

SENATE BILL REPORT

ESB 6441

AS PASSED SENATE, FEBRUARY 12, 1992

**Brief Description:** Establishing construction lien rights.

**SPONSORS:** Senators McMullen and Matson

**SENATE COMMITTEE ON COMMERCE & LABOR**

**Majority Report:** Do pass as amended.

Signed by Senators Matson, Chairman; Anderson, Vice Chairman; Bluechel, McMullen, Moore, Murray, and Skratek.

**Staff:** Dave Cheal (786-7576)

**Hearing Dates:** February 4, 1992; February 7, 1992

**BACKGROUND:**

A comprehensive overhaul of the construction lien law was enacted in 1991 with an effective date of April 1, 1992. The purpose of the delayed effective date was to allow those involved with the application of the act an additional period of time to become familiar with its provisions and identify technical problems that could be corrected prior to its effective date.

**SUMMARY:**

Terms with legal significance are made more accurate and consistent throughout the act. Certain key time periods are described with more precision. Additional instruction is provided regarding the content of certain forms, the method for providing certain notices, and the minimum requirements of some legal procedures.

In order to provide as much understanding as possible of what is being attempted, a section-by-section analysis follows.

Section 1. The definition of "owner" is removed.

Section 2 (1). The addition of the word "also" at line 25, page 4, makes it clear that notice must be given to both the owner and the prime contractor, as designated. The addition of the phrase "as described in this subsection" provides guidance as to how the notice is to be given to the prime contractor. The additions to subsection (b) of subsection (1) on page 5 make it clear that notice may be delivered informally or served by a process server in the usual manner.

Section 2 (2). This subsection lists those persons who need not provide a notice of a right to claim a lien. The amendment to subsection (c) makes it clear that subcontractors

who contract directly with a prime contractor still need to give notice to the owner as provided in subsection (3)(b) if they are working on an owner-occupied residential repair or remodel.

The addition of the phrase "or their common law agent" in subsection (a) and (b) of subsection (3) makes those phrases consistent with other places in this section where "owner" is mentioned. The changes on page 6, lines 1 and 2, are the first of many modifications to make the language consistent throughout the chapter. As currently drafted, the chapter interchanges the terms of "liens," "claim of lien," "lien claims," and "notice of lien claims." Many of the changes throughout the bill are an attempt to use the most accurate term and to use terms as consistently as possible. The same is true of the phrase "furnishing professional services, materials, or equipment." The bill attempts to always list these in the same order, so that no significance could be attached to listing them differently.

The changes in subsection (3)(b) of section 2 are designed to provide more precision as to when notice to the owner of an existing residence occurs. This is a very key event in determining the rights of the parties, and it needs to be identified as precisely as possible.

Several changes are made to the suggested notice form following subsection (4) of section 2. These changes are for the purpose of clarity, and consistency of phrase.

Section 2 (5). The addition of the phrase "if the mortgagee or purchaser" makes it clear that they both must act in good faith, not just the subsequent purchaser.

A suggested notice form for providers of professional services is added.

Section 3. This is a substantive change to protect subcontractors from intimidation and coercion.

Section 4. The word "chapter" is substituted for the word "section," as a more accurate designation.

Section 5. The amendment makes it clear that the interest in land referred to is that of the owner who orders the work done, as opposed to some other owner. The phrase is also changed for the purpose of consistency. The rearrangement of the last sentence is grammatical.

Section 6. In the first sentence, the phrase "notice of claim of lien" appears. This phrase appears frequently throughout the chapter. The words "notice of" are superfluous and possibly misleading. The "claim" includes a notice. For the purposes of consistency and accuracy, "notice of" is removed throughout the bill.

The addition of "lender or lien claimant" in the first sentence recognizes that lenders and other lien claimants may

have a legitimate need to challenge frivolous or clearly excessive lien claims.

The language added at lines 24 through 28 of page 10 are to make it clear that a motion to obtain the prompt release of a frivolous lien claim must include some statement as to why the lien is believed to be frivolous or clearly excessive. This language is taken from Rule 60 of the Rules of Civil Procedure which describes how to file a motion to vacate a default judgment. Without this language, a motion could be vague or conclusory, and the lien claimant would be put in the position of proving a negative, or disproving all possible reasons why the lien claim is not frivolous.

The term "release" is substituted for "dismiss" in subsections (2) and (4) because that is the traditional word used to describe the elimination of a lien. Other amendments in subsections (2) and (4) are for the purposes of consistency and clarity.

Section 7. The phrase "file for recording" is substituted for the word "record." In some counties, liens are accepted for recording and time-date stamped on one day and actually recorded the following day. The lien claimant has no control over which day the lien is actually recorded. Therefore as a matter of fairness, the designation should be the day filed for recording. A new lien claim form is supplied that is hopefully more clear.

The remaining changes to section 6 on page 14 have been described earlier.

Section 8. See comments under section 5 regarding "notice of."

Section 9. This section has to do with offsets which an owner is entitled to take against amounts due in the future on a construction contract when a lien claim on that project leads to a judgment against the owner. Current language indicates that the setoff is against amounts due to the "lien claimant." This is an error because payment flows from the owner to the prime contractor. Therefore, it is necessary to change the term "lien claimant" to "prime contractor."

Section 10. This section allows an owner, contractor, or subcontractor to post a bond in the event of a lien claim, and obtain a prompt release of the property from the lien. This allows projects in progress to proceed, and the validity and amount of the lien can be determined later at the convenience of the parties. The first amendment to this section at line 8, page 16, adds "lenders and other lien claimants" to the list of those who are entitled to use the bond procedure.

Section 11. This first section describes how a lien may be foreclosed, and who must be joined in the foreclosure action. Currently, this section provides that lien claimants whose lien is recorded at the time of the commencement of the foreclosure action must be joined as a party or their claim

will not be affected. The amendment broadens this principle to include those who have a recorded interest in the same property. Under the amendment, anyone who has an interest such as a long-term lease, an option, or a lien claim would have to be joined as a party or their interest in the property could not be affected by the lien claim.

Section 12. The only amendment to this section is the elimination of the words "notice of," line 23, page 19. (See comments to section 5)

Section 13. The elimination of the phrase "who shall affirmatively state under penalty of perjury,..." in subsection (2) would make this subsection consistent with current law. This requirement and sanction is not appropriate because other penalties are in place for specious stop notices. The changes in subsection (3), reflect the fact that notices are not "filed" with a lender but simply "given" to the lender. The instructions on how to give notice in subsections (a) and (b) of subsection (3) parallel the methods of giving notice in other portions of the act.

The purpose of subsection (9) is to provide a method for the prompt disposition of stop notices to a lender that are believed to be frivolous, without reasonable cause, or clearly excessive. This procedure parallels the method of disposing of frivolous lien claims set forth in section 5. The comments to that section apply to the amendments made here.

Other minor grammatical and technical changes are made.

**Appropriation:** none

**Revenue:** none

**Fiscal Note:** none requested

**TESTIMONY FOR:**

Numerous technical amendments are needed to improve a comprehensive lien law change made in 1991.

**TESTIMONY AGAINST:** None

**TESTIFIED:** Mark Triplett, Building Industry Association of Washington; Duke Schaub, ACG of Washington (pro); William H. Charbonneau, attorney (pro)