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Memorandum 2009-48

Status of Bills (SB 189 (Lowenthal))

This memorandum reports on the status of Senate Bill 189 (Lowenthal), presently pending in the Senate, which would implement the Commission's recommendation on *Mechanics Lien Law*, 37 Cal. L. Revision Comm'n Reports 527 (2007).

WORKING GROUP PROCESS

Since the last Commission meeting, Commission staff has continued to discuss with stakeholders any remaining concerns relating to SB 189.

On November 4, 2009, a second working group meeting was held to discuss these concerns. Among the participants at the meeting were the Associated General Contractors, California (AGC), Association of California Surety Companies, the American Subcontractors Association of California (ASAC), the California Professional Association of Specialty Contractors (CALPASC), the California Council of the American Society of Landscape Architects (CC/ASLA), and the Contractors' State License Board (CSLB).

At the meeting, revisions to the bill to address the stakeholder concerns discussed at the first working group meeting were presented. These revisions, which had been accepted by the Commission at its last meeting (see Memorandum 2009-45), were accepted without objection by the stakeholders present.

Next, a second round of stakeholder concerns about SB 189 were discussed. As with the concerns expressed at the first working group meeting, these concerns are also likely to translate into opposition to the bill, if left unaddressed.

This memorandum describes this second round of stakeholder concerns, evaluates their technical and policy merit, and suggests revisions intended to address the concerns. Based on legislative time constraints, these revisions have already been discussed with and preliminarily approved by the Commission

chair, and the Office of Legislative Counsel has been requested to prepare amendment instructions that would implement the revisions. The Commission at this time needs to decide whether the revisions would be compatible with the overall purpose of the Commission's recommendation. The Commission decisions will then be related to Senator Lowenthal, who will make a final decision on how or whether to amend the bill.

Again, as a general matter, the staff would recommend that the Commission find a proposed revision acceptable (with or without changes), if the Commission concludes that (1) the stakeholder concern underlying the revision has significant merit, and (2) the proposed change would not significantly undermine the overall value of the proposed law.

STAKEHOLDER CONCERNS

The following matters were discussed at the working group meeting on November 4, 2009.

Placement of Private and Public Work Provisions in Separate Codes

The existing mechanics lien statute (Civ. Code §§ 3082-3267) contains provisions relating to both private and public works of improvement. Under SB 189, provisions relating to private work would remain in the Civil Code, but provisions relating to public work would be moved to the Public Contract Code.

AGC representatives expressed significant concern at both working group meetings about this proposed separation of the public work provisions from the private work provisions. This concern is not new; other stakeholders had objected to this separation when the Commission was formulating its final recommendation in this matter.

Analysis

The Commission previously decided on this placement of the public work provisions for two primary reasons.

First, given that a mechanics lien is not available on a public work, the placement of these public work provisions in a statute commonly known as the "mechanics lien statute" was perceived to be confusing for laypersons, or occasional practitioners.

Second, the Public Contract Code — which didn't exist when the mechanics lien statute was last recodified — appeared to be a more logical home for these

provisions, as that code contains other statutory material governing public construction contracts.

Nevertheless, as stakeholders at the meeting pointed out, continuity and familiarity are also valid considerations relating to the placement of these provisions. The staff was informed that, among persons most involved with the mechanics lien statute on a regular basis, the placement of all "mechanics lien" provisions within a single code (relating to both private and public work) is more important than placement of all provisions relating to public construction in a single code.

Recommendation

This expressed concern could be addressed through a series of amendments to the bill that would not appear to impair the overall value of the proposed law. The staff suggests that, instead of placing the private and public work provisions in separate codes, all provisions be placed within a single statutory Part of the Civil Code, in consecutive statutory Titles.

Amendments to achieve this reorganization would result in the bill having the following general organization:

PART 6. ~~PRIVATE WORK~~ WORKS OF IMPROVEMENT

TITLE 1. PRIVATE WORK OF IMPROVEMENT

(private work provisions here)

TITLE 2. PUBLIC WORK OF IMPROVEMENT

(renumbered public work provisions here)

Reorganizing the bill in this fashion would address the stakeholder concern, without requiring any substantive amendments to the bill. The statutory text of all provisions could be retained almost verbatim, save for renumbering of the public work provisions, and nonsubstantive conforming revisions needed to reflect the new organization (e.g., revising references to "this *part*" to instead refer to "this *title*").

The staff recommends that **the Commission accept this reorganization**. It would have no effect on the substance of the bill and would make the bill more

user-friendly to the stakeholders who have expressed a preference. The change would also neutralize a probable source of strong opposition to the bill.

