

Memorandum 2005-12

**Mechanics Lien Law (Discussion of Issues)**

This memorandum continues to develop the proposed revision of the mechanics lien law. The Commission’s objective is to modernize and simplify but not to make radical changes in the basic structure of the law unless there is a broad consensus of stakeholders that a particular change is desirable. A staff draft incorporating the latest Commission decisions is attached.

The term “mechanics lien law” is used loosely. The law encompasses not only the lien remedy but also the stop notice and payment bond remedies, as well as prompt payment statutes.

This memorandum addresses (1) general provisions applicable to the entire statute, (2) the mechanics lien remedy, (3) miscellaneous provisions relating to several remedies, (4) the design professionals lien, and (5) conforming revisions. The following communications and other materials are appended as an Exhibit:

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GENERAL PROVISIONS

**Contract Forms**

A contract for a work of improvement must include a space for the owner to enter information about the name and address of the owner and of the construction lender if any. A construction lender need not be identified on a home improvement contract or swimming pool contract. See staff draft Section 3082.310 (contract forms).

Sam Abdulaziz suggests that home improvement and swimming pool contracts should not be exempted from the requirement. Inclusion of lender information in these contracts would facilitate the owner and direct contractor’s

continuing obligation to provide that information to subcontractors and material suppliers.

Presumably these contracts have been excepted from the statute because the form and content of home improvement and swimming pool contracts is already extensively regulated by the Contractors License Law. See Bus. & Prof. Code § 7150 et seq. The **staff would be reluctant to make the law even more complex** by attempting to further regulate the content of home improvement and swimming pool contracts from within the mechanics lien law.

### **Mailed Notice**

A number of provisions of the mechanics lien law contemplate notice by registered or certified mail. Typically these statutes provide for proof of notice by a return receipt or a photocopy of the record of delivery and receipt maintained by the post office, showing the date of delivery and to whom delivered. In the event of nondelivery, the returned envelope itself is proof of mailing. These provisions are consolidated in staff draft Section 3082.240 (mailed notice).

Mr. Abdulaziz says a recurring problem is that the post office may not return either the proof of mailing or the envelope. “In that case, sometimes there is difficulty to attest to the fact that the envelope was delivered.” He suggests a presumption of proper mailing.

We have previously looked into other indicia of proper mailing that might be available, such as a certificate of mailing issued by the post office. While this is not perfect, it is preferable to a presumption of proper mailing.

Other options, if the United States Postal Service is not doing its job, would be to allow delivery of notice by a commercial delivery service that maintains a record of delivery, such as United Parcel Service or Federal Express.

The **staff wonders how commonly the problem occurs** that is raised by Mr. Abdulaziz.

## MECHANICS LIEN

### **Notice of Nonresponsibility**

If the owner of property on which a work of improvement is situated did not contract for the work of improvement, the owner can avoid imposition of a lien by giving notice of nonresponsibility. The owner must record the notice and post

it in a conspicuous place on the site within 10 days after learning of the work. See staff draft Section 3083.530 (notice of nonresponsibility).

The occasion for a notice of nonresponsibility typically arises where a work of improvement is that of a tenant, not of the property owner. The concept is that the tenant's actions should not imperil the owner's property rights.

Case law makes clear that a notice of nonresponsibility does not shield a "participating" owner, however. An owner is considered to be participating, for example, if the tenant acts as the owner's agent, if the lease obligates the tenant to make the improvements, or if the tenant is to be repaid for the cost of the improvement from rental income.

In the recent case of *Howard S. Wright Constr. Co. v. Superior Court*, 106 Cal. App. 4th 314, 130 Cal. Rptr. 2d 641 (2003), the owner of property on which a warehouse was situated leased the property to a telecommunications company. The company proceeded to up a \$2.4 million construction debt to convert the warehouse into a facility adequate for its telecommunications business. The owner gave a notice of nonresponsibility; the lessee went bankrupt. The mechanics lien claimant argued that the owner's notice of nonresponsibility was ineffective because the owner "participated" in the work of improvement. The Court of Appeal agreed with the lien claimant — the lease had required the owner's approval of construction plans and specifications, the owner monitored construction work, and the owner stood to benefit from the improvement in terms of higher rental value of the property.

