Study H-821 August 13, 2007

Memorandum 2007-34

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

This memorandum continues a discussion of comments on the public work portion of the Commission's tentative recommendation on *Mechanics Lien Law* (June 2006).

Most comments analyzed in this memorandum were attached as an exhibit to previous CLRC memoranda. The relevant portions of those comments are summarized and discussed in this memorandum, but the comments have not been republished.

We have also received a two part letter from the California State Council of Laborers Legislative Department and Construction Laborers Trust Funds for Southern California (6/21/07 and 6/25/07), which is attached as an Exhibit to this memorandum.

Comments supportive of a provision of the proposed law are not discussed in this memorandum, except when comments questioning the same provision have been received, or when the Commission has specifically solicited comment on the provision.

Issues in this memorandum that clearly require discussion have been marked with the following symbol: ☞.

All other issues in this memorandum are presumed to be noncontroversial "consent" issues. The staff does not intend to discuss any consent issue, unless a Commission member or member of the public expresses a question or concern about the issue.

Sections of the proposed law reprinted in this memorandum are the latest draft versions of the section, incorporating any revisions approved by the Commission at previous meetings and any non-substantive technical corrections made by the staff.

The Associated General Contractors of California (hereinafter "AGC"), criticize the scope of proposed Public Contract Code Section 45010, a section that requires a direct contractor on certain public works projects to obtain a payment bond. Third Supplement to CLRC Memorandum 2006-48, Exhibit pp. 31-32. The group contends the section should be extended to apply to so-called "hybrid" projects, which are not clearly public or private work.

The group's comment exposes a larger problem relating to whether *any* provision of the proposed law applies to hybrid projects.

What is a Hybrid Project?

A typical "hybrid" project arises when a public entity partners with a private entity to improve publicly owned property. This may involve a long term lease of the public property to a private entity which then develops the property according to specified terms, the creation of a private non-profit corporation that solicits and uses contributions to develop the property, or another type of public-private partnership.

In general, this type of hybrid project can be characterized as a work of improvement that improves publicly *owned* property, but is directly *contracted for* by a private entity.

Does Any Part of the Proposed Law Govern Hybrid Projects?

Based on how the application provisions of the private work and public work parts of the proposed law are drafted, it appears the typical hybrid project might fall into an inadvertently created statutory gap between the two parts of the proposed law.

Applicability of Public Work Provisions to Hybrid Projects

A hybrid project involving development of public land by a private entity would not be governed by the public work part of the proposed law. Proposed Public Contract Code Section 42010 sets forth (and limits) the application of all provisions in the public work part:

> **§ 42010. Application of part**
>
> 42010. (a) This part applies to a public works contract awarded by a public entity.

Since a public works contract on a typical hybrid project is not "awarded by a public entity," the entire public work part of the proposed law (including proposed Public Contract Code Section 45010) would have no application to such a project.

Applicability of Private Work Provisions to Hybrid Projects

It is at least unclear whether a typical hybrid project would be governed by any private work provision of the proposed law. The application section of the private work part of the proposed law provides that:

> **§ 7050. Application of part**
>
> 7050. This part applies only to a private work of improvement.
>
> **Comment**. ….
>
> The provisions of the mechanics lien law governing a public work are relocated to the Public Contract Code. See Pub. Cont. Code §§ 41010-42390 (public works contract remedies).

However, neither the term "private work of improvement" nor the term "public work" are defined in the private work part of the proposed law.

The absence of definitions for these terms leaves an ambiguity as to whether a hybrid project is a "private work of improvement" governed by the private work part of the proposed law, a "public work" governed by the public work part, or neither.

Ambiguity of Coverage Under Existing Law

The ambiguity discussed above is not present in existing law, because the substantive provisions of the existing single mechanics lien statute (titled "Works of Improvement") expressly either apply to a "public work" (a defined term within the statute), or do *not* apply to a public work (thereby implying that such provisions *do* apply to any work of improvement that is *not* a public work).

Under existing law, a hybrid project thus necessarily falls into one or the other classification. (Because a hybrid project is not a "public work" under existing law, it is governed by the private work provisions of the existing mechanics lien statute.)

Recommendation

It was not the Commission's intention in drafting the proposed law to create a statutory gap exempting hybrid projects from the mechanics lien law.

The staff suggests closing the gap by following the same approach as existing law, making clear that the private work part of the proposed law applies to any work of improvement *not* governed by the public work part.

The staff recommends **revising proposed Civil Code Section 7050 as follows:**

> **§ 7050. Application of part**
>
> 7050. This part applies only to a ~~private~~ work of improvement that is not governed by Part 6 (commencing with Section 41010) of Division 2 of the Public Contract Code.
>
> **Comment**. Section 7050 is new. It subsumes various provisions of former law, including former Sections 3097 (preliminary notice of private work), 3109 (application of mechanics lien provisions), 3156 (stop notice provisions), 3260 (retention payment provisions), 3260.1 (progress payment provisions), 3260.2 (stop work notice provisions).
>
> ~~The provisions of the mechanics lien law governing a public work are relocated to the Public Contract Code. See Pub. Cont. Code §§ 41010-42390 (public works contract remedies).~~
>
> Part 6 (commencing with Section 41010) of Division 2 of the Public Contract Code applies to works of improvement performed pursuant to a public works contract awarded by a public entity. See Public Contract Code Section 42010.

Under this approach, a hybrid project would be governed by the private work provisions of the proposed law (as under existing law).

Availability of Mandatory Payment Bond Remedy on Hybrid Project

AGC is correct that the mandatory payment bond remedy in proposed Public Contract Code Section 45010 is not applicable to a hybrid project. In fact, since a hybrid project is not "awarded by a public entity," *no* public work provision of the proposed law is applicable to such a project.

This is also the state of existing law.

Under existing law, a "public work" is defined as "any work of improvement contracted for by a public entity." Civ. Code § 3100. Since a hybrid project is *not* "contracted for by a public entity," it is therefore necessarily a private work. *North Bay Construction, Inc. v. City of Petaluma*, 143 Cal. App. 4th 552, 556, 49 Cal. Rptr. 3d 455 (2006), *Progress Glass Co. v. American Ins. Co.*, 100 Cal. App. 3d 720, 727, 161 Cal. Rptr. 243 (1980).

And as the mandatory payment bond remedy under existing law (Civ. Code § 3247) is only available on a "public work," the remedy is thus not available at the present time on a typical hybrid project.

Should Existing Law Be Changed to Make a Mandatory Payment Bond Remedy Available on a Hybrid Project?

There is some justification for making the payment bond requirement of section 45010 applicable to hybrid projects.

When an improvement is made to publicly owned land in California (regardless of who *contracts for* the improvement), contributors to that improvement are precluded from asserting a mechanics lien claim, based on common law principles of sovereign immunity. *North Bay Construction, Inc. v. City of Petaluma*, 143 Cal. App. 4th 552, 49 Cal. Rptr. 3d 455 (2006).

As a substitute for the unavailable mechanics lien claim, the Legislature has long required a direct contractor on most public works projects to obtain a payment bond guaranteeing payment to all contributors on the project. See *French v. Powell*, 135 Cal. 636, 641, 68 P. 92 (1902), *N.V. Heathorn, Inc. v. County of San Mateo*, 126 Cal. App. 4th 1526, 25 Cal. Rptr. 3d 400 (2005) *Pneucrete Corp. v. U.S. Fidelity & Guaranty Co.*, 7 Cal. App. 2d 733, 46 P.2d 1000 (1935).

Since a hybrid project is an improvement to publicly owned land, contributors to the project may not assert a mechanics lien claim. *North Bay Construction, Inc. v. City of Petaluma*, 143 Cal. App. 4th 552, 49 Cal. Rptr. 3d 455 (2006).

Therefore, if a payment bond remedy is also unavailable on a hybrid project, contributors to those projects will receive the worst of both worlds — neither a mechanics lien claim, nor a payment bond remedy.

Recommendation

The last time the Legislature addressed Civil Code Section 3247 (containing the mandatory payment bond provision in existing law) was in 1985, when hybrid projects may not have been as common as they are today. It is thus not clear whether the Legislature intended that contributors to hybrid projects should be denied the payment bond remedy available to contributors to pure public works projects.

The staff does not see any good policy reason to distinguish between a pure public works project and a hybrid project in terms of the availability of a payment bond remedy. In both cases contributors to the project are barred from

asserting a mechanics lien claim, and in both cases the entity bearing the burden of providing the payment bond is a private contractor.

However, the staff is nevertheless reluctant to recommend making this substantial change in existing law in the context of this study, particularly this late in the Commission's process. Not enough is known about how common these hybrid projects are, or whether they might differ from conventional public works projects in some unknown but significant way. Interested persons have not been given sufficient opportunity to address the Commission about whether the revision urged by AGC might result in unintended consequences.

Moreover, this change could not be easily implemented. Attempting to include a hybrid project within the scope of only a single public work provision would create significant confusion as which if any related provisions would also be applicable. Drafting a new provision in the private work part making a payment bond mandatory only for a private "hybrid" project would likely generate significant litigation over just what is a hybrid project.

