7016) continue to reference the term "owner."

However, the term "owner" is defined by Section 7028 of the draft statute to include *any* individual with an interest in property.

The staff therefore recommends **adding a new section to Chapter 3 of the draft statute, the chapter containing the sections relating to the design professional lien, to read as follows**:

> **§ 7300. Owner**
>
> 7300. Notwithstanding Section 7028, for purposes of this chapter "owner" means a fee owner of a site.

Section 7304 (Creation, expiration, and release of lien)

> **§ 7304. Creation, expiration, and release of lien**
>
> 7304. (a) On recordation of the claim of lien, a lien is created in favor of the named design professional.
>
> (b) The lien automatically expires and is null and void and of no further force or effect on the occurrence of either of the following events:
>
> (1) The commencement of the work of improvement for which the design professional provided services.
>
> (2) The expiration of 90 days after recording the claim of lien, unless the design professional commences an action to enforce the lien within that time.
>
> (c) If the owner partially or fully satisfies the lien, the design professional shall execute and record a waiver and release under Article 8 (commencing with Section 7160) of Chapter 2.
>
> **Comment**. Section 7304 restates former Section 3081.4. On expiration of the lien as a result of commencement of the work of improvement, the design professional may obtain a lien under Section 7400 (mechanics lien). See Section 7308 (mechanics lien right not affected).
>
> ….

Mr. Brown suggests this section is too long, and should be shortened to make it more meaningful and understandable. Exhibit pp. 36-37. In particular, he urges the section does not sufficiently clearly indicate that, once a work of improvement commences, a design professional may record a mechanics lien for services rendered.

The staff believes the section Comment sufficiently addresses Mr. Brown's concern, and recommends that **the section be retained as drafted**.

New provisions

At present, statutes allowing a design professionals lien for design work performed before commencement of a work of improvement are located in the Civil Code, but outside the mechanics lien statute. Civ. Code §§ 3081.1 through 3081.10. Except for enforcement of a design professional lien (Civ. Code § 3081.5), none of the provisions of the existing mechanics lien statute are applicable to design professionals liens.

The Commission has decided to relocate the design professionals lien provisions within the new draft statute. At the same time, the Commission

decided not to change existing law by making any other existing statutory provision in mechanics lien law applicable to design professionals liens.

However, the draft statute also includes a few *new* provisions relating to mechanics liens. The Commission therefore needs to decide whether to make any of these new provisions, not a part of existing statutory law, applicable to design professionals liens.

The staff does not recommend any significant expansion of the law relating to design professionals liens. Nevertheless, the staff has identified a handful of new provisions in the draft statute that may be appropriately applied to the design professionals lien process.

Each section, which is presently applicable only to a mechanics lien, is listed below as it currently appears in the draft statute. Proposed modifications to each listed section have then been added in order to indicate how a proposed new design professionals lien section would look.

> **§ ~~7420~~ 7303. Notice of intended recording of claim of lien**
>
> ~~7420~~ 7303. (a) Before recording a claim of lien, the ~~claimant~~ design professional shall give notice of the intended recording to the owner or reputed owner of property subject to the claim of lien.
>
> (b) Notice of the intended recording of a claim of lien shall include a copy of the claim of lien.

> **§ ~~7422~~ 7303.1. Notice prerequisite to recording claim of lien**
>
> ~~7422~~ 7303.1. The county recorder shall not record a claim of lien that is filed for record unless accompanied by the ~~claimant~~ design professional's proof of notice showing compliance with Section 7303.

These first two listed sections are a pair. The first would require a design professional to give an owner notice of a recordation of a design professional lien; the second would provide an enforcement mechanism.

As will be discussed in a section of this memorandum entitled "*Section 7420 (Notice of intended recording of claim of lien),*" these two provisions of the draft statute have generated significant comment with regard to their intended application to mechanics liens. The Commission may ultimately decide to modify one or both of these provisions, or delete one or both. If the Commission decides that these provisions (in some form) should be included in the design professional lien section, the staff recommends that **the provisions be**

incorporated in whatever form they are incorporated in the part of the draft statute applicable to mechanics liens.

In addition, one of the design professionals lien sections already contains a provision at least similar to these two new proposed sections. Section 7302 provides in pertinent part:

> **§ 7302. Prerequisites for lien**
>
> 7302. A design professional is not entitled to a lien under this chapter unless all of the following conditions are satisfied:
>
> ….
>
> (c) Not less than 10 days before recording a claim of lien, the design professional gives the owner notice making a demand for payment and stating that a default has occurred under the contract and the amount of the default.

However, this required demand differs from the notice of lien contemplated in two significant respects. First, the demand will not necessarily advise the owner that a lien has been recorded on the owner's property. Second, although the failure to make the demand might ultimately render the design professionals lien *unenforceable*, it would not appear to preclude *recording* the lien.

> **§ ~~7426~~ 7305.5. Damages for false claim of lien**
>
> ~~7426~~ 7305.5. (a) If a ~~claimant~~ design professional records a claim of lien containing erroneous information relating to the design professional's demand with intent to slander title or defraud, the ~~claimant~~ design professional is liable for damages caused by the recordation, including costs and a reasonable attorney's fee incurred in a proceeding to invalidate the claim of lien and recover damages.
>
> (b) An owner may not commence an action for damages under this section unless at least 10 days before commencement the owner gave the claimant notice demanding that the ~~claimant~~ design professional execute and record a verified release of the claim of lien and the ~~claimant~~ design professional failed to do so. A demand given under Section [xxx] satisfies the requirement of this subdivision.
>
> (c) The owner has the burden of proof of all elements of an action for damages under this section.