James Stiepan of the Irvine Company has written to suggest that the Commission review this situation -- "in California, notices of nonresponsibility are, as a practical matter, virtually meaningless." The *Howard S. Wright Construction* case finds owner participation because the tenant needed to make improvements due to the nature of its proposed use and because the landlord required that it be permitted to supervise the work being done by the tenant. "Since those criteria will come to play in virtually all tenant leases, the landlord/owner will never be able to post a valid notice of nonresponsibility (except perhaps for de minimis projects where it is not worth the time and trouble to deal with the notice procedures in the first place)."

Mr. Stiepan suggests that this is one area where the Commission could truly make an important difference. "It is time that some clear and sensible statutory rules are established."

Generally, the Commission's attitude towards the mechanics lien project has been to treat it as basically simplification and clarification, with modest cleanup, and not to get involved with major substantive revisions. However, as we have progressed through the material, we have tentatively proposed quite a few substantive revisions that would benefit lien claimants and very few that would benefit property owners. That is largely a function of the stakeholders that have participated in this project to this point.

But before we finalize a recommendation we need to ensure that we have a balanced package. We may be able to improve the notice of nonresponsibility in a way that will benefit property owners and provide counterbalance to the many improvements that would benefit lien claimants. **Does the Commission wish to pursue this topic?** If so, the staff will go into it in greater depth, including information on how the issue is treated in other jurisdictions.

#### **Time for Recording Claim of Lien by Direct Contractor**

A direct contractor may not record a claim of lien until after the contractor has completed the contract. See staff draft Section 3083.320 (time for claim of lien by direct contractor).

Mr. Abdulaziz suggests that this provision be revised to make clear that a direct contractor may record a claim of lien after the direct contractor ceases to provide labor, service, equipment, or material, even though the contract may not be complete. His concern is that, in case of a dispute that results in the project being abandoned, the contractor would be without a remedy, the contract not having been completed.

The staff does not know why the direct contractor is treated differently from other lien claimants in this respect. However, this has been the law for a very long time — since the earliest days in fact. Perhaps the original conceivers of the mechanics lien law contemplated that in the case of a contract dispute, the parties should be limited to standard remedies for breach of contract rather than giving the direct contractor the interim leverage of the mechanics lien. If the direct contractor prevails, the contractor would not be without remedy; a judgment lien against the property would be available.

The **staff is reluctant to disturb such a venerable feature of the mechanics lien law** absent a showing that there has been a real problem in practice.

### **Time for Recording Claim of Lien on Separate Units**

Where a construction project includes a number of separate residential units — for example a condominium or a planned development — each unit is deemed a separate work of improvement for purposes of application of the mechanics lien law. See staff draft Section 3083.550 (claim against separate residential units).

Mr. Abdulaziz indicates that where a lien claimant is doing work on both separate residential units and common area, it may be difficult to determine what is separate and what is common. The lien claimant faces a problem as to whether a separate unit has been completed for purpose of triggering the time limit for recording a claim of lien on it. He suggests in that situation that the time for recording a claim of lien should be the **later** of completion of work on the common area or work on the residential unit.

It appears to the staff that the law to a large extent already achieves this effect by excepting from separate unit treatment both site improvement work and multiple works of improvement contracted for by the same person. See staff draft Section 3083.550(b) (claim against separate residential units); see also staff draft Sections 3083.230 (site improvement lien) and 3083.540 (multiple works of improvement). The **staff would be reluctant to go beyond this** for fear of undermining the existing system.

### **Notice of Claim of Lien**

At the January meeting the Commission discussed a staff proposal that would have required a lien claimant to notify the property owner on recordation of a claim of lien. The Commission decided instead to rely on, and cross-refer to, Government Code Section 27297.5, providing for notice to the owner by the county recorder on recordation of an involuntary lien on property.

Unfortunately, that statute has been revised by urgency measures, effective August/September 2004, to make notice of an involuntary lien by the county recorder optional rather than mandatory. The revision is the result of an examination of the statute by the Assembly Special Committee on State Mandates, which is charged with reviewing all reimbursable state mandates and recommending reforms to the reimbursement system. Making county recorder notice optional conforms the statute to the current state budgeting practice of suspending the mandate and the state's reimbursement obligation.

Although county recorder notice is now optional, the statute encourages county recorders to continue the practice of giving notice, even though there is no state reimbursement:

In recognition of the state and local interests served by the action made optional in subdivision (a), the Legislature encourages the county recorder to continue taking the action formerly mandated by this section. However, nothing in this subdivision may be construed to impose any liability on a local agency that does not continue to take the formerly mandated action.