The staff **does not recommend addressing this issue in the proposed law**.

☞ RECONCILIATION OF PAYMENT BOND PROVISIONS IN PUBLIC CONTRACT CODE

Existing Civil Code Section 3247 provides that a direct contractor awarded a public works contract by a public entity for more than $25,000 must provide a payment bond as security for other contributors on the project. Existing law also contains several other provisions relating to the payment bond.

The proposed law continues the substance of Section 3247, along with the related public work payment bond provisions, in the Public Contract Code. Proposed Pub. Cont. Code §§ 41090, 45010–45090.

However, the Public Contract Code already contains several provisions requiring payment bonds, and specifying rules and requirements for those payment bonds, in other specifically described public work contexts.

In discussing how the proposed law would impact the existing public work payment bond provisions, the Commission stated:

> The proposed law does not attempt to provide uniform rules [relating to payment bonds] applicable to all public works contracts, state and local. The public cost implications are significant. *The proposed law preserves the status quo.*

Tentative Recommendation on *Mechanics Lien Law* (June 2006), p. 54 (emphasis added).

Despite the Commission's stated intentions however, the proposed law's payment bond provisions are worded in a manner that could be read as superseding existing payment bond provisions in the Public Contract Code, or otherwise changing the "status quo."

Position of Commenters

The California Department of Water Resources ("DWR") disagrees with the Commission's stated approach to this issue, suggesting that payment bond provisions in the proposed law *should* be made applicable to other statutory payment bonds. CLRC Memorandum 2007-25, Exhibit p. 4. The American Insurance Association, National Association of Surety Bond Producers, and Surety & Fidelity Association of America ("joint surety commenters") also apparently have no objection to blending together requirements relating to payment bonds given under different provisions. CLRC Memorandum 2006-39, Exhibit p. 94.

The staff respectfully disagrees with these comments. The Commission has not studied all provisions relating to public work payment bonds, and harmonizing the various provisions could impose potentially significant unintended consequences on both public entities and direct contractors. As the Commission has already expressed, the proposed law should instead take a conservative approach, and preserve the status quo.

Overbroad Language in Proposed Law

Proposed Public Contract Code Section 41090 defines "a payment bond" as a payment bond given under *any* provision of the Public Contract Code. There are several other payment bond provisions in the proposed law that use the defined term. Given the code-wide scope of the definition, one could read those sections as applying to *any* payment bond given under the Public Contract Code, rather than applying only to payment bonds given under the mechanics lien statute.

For example, proposed Public Contract Code Section 45030 provides that a "payment bond" must be for 100% of the amount payable pursuant to the public works contract. Does that mean that *every* payment bond given under the Public Contract Code must be funded at 100% of the amount of the contract? That would contradict at least one existing section of the Public Contract Code, as existing Section 10222 specifically provides for a payment bond that may be for less than 100% of the contract amount.

Applicability of Payment Bond Provisions to State Public Works Projects

The proposed law may also fail to adequately preserve a distinction drawn in existing law between a payment bond given on a state public works project, and other payment bonds.

Existing Civil Code Section 3247 provides rules for a mechanics lien payment bond, but expressly exempts from those rules projects contracted for by a state entity, as described in Public Contract Code Section 7103(d).

Existing Public Contract Code Section 7103 provides special payment bond rules for a public work contracted for by a state entity, but expressly states in subdivision (d) that "All other public entities shall be governed by the provisions of Section 3247 of the Civil Code."

Those two provisions in existing law appear to draw a bright line between rules relating to payment bonds on a state public work, and rules relating to payment bonds on projects contracted for by all other public entities.

The proposed law attempts to preserve that distinction by including an express reference to Section 7103 in the proposed law's basic payment bond provision. However, the relevance of that reference is not as clear as it could be:

> **§ 45010. Payment bond requirement**
>
> 45010. (a) *Except as provided in subdivision (d) of Section 7103:*
>
> (1) A direct contractor that is awarded a public works contract involving an expenditure in excess of twenty-five thousand dollars ($25,000) shall, before commencement of work, give a payment bond to and approved by the public entity.
>
> ….

(emphasis added).

Moreover, that reference to Section 7103 is *not* continued in any of the other public work payment bond provisions in the proposed law. Those provisions remain applicable to *any* "payment bond," which per the proposed law's definition of "payment bond" expressly *includes* a bond obtained pursuant to Section 7103. Proposed Pub. Cont. Code § 41090(b).

Recommendation

To better preserve the status quo relating to payment bonds given under the Public Contract Code, the staff suggests two types of revisions.

First, the payment bond provisions in the public work part of the proposed law should be revised to make clear that the provisions relate *only* to a payment bond required to be given under the public work part of the proposed law.

Second, the separation between the payment bond provisions of the mechanics lien statute and the provisions applicable to state public works projects under Public Contract Code Section 7103 should be made clearer.

The staff recommends **the following revisions**:

§ 41090. Payment bond

41090. For purposes of this part, a "payment bond" means a ~~bond given under any of the following provisions:~~

~~(a) Section 7103.~~

~~(b) Chapter 5 (commencing with Section 45010).~~

~~(c) Another provision of this code that provides for a payment bond~~.

payment bond required by Section 45010.

Comment. Section 41090 supersedes former Civil Code Section 3096.

§ 45010. Payment bond requirement

45010. (a) ~~Except as provided in subdivision (d) of Section 7103:~~

~~(1)~~ A direct contractor that is awarded a public works contract involving an expenditure in excess of twenty-five thousand dollars ($25,000) shall, before commencement of work, give a payment bond to and approved by the public entity.

~~(2)~~ (b) A public entity shall state in its call for bids that a payment bond is required for a public works contract involving an expenditure in excess of twenty-five thousand dollars ($25,000).

~~(b)~~ (c) A payment bond given and approved under this section is sufficient to permit performance of work pursuant to a public works contract that supplements the contract for which the bond is given, if the requirement of a new bond is waived by the public entity.

~~(c)~~ (d) For the purpose of this section, a design professional is not deemed a direct contractor and is not required to give a payment bond.

(e) This section does not apply to a public works contract with a "state entity" as defined in subdivision (d) of Section 7103.

Comment. Section 45010 restates former Civil Code Section 3247. The transitional provisions of the former section are omitted due to lapse of time. ~~Section 7103(d) defines "state entity" for purposes of the payment bond requirement under that section.~~

See also Sections 41030 ("design professional" defined), 41040 ("direct contractor" defined), 41090 ("payment bond" defined), 41120 ("public entity" defined), 41130 ("public works contract" defined).

§ 45020. Consequences of failure to give bond

45020. If a payment bond is not given and approved as required by ~~statute~~ Section 45010:

(a) The public entity awarding the public works contract shall not audit, allow, or pay a claim of the direct contractor pursuant to the contract.

(b) A claimant shall receive payment of a claim pursuant to a stop payment notice under Chapter 4 (commencing with Section 44110.

INTERPLAY BETWEEN PUBLIC WORK REMEDY AND PERSONAL ACTION

The California State Council of Laborers Legislative Department and the Construction Laborers Trust Funds for Southern California (collectively, the "Laborers Group") argue that existing Civil Code Section 3152, a section in the existing mechanics lien statute that the Commission has continued only in the private work part of the proposed law, should also be continued in the public work part. Exhibit p. 4.

Section 3152 generally allows a claimant to pursue an independent civil action to recover a debt that is the subject of a pending mechanics lien remedy:

> 3152. Nothing contained in this title affects the right of a claimant to maintain a personal action to recover a debt against the person liable therefor either in a separate action or in the action to foreclose the lien, nor any right the claimant may have to the issuance of a writ of attachment or execution or to enforce a judgment by other means. In an application for a writ of attachment, the claimant shall refer to this section. A lien held by the claimant under this chapter does not affect the right to procure a writ of attachment. The judgment, if any, obtained by the claimant in a personal action, or personal judgment obtained in a mechanic's lien action, does not impair or merge a lien held by the claimant under this chapter, but any money collected on the judgment shall be credited on the amount of the lien.

Laborers Group points out that Section 3152 states that "Nothing contained in this *title*" (emphasis added) affects a claimant's right to maintain a personal action to recover a debt, and Section 3152 is part of a title that provides for mechanics lien law remedies in a *public* work as well as a private work. The Laborers Group further argues that if the provisions of Section 3152 are not included in the public work part of the proposed law, the omission would imply that the pursuit of a public work remedy precludes a personal action to collect the same debt.

Analysis

Section 3152 appears in a chapter of the mechanics lien statute that is governed by the following application section:

> 3109. This chapter does not apply to any public work.

This provision strongly suggests that Section 3152 was not intended to apply to public work.

Continuing any part of Section 3152 in the public work part of the proposed law would therefore appear to change existing law. In the absence of substantial justification for such a change, **the staff does not recommend doing so**.