This section would allow an owner to bring an action for damages based on the recordation of a design professionals lien with intent to slander or defraud.

> **§ ~~7480~~ 7307. Petition for release order**
>
> ~~7480~~ 7307. (a) The owner of property subject to a design professional's claim of lien may, pursuant to Article 7 (commencing

with Section 7480) of Chapter 4 of this part, petition the court for an order to release the property from a ~~claimant's~~ design professional's claim of lien, for any of the following causes:

~~(1) The claimant has not commenced an action to enforce the lien within the time provided in Section 7460.~~

~~(2) The claim of lien is invalid under Section 7424.~~

~~(3) The claimant's demand stated in the claim of lien has been paid in full.~~

~~(4) None of the labor, service, equipment, or material stated in the claim of lien has been provided.~~

~~(5) The claimant was not licensed to provide the labor, service, equipment, or material stated in the claim of lien for which a license was required by statute.~~

~~(6) 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.~~

[The Commission would need to decide the grounds upon which this petition could be based]

(b) This article does not bar any other cause of action or claim for relief by the owner of the property, nor does a release order bar any other cause of action or claim for relief by the ~~claimant~~ design professional, other than an action to enforce the claim of lien that is the subject of the release order. However, another action or claim for relief may not be joined with a petition under this ~~article~~ section.

~~(c) Notwithstanding Section 7054, 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.~~

This provision would allow an owner to make use of the expedited lien release procedure provided by the draft statute. Although this procedure is a part of the existing mechanics lien statute, the draft statute proposes to significantly expand its application.

If the Commission elected to make this procedure applicable to a design professionals lien, it would likely be necessary to also incorporate several of the supporting procedural provisions from the draft statute.

Mechanics Lien Issues

Section 7400 (Persons entitled to lien)

§ 7400. Persons entitled to lien

7400. A person that provides labor, service, equipment, or material authorized for a work of improvement, including but not limited the following persons, has a lien right under this chapter:

(a) Direct contractor.

(b) Subcontractor.
(c) Material supplier.
(d) Equipment lessor.
(e) Laborer.
(f) Design professional.
(g) Builder.

The Association of California Surety Companies urges that the draft statute should preclude mechanics lien remedies to persons who merely advance funds for labor, citing *Primo Team Inc. v. Blake Construction Co.*, 3 Cal. App. 4th 801, 4 Cal. Rptr. 2d 701 (1992). Exhibit p. 113. The Association further urges that the draft statute should also exclude persons who are not licensed contractors, and which only supply workers for the project, pay wages and employment benefits, provide workers' compensation insurance, and are responsible for tax withholding, citing *Contractors Labor Pool, Inc. v. Westway Contractors, Inc.*, 53 Cal. App. 4th 152, 61 Cal. Rptr. 2d 715 (1997).

These comments are discussed in this section of the memorandum, because all mechanics lien remedies generally flow from this section. See proposed Sections 7520 and 7530 (stop payment notice rights); *Primo Team Inc.*, *supra* (payment bond rights).

The staff does not believe that any provision of the draft statute creates any substantive change in existing law relating to the entitlement of an entity to a mechanics lien law remedy. The Association does not appear to be contending otherwise, but rather appears to be urging a codification of two of the many judicial interpretations of existing statutory law.

While attempts at such codification can be helpful, they may also be dangerous. An appellate court's construction of a vague statute, while certainly a part of mechanics lien law, is itself subject to interpretation, and may be later disagreed with by another appellate court, or disapproved by the California Supreme Court. Once a judicial construction is codified however, it is largely set in stone, subject to revision only by another legislative act (assuming no finding of unconstitutionality).

In the context of this study, the Commission has largely avoided such codification. Particularly on such a key issue as the eligibility of a person for any mechanics lien remedy, the staff recommends that **the codifications suggested by the Association not be incorporated in the draft statute.**

GGLT suggests that the term "builder" in subdivision (g) needs a statutory definition, offering that the term is not referenced in existing law as a party

entitled to a lien right. Civ. Code § 3110. Exhibit p. 149. The joint surety commenters also urge that a definition of "builder" be provided. Exhibit p. 98.

Although it is easy to miss in the laundry list of entities granted a lien right by Section 3110, "builders" are listed in Section 3110, and have been since at least 1971. Rather than attempt a definition that might inadvertently change existing law, the staff recommends that **no definition of this term be provided in the draft statute.**

However, Mr. Brown urges the reference to "builder" is superfluous. Exhibit p. 26. He argues that any builder would either be a direct contractor or a subcontractor, so this additional reference must indicate a person with some other status.

The staff believes this is a legitimate point. The draft statute has already deleted a host of other entities listed in Section 3110, streamlining the list to represent *categories* of claimants, rather than individual occupations. See Comment to proposed Section 7400. "Builder" appears to be the sole exception.

(Section 3110 currently provides lien rights to "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.")

The staff solicits input from practitioners as to whether the deletion of "builder" from the list of persons entitled to lien rights under Section 7400 would cause any problem in practice. In the absence of any such indication, the staff recommends that **subdivision (g) of Section 7400 be deleted.**

Mr. Brown further asserts the draft statute does not make sufficiently clear that *a supplier to a supplier* does not have a lien right, as provided by existing law. Exhibit pp. 25-26. He argues that statute's definition of "material supplier" in Section 7026 includes a lower tier supplier, and Section 7400 provides that a material supplier has a mechanics lien right.