Gov't Code § 27297.5(h).

We do not know whether county recorders have taken up the Legislature's invitation to give this notice at their own expense. However, given the pressures on local government budgets, the staff would guess that many county recorders have discontinued the practice of giving this notice or, if they have not yet done so, will do so shortly. The staff does not currently have the resources to survey county recorder practices, though we hope to have law student assistance this summer that may be able to help.

The staff believes it is important that the owner get notice when a lien has been recorded. If the claim is paid, and no enforcement action is ever taken, the owner may be surprised sometime down the road to find the property is encumbered. This is likely to occur at an inconvenient time — when the owner is about to refinance or take some other action affecting title.

The law greatly favors a lien claimant. The claimant may record a claim of lien that ties up property on a simple allegation that money is owed, without bonding against damage caused by a false claim. (This is mitigated by the requirement that a claim of lien be verified, which may help deter a false claim.)

The claim of lien procedure has been upheld by a divided California Supreme Court against a due process challenge. The theory is that the property owner has preliminary notice of a potential claim and, on recordation of a claim of lien, can bring an immediate court action to discharge a false claim. The right to seek immediate judicial relief is not expressed in the mechanics lien law, but we can fix that. See staff draft Section 3083.810 (petition for release order).

The staff thinks that **the constitutionality of the mechanics lien law, as well as its fairness, would be enhanced** if the lien claimant were required to notify the owner on recording a claim of lien against the property:

**§ 3083.355 (added). Notice of recordation of claim of lien**

3083.355. (a) Not later than 10 days after recordation of a claim of lien, the claimant shall give notice of the recordation to the owner or reputed owner of property subject to the claim of lien.

(b) Notice of recordation of a claim of lien shall include all of the following information:

(1) The date of recordation.

(2) The county in which the claim of lien is recorded.

(3) The recording identification number of the claim of lien.

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

(c) The lien claimant shall mail notice of recordation, together with a copy of the claim of lien, to the owner or reputed owner of the property at an address reasonably calculated to give the owner or reputed owner actual notice.

**Comment.** Section 3083.355 is new. An unenforceable lien may be expunged. Section 3083.810 (petition for release order).

For proof of notice, see Section 3082.240 (mailed notice).

What should be the consequence of the lien claimant's failure to notify the owner after recording a claim of lien? If the lien is valid, and the lien claimant acts in a timely fashion to enforce it, there is no problem. The problem occurs when a lien claimant files a claim of lien and, even though the claim is satisfied or is invalid, the lien claimant takes no action to remove the cloud on title.

The owner must resort to court proceedings to expunge the claim of lien from the record. This can take up to half a year or more, causing substantial damage to the owner. The law allows the owner to recover reasonable attorneys fees to expunge the lien. Should it also allow consequential damages caused by the lien claimant's recording a claim of lien, failing to notify the owner, and failing or refusing to remove the cloud on the owner's title? **The staff proposes:**

(d) A lien claimant that fails to give notice as provided in this section is liable to the owner of the property for costs and expenses reasonably incurred to release the property from the claim of lien and for consequential damages to the owner caused by recordation of the claim of lien.

Dick Nash of the Building Industry Credit Association and Commission consultant Gordon Hunt think this remedy is excessive and contrary to law. They argue that recordation of a mechanics lien is privileged and should remain so.

Whether or not the recording of a claim of lien is privileged (particularly a fraudulent recording), a lien claimant's failure or refusal to release an invalid or unenforceable lien ought not to be protected. The mechanics lien is one of the

few, if not the only, involuntary liens that may be imposed on real property without any intervening court determination of validity or probable validity. The mechanics lien law allows a lien claimant liberally to encumber other peoples' property; such an encumbrancer should have some responsibility to follow up. The staff thinks a strong argument can be made for damages in **any** case where the owner has to go to court under the mechanics lien law to remove an invalid or unenforceable claim of lien, not just where the lien claimant has failed to notify the owner.

### **Lien Enforcement**

Under existing law, if a lien claimant such as a subcontractor or material supplier seeks to recover for labor, service, equipment, or material provided to a contractor, the contractor must defend the action at the contractor's own expense. See staff draft Section 3083.790(a) (liability of contractor for lien enforcement).