COMMENTS ON SPECIFIC PROVISIONS OF PROPOSED LAW

Labor, Service, Equipment, or Material

Proposed Public Contract Code Section 41070 provides:

> 41070. "Labor, service, equipment, or material" includes but is not limited to labor, skills, services, material, supplies, equipment, appliances, power, and surveying *provided for a public works contract*.
>
> **Comment.** Section 41070 is a new definition. It is included for drafting convenience. The phrase is intended to encompass all things of value *provided for a public works contract*, and replaces various phrases used throughout the former law, including "labor or material," "labor, services, equipment, or materials," "appliances, teams, or power," "provisions, provender, or other supplies," and the like.
>
> See also Section 41130 ("public works contract" defined).

(emphasis added).

At the Commission's June meeting, it was suggested the italicized phrases above should instead read "provided for *in* a public works contract."

The staff agrees that proposed Section 41070 is awkward. However, the suggested rephrasing could change the meaning of the provision, by limiting the definition to include only those items of labor, services, equipment, or material specifically itemized in a public works contract.

Instead, consistent with language that the Commission has previously approved when seeking to link work with a contract, the staff recommends **the following revision**:

> 41070. "Labor, service, equipment, or material" includes but is not limited to labor, skills, services, material, supplies, equipment,

appliances, power, and surveying provided ~~for~~ pursuant to a public works contract.

Comment. Section 41070 is a new definition. It is included for drafting convenience. The phrase is intended to encompass all things of value provided ~~for~~ pursuant to a public works contract, and replaces various phrases used throughout the former law, including "labor or material," "labor, services, equipment, or materials," "appliances, teams, or power," "provisions, provender, or other supplies," and the like.

See also Section 41130 ("public works contract" defined).

Description of Job Site in Standardized Notice

Proposed Public Contract Code Section 42102(a)(3) requires that all public work notices include "a description of the site sufficient for identification, including the street address of the site, if any."

Laborers Group argues that this provision makes sense for a notice on a *private* work of improvement, since documents relating to a lien claim (only available on a private work) are indexed and recorded by site address. Exhibit p. 10. On a public work however, the group points out that all available remedies are against either the public fund allocated for the project, or the direct contractor's payment bond. The group therefore suggests that instead of requiring a site description, the proposed law require specification in the notice of "the project description and contract or project number (if available)."

The Commission began a discussion of this issue at the June meeting, with no resolution.

Existing Law

The notice provision at issue here is new. Existing law contains no standardized notice provision applicable to all public work notices, and so contains no standardized provision indicating whether or how a public work notice should identify the work of improvement.

There are, however, two specific notice provisions in the existing mechanics lien statute applicable to public work that call for an identification of the work of improvement. See Civ. Code §§ 3092 (notice of cessation), 3093 (notice of completion). Both provisions require "A description of the site sufficient for identification, containing the street address of the site, if any."

Analysis

Some recipients of a public work notice (such as the public entity and the direct contractor) might prefer that a notice identify a project by contract number or some other identifier other than the street address.

However, this information may not be readily available to all contributors on the project, and if the provision of the information is required to comply with a notice requirement, the failure to provide it (or provide it accurately) could lead to a claim that a given notice was legally insufficient. Moreover, a contract or project number would not likely provide much benefit to a notice recipient that only knows a project by street address.

Since the provision at issue is intended to apply to all public work notices, it needs to be workable for *all* persons who give or receive notices on a public works project. The staff believes the suggested revision would offer some added convenience for some public work notice participants, but at the expense of a greater inconvenience to others.

Moreover, as existing law already requires public work notices in two different contexts to contain identifying street addresses, it seems unlikely that a generalization of this requirement would cause a significant hardship.

The staff recommends against making the proposed change.

Notice of Overdue Laborer Compensation

Proposed Public Contract Code Section 42103 requires a delinquent contractor to provide notice of overdue laborer compensation to various persons on a public works project. Laborers Group points out that substantially similar "certified payroll" information is required to be disclosed on a public work by Labor Code Section 1776, and suggests a coordination of the two sections. Exhibit pp. 11-12.

Specifically, Laborers Group proposes to add a subdivision (c) to proposed Section 42103:

> (c) Nothing herein shall alter or diminish the requirements of Labor Code Section 1776, except that a copy of the certified payrolls described there may be used to provide the information required by subsections (a)(1) through (a)(3), above.

The staff believes the suggested language is not necessary, and could be problematic.

There are other provisions of law in other codes imposing legal requirements on contributors to a work of improvement that in some way overlap with requirements in the proposed law. For example, Business and Professions Code Section 7159 requires a contractor on a home improvement contract to give an owner a notice that is very similar to a preliminary notice.

The staff is concerned that identifying one section in another code loosely paralleling a provision of the proposed law as expressly unaffected by the proposed law would suggest by negative implication that other unmentioned sections *may* be affected by the proposed law.

Moreover, the second clause of the suggested language could cause confusion, by seemingly equating compliance with Labor Code Section 1776 with compliance with proposed Public Contract Code Section 42103. For example, if a contractor served copies of the "certified payroll" described in Labor Code Section 1776 in an attempt to comply with proposed Public Contract Code Section 42103, but the documentation served proved to have been improperly certified for purposes of Section 1776, would that lack of compliance with Section 1776 affect the contractor's compliance with proposed Public Contract Code Section 42103?

For the reasons stated, the staff **does not recommend adding the suggested language to Section 42103. However, the Comment could be revised to partially address the point, as follows:**

> **Comment.** Section 42103 continues former Civil Code Section 3097(k), with the additional requirement that the information provided be given to the public entity, and include the name and address of the unpaid laborer.
>
> Former Civil Code Section 3098(b), providing for disciplinary action if a subcontractor fails to give preliminary notice on a work of improvement exceeding $400, is not continued.
>
> The reference to the Registrar of Contractors in the final sentence of former Section 3097(k) is revised to refer to the Contractors' State License Law. This is a technical, nonsubstantive change.
>
> Compliance with this section does not excuse compliance with Section 43010, if applicable.
>
> Nothing in this section affects any requirement to provide similar information for other purposes. See, e.g., Labor Code Section 1776 (payroll records).
>
> See also Sections 41040 ("direct contractor" defined), 41075 ("laborer" defined), 41120 ("public entity" defined), 41160 ("subcontractor" defined), 42010 (application of part).

☞ **Delivery of Notice to Public Entity**

Proposed Public Contract Code Section 42106(a) provides that when a public work notice is given to a public entity, the notice shall be given "at the office of the public entity or at another address specified in the contract for service of notices, papers, and other documents."

Laborers Group proposes that a public entity be permitted to designate a particular officer and address for service of notice, as long as the designation is publicly posted in a location easily accessible by the general public (such as a public website). Exhibit p. 11.

This issue was discussed, but not resolved, at the Commission's June meeting. The Commission directed the staff to analyze whether it would be practical to revise proposed Public Contract Code Section 42106 to provide additional opportunities for a public entity to designate a location for service of notice to the entity.

Existing Law

Existing law does not contain a standardized provision indicating precisely where a notice to a public entity on a public works project should be sent. Existing law does require two particular notices (a preliminary notice to two specifically identified state agencies, and a stop payment notice) to be given to a particular employee or department within the public entity. Civ. Code §§ 3098(a), 3103. As to all other notices however, existing law is silent on the issue.

The Laborers Group argues its suggested addition to the law is needed because at the present time claimants that must give a notice to a large public entity do not know which individual office to send the notice to, and notices are often returned with directions to send the notice elsewhere. The group also suggests public entities would benefit from this addition, by being able to designate a single location where all notices would be sent.

The suggestion raises two underlying questions. First, would the addition to the section *require* a public entity to designate a precise location for service of notices, or would the designation be optional? Second, in the event a precise location was designated, would giving the notice at that address be *mandatory*, or would the designated location simply be an alternative address that could be used if desired?

Mandatory vs. Optional Designation

The staff believes that a provision *requiring* a public entity to designate a precise location to receive notices would be problematic.

Would such a provision also have to specify the manner in which the designation would have to be made? A provision that did *not* do so might generate significant litigation over the adequacy of the public entity's chosen means of complying with the provision. On the other hand, given the wide variety of public entities governed by the proposed law, it would be difficult if not impossible for the proposed law to specify a manner of designation that could be easily accommodated by all public entities.

The most obvious location for the designation, and perhaps the only workable location, would be in the public works contract itself. However, Laborers Group has argued that this is actually *not* a good place for the designation, as most laborers (and perhaps many small subcontractors) are not able to access the actual public works contract.

Requiring public entities to designate a precise location for service of notices would also impose a new administrative burden on these entities, a burden that would not only include the initial designation, but also the "maintenance" of the designation throughout the project. For example, if the designation was on a website, the public entity would have to continuously ensure that the website was up and running, and that the designated address remained accurately displayed, in order that persons joining the project midstream would know where to send notices.

Finally, if the proposed law required a public entity to make this designation, the Commission would then have to decide on and add additional provisions to the proposed law addressing the consequences for non-compliance by the public entity.

Alternative vs. Mandatory Location

The second question that needs to be answered in analyzing this issue would be whether a designated location, if specified, would *mandate* service of notices at that location, or only offer it as an option.