The staff believes this issue is addressed by the requirement in Section 7400 that work provided must be "authorized" before supporting a lien right, as described in Section 7406.

Section 7406 provides:

§ 7406. Who may authorize work

7406. Labor, service, equipment, or material is authorized for a work of improvement or for a site improvement in any of the following circumstances:

(a) It is provided at the request of or agreed to by the owner.

(b) It is provided or authorized by a direct contractor, subcontractor, architect, project manager, or other person having charge of all or part of the work of improvement or site improvement.

However, Mr. Brown contends that Section 7406 is sufficiently broad to nevertheless allow a lower tier supplier lien claim. He asserts express language should be included somewhere in the draft precluding a lien right to a person "supplying materials to a material supplier supplying materials to be used or consumed in the work of improvement."

The staff enjoyed considering the possible inclusion of this particular language in the draft statute. However, a blanket exclusion of material suppliers from the list of entities that may authorize work under Section 7406 could cause substantial confusion in the case of an entity that contributes to a work of improvement in a dual capacity, as both a contractor *and* a material supplier.

The staff believes that Sections 7400 and 7406, read in conjunction, accurately state existing law, and recommends that **both sections be retained as drafted**.

Section 7402 (Lien right of express trust fund)

Mr. Sackman urges deletion of this section, for reasons relating to ERISA preemption. Exhibit p. 53. **His suggested revision is discussed in the section of this memorandum entitled "Laborers Compensation Fund Issues."**

Section 7412 (Time for claim of lien by direct contractor)

§ 7412. Time for claim of lien by direct contractor

7412. A direct contractor may not enforce a lien unless the contractor records a claim of lien within the following times:

(a) After the contractor completes the contract.

(b) Before the earlier of the following times:

(1) Ninety days after completion of the work of improvement.

(2) Sixty days after the owner records a notice of completion.

Comment. Section 7412 restates former Section 3115. A contract is complete within the meaning of this section **when the contractor's obligations under it are substantially performed, excused, or otherwise discharged**. See Howard S. Wright

Construction Co. v. BBIC Investors, LLC, 136 Cal. App. 4th 228, 38 Cal. Rptr. 3d 769 (2006).

Mr. Abdulaziz urges that a direct contractor should be entitled to record a claim of lien once the contractor stops work. Exhibit p. 17. He wonders how a contractor could record a lien if the contractor was terminated prior to completion of the contract.

Mr. Abdulaziz's comment highlights another gap in statutory mechanics lien law, that has been arguably filled by judicial interpretation. See *Howard S. Wright Construction Co. v. BBIC Investors, LLC*, 136 Cal. App. 4th 228, 38 Cal. Rptr. 3d 769 (2006). The draft statute attempts to address Mr. Abdulaziz's concern, to the limits of current statutory authority, by referencing this judicial interpretation in the section Comment.

However, to the extent Mr. Abdulaziz is urging codification of the *Howard S. Wright* holding, the staff believes such codification would be unwise. In fact, it is not even clear that the referenced opinion answers Mr. Abdulaziz's question, as it leave certain related questions unanswered. For example, the opinion does not appear to address a *contractor* breach of contract, prior to completion of the contract.

There are a great number of undefined terms in the existing mechanics lien statute that the draft statute leaves undefined, to allow for continuing judicial interpretation. **The staff believes that, in the context of this study, "completion" of a contract should remain one of those undefined terms.**

Mr. Brown questions why direct contractors are given 60 days to record a lien following the recordation of a notice of completion, when other claimants are only allowed 30 days. See proposed Section 7414. Exhibit pp. 22, 37.

This significant distinction relating to an extremely key component of mechanics lien law is a part of existing law, and has been since at least 1971. Civ. Code §§ 3115, 3116. Whatever the historical justification or rationale, in the absence of substantial evidence of real world problems, **the staff does not believe the draft statute to be an appropriate vehicle to modify these provisions.**

Section 7418 (Contents of claim of lien)

§ 7418. Contents of claim of lien

7418. A claim of lien shall be in writing, signed and verified by the claimant, and shall include all of the following information:

(a) A statement of the claimant's demand after deducting all just credits and offsets.

(b) The name of the owner or reputed owner, if known.

(c) A general statement of the kind of labor, service, equipment, or material provided by the claimant.

(d) **The name of the person that contracted for the labor, service, equipment, or material**.

(e) A description of the site sufficient for identification.

(f) The claimant's address.

Comment. ….

Subdivision (d) requires the name of the person that "contracted for" the labor, service, equipment, or material, rather than who "employed" the claimant.

….

Graniterock urges that subdivision (d) of this section is ambiguous, in that the reference to "the person that contracted for the labor…" could be interpreted as any number of different persons, including the owner or direct contractor. Exhibit p. 11. Graniterock urges that the phrase be modified to read "the person that contracted *with the claimant* for the labor…."

The staff agrees with Graniterock's suggestion, believing the modification would more accurately state existing law. See section Comment. The staff therefore recommends that **subdivision (d) of the section be modified to read**:

(d) The name of the person that contracted <u>with the claimant</u> for the labor, service, equipment, or material.

BOMA urges that a lien claimant should be required to provide more detail as to the demand referenced in subdivision (a), for example breaking down the demand by category of work provided. Exhibit p. 110. BOMA reports that a great deal of mechanics lien litigation is spent simply trying to clarify the items on which a claim is based, and whether all such items are properly recoverable in a lien claim.