Mr. Abdulaziz would limit this duty to a direct contractor. The staff thinks in most cases it will be a direct contractor who has contracted out for the labor, service, equipment or material. But if it is a subcontractor who has contracted out and not paid for the work, why should the subcontractor be exempt from the duty to defend? **The staff would not change this provision.**

The statute also provides that during the pendency of such an action against a direct contractor, the owner may withhold from the direct contractor the amount claimed in the action. Mr. Abdulaziz takes the position that the contractor should not have an indemnity obligation if the owner has not paid the contractor. That position makes some sense to the staff. On the other hand, given the owner's potential double liability exposure here, **we do not think it would be prudent to require payment by the owner** in the midst of the dispute.

### **Expungement of Lien**

The statutory procedure by which the owner may obtain release of an invalid lien requires that the owner serve a copy of the release petition and notice of hearing on the lien claimant in the same manner as service of summons, or by registered or certified mail. See staff draft Sections 3083.830 (notice of hearing), 3082.240 (mailed notice).

Mr. Abdulaziz argues that mailed notice should not be allowed. He notes that the lien right is at stake, and suggests this is a due process issue. He thinks

mailed notice should only be allowed once process has been achieved in a pending action.

The staff agrees with this position in the abstract. However, no other notice under the mechanics lien law, including the preliminary notice, is required to be served in the same manner as summons, and some acts such as the recording of a lien itself do not require notice of any kind. To our knowledge there has not been a problem with mailed notice under the release procedure, and the petitioner must prove proper service in the proceeding. **Why start running up the costs and complexity of this particular procedure now?**

#### MISCELLANEOUS PROVISIONS

##### **Preliminary Notice**

A lien claimant must give preliminary notice to the construction lender as well as to the owner. Civ. Code § 3097(a)-(b). There are several avenues by which the lien claimant can discover the existence and identity of a construction lender, including building permit records. Under existing law, a building permit is supposed to include information about the construction lender. But failure of the permit to include that information (which is ordinarily the case) does not excuse the duty to give preliminary notice. See staff draft Section 3082.320 (designation of construction lender on building permit).

Case law interpreting this provision says that a lien claimant need only check for the existence of a construction lender at the commencement of the lien claimant's work and may give preliminary notice on that basis. The lien claimant is not charged with the obligation continually to monitor public records to see whether evidence of a construction lender appears at a later date. *Kodiak Industries, Inc. v. Ellis*, 185 Cal. App. 3d 75, 229 Cal. Rptr. 418 (1986).

Mr. Abdulaziz is concerned that recodification of existing law, without codifying the case law interpretation of it, might be construed as a statutory rejection of the case law. The staff does not believe this is a serious concern. The Code makes clear that a provision, so far as it is substantially the same as an existing statute, must be construed as a continuation of the statute and not as a new enactment. Civ. Code § 5.

It would be possible to revise the statutes to try to capture the essence of case law interpretation of them. However, with 150 years of intensive litigation over mechanics lien law under our belts, this would be a very substantial undertaking.

Another possibility would be to refer to key interpretive cases in the section Comments. But how does one pick and choose as to which cases to mention and which not? The staff believes **the simpler and safer approach is simply to note that the new statute continues the substance of the old one** (except to the extent we are changing the substance) and leave it at that.

## **Notice of Completion**

### *Notice to Persons Who Gave Preliminary Notice*

Our current draft requires that on recording a notice of completion, the owner must give a copy of the notice to persons who have served a preliminary notice on the owner. Staff draft Section 3089.450 (notice of recordation by owner). Mr. Nash suggests that the owner also be required to give those persons a copy of the preliminary notice. This would be a convenience to material suppliers and equipment rental companies to help them match the notice of completion with the job it relates to. (That may not be apparent from their own records, which are typically indexed by the subcontractor they have dealt with rather than by the owner or job description.)

This would probably be a relatively minor imposition on the owner in most cases, and **the staff has included it in the current draft**. Suppose, however, that the owner does not retain sheaves of old notices, but simply enters the information in a database? Also, should we limit the duty to circumstances where the material supplier or equipment rental company or other preliminary notifier has provided the owner with a self-addressed stamped envelope?

In any event, it seems probable to the staff that as computerization makes inroads (even into the construction industry), eventually simple databases will enable material suppliers and equipment rental companies to track invoices by owner and job description as well as by customer. It would be nice if the end result of our revision project were to decrease, rather than increase, the amount of paperwork that travels about under the mechanics lien law.

Ultimately, we should bear in mind that to have an enactable measure at the conclusion of this project, we must ensure balance in proposed changes that burden and benefit the various stakeholders in the mechanics lien process. We will need to review the whole package at the end, and perhaps revisit individual changes such as this.