In the private work context, the Commission has already considered — and rejected — allowing a recipient of notice to mandate a specific location for delivery of notices. CLRC Minutes (December 2006), pp. 3-4. The Commission's main concern was that such a provision could unduly complicate the giving of

notice, and lead to litigation over whether a served notice complied with the law. Given that remedies often hinge on whether a given notice was "valid," the Commission felt it best not to add a complication in this area.

These same concerns would apply if a public entity was given statutory authority to designate a precise location where its notices *must* be served. No matter where or how this special designation was made, some claimants would have difficulty accessing the designation. For example, a designation made on a publicly accessible website would create a significant hardship for persons without ready access to a computer.

Recommendation

The staff believes that a new provision either *requiring* a public entity to designate an alternative location for notices, or *requiring* a notice to be given to a public entity at a designated alternative location, would be too restrictive.

However, a new provision allowing a public entity the *option* to designate — in any manner it wishes — an alternative location where its notices *may* be sent would not seem to create any problem. Proposed Section 42106(a) already allows a public entity one option to do so (by designating an alternative address in the public works contract), but there appears to be no reason not to allow a public entity the added flexibility of designating this alternative address by other means.

The staff recommends the following revision of Section 42106(a):

> **§ 42106. Address at which notice is given**
>
> 42106. Except as otherwise provided by this part, notice under this part shall be given to the person to be notified at the following addresses:
>
> (a) If the person to be notified is the public entity, at the office of the public entity or at another address specified by the public entity in the contract or elsewhere for service of notices, papers, and other documents.

☞ **Public Contract Code Section 42114 (Proof of Notice by Mail)**

Proposed Public Contract Code Section 42114(b) duplicates the language of proposed Civil Code Section 7108 (relating to private work). It requires one of the following in order to establish proof of notice by mail:

> **§ 42114. Proof of notice**
>
> 42114. (a) ….

> (b) If the notice is given by mail, the declaration 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) *A receipt for registered or certified mail issued by the United States Postal Service*, or
>
> (3) A tracking record or other documentation certified by an express service carrier showing delivery or attempted delivery of the notice.

(emphasis added).

Laborers Group criticizes Section 42114, which the group reads as requiring proof of actual or attempted *delivery* of a notice. Exhibit p. 10. The group asserts this proof is often difficult or impossible for an unpaid claimant to obtain. It argues that a delinquent contractor will typically refuse any mail from a claimant, thwarting actual delivery. Furthermore, obtaining proof of attempted delivery from the United States Post Office takes so long it may be unavailable when needed.

However, Section 42114 does not require proof of either actual or attempted delivery of a given notice. The impression that it does probably stems from the ambiguous meaning of the word "receipt" as used in paragraph (b)(2).

Under the proposed law, mailed notice may only be sent by (1) registered or certified mail via the United States Post Office, or (2) overnight delivery using a private delivery service. Proposed Pub. Cont. Code § 42108. Under proposed Section 42114(b)(2), a person may establish proof of mailed notice by simply demonstrating that the person had used one of the specified United States Post Office services to *send* the notice (regardless of whether attempted or actual *delivery* occurred).

This "receipt" in paragraph (b)(2) was thus intended to be distinguished from the "*return* receipt" referenced in subdivision (b)(1), which proves actual or attempted *delivery* of the notice.

The terms used in paragraphs (b)(1) and (b)(2) correspond with the terminology used by the United States Post Office. The familiar green and white slip a person completes in order to *mail* a document via certified mail is called a "Certified Mail Receipt." The slip filled out in order to mail a document via

registered mail is labeled a "Receipt for Registered Mail." The slightly larger green postcard that is *returned* to the sender, *after* delivery is attempted or accomplished by either certified or registered mail, is labeled a "Domestic Return Receipt."

Nevertheless, despite their technical accuracy, it appears that the terms used in paragraphs (b)(1) and (b)(2) are confusing. The staff recommends that **Section 42114 be revised to clarify the terms, as well as to add internal consistency**:

> **§ 42114. Proof of notice**
>
> 42114. (a) ….
>
> (b) If the notice is given by mail, the declaration shall be accompanied by one of the following:
>
> (1) Documentation provided by the United States Post Office showing that payment was made to mail the notice using registered or certified mail.
>
> (2) Documentation provided by an express service carrier showing that payment was made to send the notice using an overnight delivery service.
>
> (3) 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) A receipt for registered or certified mail issued by the United States Postal Service.~~
>
> ~~(3)~~ (4) A tracking record or other documentation ~~certified~~ provided by an express service carrier showing delivery or attempted delivery of the notice.
>
> ….

The staff also recommends that **proposed Civil Code Section 7108 relating to proof of notice on a private work be similarly revised.**

COMPLETION ISSUES

As on a private work, "completion" of a public works project is a statutorily defined event. The event's primary significance is as a marking point to calculate the time a claimant has to initiate a statutory remedy. See, e.g., proposed Pub. Cont. Code §§ 44140 (stop payment notice must be given within 90 days of the date of completion), 45060 (notice of a claim against a direct contractor's payment bond may in some circumstances need to be given within 75 days of completion).

Shorter time limits may apply if the public entity records a notice of completion. See proposed Pub. Cont. Code § 44140.

Proposed Section 42210 continues existing law's definition of what constitutes completion of a public work:

> **§ 42210. Completion (including acceptance and cessation)**
>
> 42210. For the purpose of this part, completion of a public works contract occurs at the earliest of the following times:
>
> (a) Acceptance of performance by the public entity.
>
> (b) Cessation of labor for a continuous period of 30 days. This subdivision does not apply to a contract awarded under the State Contract Act, Part 2 (commencing with Section 10100).

Acceptance by the Public Entity

Several commenters have questioned or criticized subdivision (a) of Section 42210, which provides that "acceptance" by the public entity constitutes completion.

Acceptance of "Performance"

Mr. Jeffrey Ward, an attorney in Oakland, expresses concern that the use of the term "performance" is neither explained nor defined. CLRC Memorandum 2006-39, Exhibit p. 49. He suggests that the introduction of the term, which is not used in existing law, may generate increased litigation over whether completion has occurred.

The Department of Water Resources ("DWR") concurs, and believes the term should be deleted. CLRC Memorandum 2007-25, Exhibit p. 2.

Existing law defines completion of a public work simply as acceptance of "the work of improvement." Civ. Code § 3086.

The introduction of the term "performance" is based on the Commission's proposed relocation of the public work provisions to the Public Contract Code, a relocation that was accompanied by a global substitution of the term "public works contract" in place of the term "work of improvement." Following this substitution, the staff was concerned that the phrase "acceptance of the public works contract" might be misinterpreted as referring to acceptance of *terms* of the contract, rather than of work performed pursuant to the contract, so the word "performance" was added.

However, there is some merit to the commenters' point. The staff **recommends that the section be revised as follows:**

§ 42210. Completion

42210. For the purpose of this part, completion of a public works contract occurs at the earliest of the following times:

(a) Acceptance ~~of performance~~ by the public entity of the work performed pursuant to the contract.

(b) ….

Manner of Acceptance

Mr. William Last, an attorney in San Mateo, asks whether "acceptance" requires formal action by the governing board of the public entity, which is what he believes is required under current law. CLRC Memorandum 2006-39, Exhibit p. 86. Mr. Last suggests that the Commission clarify this issue.

The existing mechanics lien statute does not specify *how* acceptance must occur, nor does any appellate opinion clearly address the issue. In the absence of clearly stated legal authority, it is likely various public entities have developed and now rely on slightly different methods of accepting work performed pursuant to a public works contract. The absence of any clear standard does not appear to be causing any problem, and imposing such a standard very well might.

The staff does not recommend adding a provision mandating any specific method of "acceptance."

Implied Acceptance

Mr. Last also asks whether a public works project would be deemed completed if a public entity had not yet formally "accepted" work, but was already occupying and using the property being improved. As Section 42210 does not mention occupancy or use as a factor relating to completion, Mr. Last's inquiry appears to be whether or under what circumstances occupancy, use, or perhaps some other action by a public entity should be deemed an *implied* "acceptance" of work.

The existing mechanics lien statute does not answer that question, nor is there any clear appellate authority on the point. The staff therefore believes it would be inappropriate for the proposed law to attempt to resolve the issue. There may be any number of circumstances, almost always dependent on the facts of a particular case, which may support an implied acceptance of provided work.

The staff believes this type of question is instead best answered either by a court on a case-by-case basis, or by a specific legislative proposal that considers

whether there are facts that should be deemed to constitute statutory acceptance. (For example, existing Public Contract Code Section 7107(c)(1) provides that, for purposes of releasing retention funds after "completion" of a public works project, occupancy plus cessation of labor *does* constitute "completion.") The best the proposed law can do in addressing the issue is to generally continue the language of the existing statute, so as to not disturb whatever understanding of implied acceptance may exist among practitioners and trial courts.

The staff does not recommend that the proposed law address the issue of implied acceptance.