As an alternative to requiring such information in the lien claim, BOMA suggests an additional provision requiring a claimant to provide such information on request.

The staff does not recommend BOMA's alternative suggestion. Implementation would likely be quite difficult, as the validity of a constitutionally protected lien could be dependent on an entirely new additional process involving the service of secondary demands for information, and responses.

BOMA's primary suggestion makes some sense to the staff. As contrasted with the preparation of a preliminary notice, there does not appear to be any reason why a claimant preparing a lien claim would not be able to provide at least some breakdown of the components of the claim. In fact, it is likely the total demand to be included in the claim was only arrived at after identifying and adding components of the claim. Moreover, it is a near certainty that any resolution of the claim, whether informally with an owner or in an enforcement action, will require the claimant to prepare and disclose such a breakdown.

On the other hand, the annotations to Civil Code Section 3084, from which subdivision (a) is taken verbatim, include a slew of quite old entries indicating that a detailed demand in a lien claim has historically never been required.

The staff solicits input from knowledgeable practitioners on this issue. Pending such input, the staff tentatively recommends that **the subdivision be modified to read:**

> (a) ~~A statement~~ An itemization of the claimant's demand after deducting all just credits and offsets.

Section 7420 (Notice of intended recording of claim of lien)

> **§ 7420. Notice of intended recording of claim of lien**
>
> 7420. (a) Before recording a claim of lien, the claimant shall give notice of the intended recording to the owner or reputed owner of property subject to the claim of lien.
>
> (b) Notice of the intended recording of a claim of lien shall include a copy of the claim of lien.

The draft statute proposes to add two new provisions to mechanics lien law, (1) requiring a lien claimant to provide notice to an owner prior to recording the lien (proposed Section 7420), and (2) precluding recording without proof that such notice has been given (proposed Section 7422, discussed in the next section of this memorandum). As might be expected, the Commission has received significant comment on these provisions.

Graniterock is opposed to the provisions. Exhibit p. 5. It argues first that the provisions will not provide any meaningful additional protection to owners, as the owner will have already received a preliminary notice advising of a possible lien. It further advises that in its own practice it has frequently sent an owner an informal notice of intent to record as a means to motivate payment, and such notices have seldom been effective.

Graniterock suggests that by the time a lien is to be recorded, an owner will either have already paid the prime contractor and so won't be willing to pay again, or has some other reason why they won't or can't pay (i.e., default or good faith dispute). In any event, Graniterock argues, providing the notice required by Section 7420 will do nothing to preclude the recording of the lien, and litigation will be fostered over compliance with the section.

Mr. Abdulaziz also expresses strong disagreement with this new provision, arguing that it is an additional and unnecessary burden on a lien claimant trying to enforce a constitutional right. Exhibit p. 17. Mr. Abdulaziz also urges that the provisions will shorten the time a claimant has to record a lien, and generate litigation over the sufficiency of the notice provided to the owner.

Mr. Brown sees no reason for this provision. Exhibit p. 37. He also believes the section as drafted is ambiguous in terms of when the advance notice must be given, and urges it will require providing claimants additional time to record a lien.

For example, Mr. Brown presents a hypothetical in which a claimant gives the owner the required advance notice, and the owner thereafter contacts the claimant (before the lien is recorded), and the claimant obliges a request from the owner to delay recording the lien while the two of them discuss the matter. If the matter is thereafter not resolved, asks Mr. Brown, does the claimant have to give a new notice? Is the claimant afforded some extension of time to record the lien? Mr. Brown believes enactment of these sections "may result in less negotiations for settlement of disputes."

Mr. Brown further urges the section does not clearly indicate what type of notice is required, or how it must be served.

BOMA appears to support the inclusion of the provisions, but believes Section 7420 should specify and require at least 10 days' advance notice of the intended recordation. Exhibit pp. 110-111. It points out that one of the cornerstones of the *Connolly* decision upholding the constitutionality of the mechanics lien law was the possibility that an owner could seek injunctive relief to preclude the recording of an invalid lien, and 10 days would be an insufficient amount of time to allow for such action.

BOMA also suggests the 10 days should be extended based on how the notice is given, as generally provided in Code of Civil Procedure Section 1013.

GGLT indicates it believes the inclusion of the provisions is a "good idea which may lead to an early resolution of some disputes without a lien being recorded." Exhibit p. 150.

The notice required by the new provisions could conceivably serve two distinct purposes. The first, the only one the commenters address, might be characterized as a more emphatic and more specific preliminary notice, warning owners of an imminent lien claim recording. However, *it does not appear this purpose was ever contemplated by the Commission in proposing the two sections.*

If the Commission were to nevertheless decide it was worthwhile to try to achieve this goal, the staff believes it would be theoretically possible, but the sections would require substantial revision.

There are significant differences between a preliminary notice and the notice required by Section 7420, and if this latter notice were given sufficiently in advance of recordation, it could foster resolution of at least *some* prospective lien claims, as well as give an owner a meaningful opportunity to seek injunctive relief before a lien is recorded.

However, the Section 7420 *as written* could not effectively further either one of these goals, because it does not require any particular amount of advance notice. As the provision is written, a lien claimant could place the required notice in the mailbox outside the county recorder's office just before stepping inside to record the lien claim. Further, even if the claimant sent the notice in time for the owner to receive it before recordation occurred, the concerns expressed by the commenters about what happens *then* are legitimate.