### *Failure to Give Notice*

If the owner does not record a notice of completion, a lien claimant has until 90 days after completion of the work of improvement to record a claim of lien. If the owner does record a notice of completion but fails to give notice to lien claimants, their time to record a claim of lien is extended until 90 days after recordation of the notice, rather than 90 days after completion of the work of improvement. Thus the owner's recordation of a notice of completion can actually have the effect of extending, rather than limiting, the lien rights of claimants.

We could revise the statute to provide that if the owner records a notice of completion but fails to notify lien claimants, the notice of completion is simply ineffective. Thus lien claimants would have until 90 days after completion of the work of improvement to record their claims, as if a notice of completion had never been recorded.

The staff has not done that in this draft. The concept of completion is fairly nebulous, and recordation of a notice of completion does provide a clear line of demarcation for running the 90 day claim period. **We would be interested in views as to which is the better policy here.**

### *Notice by County Recorder*

Existing law requires the county recorder to give notice to potential lien claimants when a notice of completion is filed. There is no consequence for the recorder's failure to do this, and surveys show that most of them do not. We have eliminated this provision from the draft. The requirement that the owner notify potential lien claimants directly is a better remedy.

Mr. Abdulaziz argues for keeping county recorder notice. His position is that, although it is not perfect, the more notice the better. Moreover, we can't simply rely on notice by the owner because the statute does not require notice in the case of residential construction and in some other circumstances.

While acknowledging the force of these arguments, the staff nonetheless thinks that, due to the marginal benefit of the county recorder notice scheme, and in the interest of greater simplicity of the mechanics lien law, **the county recorder notice scheme should be eliminated.**

## Recommencement of Work after Notice of Completion

The Commission decided to include in the tentative recommendation a provision that notice of completion based on cessation of labor is ineffective if labor recommences before the lien claim period has expired. The Commission is soliciting comment on the workability of this provision.

Mr. Abdulaziz thinks this provision would destroy the utility of the notice of cessation. He points out that a notice of cessation is commonly used to terminate one construction project and start a new one. This can happen if there is a change of contractors. In that case a notice of cessation is recorded to make sure that all subcontractors and suppliers to the first contractor make their claims before the second contractor starts work. To make the notice of cessation ineffective when work recommences would eliminate this device.

The staff thinks **this is a good enough reason not to proceed with the proposed change**. We would remove it from the draft.

## Waiver and Release

The staff has taken its hand at trying to improve the statutory waiver and release forms. Our initial effort is set out at Exhibit pp. 1-4.

**We would appreciate input** from people who use these forms as to whether simplification and standardization of the type proposed is helpful.

## DESIGN PROFESSIONALS LIEN

An architect, engineer, or land surveyor who is not paid for design services provided to the owner is entitled to a lien under the mechanics lien law. Civ. Code § 3110. The mechanics lien right of a design professional is also supplemented by a separate lien — the Design Professionals Lien under Civil Code Sections 3081.1-3081.10. The text of the Design Professionals Lien is set out at Exhibit p. 5.

The Design Professionals Lien was enacted in 1990. It is intended to cover the situation where services are provided by a design professional but construction on the work of improvement is not commenced. A mechanics lien is unavailable to a design professional if construction is not commenced. *D'Orsay Intern. Partners v. Superior Court*, 123 Cal.App.4th 836, 20 Cal.Rptr.3d 399, (2004).

It is not clear to the staff why it was felt necessary to enact an entirely separate statute for the Design Professionals Lien. In theory, if construction is never commenced, there is no improvement for the lien to attach to, so the

mechanics lien remedy is not the proper vehicle. But it appears to us that the mechanics lien statute could easily have been tweaked in such a way to make it adequate for a design professional.

The Design Professionals Lien process is basically a mini-mechanics lien, and is refreshingly simple. That is undoubtedly because the statute is little used. If it were heavily used, it would soon become as detailed and complex as the mechanics lien statute itself. As it is, the Design Professionals Lien parallels the mechanics lien, incorporates by reference the mechanics lien enforcement procedure, and is terminated by commencement of work (in that situation the design professional would be relegated to the mechanics lien remedy).

The staff's initial thought was to integrate the Design Professionals Lien material with the mechanics lien law — it appears to us that the mechanics lien law is readily adaptable to cover the situation where design services are provided but no construction is commenced.