Acceptance vs. Actual Completion

Some commenters at the Commission's June meeting have suggested that tying completion to "acceptance" by a public entity is problematic. The commenters argue that doing so allows a public entity to unfairly delay acceptance of a project well past the project's actual completion — thereby prolonging the direct contractor's continuing exposure to statutory claims — possibly in order to extract concessions from a direct contractor.

It does seem somewhat illogical that *actual* completion of a public works project is not an event that constitutes statutory "completion" of the project.

However, that is existing law, and it seems clear the Legislature intended that result. Civil Code Section 3086, the section of existing law that defines completion of both a private and public work, expressly *disallows* actual completion as a basis for completion of a public work:

> 3086. "Completion" means, *in the case of any work of improvement other than a public work*, actual completion of the work of improvement. ….
>
> *If the work of improvement is subject to acceptance by any public entity, the completion of such work of improvement shall be deemed to be the date of such acceptance*; ….

(emphasis added).

This construction of existing law is also supported by appellate authority. See *Krueger Brothers Builders, Inc. v. San Francisco Housing Authority*, 198 Cal. App. 3d 1, 243 Cal. Rptr. 585 (1988).

Moreover, as pointed out by Mr. Ward, the commenters' concern is significantly ameliorated by existing Public Contract Code Section 7107. Section 7107 requires a public entity, with certain specified exceptions, to release retention funds to a direct contractor within 60 days of "completion" of a public

works project, and "completion" as defined for purposes of Section 7107 does *not* require "acceptance" of the project by the public entity. CLRC Memorandum 2006-39, Exhibit p. 50.

In the context of this study, **the staff does not recommend disturbing this key and well established principle of mechanics lien law.**

Notice of Acceptance

Mr. Howard Brown, an attorney from Manhattan Beach, suggests adding a statutory "notice of acceptance" to the proposed law. CLRC Memorandum 2006-39, Exhibit p. 44.

Mr. Sam Abdulaziz suggests that if an entity were to record such a notice of acceptance, the proposed law should deem the notice to be a notice of completion. CLRC Memorandum 2006-39, Exhibit pp. 19-20.

Although not expressly provided for in existing law, public entities apparently at times do issue or record what is titled a "Notice of Acceptance." As best as the staff is able to determine, this notice is intended to serve as a substitute for a statutory notice of completion.

To the extent that Mr. Brown is suggesting that a notice of acceptance be given statutory recognition, the staff does not see how this new notice would serve any purpose which cannot be achieved by a notice of completion.

If recordation of this new notice of acceptance were voluntary (as recordation of a notice of completion is), the new notice would seem to be superfluous. A public entity inclined to record a notice of acceptance is already statutorily authorized to record a notice of completion.

If instead recordation of the notice of acceptance were mandatory, that would be equivalent to mandating the recording of a notice of completion. The staff believes that would represent a significant and seemingly unwarranted substantive change in existing law.

The staff does not recommend creating or recognizing a statutory "notice of acceptance," at least without further justification.

Cessation of Labor

Several commenters have also questioned or criticized Section 42210(b), which provides that 30 days of continuous "cessation of labor" constitutes completion of a public work on all but certain specially exempted state public works projects.

Punchlist Work

Mr. Last asks whether a failure to do punchlist work for a continuous period of 30 days would constitute the "cessation" specified in Section 42210(b). CLRC Memorandum 2006-39, Exhibit p. 86. (Punchlist work is commonly understood to be relatively simple and often remedial work performed after a project is essentially complete.)

This issue underlying Mr. Last's question has been raised (but not yet resolved) in questions relating to how punchlist work affects completion of a *private* work of improvement.

Along with a number of other particularly thorny issues, the Commission has deferred resolution of those questions until the Commission concludes one complete review of the entire proposed law.

The staff recommends that Mr. Last's question also be deferred for consideration in conjunction with similar issues relating to private work.

☞ *Alternative to Cessation*

DWR argues that cessation of labor is not an appropriate measure of completion at all. CLRC Memorandum 2007-25, Exhibit pp. 2-3. The agency offers that work on a public works contract may be suspended for periods longer than 30 days for reasons that have nothing to do with "completion" of the project, such as a need to resolve funding problems or deal with site conditions.

The agency instead suggests that completion should be triggered by a notice issued by the public entity of "termination of the contract for cause or convenience."

Cessation of labor has long been explicitly provided for in the mechanics lien statute as a basis for completion of all but certain exempted state public works projects.

In the absence of a clearly established problem with cessation of labor as a basis for completion, the staff does not believe it would be wise to eliminate it as a ground for completion in the context of this study. The staff is also doubtful that a notice that would be issued solely at the discretion of the public entity would be viewed by most participants as an adequate substitute.

The staff does not recommend deleting cessation of labor as a basis for completion of public work.

However, the staff does wonder whether the notice suggested by DWR might makes sense as an *additional* basis for completion of a public work. The staff has

in mind a scenario in which cessation of labor for 30 days has not occurred, but the public entity — possibly with the consent of the direct contractor — has nevertheless decided to terminate the existing contract "for cause or convenience."

In this situation, once the public entity shuts the project down, there does not appear to be a reason why "completion" should not be deemed to occur immediately, rather than awaiting the passage of 30 days cessation of labor.

The staff solicits input from practitioners as to the appropriateness of adding as a ground for completion the issuance by a public entity of a "Notice of Termination of Contract."

☞ *Number of Days of Cessation Necessary to Constitute Completion*

Under existing law, continuous cessation of labor for 30 days constitutes completion on all but certain specially exempted state public works projects. Civ. Code § 3086. This provision has been continued in the proposed law by proposed Public Contract Code Section 42210(b).

On a *private* work of improvement, *60* days of continuous cessation of labor is required to constitute completion (shortened to 30 days if a notice of completion is recorded). Proposed Civ. Code § 7150.

In a staff note accompanying Section 42210, the Commission inquired whether the 30 day cessation period for a public work was too short, and whether it should be changed to 60 days for consistency with the rule applicable to a private work of improvement.

Mr. Rodney Moss, an attorney in Los Angeles, believes the 30 day requirement should be changed to parallel the private work provision. CLRC Memorandum 2006-39, Exhibit p. 2. Gibbs, Giden, Locher & Turner LLP ("GGLT"), a law firm in Los Angeles, concurs. CLRC Memorandum 2006-39, Exhibit p. 162.

Mr. Last also agrees, offering that it is often difficult for a subcontractor to know when there is a cessation of work. CLRC Memorandum 2006-39, Exhibit p. 86.

The Association of California Surety Companies ("Surety Association") also advocates expanding the number of days to 60. CLRC Memorandum 2006-39, Exhibit pp. 87, 123.

Graniterock, a contractor and a material supplier, also asserts that 30 days is too short, and the time should be changed to 60 days. Graniterock notes it can

often take longer than 30 days to "close out" a complex public works project, and the 30 day period complicates the process and can force premature public work claims. CLRC Memorandum 2006-39, Exhibit p. 9.

The Regents of the University of California ("UC") also recommend changing the term to 60 days, indicating that "the complexity of today's projects necessitates this extension to the time period." CLRC Memorandum 2006-39, Exhibit p. 82.

AGC indicates its members are divided on the issue, but overall favors extending the time requirement to 60 days. Third Supplement to CLRC Memorandum 2006-48, Exhibit pp. 19-20. It asserts that the 30 day provision puts undue pressure on subcontractors who have not been paid to give a stop payment notice, rather than wait for direct payment from the direct contractor.

Mr. Abdulaziz believes the 30 days provided under existing law is sufficient. CLRC Memorandum 2006-39, Exhibit p. 19.

The staff believes the rationale offered by the entities advocating a change to 60 days is persuasive. In addition, defining completion of a public work as 60 days continuous cessation of labor would make the public work completion provision more consistent with the corresponding private work provision. That would be beneficial to those involved in both types of work.

The staff recommends **further revising Section 42210 as follows:**

> **§ 42210. Completion**
>
> 42210. For the purpose of this part, completion of a public works contract occurs at the earliest of the following times:
>
> (a) ….
>
> (b) Cessation of labor for a continuous period of ~~30~~ 60 days. This subdivision does not apply to a contract awarded under the State Contract Act, Part 2 (commencing with Section 10100).

However, existing law does provide for a *notice of cessation*, after 30 days cessation of labor on a public work. Civ. Code § 3092. That notice has the same substantive effect as a notice of completion of a public work. Civ. Code §§ 3184, 3249.

The notice of cessation is discussed below.

☞ **Notice of Cessation**

Existing law provides that a "notice of cessation" may be recorded by a public entity after 30 continuous days of cessation of labor on a project. Civ. Code § 3092. Under existing law, this recordation also triggers the running of the

time limits within which a claimant must give a stop payment notice, or enforce a payment bond claim. Civ. Code §§ 3184, 3249.

In both the private and public work parts of proposed law, the Commission has merged the notice of cessation into the notice of completion, as the Commission perceived the two types of notices to have essentially identical effect. Tentative Recommendation on *Mechanics Lien Law* (June 2006), p. 26.