If the Commission wishes the section to effectively serve as a more urgent and detailed second preliminary notice, the staff believes further discussion is required before a recommendation can be made as to how or if that goal can be accomplished.

However, aside from serving as an advance warning of an impending lien claim, this section also serves a completely independent function, the function contemplated by the Commission.

As written, the section simply provides an owner with "*after* the fact" notice that a lien claim had been recorded on the owner's property, a notice which also has significant value. Without this notice, recorded lien claims can cloud titles indefinitely. Owners may learn of the cloud much later, and only during an event (such as the sale of the property) when the lien claimant is nowhere to be found to secure a release, and there is little time to run to court.

In order to serve *this* purpose, the notice need only be served roughly contemporaneously with recordation. In fact, the section requires the notice to be given before recordation only as a component of the enforcement mechanism provided by Section 7422. By requiring the claimant to attach to the lien claim an affidavit stating that the notice was served (which obviously requires the notice to be served before recordation), the claimant is thereby compelled to either serve the notice, or commit perjury.

Requiring the notice to be served at any time *after* recordation would be not nearly as effective at achieving this stated goal, because there would be no enforcement mechanism. The only real consequence that could be imposed at that time for failure to serve the notice would be preclusion of an enforcement action on the recorded lien. This preclusion, however, would have no effect at all on lien claimants that had decided not to pursue their claims anyway.

With only this goal in mind, all of the objections of the commenters are largely answered. Since the purpose of the notice is not to foster resolution of the claim, there is no need for the claimant to do anything other than ensure that notice is given before recordation, and then complete the proof of service affidavit. The "burden" on the claimant to satisfy the requirements of the sections is minimal, there is no need to change the time requirements for recording, and there is no need to provide any minimum period of advance notice.

Finally, Mr. Brown's concern about the type of notice is discussed in a section of this memorandum entitled "Notice Provisions."

The staff recommends that **Section 7420 be retained as drafted.**

Section 7422 (Notice prerequisite to recording claim of lien)

> **§ 7422. Notice prerequisite to recording claim of lien**
>
> 7422. The county recorder shall not record a claim of lien that is filed for record unless accompanied by the claimant's proof of notice showing compliance with Section 7420.

Related to its criticism of Section 7420, Graniterock argues that all Sections 7420 and 7422 will accomplish is to complicate recordation, as county recorders will now have to verify compliance with the notice requirement. Exhibit p. 5.

The staff recognizes that *any* added imposition on a county recorder to review submitted documents before filing or recording creates at least the theoretical possibility that the documents will be wrongly rejected.

However, the staff does not believe that requiring the county recorder to simply check to see if a proof of service affidavit is attached to a lien claim is likely to add to the rejection of submitted lien claims. The staff presumes that at the present time county recorders check to insure *some* minimum form requirements are satisfied before recording a lien claim, and this would constitute just one more easily verifiable requirement. The staff anticipates that a standard proof of service form designed to satisfy this section would quickly be developed and distributed. The only burden on the county recorder would then be to flip to the back of the claim form to insure that a proof of service affidavit was attached.

The staff recommends that **the section be retained as drafted**.

Mr. Brown asks whether, by virtue of this provision, a county recorder is also granted authority to judge the *adequacy* of the notice. Exhibit p. 38.

To address this concern, the staff recommends that **the section Comment be augmented, as follows**:

> **§ 7422. Notice prerequisite to recording claim of lien**
>
> 7422. The county recorder shall not record a claim of lien that is filed for record unless accompanied by the claimant's proof of notice showing compliance with Section 7420.
>
> **Comment.** Section 7422 is new. Cf. Gov't Code § 27297.5 (notification by county recorder of person against which involuntary lien is recorded). See also Section 7116 (proof of notice).
>
> It is intended by this section that the county recorder verify only the existence of the claimant's proof of notice, not its adequacy.

Section 7424 (Forfeiture of lien for false claim)

> **§ 7424. Forfeiture of lien for false claim**
>
> 7424. (a) Except as provided in subdivision (b), erroneous information contained in a claim of lien relating to the claimant's demand, credits and offsets deducted, the labor, service, equipment, or material provided, or the description of the site, does not invalidate the claim of lien.
>
> (b) Erroneous information contained in a claim of lien relating to the claimant's demand, credits and offsets deducted, or the labor, service, equipment, or material provided, invalidates the claim of lien if the court determines either of the following:

(1) **The claim of lien was made with intent to slander title or defraud**.

(2) An innocent third party, without notice, actual or constructive, became the bona fide owner of the property after recordation of the claim of lien, and the claim of lien was so deficient that it did not put the party on further inquiry in any manner.

BOMA points out that subparagraph (b)(1) is ambiguous as to *when* a claimant must have an intent to defraud. Exhibit p. 110. Specifically, BOMA is concerned about a claimant who records a lien claim in good faith, later discovers that all or part of the claim is in fact unsupportable, but does not record a release or partial release of the claim. BOMA urges that in such a situation, the lien should be invalidated under Section 7424, and the claimant should be subject to a damages claim under Section 7426 (to be discussed in the next section of this memorandum).

The validity of a lien claim *itself*, the focus of Section 7424, normally turns on the information included *in the claim*. As such, subdivision (b) of the section provides a sanction against a claimant — forfeiture of the lien claim — for specified erroneous information *in the claim*, that was included with intent to slander title or defraud.

What BOMA appears to be arguing for are sanctions against a lien claimant based on *conduct of the lien claimant*, rather than based on the content of the claim.