Application of Provisions to "Landscape Architects"

Existing law provides a "design professionals lien" to specified professionals (licensed architects, engineers, and land surveyors) that provide pre-commencement design work on a contemplated work of improvement. Civ. Code §§ 3081.1-3081.10. These professionals are also specially referenced in certain provisions of the existing mechanics lien statute. See generally Civ. Code §§ 3097(c), 3247(c). SB 189 would implement the Commission's recommendation to generally continue each of these provisions.

Stakeholders representing landscape architects, who receive a different license than that received by licensed architects, have requested that licensed landscape architects be added to the list of "design professionals" governed by these provisions.

Analysis

A mechanics lien is not available and does not attach to a work of improvement until "commencement" of the work of improvement. Civ. Code § 3134. "Commencement" is not defined by statute, but generally requires either delivery of construction material to the jobsite, or a permanent and visible improvement to the property. See *Walker v. Lytton Sav. & Loan Ass'n*, 2 Cal. 3d 152, 159, 465 P.2d 497, 84 Cal. Rptr. 521 (1970); *Halbert's Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th 1233, 1240-1241, 8 Cal. Rptr. 2d 298 (1992).

The design professionals lien was created by statute to provide a mechanics lien type remedy for a person providing pre-commencement design work on a construction project. The lien is presently available to three of the four categories of licensed professionals that regularly provide pre-commencement design work. As licensed landscape architects also provide such design work, there appears to be no sound policy reason not to also include these licensed professionals within the same group.

No objection to this stakeholder request was raised by any other stakeholder at the working group meeting.

Recommendation

The staff recommends that **the Commission accept the proposed change, which would add licensed landscape architects to the definition of "design professional" in SB 189, and to the list of design professionals specially referenced by selected mechanics lien provisions in SB 189.**

Proof of Notice

SB 189 would implement the Commission's recommendation to standardize the many varied notice requirements in the existing mechanics lien statute. One provision of the bill, applicable to all notices unless otherwise indicated, specifies the type of documentation that may be used to establish proof of notice.

The bill provides that, if notice has been given by using an express service carrier (e.g., FedEx or UPS), proof of such notice may be established through a "tracking record" provided by the carrier.

A stakeholder that regularly mails mechanics lien notices requested that SB 189 also allow a "tracking record" provided by the United States Post Office to be used to establish proof of notice, when a notice is sent by certified, registered, or Express mail.

Analysis

A tracking record of a notice sent by certified, registered, or Express mail is available from the United States Post Office, and it appears to be no less reliable or comprehensive than the tracking record provided by express service carriers such as FedEx or UPS. There appears to be no sound policy reason not to allow use of a USPS tracking record to establish proof of notice.

Recommendation

The staff recommends that **the Commission accept the proposed change, to permit use of a USPS "tracking record" as proof of notice under SB 189.**

Distinction Between "Claimant" and "Beneficiary"

SB 189 implements the Commission recommendation continuing an existing provision of law that indicates how a payment bond on a work of improvement is to be construed. In an attempt to modernize the language of the provision and make it easier to read, the bill would reconcile references in the provision to the

"beneficiary" on the bond and the "claimant," two terms that had been understood to have the same meaning.

However, a stakeholder representing surety groups has advised that in the industry the two terms have slightly different accepted meanings, and that the reconciliation could change existing law.

Analysis

It was not the intention of the Commission to change existing law on this issue. Rather than risk any unintended consequence, it would appear safer to revise the provisions in SB 189 that continue the existing provision, so as to more closely track the language of existing law.

Recommendation

The staff recommends that **the Commission accept the following changes to SB 189:**

> 8144. (a) A bond … shall be construed most strongly against the surety and in favor of the beneficiary.
>
> (b) ….
>
> (c) Except as otherwise provided by statute, the sole conditions of recovery on the bond are that the ~~beneficiary~~ claimant is a person described in Article 1 (commencing with Section 8400) of Chapter 4~~,~~ and ~~the beneficiary~~ has not been paid the full amount of the claim.
>
> ~~45040~~ 9556. (a) A payment bond shall be construed most strongly against the surety and in favor of the beneficiary.
>
> (b) ….
>
> (c) Except as otherwise provided by statute, the sole conditions of recovery on the bond are that the ~~beneficiary~~ claimant is a person authorized under Section 9056 to assert a claim against a payment bond~~,~~ and ~~the beneficiary~~ has not been paid the full amount of the claim.

Deletion of Hold Period After Order Releasing Lien Claim

Under existing law, an owner may petition a court in a summary proceeding to release a recorded lien claim, if the lien claimant has failed to file an action in court to enforce the claim within 90 days after recordation of the lien claim.

SB 189 as introduced would have implemented the Commission recommendation to add four new grounds upon which an owner could petition for release of a lien claim in this summary proceeding. It would also have added

a 20-day "hold period" before an order releasing a lien claim would become effective. The intent was to protect a lien claimant's appeal rights, in the event a court made an erroneous ruling.