On further reflection, however, we have concluded it would be better to leave well enough alone. The Design Professionals Lien covers a narrow fact situation and is sui generis. Integrating it with the mechanics lien law would add to the complexity of that law without a significant expansion of its coverage. Bearing in mind also that the Design Professionals Lien is of relatively recent vintage, **the staff has tentatively concluded that it should be left alone**, as a companion to the mechanics lien law.

#### CONFORMING REVISIONS

##### **Subdivision Map Act**

Mr. Nash calls our attention to Government Code Sections 66499-66499.10 — the improvement security provisions of the Subdivision Map Act. Since those provisions describe the types of security available to claimants for off site work under the Subdivision Map Act, he suggests that the mechanics lien law ought to at least cross refer to them.

Generally the Commission tries to avoid writing a practice manual into a statute. But it is probably also true that a laborer, artisan, or small contractor or subcontractor may not have counsel, and that a cross-reference in the mechanics lien law could be helpful to such a person.

The improvement security provisions of the Subdivision Map Act make specific reference to the mechanics lien law. See Gov't Code §§ 66499.2 (bond for

benefit of persons entitled to file claims under mechanics lien law), 66499.7 (release of security after lapse of time to file claims under mechanics lien law).

**It would be possible to make reference back from the mechanics lien law.**

For example:

**§ 3082.280. Relation to other statutes**

3082.280. (a) This title does not apply to a transaction governed by the Oil and Gas Lien Act, Chapter 2.5 (commencing with Section 1203.50) of Title 4 of Part 3 of the Code of Civil Procedure.

(b) This title does not apply to a transaction governed by Sections 20457 to 20464, inclusive, of the Public Contract Code (street work bond).

(c) This title does not limit, and is not affected by, improvement security provided under the Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7 of the Government Code.

**Comment.** Subdivision (a) of Section 3082.280 restates former Section 3266(a) without substantive change.

Subdivision (b) restates former Section 3266(b) without substantive change. This provision updates the former cross-reference to Streets and Highways Code Sections 5290-5297, which were repealed in 1982 when the Public Contract Code was created. See 1982 Cal. Stat. ch. 465, § 56. The repealed sections were superseded by Public Contract Code Sections 20457-20464. See 1982 Cal. Stat. ch. 465, § 11. The new sections apply to bonds in “street work” projects under Division 2 (commencing with Section 1600) (general provisions) of the Public Contract Code. See Pub. Cont. Code § 20457.

Subdivision (c) is new. It clarifies the interrelation between this title and the Subdivision Map Act. For relevant provisions of that act, see Gov’t Code §§ 66499-66499.10 (improvement security).

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

Exhibit

**REVISED WAIVER AND RELEASE FORMS**

**UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT**

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

**Identifying Information**

Name of Claimant: \_\_\_\_\_  
Name of Customer: \_\_\_\_\_  
Job Location: \_\_\_\_\_  
Owner: \_\_\_\_\_  
Date: \_\_\_\_\_

**Unconditional Waiver and Release**

This document waives and releases lien, stop notice, and payment bond rights the claimant has for all labor, service, equipment, and material provided to the customer on this job. The claimant has been paid in full.

**Exceptions**

This document does not affect any of the following:

(1) Disputed claims for extras in the amount of \$ \_\_\_\_\_

**Signature**

Claimant's Signature: \_\_\_\_\_  
Claimant's Title: \_\_\_\_\_

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

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

**Identifying Information**

Name of Claimant: \_\_\_\_\_  
Name of Customer: \_\_\_\_\_  
Job Location: \_\_\_\_\_  
Owner: \_\_\_\_\_  
Date: \_\_\_\_\_

**Conditional Waiver and Release**

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

Maker of Check: \_\_\_\_\_  
Amount of Check: \$ \_\_\_\_\_  
Check Payable to: \_\_\_\_\_

**Exceptions**

This document does not affect any of the following:

- (1) Disputed claims for extras in the amount of \$ \_\_\_\_\_
- (2) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment:

Date of waiver and release: \_\_\_\_\_  
Amount remaining unpaid: \$ \_\_\_\_\_

**Signature**

Claimant’s Signature: \_\_\_\_\_  
Claimant’s Title: \_\_\_\_\_

UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

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

**Identifying Information**

Name of Claimant: \_\_\_\_\_  
Name of Customer: \_\_\_\_\_  
Job Location: \_\_\_\_\_  
Owner: \_\_\_\_\_  
Date: \_\_\_\_\_

**Unconditional Waiver and Release**

This document waives and releases lien, stop notice, and payment bond rights the claimant has for labor, service, equipment, and material provided to the customer on this job through the date of this document. The claimant has received the following payment:

Amount of payment: \$\_\_\_\_\_

**Exceptions**

This document does not affect any of the following:

- (1) Retentions.
- (2) Extras for which the claimant has not received payment.
- (3) Contract rights, including (i) a right based on rescission, abandonment, or breach of contract, and (ii) the right to recover compensation for labor, service, equipment, or material not compensated by the payment.

