Legis. Prog., H-820 October 22, 2009

First Supplement to Memorandum 2009-45

Report on SB 189 (Lowenthal)

The Commission has received comment on Memorandum 2009-45 from Howard Brown, an attorney with a mechanics lien practice and a past commenter on the Commission's study of mechanics lien law. Mr. Brown's comment, which is attached, is much appreciated.

Mr. Brown believes it would be inappropriate for the Commission to reverse prior decisions in this study based on objections from stakeholders who he feels may not share the same interests and goals as that of the Commission, or the general public. He suggests that making only piecemeal changes to existing law, rather than a comprehensive revision, will result in an "interim law" that will create confusion and need eventual correction. He notes that he participated in writing the last recodification of the mechanics lien statute in the late 1960s, and indicates that many provisions of existing law were enacted over stakeholder objection.

Mr. Brown also addresses each of the specific issues discussed in Memorandum 2009-45. With a few exceptions, Mr. Brown believes the Commission's original decision on each issue was correct, and he would not make the revisions suggested by the staff in the memorandum.

Respectfully submitted,

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Via: e-mail Scohen@clrc.ca.gov

STEVE COHEN
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Re: Memorandum 2009-45

Dear Mr. Cohen,

The above memo ('Memo') is an effort to meet the objections and recommendations of various disparate groups with what the Commission has concluded are necessary changes to the lien laws of California. I realize this is a legislative and perhaps political effort and some accommodations and concessions were necessary and were made. The Commission started in 2004 to develop a comprehensive analysis of the problems under existing law and, to a substantial extent, resolved many of them. Senate Bill 189 is a fair, skilled and competent resolution of many of the existing problems. After so much study and work, it is now ignoring that work in capitulating and catering to the unconvincing concerns of individual stakeholders who are not entirely concerned with achieving the same ends as those of the Commission. Such stakeholders are more interested in protecting and achieving their own interests and goals than those of the public. Unfortunately many of the problems with existing law will remain extant if such objections are sustained. The Memo correctly summed up its concerns in its second paragraph beginning with the words "It was the Commission's view. . . " After so much work, why abandon it? If, as stated in the Memo at the top of page 2, changes are known to be necessary and appropriate, why is the effort now discarded?

On page 3 of the Memo remarks the Commission remarks with regard to the stakeholders that if ' the stakeholder concern has significant merit and that the proposed change would not significantly undermine the overall value of the proposed law' that the revision would be adopted. I do not believe that this goal was achieved. Making significant changes knowing that they are piecemeal and requiring further study (resulting in an interim law[1]) and needing eventual correction creates confusion. Undoubtedly it will duplicate much of the work already performed by the Commission and which resulted in the present proposed legislation. This failure will require more piece meal efforts to resolve any problems of the existing law.

Although I don't recall the details, and I know that we went through the same process in the latter part of the 1960s when writing the current version of the lien laws. I recall that there were arguments by various 'stakeholders' and when we didn't agree with them, we wrote what was best and appropriate. This was particularly true of the definitions in the first part of that legislation beginning with CC § 3082: everyone had some objection to some part of it but they have survived almost intact.

[1] For example the recent amendments to CC § 3097.

With that said, I have these comments.

Commencement:

Starting with § 8004. 'Commencement' as consisting of (1) delivery to the site and incorporation or (2) visible work of a permanent improvement, was and is a sound and workable definition. The objection that some work (such as foundations) would not be visible and therefore should not constitute commencement ignores common sense and practice. It is and has been held to be commencement. I actually tried the issue of a 'drive by' examination by a proposed lender and lost: the court holding it was commencement. Any lender that relies upon a 'drive by' and not getting out of the vehicle and personally examining the site, would be ill advised in making the loan in the first place. I would retain proposed § 8004.

Delivery:

There are many who generally oppose the use of mechanics' lien laws. Their purpose is served by their objections to § 8026(b). The proposed section, adding to existing law an evidentiary presumption of use by the supplier, was a useful tool for claimants. It avoids numerous evidentiary problems and reduces trial time and expenses. To let it go by the wayside after so much discussion is disappointing. I would retain § 8026(b).