BOMA's suggestion will therefore be addressed in the next section of this memorandum, discussing Section 7426.

Section 7426 (Damages for false claim of lien)

§ 7426. Damages for false claim of lien

7426. (a) If a claimant records a claim of lien **containing erroneous information** with intent to slander title or defraud, the claimant is liable for damages caused by the recordation, including costs and a reasonable attorney's fee incurred in a proceeding to invalidate the claim of lien and recover damages.

(b) An owner may not commence an action for damages under this section unless at least 10 days before commencement the owner gave the claimant notice demanding that the claimant execute and record a verified release of the claim of lien and the claimant failed to do so. A demand given under Section 7482 satisfies the requirement of this subdivision.

(c) The owner has the burden of proof of all elements of an action for damages under this section.

Comment. Section 7426 is new. It reverses case law to the effect that recordation of a claim of mechanics lien is privileged. See, e.g., Pisano & Associates v. Hyman, 29 Cal. App. 3d 1, 105 Cal. Rptr. 414 (1972).

….

BOMA argues that, even if a claimant *recorded* a claim of lien in good faith (i.e., without the requisite intent to slander title or defraud), a sanction should also be imposed against a claimant who learns *after* recording that a lien claim is erroneous and does nothing, for "[l]eaving a false lien in place." Exhibit p. 110. BOMA argues that a claimant in this situation should be obligated to record a release or partial release of the lien, or be subject to an action for damages under this section as well as forfeiture of the lien.

Section 7426 is a new section, and the staff believes BOMA's suggested extension of the section has merit. An argument in opposition would appear to be an argument that a lien claimant who records a lien claim in good faith should thereafter be permitted to prosecute a lien claim, or allow a lien claim to continue to cloud title, that the claimant knows to be false.

The staff recommends that **Section 7426 be modified as follows:**

§ 7426. Damages for false claim of lien

7426. (a) If a claimant, with intent to slander title or defraud, records a claim of lien containing erroneous information ~~with intent to slander title or defraud~~, or fails to record a verified release or partial release of a claim of lien containing erroneous information within 10 days after a demand notice under subdivision (b), the lien claim is invalid, and the claimant is liable for damages caused by the recordation, including costs and a reasonable attorney's fee incurred in a proceeding to invalidate the claim of lien and recover damages.

(b) An owner may not commence an action for damages under this section unless at least 10 days before commencement the owner gave the claimant notice demanding that the claimant execute and record a verified release of the claim of lien and the claimant failed to do so. A demand given under Section 7482 satisfies the requirement of this subdivision.

The staff is also concerned that the reference to "erroneous information" in this new section may be broader than was intended by the Commission.

A lien claim must contain various pieces of information. See proposed Section 7418. Any of the items listed could be "erroneous." However, the previous

section of the draft statute, Section 7424, identifies two narrower categories of "erroneous information" in a lien claim, which either does not invalidate or may invalidate the claim:

> **§ 7424. Forfeiture of lien for false claim**
>
> 7424. (a) … erroneous information contained in a claim of lien relating to **the claimant's demand, credits and offsets deducted, the labor, service, equipment, or material provided, or the description of the site**, does not invalidate the claim of lien.
>
> (b) Erroneous information contained in a claim of lien relating to **the claimant's demand, credits and offsets deducted, or the labor, service, equipment, or material provided**, invalidates the claim of lien if the court determines either of the following:
>
> (1) The claim of lien was made with intent to slander title or defraud.
>
> ….

The staff suggests that the types of erroneous information that can give rise to a damage claim under Section 7426 should be coextensive with the types of erroneous information that can invalidate the claim of lien under Section 7424.

The staff therefore recommends that **the reference in subdivision (a) of Section 7426 to "erroneous information" be modified to read "erroneous information relating to the claimant's demand, credits and offsets deducted, or the labor, service, equipment, or material provided."**

Section 7428 (Release bond)

> **§ 7428. Release bond**
>
> 7428. (a) An owner of property subject to a recorded claim of lien or a direct contractor or subcontractor affected by the claim of lien that disputes the correctness or validity of the claim may obtain release of the property from the claim of lien by recording a lien release bond. The principal on the bond may be the owner of the property or the contractor or subcontractor.
>
> (b) The bond shall be conditioned on payment of any judgment and costs the claimant recovers on the lien. The bond shall be in an amount equal to 125 percent of the amount of the claim of lien or 125 percent of the amount allocated in the claim of lien to the property to be released. The bond shall be executed by an admitted surety insurer.
>
> (c) The bond may be recorded either before or after commencement of an action to enforce the lien. On recordation of the bond the property is released from the claim of lien and from any action to enforce the lien.

(d) A person that obtains and records a lien release bond shall give notice to the claimant by mailing a copy of the bond to the claimant. Failure to give the notice required by this section does not affect the validity of the bond, but the statute of limitations for an action on the bond is tolled until notice is given. **The claimant shall commence an action on the bond within six months after notice is given.**

In order to clarify whether or not a claimant who has already commenced an action to enforce a lien has to file a new action seeking recovery against a subsequently recorded release bond, the staff recommends that **the Comment to this section be augmented as follows**:

Comment. ….
If a action to enforce a lien has been timely commenced before a release bond is recorded, the claimant may name the surety as a defendant and seek recovery against the bond in the enforcement action; the claimant is not required to commence a new action on the bond. See Hutnick v. United States Fidelity & Guaranty Co., 47 Cal. 3d 456, 763 P.2d 1326, 253 Cal. Rptr. 236 (1988).
….