GGLT supports the merging of the two notices. CLRC Memorandum 2006-39, Exhibit p. 162. Mr. Moss indicates that he has not seen the recordation of a notice of cessation by a public entity in 45 years of practice, and does not believe it needs to be included in the new draft. CLRC Memorandum 2006-39, Exhibit p. 2.

Surety Association does not support merging the two notices, as it believes a separate notice of cessation should remain in the public work provisions. CLRC Memorandum 2006-39, Exhibit p. 123. Surety Association argues that sureties on a public work need the notice in order to invoke the shorter time period for claimants to enforce bond claims, when there is a performance default by the direct contractor that lasts more than 30 days.

In response to a follow-up question as to why a recorded notice of *completion* could not be used to achieve that same goal (since 30 days continuous cessation of labor also constitutes "completion" on most public works projects), Surety Association responded that a public entity would never agree to sign a notice titled "notice of completion," when a project was clearly *not* "completed." Doing so could leave a public entity exposed to a claim that, by executing the notice, the entity had waived its contractual right to *true* completion of the project.

UC also favors the restoration of the separate notice of cessation, asserting that "cessation" is a concept distinct from "completion." CLRC Memorandum 2006-39, Exhibit p. 82. UC asserts the former indicates only that work has stopped, whereas the latter indicates the project is complete and accepted. UC believes it would be confusing and problematic to substitute a notice of completion for the notice of cessation in the public works provisions, as the notice of completion may trigger certain obligations and deadlines for sureties and other parties that may be undesirable when only cessation has occurred.

Mr. Ward points out that a recordation of a notice of cessation in a public work is also referenced by existing Public Contract Code Section 7107, relating to the release of retention funds following completion of a public works project. CLRC Memorandum 2006-39, Exhibit p. 51. Section 7107 defines completion for

purposes of that section as 30 days of continuous cessation of work, if the public agency thereafter records a notice of cessation or completion.

The merging of the notice of cessation and the notice of completion was intended only to simplify the law. If that simplification would cause practical problems however, it should not be done.

The staff recommends **restoring the two distinct notices as provided by existing law, by adding a provision to the proposed law authorizing a notice of cessation in a public work**:

> **§ 42215. Notice of cessation**
>
> 42215. (a) A public entity may record a notice of cessation if there has been a continuous cessation of labor for at least 30 days prior to the recordation that continues through the date of the recordation.
>
> (b) The notice shall be signed and verified by the public entity or its agent.
>
> (c) The notice shall comply with the requirements of Article 2 (commencing with Section 42100), and shall also include all of the following information:
>
> (1) The date on or about which the labor ceased.
>
> (2) A statement that the cessation has continued until the recordation of the notice.
>
> **Comment.** Section 42215 continues former Civil Code Section 3092 (notice of cessation), to the extent it applied to a public works contract. For the effect of recordation of a notice of cessation, see Sections 44140 (time for giving stop payment notice) and 45050 (time for enforcing payment bond).
>
> A notice of cessation is recorded in the office of the county recorder of the county in which the public works contract or part of it is performed. Section 42230 (recordation of notice). A notice of cessation is recorded when it is filed for record. Section 42230 (recordation of notice).
>
> See also Section 41120 ("public entity" defined).

The staff also recommends the following additional revisions to the proposed law, consistent with the restoration of a notice of cessation on a public work:

> **§ 42220. Notice of completion**
>
> 42220. (a) A public entity may record a notice of completion on or within 15 days after completion of a public works contract.
>
> (b) The notice shall be signed and verified by the public entity or its agent.

(c) The notice shall comply with the requirements of Article 2 (commencing with Section 42100), and shall also include ~~all of the following information:~~

~~(1) The~~ 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 15 days or less before the date of recordation of the notice.

~~(2) If the notice is based on cessation of labor, the date on or about which labor ceased.~~

Comment. Section 42220 ~~combines~~ continues former Civil Code Section 3093 (notice of completion) ~~with former Civil Code Section 3092 (notice of cessation),~~ to the extent ~~they~~ it applied to a public works contract. For the effect of recordation of a notice of completion, see Sections 44140 (time for giving stop payment notice) and 45070 (notice to principal and surety on payment bond).

A notice of completion is recorded in the office of the county recorder of the county in which the public works contract or part of it is performed. Section 42230 (recordation of notice). A notice of completion is recorded when it is filed for record. Section 42230 (recordation of notice).

See also Sections 41120 ("public entity" defined), 41130 ("public works contract" defined).

§ 42230. Recordation of notice

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

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

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

Comment. Section 42230 generalizes a number of provisions of former law, to the extent they applied to a public works contract. *Cf.* former Civ. Code § 3258.

See also Sections 42215 (notice of cessation), 42220 (notice of completion).

See also Section 41130 ("public works contract" defined).

§ 44140. Time for giving notice

44140. A stop payment notice is not effective unless given within 30 days after recordation of a notice of cessation or notice of completion or, if a notice of cessation or completion is not recorded, within 90 days after cessation or completion.

Comment. Section 44140 ~~restates~~ continues former Civil Code Section 3184 without substantive change. ~~The former statutory references to "notice of cessation" and "notice of acceptance" are not continued; they are subsumed within the notice of completion.~~ See Sections 42210 (completion ~~(including acceptance and cessation)~~), 42215 (notice of cessation), and 42220 (notice of completion).

See also Section 41150 ("stop payment notice" defined).

The restoration of the separate notice of cessation may also be appropriate in the private work provisions of the proposed law, based on slightly different considerations. The staff will continue to analyze that issue, and will present the issue for further discussion in a future memorandum.

Number of Days Cessation Required for Notice of Cessation

UC advocates that a notice of cessation on a public work should only be permitted to be given after *60* days of continuous cessation of labor (consistent with UC's suggestion that 60 days cessation of labor should be required to constitute *completion* of a public work). This would be a change in existing law, which provides that a notice of cessation on a public work requires a cessation of labor for only 30 days.

While considerations underlying the number of days cessation of labor required before a notice of cessation may be recorded are probably very similar to considerations underlying the number of days that should constitute statutory completion, there may be considerations that dictate different treatment.

If the Commission restores a notice of cessation on a public work to the proposed law, the staff solicits input from practitioners as to whether the Commission should change existing law and require that 60 days cessation of labor must occur before the notice of cessation may be given.

Required Recordation of Notice of Cessation

Mr. Brown suggests the proposed law should *require* a public entity to record a notice of cessation. CLRC Memorandum 2006-39, Exhibit pp. 44-45. He notes that claimants who work in the early stages of a project tend not to monitor its

progress, and may lose rights based on cessation if a notice is not required to be recorded.

However, the law already addresses this issue by providing a significantly longer time period for claimant remedies when there has been no recorded notice of cessation or completion. This has been the state of the law for some time, and there is no indication that this legislative solution has not been working.

It is also not clear Mr. Brown's suggestion would in all cases be beneficial to a claimant, as in some cases a claimant may prefer that a public entity *not* record a notice of cessation. For example, a claimant who has substantial assurance of being paid in the near future may be willing to hold off on giving a stop payment notice, as long as the time to give the notice does not expire. Once a notice of cessation is recorded, however, the time during which the claimant can safely refrain from giving a stop payment notice is substantially reduced.

The staff does not recommend requiring a public entity to record a notice of cessation.

Proposed Alternative Method for Defining Completion

UC suggests that completion of a public work be instead defined as "the date of actual completion identified in the notice of completion by the public entity." CLRC Memorandum 2006-39, Exhibit p. 82.

The staff believes this suggestion would be unworkable, as public entities are not required to record a notice of completion, and at times do not. In that event, under the UC proposal, a project would *never* be "completed" for purposes of limiting a direct contractor's and surety's liability for stop payment notice and bond claims.

The staff does not recommend adopting this suggestion.

☞ **Completion of Individual Contract**

On a private work of improvement, proposed Civil Code Section 7154 provides that, in the event of multiple contracts with the owner on a single work of improvement, an owner may record a notice of completion following the completion of an individual contract, thereby starting the claims clock running for all claimants who did work on that particular contract:

§ 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.

Comment. ….

See also Sections 7002 ("claimant" defined), 7006 ("contract" defined), 7012 ("direct contractor" defined), 7028 ("owner" defined), 7045 ("work" defined), 7046 ("work of improvement" defined).

California State University ("CSU") would like a similar option to be available to public entities on public work projects. CLRC Memorandum 2006-39, Exhibit p. 102.

The staff sees no policy reason why the option to give a notice of completion for work under a specific contract should exist for a private work, but not for a public work. It seems like a sensible way to handle a project that is based on multiple discrete contracts with the public entity.

The staff solicits input on this issue from practitioners. However, in the absence of persuasive countervailing arguments, the staff recommends that new Section 42225 be added to the proposed law:

§ 42225. Notice of completion of contract for portion of work of improvement

42225. (a) If a work of improvement is made pursuant to two or more contracts with a public entity, each covering a portion of the work of improvement, the public entity may record a notice of completion of a contract with the public entity for a portion of the work of improvement.

(b) The recordation of a notice of completion of a contract under this section governs only work provided pursuant to that contract.