Recordation:

I have no problems with proposed § 8058. Although the proposed action is acceptable, to be consistent with my belief that the original submitted and adopted SB 189 should be retained, I would still retain the original SB 189 language.

Completion:

The Memo reverting back to the original definition of 'Completion' to be *actual a*nd not substantial is just wrong. I have previously expressed my concerns regarding the existing definition as 'actual completion' as being tautological and redundant. It is no different than defining an 'apple' as an 'apple'. No one, including the courts, has satisfactorily explained in a decision or to me what this definition meant. The courts have, as

the Commission notes, wrestled with this definition for years and there is no definitive definition or explanation. On the other hand, those in construction understand, use and are well versed with the term 'substantial completion'. This is also true of the legislature. I am not aware of any dispute arising from the use of the term 'substantial' in Civil Code § 337.15. Why continue with a known ambiguous and uncertain term when, after a lengthy examination, the Commission and the legislature agreed to a logical and understandable term?

Advance Notice:

Proposed CC §§ 8418, 8420 are not in my opinion desirable, helpful or useful. They only add a wasteful procedure and add an additional problem to those seeking to enforce their lien rights. Since the lien claimant must give notice in advance to recording the lien, it essentially reduces the time and opportunity to resolve the issues. However, since there is enacted legislation on the same topic, it is logical to adopt the revise the proposed legislation to conform to and continue the law on this issue as enacted by AB 457.

Payment Bond: Oligee or beneficiary:

I agree that the suggested changes discussed on page 16 relating to the sections of PCC § 45040 and CC§ 3226 should be consistent as recommended. PCC § 45040 discussed starting on page 16 was consistent with the Civil Code. It received no objections when discussed and accepted and I see no reason why the consistency should not be maintained in preference to what would appear to be single objection about a remote possibility of confusion. Consistency is much more agreeable than potential confusion. I would not delete the section.

Public Words: Notices of Completion

I do not see how anyone would be confused as stated by the stakeholder on page 17 by enactment of a Notice of Completion by public entities PCC § 42240. Why should it be deleted because someone, who is performing work on a public project, does not know the legal requirements to enforce its rights? Although I don't see it as a problem, the proposed changes to CC §§ 8600 and 8602 starting on page 19 are acceptable.

Performance Bond on Private Work:

The suggestions to renumber and revise CC §§ 8600 and 8602 make sense.

Claimants on Payment Bond:

The discussion and explanations of the objections to the proposed changes beginning on page 21 and continuing to page 25 regarding claimants on payment bonds are not clear. Since the *Union Asphalt* decision resolved the issue, there is no reason to make the statutory changes suggested by opponents to proposed CC § 8608 and PCC § 45090. The Commission's original conclusion not to make any changes appears appropriate since case existing law has explained what the statutes mean. Leaving these statutes alone, makes sense.

Judicial Release of a Lien Claim:

This subject of obtaining a release of a mechanics' lien in proposed CC § 8480 beginning on page 26 contained perfectly valid and sound provisions. The objections now voiced were previously raised, as were all objections, now asserted. When I first considered the original proposal contained in § 8480 in what now seems ages ago, I considered the possibility of the problems now again being raised. After much consideration I concluded, as did the Commission, that if one seeking the release could not establish the ground, it would not prevail. The courts are frequently faced with motions for summary judgments and resolve them. The Memo discussed many of the issues: 'how to' do this or that. These arguments only restate the problems that one faces seeking by a motion to obtain the release; they do not raise legitimate arguments why the various proposed objections by motions to release should not be retained. I would suspect that when the concept of motions summary judgment was originally conceived, the same arguments were made at that time. It does not mean that the objections are valid. None of the objections cited raise an issue as to whether they should be sustained. They only raise the problems of establishing by declarations or affidavits the validity of the motion.

I am convinced ─ although disagreeing with some of the provisions reached in SB 189 ─ that those provisions were adopted only after a lengthy period of time and after much consideration, arguments, concessions and thought, and should be retained intact.

Thank you for the opportunity to have been of some service to you and the Commission. Do not hesitate to contact me if I may be of any further service.

Sincerely,

Howard B. Brown

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