Section 7430 (Amount of lien)

§ 7430. Amount of lien

7430. (a) The lien is a direct lien for the lesser of the following amounts:

(1) The reasonable value of the labor, service, equipment, and material provided by the claimant.

(2) The price agreed to by the claimant and the person that contracted for the labor, service, equipment, or material.

(b) The lien is not limited in amount by the contract price for the work of improvement except as provided in Section 7602.

(c) This section does not preclude the claimant from including in a claim of lien an amount due as a result of rescission, abandonment, or breach of the contract. If there is a rescission, abandonment, or breach of the contract, the amount of the lien may not exceed the reasonable value of the labor, service, equipment, or material provided by the claimant.

Comment. Section 7430 restates subdivisions (a) and (b) of former Section 3123 and a portion of former Section 3110. See also Sections 7008 ("contract price" defined) and 7602 (payment bond). As used in this section, the reasonable value of labor, service, equipment, and material includes the reasonable use value of appliances, equipment, teams, and power.

> The provision of former Section 3123(c) that required an owner to give notice of a change of 5 percent or more is not continued.
>
> See also Sections 7002 ("claimant" defined), 7016 ("labor, service, equipment, or material" defined), 7024 ("lien" defined), 7032 ("person" defined), Section 7418 (claim of lien).

This section does not continue a requirement in existing law that an owner notify the "prime" contractor and the construction lender of a change in the price of the contract of five percent or more. Civ. Code §3123(c). The Commission was unsure of the purpose of the deleted provision, and noted that it had no enforcement mechanism.

Mr. Brown is in favor of retaining the provision. Exhibit p. 38. He expresses the belief that the provision was designed to provide notice to a surety when the cost of a project increased beyond the penal sum of a bond on the project, so additional security could be demanded from the principal on the bond. However, the staff notes that the provision in existing law did not require notice to a surety.

BOMA agrees that the provision is unnecessary for two reasons. Exhibit p. 109. First, it points out that a direct contractor will have equal knowledge as to contract changes, and a construction lender typically requires notice of changes independent of any statutory requirement. Second, it contends the provision is not followed in practice because it has no enforcement mechanism.

Mr. Melino concurs in BOMA's assertions. Exhibit p. 129.

GGLT concurs in the deletion of the provision, indicating that the provision in existing law is not typically observed. Exhibit p. 147.

The staff recommends that the provision in existing law requiring notification of the specified contract change remain deleted from the draft statute.

Mr. Abdulaziz would like to see an explicit reference to contract changes in subparagraph (b)(2). Exhibit p. 17. He indicates this reference is particularly important because the section referenced in the subparagraph — Section 7602 — also does not have an explicit reference to contract changes.

The staff notes that the definition of "contract price" provided in Section 7008 explicitly provides that "contract price" includes change orders. However, **the staff agrees that a clarification in the section Comment might be helpful.**

The Association of California Surety Companies asserts that "damages for claims based upon contracts, such as rescission, abandonment and breach of

contract do not have any place in the [mechanics] lien law," and are "totally contrary to the constitutional mandate of the mechanic's lien right." Exhibit p. 118.

The staff suggests that subdivision (c) in fact does not allow a claimant to include in a lien claim traditional contract damages, such as consequential or delay damages. Rather, the subdivision — a provision in existing Civ. Code § 3123 — is only meant to protect a claimant's right to a lien for labor, service, equipment, or material provided as the result of a *rescission, abandonment, or breach* of a contract (as contrasted with work provided *pursuant* to a contract). See *Basic Modular Facilities, Inc. v. Ehsanipour*, 70 Cal. App. 4th 1480, 83 Cal. Rptr. 2d 462 (1999).

The Association urges that if the above construction is the intent of subdivision (c), it is poorly drafted.

Mr. Brown also suggests that the section does not clearly provide "what is now eliminated [from] or included" in a lien claim. Exhibit p. 38.

The challenged language in this section is taken virtually verbatim from existing law (Civ. Code § 3123). **The staff thinks we ought not tamper with the policy expressed in this section in the context of the current project.**

The staff recommends that **the section be retained as drafted, with the Comment augmented as follows:**

> **Comment.** Section 7430 restates subdivisions (a) and (b) of former Section 3123 and a portion of former Section 3110. See also ~~Sections 7008 ("contract price" defined) and~~ Section 7602 (payment bond). As used in this section, the reasonable value of labor, service, equipment, and material includes the reasonable use value of appliances, equipment, teams, and power.
>
> The term "contract price" in subdivision (b) includes contract changes. See Section 7008.
>
> The provision of former Section 3123(c) that required an owner to give notice of a change of 5 percent or more is not continued.
>
> See also Sections 7002 ("claimant" defined), 7016 ("labor, service, equipment, or material" defined), 7024 ("lien" defined), 7032 ("person" defined), Section 7418 (claim of lien).

Section 7432 (Lien limited to work included in contract or modification)

> **§ 7432. Lien limited to work included in contract or modification**
>
> 7432. (a) **A lien does not extend to labor, service, equipment, or material not included in a contract** between the owner and direct contractor **if the labor, service, equipment, or material was**

authorized by the direct contractor or subcontractor and the claimant had actual knowledge or constructive notice of the contract before providing the labor, service, equipment, or material.

(b) The filing of a contract with the county recorder, before the commencement of work, is equivalent to giving actual notice of the provisions of the contract by the owner to a person providing labor, service, equipment, or material.