Comment. Section 42225 is new. It is adopted from former Civil Code Section 3117.

See also Sections 41120 ("public entity" defined), 41170 ("work" defined), 41180 ("work of improvement" defined).

If this new section is added to the proposed law, the staff would also recommend the following **related revisions, differentiating a work of improvement as a whole from contracts under which the work is performed:**

§ 41180. Work of improvement

41180. (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.

Comment. Section 41180 restates former Section 3106. The section is revised to reorganize and tabulate the different types of works falling within the definition, to expand the coverage of the definition, and to make various technical, nonsubstantive revisions. The term "property" replaces "lot or tract of land."

§ 42210. Completion

42210. For the purpose of this part, completion of a ~~public works contract~~ work of improvement occurs at the earliest of the following times:

(a) Acceptance of ~~performance~~ the work of improvement by the public entity.

(b) Cessation of labor on the work of improvement for a continuous period ….

Comment. Section 42210 restates former Civil Code Section 3086, to the extent it applied to a public ~~works contract~~ work of improvement. See also Section 42220 (notice of completion).

See also Section 41120 ("public entity" defined), 41170 ("work of improvement" defined).

§ 42220. Notice of completion

42220. (a) A public entity may record a notice of completion on or within 15 days after completion of a ~~public works contract~~ work of improvement.

(b) ….

§ 44170. Notice to claimant

44170. (a) Not later than 10 days after completion of a ~~public works contract~~ work of improvement, the public entity shall give notice to each claimant that has given a stop payment notice of the time within which payment of the claim stated in a stop payment notice must be enforced.

(b) A public entity need not give notice under this section unless the claimant has paid the public entity ten dollars ($10) at the time of giving the stop payment notice.

Recordation of Notice of Completion

Proposed Public Contract Code Section 42220 provides:

§ 42220. Notice of completion

42220. (a) A public entity may record a notice of completion on or within 15 days after completion of a public works contract.

(b) ….

Mr. Abdulaziz expresses concern that this section may be interpreted to redefine completion as the date the notice of completion is recorded. CLRC Memorandum 2006-39, Exhibit p. 19.

The staff does not see the ambiguity. However, **clarifying language can be added to the Comment, as follows:**

Comment. ….

For the date of completion of a work of improvement, see Section 42210.

Respectfully submitted,

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June 21, 2007

Via E-Mail and Overnight Delivery

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Comments from California State Council of Laborers Legislative Dept. and Construction Laborers Trust Funds for Southern California on Public Works - Memorandum 2007-25 (Part 1)

Dear Members of the Commission:

The Staff of the California Law Review Commission has done a remarkable job in coordinating a complex and confusing statute with a myriad of comments from various interests, regarding the Private Works (Civil Code) provisions of the Mechanics Lien Law, and the Commission has spent a great deal of time in making a first pass through those revisions. Now, the Commission is asked to embark upon the Public Works (Public Contract Code) provisions of the Mechanic Lien Law. Although the progress made in the Private Works revisions will give the Commission a head start, this also promises to be a long and arduous task.

On behalf of the California State Council of Laborers Legislative Department (Laborers), and the Construction Laborers Trust Funds for Southern California (Laborers Funds), we respectfully suggest that *the Commission first deal with the overarching issues of the relation between the Private Works and Public Works portions of the Revisions*, before dealing with the specific code revisions suggested. In particular, we suggest that the parity existing between the Private and Public Works provisions in current law be maintained as much as possible. Memorandum 2007-25 does indeed address this. However, we have found at least one important omission, and we suspect there may be more that other commentators may spot.

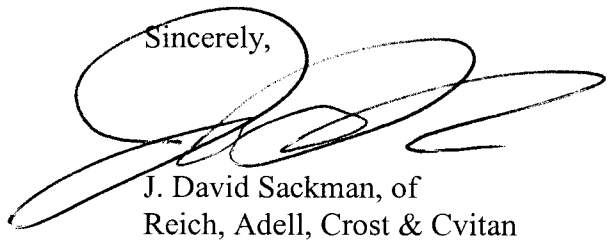
These Comments are therefore addressed to the issue of parity between the Private and Public Works, and our specific suggestion for a provision which was inadvertently not carried over from current law. We will separately submit Comments on the other issues addressed in Memorandum 2007-25 before the June Meeting of the Commission.

Our Comments follow with the hard-copy of this letter. They are attached as Word and PDF files to the e-mail version of this letter.

I am available for questions, discussion or further input, at the address, phone and e-mail listed here. The best way to contact me is at this e-mail address: jds@racclaw.com

Thank you for your consideration.

Sincerely,



J. David Sackman, of
Reich, Adell, Crost & Cvitan

following: Comments (attached as separate files with e-mail)

cc: Mike Quevedo, Southern California District Council of Laborers
Jose Mejia, Cal. State Council of Laborers
Ric Quevedo, Construction Laborers Trust Funds for Southern California
John Miller, Cox Castle & Nicholson
Alexander Cvitan, Reich, Adell, Crost & Cvitan

GENERAL COMMENTS ON THE PARITY OF PROVISIONS ON PUBLIC AND PRIVATE WORKS

Both the stop notice and payment bond statutes have been considered part of the fulfillment of the constitutional mandate to the Legislature to provide mechanic lien procedures, in Calif. Const. Art. XIV § 3:

> "Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

See *Clark v. Beyrle*, 160 Cal. 306, 311, 116 P. 739 (1911); *Goldtree v. City of San Diego*, 8 Cal.App. 505, 508-10 (1908) (stop notice in then Code Civ. P. § 1184 was fulfillment of constitutional mandate for "speedy and efficient enforcement of such liens"); *French v. Powell*, 135 Cal. 636, 639, 68 P.2d 92 (1902) (intent of Bond Act was to fill gap left by removing public property from mechanic liens).

Both procedures on public works were developed following court decisions holding that a lien could not be placed upon public property. *Mayrhofer v. Board of Education of the City of San Diego*, 89 Cal. 110, 26 P. 646 (1891); *see* 1885 Cal.Stat. 144, ch. 152 §2 (stop notice); Stats 1897 p. 201 (Bond Act of 1897). Thus, the purpose of a stop notice "is analogous to that underlying the entire scheme of mechanics liens, ..." *Clark*, *supra*, 160 Cal. 306, 311, and so to the Bond Act, *Globe Indemnity Co. v. Hanify*, 217 Cal. 721, 730, 20 P.2d 689 (1933); *French v. Powell*, *supra*. They have therefore been traditionally interpreted together.

Currently, the provisions for remedies on private and public works are contained in the same Title of the Civil Code, and contain a common set of definitions. For example, the current provision describing who may assert a claim on a payment bond on public works, Civil Code § 3248, refers back to the provision describing who may assert a stop notice, Civil Code § 3181, which in turn refers back to the provision describing who may assert a mechanic lien in § 3110, which in turns refers to a "laborer," which is defined in § 3089. They are all part of the same "integrated statutory scheme." As the Ninth Circuit put it:

> "The mechanic's lien sections, Cal. Civil Code §§ 3110 and 3111 are also part of California's integrated statutory scheme. Section 3111, which allows employee benefit trusts to avail themselves of the mechanic's lien, is by incorporation also the section which allows them to avail themselves of the stop notice and payment bond remedies" *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric*, 247 F.3d 920, 928 n. 13 (9th Cir. 2001).

By separating the Private Works and Public Works provisions, the Commission is faced with the task of maintaining this parity between them. Because both arise from the same Constitutional mandate, they should be identical as much as possible. To change this parity would effect a change in the law, which we argue is not consistent with the Constitutional mandate. The only differences should be to account for the unique features of public works. *We urge the Commission to explicitly adopt this policy to guide the rest of the revisions in the Public Works provisions.*

Memorandum 2007-25 already goes a long way to put this policy into effect. However, we have found at least one important omission, discussed below. There may be others. We therefore suggest an additional review, with comments from the public, to spot any other changes.

MISSING PROVISION - REMEDIES NOT EXCLUSIVE

The significant omission from the Public Contracts Code provisions carried over from current law is the provision providing that these remedies are not exclusive. Currently, this is in Civil Code § 3152:

> *Nothing contained in this title affects the right of a claimant to maintain a personal action to recover a debt against the person liable therefor either in a separate action or in the action to foreclose the lien, nor any right the claimant may have to the issuance of a writ of attachment or execution or to enforce a judgment by other means. In an application for a writ of attachment, the claimant shall refer to this section. A lien held by the claimant under this chapter does not affect the right to procure a writ of attachment. The judgment, if any, obtained by the claimant in a personal action, or personal judgment obtained in a mechanic's lien action, does not impair or merge a lien held by the claimant under this chapter, but any money collected on the judgment shall be credited on the amount of the lien.*

Note that the current statute refers to" Nothing contained *in this title"* as affecting other remedies. Currently, "this title" includes the remedies of stop notice and bond claims on public works, as well as those on private works. For Private Works, this section is indeed carried over into proposed Civil Code § 7474. However, no parallel provision was proposed to carry over these provisions into the proposed Public Contracts Code revisions. This is a significant omission. Without it, stop notice and bond claims could be held to affect direct actions against the delinquent contractor, contrary to current law. We therefore propose importing the language from proposed Civil Code § 7474 (in turn derived from § 3152) into a new Public Contracts Code § 42035.