The Commission and the author have already agreed to remove the new grounds from the bill.

A stakeholder group requests that the 20-day hold also be deleted from the bill.

Analysis

The Commission probably would not have recommended adding the hold period provision to existing law, if it had not first recommended adding the new, more factually complex grounds for a lien release. In the absence of those new grounds, there is minimal benefit to be gained from the hold period provision, and proportionately more detriment. This is because the sole ground provided in existing law is expiration of the time provided for enforcing a lien claim. The risk of judicial error on that factually simple ground is probably not great enough to justify adding an additional 20 days to the 90 days an owner must already wait to clear an invalid lien claim.

Recommendation

The staff recommends that **the Commission accept deletion of the 20-day "hold period" from SB 189.**

MISCELLANEOUS REVISIONS

The staff also suggests that the Commission approve a few nonsubstantive technical revisions to the bill.

Operational Date

Three provisions in the bill indicate that the bill is to have an operative date of January 1, 2011. See proposed Sections 8051(a), 9050(a), and the uncodified Section 108 of the bill.

Those provisions were intended to provide a one-year deferred operative date, if the bill had been enacted in 2009.

To preserve the one-year deferred operative date, the bill's operative date provisions should be revised to refer to January 1, 2012. **The staff recommends that those changes be made.**

Reconciliation of Form Language in Statutory Waiver Forms

The existing mechanics lien statute contains a single section that requires the use of specified statutory forms to obtain a waiver and release from a claimant on a work of improvement. Civ. Code § 3262. SB 189 would implement the Commission recommendation to set out these forms (eight in total) in separate statutory sections.

Two of the eight forms inadvertently contain slightly different language introducing exceptions to the scope of the form. The staff recommends that **the Commission approve nonsubstantive changes to the two nonconforming forms so that they use the same language as the other six forms, thus:**

> 8170. If a claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall be in substantially the following form:
>
> ….
>
> Exceptions
>
> This document does not ~~apply to a lien right based on~~ affect any of the following:
>
> ….

> 8172. If the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been paid the progress payment, the waiver and release shall be in substantially the following form, with the text of the "Notice to Claimant" in at least as large a type as the largest type otherwise in the form:
>
> ….
>
> Exceptions
>
> This document does not ~~apply to a lien right based on~~ affect any of the following:
>
> ….

Enforcement of Design Professionals Lien

Existing law provides that a design professionals lien may be enforced pursuant to a specified article in the existing mechanics lien statute.

The provision in SB 189 that continues this design professionals lien enforcement provision inadvertently omits some relevant provisions from the referenced article.

The staff recommends that proposed Section 8308 be revised to correct that omission, as follows:

> 8308. (a) Except as provided in subdivision (b), no provision of this ~~part~~ title applies to a lien created under this chapter.
>
> (b) The following provisions of this ~~part~~ title apply to a lien created under this chapter:
>
> (1) This chapter.
>
> (2) Article 1 (commencing with Section 8000) of Chapter 1.
>
> (3) Section ~~8428~~ 8424.
>
> (4) Article 6 (commencing with Section 8460) of Chapter 4.
>
> (5) Article 7 (commencing with Section 8480) of Chapter 4.
>
> ~~(5)~~ (6) Article 8 (commencing with Section 8490) of Chapter 4.

Prevailing Party in a Stop Payment Notice Enforcement Proceeding

Under existing law, the prevailing party in a stop payment notice enforcement proceeding is entitled to reasonable attorney's fees. One provision of the existing statute provides that a defendant in such an action will be deemed the prevailing party if the defendant had tendered to the claimant the amount ultimately determined to be owed the *claimant*, and had deposited that sum with the court.

The provision in SB 189 that continues this provision of existing law mistakenly refers to tendering the amount owed to the *defendant*, rather than to the *claimant*. **The staff recommends that this plain error be corrected, by amending proposed Section 8558 as follows:**

> 8558. (a) In an action to enforce payment of the claim stated in a bonded stop payment notice, the prevailing party is entitled to a reasonable attorney's fee in addition to costs and damages.
>
> (b) The court, on notice and motion by a party, shall determine who is the prevailing party or that there is no prevailing party for the purpose of this section, regardless of whether the action proceeds to final judgment. The prevailing party is the party that recovers greater relief in the action, subject to the following limitations:

(1) If the action is voluntarily dismissed or dismissed pursuant to a settlement, there is no prevailing party.

(2) If the defendant tenders to the claimant the full amount to which the ~~defendant~~ claimant is entitled, and deposits in court for the claimant the amount so tendered, and alleges those facts in the answer and the allegation is determined to be true, the defendant is deemed to be the prevailing party.

Respectfully submitted,

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