Graniterock contends that subdivision (a) of this provision is ambiguous. Exhibit p. 9. It asserts that the bolded language implies that if provided labor was *not* authorized by the direct contractor or subcontractor, the labor *may* be included in a lien claim.

Section 7400 provides that only authorized labor may be included in a lien claim. However, the section could be made more clear.

The staff therefore recommends that **the section be modified to read**:

§ 7432. Lien limited to work included in contract or modification

7432. (a) A lien does not extend to labor, service, equipment, or material authorized by a direct contractor or subcontractor, if the labor, service, equipment, or material was not included in a contract between the owner and direct contractor, ~~if the labor, service, equipment, or material was authorized by the direct contractor or subcontractor~~ and the claimant had actual knowledge or constructive notice of ~~the~~ that contract before providing the labor, service, equipment, or material.

(b) The filing of a contract with the county recorder, before the commencement of work, is ~~equivalent to giving actual~~ constructive notice of the ~~provisions of the~~ contract by the owner to a person providing labor, service, equipment, or material.

Section 7434 (Amount of recovery)

§ 7434. Amount of recovery

7434. A direct contractor or a subcontractor may enforce a lien only for the amount due **pursuant to the contract** after deducting all claims of other claimants for labor, service, equipment, and material provided and embraced **within the contract**.

The staff believes that, as applicable to a subcontractor, the references to "contract" in the section are ambiguous. The term could apply either to the subcontractor's contract with the direct contractor, or the direct contractor's contract with the owner.

The language of Civil Code Section 3140, which this provision continues, refers to "his" contract, thereby supporting the former interpretation.

The staff recommends that **Section 7434 be modified as follows**:

> **§ 7434. Amount of recovery**
>
> 7434. A direct contractor or a subcontractor may enforce a lien only for the amount due pursuant to ~~the~~ that contractor's contract after deducting all claims of other claimants for labor, service, equipment, and material provided and embraced within ~~the~~ that contract.

Section 7442 (Interest subject to lien)

> **§ 7442. Interest subject to lien**
>
> 7442. The following interests in property to which a lien attaches are subject to the lien:
>
> (a) The interest of a person that contracted for the work of improvement.
>
> (b) The interest of a person that did not contract for the work of improvement, if labor, service, equipment, or material for which the lien is claimed was provided with the knowledge of the person. This subdivision does not apply to the interest of a person that gives notice of nonresponsibility under Section 7444.

Mr. Brown asserts that Section 7442 does not continue a key provision from the section on which Section 7442 is based, Civil Code Section 3129. Exhibit p. 38.

Section 3129 provides as follows:

> 3129. Every work of improvement constructed upon any land and all work or labor performed or materials furnished in connection therewith with the knowledge of the owner or of any person having or claiming any estate therein shall be held to have been constructed, performed, or furnished at the instance of such owner or person having or claiming any estate therein and such interest shall be subject to any lien recorded under this chapter unless such owner or person having or claiming any estate therein shall give a notice of nonresponsibility pursuant to Section 3094.

Civ. Code § 3129.

Mr. Brown reads Section 3129 as stating a presumption that all work of improvement on a site is performed with the knowledge of the owner, unless the owner gives a notice of nonresponsibility. He asserts that this presumption allows a claimant to record a lien against an owner's interest in property based solely on furnishing labor, service, equipment, or material, and places a burden on an owner who did not give a notice of nonresponsibility to affirmatively

prove it had no knowledge of the work of improvement in order to defend against the lien.

Mr. Brown urges that this presumption should not be omitted.

The staff seeks input from practitioners on this issue. With respect, the staff does not find the presumption Mr. Brown refers to in the text of Section 3129, nor is the staff aware of any such statutory presumption anywhere within existing mechanics lien law. However, **if such a presumption is a part of existing law, a discussion of adding the provision to the draft statute would be warranted.**

BOMA, although appearing to concede that Section 7442 continues existing law, argues that the scope of the section should be narrowed when applied to landlord-tenant situations. Exhibit p. 111. It asserts that a landlord's mere "knowledge" of tenant improvements should not be sufficient to cause the property owner to be considered a "participating owner," and preclude it from posting a notice of nonresponsibility. BOMA argues that if a lease does not require improvements or require the owner to pay for all or part of tenant improvements, the property owner should not be considered a "participating owner."

Under the "participating owner" doctrine, if a property owner "participates" in a tenant's contract for a work of improvement, the property owner is subject to a mechanics lien under subdivision (*a*) of Section 7442 (and may not post a notice of nonresponsibility). This "participation" has been deemed to exist even when the landlord has no knowledge of the work, if the tenant was required by the lease to contract for the improvement. See *Howard S. Wright Construction Co. v. Superior Court*, 106 Cal. App. 4th 314, 130 Cal. Rptr. 2d 641 (2003).

However, contrary to BOMA's apparent assertion, a landlord's mere "knowledge" of tenant improvements is *not* sufficient to cause the property owner to be considered a "participating owner." Rather, a landlord who has only knowledge of a work of improvement on the property would be a person described by subdivision (*b*) of Section 7442, and *would* be permitted to post a notice of nonresponsibility.

It is therefore not clear to the staff what BOMA is arguing for, as it appears to have accurately stated existing law, which remains changed by Section 7442.

To the extent BOMA is urging a substantive change in the law that would reduce a landlord's lien exposure, however, the staff believes that any such

proposed change would be inappropriate in the context of the current study. The staff recommends that **the section be retained as drafted.**

Respectfully submitted,

Steve Cohen
Staff Counsel