In our suggested § 42035, we have also added language consistent with our prior comments to Civil Code § 7474. This language (in subsection (b)) deals with the common situation where a contractor becomes delinquent on all of its jobs. When a judgment is entered in a "personal action" which includes the delinquency for several jobs, and a partial collection of that judgment is made, which job is the money collected to be applied to? The general contractor on a stop notice or bond claim would of course like all the money to be applied to the claim on its project. However, the equitable solution (and common practice) is to pro-rate the collection among the jobs, in the proportion they bear to the total judgment. For example, if there is a single judgment for $10,000 in a "personal action" against a delinquent contractor, and five pending stop notice claims for $2,000 each, then a collection of $1,000 would be credited $200 to each mechanic lien claim.

The provision we propose follows on the next page.

PROPOSED ADDITION TO PUBLIC WORKS CODE PROVISIONS

Public Contracts Code Part 6

Chapter 2
Article 1

[*Add the following section:*]

§ 42035 Remedies Not Exclusive

(a) This Part does not affect any of the following rights of a claimant:

(1) The right to maintain a personal action to recover a debt against the person liable, either in a separate action or combined with an action under this Part.

(2) The right to a writ of attachment. In an application for a writ of attachment, the claimant shall refer to this section. The claimant's assertion of any remedies under this Part does not affect the right to a writ of attachment.

(3) The right to enforce a judgment.

(b) A judgment obtained by the claimant in a personal action described in subdivision (a) does not impair or merge any claim under this Part, but any amount collected on the judgment shall be credited on the amount of a claim under this Part, pro-rated according to the percentage that the claim under this Part is to the total judgment.

[*Based on Proposed Civil Code § 7474, which is based on current Civil Code § 3152, which applies to stop notice and bond claims as well as lien claims.*]

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June 25, 2007

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Palo Alto, CA 94303-4739

Comments from California State Council of Laborers Legislative Dept. and
Construction Laborers Trust Funds for Southern California
on Public Works - Memorandum 2007-25 (Part 2)

Dear Members of the Commission:

On behalf of the California State Council of Laborers Legislative Department (Laborers), and the Construction Laborers Trust Funds for Southern California (Laborers Funds), we discussed the issues of the relation between the Private Works and Public Works portions of the Revisions, in Part 1 of these Comments.

In Part 2, we address some of the specific issues raised in Memorandum 2007-25. We deal with those issues, in the order they are presented in the Memorandum, along with a reference to the Sections affected, and the page number in the Memorandum.

Our Comments follow with the hard-copy of this letter. They are attached as Word and PDF files to the e-mail version of this letter.

I am available for questions, discussion or further input, at the address, phone and e-mail listed here. The best way to contact me is at this e-mail address: jds@racclaw.com

Thank you for your consideration.

Sincerely,

J. David Sackman, of
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1. Who May Make A Claim

Exclusivity of Remedy - § 44110 - Memo pp. 9-10

Public Contracts Code § 44110 is proposed to be added, based on current Civil Code § 3264, and corresponding to Proposed Civil Code § 7500 for private works. Section 3264 refers to the exclusivity of the remedies "with respect to any fund for payment of construction costs." We submit that a "fund for payment of construction costs" refers to *private works* only, as opposed to *public funds* used for public works. The are a myraid of provisions scattered in both state and federal law, outside of this chapter, dealing with remedies against public funds. *See, e.g.*, Code Civ. P. § 708.760 (lien of creditor paid after filed stop notices); Labor Code §§ 1771.5(b)(6) (duty of public entity to withhold funds for prevailing wage violations), 1775 (penalties and withholds against funds for failure to pay prevailing wage) and 1777.7 (penalties for violation of apprentice standards). The proposal to insert this provision into the Public Contracts Code would create a conflict between these various provisions, and cause a great deal of confusion. **It does not belong in the Public Contracts Code at all, and should be dropped.**

The confusion caused by this proposed section would be even greater if the other provision we proposed in Part 1 of these comments were not included. We pointed out there that the proposed Public Contracts Code additions failed to carry forward the provisions of current Civil Code § 3152, which provide that those remedies are *not* exclusive, but cumulative to any other contract or other claim the claimants may have.

We urge that § 44110 be DELETED, and that the equivalent of Civil Code § 3152 we proposed be added instead.

Who May Make Use Remedies - § 42030 - Memo pp. 25-26 and 35-37

There are two discussions of proposed § 42030 (defining who may use the remedies of the chapter) in the Memorandum. On pages 25-26, our comments regarding the application to a "Laborer" are discussed. On pages 35-37, changes regarding the authorization for work and materials is discussed. **We concur with the changes on pages 35-37, as long as the changes on pages 25-26 are also implemented. Specifically, subsection (a)(2) should read simply "A laborer."**

2. NOTICE ISSUES

Description of the "Site" - § 42102(a)(3) - Memo pp. 16

The proposed Section 42101(a)(3) uses the same description to identify public works as used in private works. This is one area where a difference between public works and private works remedies calls for different statutory language. On private works, documents are recorded and indexed by the legal description of the real property, starting with the street address. On public works, however, the remedies run not to the real property owned by the government, but to the public funds allocated for that project, and the bond required to be posted for the project. These are tracked by the project description and number by the public entity.

We suggest, then, that the "description" referred to in § 42102(a)(3) be that used by the public entity, and therefore the other parties. This would be "the project description and contract or project number (if available)." For example, there may be several projects going on simultaneously on the same school site, with different funding and project identifications. It would be most helpful to identify the project in the same way.

Proof of Notice - § 42114 - Memo pp. 19-20 and 31-32

This section, in particular subsection (b)(1), continues the problem we pointed out previously, of the great burden placed on proving delivery, or even attempted delivery, on deadbeat contractors. This is a new provision which would add a requirement not in current law. A contractor or subcontractor who is not paying its workers and suppliers is not likely to accept delivery of any type of notice, if it is even still in business at all. While the proposed statute allows for proof of *attempted* delivery, even this is difficult and time-consuming to obtain (if it can be obtained at all). Precisely because the package is not being accepted, it will take several attempts and many days, before it is returned. Even then, the Post Office and other delivery agencies are not always diligent in returning a proof of attempted delivery. This unfair burden placed on claimants is exacerbated by the short time limits for the notices and claims under the statute. The combination of burdensome notice requirements and short time limits may make it virtually impossible for some claimants to assert valid claims, especially the most vulnerable claimants with the least resources for tracking down deadbeats.

We therefore suggest that the requirement of "proof of attempted delivery" be replaced with "proof of mailing." If this is *not* adopted, then the time limits for all actions by claimants must be extended by at least thirty (30) days to account for the delay caused by this burdensome new requirement.

Place of Stop Payment Notice - §§ 44130(b) and 42106 - Memo pp. 22 and 30-31

These sections specify the particular office or officer of a public entity where notices, in particular stop payment notices, are to be delivered. In response to comments from some public entities, the specified location has been changed for those particular agencies. Rather than continually adjusting the statute to accommodate the changes in government bureaucracy, we suggest that each public entity be given the option of publicly posting the specific address where such notice is to be sent. If this posting is easily accessible to members of the general lay public, then this would serve the dual goals of giving the agencies flexibility, and making the process more open and accessible to the public.

We suggest that, in addition to the default designation of the "director" or "disbursing officer," these sections allow public agencies to designate a particular officer and address for service, as long as that designation is publicly posted in a place easily accessible by the general public (such as a public website).

3. LABORERS ISSUES

We concur with the Staff Recommendations in Memorandum 2007-25 (at pp. 23-26) on these issues. The changes worked out as to private works have been carried over to the provisions for public works. In particular, a definition of "Laborer" based on current Civil Code § 3089 is essential. **We urge that these changes be adopted**. *See also our comments, supra, regarding § 42030.*

4. SUBCONTRACTOR DISCIPLINE

Deletion of Section 43060 - Memo pp. 26-28

For the reasons stated in the Memorandum, and our prior comments on this issue as to private works, **we concur that this proposed section should be deleted**.

New Section 42103 - Memo pp. 28

We concur that the new Section 42103 be used instead of the original proposal of § 43060, which should be deleted. We do have an additional comment.

The information required to be provided by a delinquent contractor in the proposed § 42103(a)(1) to (a)(3), is essentially the same as the information already required in Labor Code § 1776. This is part of the "prevailing wage" law applicable to public works. This Labor Code Section requires all contractors on public works to submit "certified payrolls," under penalty of perjury,"showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each" worker of that contractor on the project. Labor Code § 1776(a). There is no comparable requirement on private works.

We suggest that the two statutes be coordinated, with the addition of the following language:

> **"(c) Nothing herein shall alter or diminish the requirements of Labor Code § 1776, except that a copy of the certified payrolls described there may be used to provide the information required by subsections (a)(1) through (a)(3), above."**

We thank you for your consideration.