**Signature**

Claimant's Signature: \_\_\_\_\_  
Claimant's Title: \_\_\_\_\_

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

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

**Identifying Information**

Name of Claimant: \_\_\_\_\_  
Name of Customer: \_\_\_\_\_  
Job Location: \_\_\_\_\_  
Owner: \_\_\_\_\_  
Date: \_\_\_\_\_

**Conditional Waiver and Release**

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

Maker of Check: \_\_\_\_\_  
Amount of Check: \$ \_\_\_\_\_  
Check Payable to: \_\_\_\_\_

**Exceptions**

This document does not affect any of the following:

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

Date of waiver and release: \_\_\_\_\_  
Amount remaining unpaid: \$ \_\_\_\_\_

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

**Signature**

Claimant’s Signature: \_\_\_\_\_  
Claimant’s Title: \_\_\_\_\_

## **DESIGN PROFESSIONALS LIEN**

### **CHAPTER 8. DESIGN PROFESSIONALS' LIEN**

3081.1. For purposes of this chapter, “design professional” means any certificated architect, registered professional engineer, or licensed land surveyor who furnishes services pursuant to a written contract with a landowner for the design, engineering, or planning of a work of improvement.

Except as otherwise expressly provided, the definition in this section does not apply to, or limit or expand the meaning of, provisions of law other than this chapter.

3081.2. A design professional shall, from the date of recordation pursuant to Section 3081.3, have a lien upon the real property for which the work of improvement is planned to be constructed, notwithstanding the absence of commencement of actual construction of the planned work of improvement, if the landowner contracted for the design professional’s services and is also the owner of the real property at the time of recordation of the lien. The lien of the design professional shall be for the amount of the design professional’s fee for any services rendered prior to commencement of the work of improvement or the reasonable value of those services, whichever is less. The amount of the lien shall be reduced by the amount of any deposit or prior payments, as specified by a written contract entered into by the design professional and by the landowner or his or her agent. However, no lien shall arise pursuant to this chapter, and a design professional may not record a notice of lien pursuant to subdivision (c) of Section 3081.3, unless a building permit or other governmental approval in furtherance of the work of improvement has been obtained in connection with or utilizing the services rendered by the design professional.

3081.3. In order for the design professional to be entitled to a lien pursuant to Section 3081.2, all of the following shall occur:

(a) The landowner defaults in any payment required pursuant to the terms of the written contract or refuses to pay upon the demand of the design professional made in accordance with the written contract.

(b) Not less than 10 days prior to recordation pursuant to subdivision (c), the design professional mails by first-class registered or certified mail, postage prepaid, addressed to the landowner, a written demand for payment specifying that a default has occurred pursuant to the contract or agreement and the amount of the default.

(c) The design professional records, in the office of the county recorder in the county in which the real property or some portion thereof is located, a notice of

lien which specifies that a lien is created in favor of the named design professional, specifies the amount thereof, identifies the current owner of record of the real property, provides a legal description of the real property to be improved, and specifies the building permit or other governmental approval for the work of improvement required as a condition of recording the notice of lien by Section 3081.2.

3081.4. (a) Upon recordation of the notice of lien pursuant to subdivision (c) of Section 3081.3, a lien is created in favor of the named design professional.

(b) The lien created pursuant to subdivision (a) shall automatically expire and be null and void and of no further force or effect on the occurrence of either of the following:

(1) The commencement of the work of improvement for which the design professional furnished services at the request of the landowner.

(2) The expiration of 90 days after recording the notice of lien, unless the design professional files suit to enforce the lien within 90 days of recordation.

(c) In the event the landowner partially or fully satisfies the lien of the design professional, the design professional shall execute and record a document which evidences a partial or full satisfaction and release of the lien, as the case may be.

3081.5. Any design professionals' lien perfected pursuant to this chapter shall be enforced pursuant to the provisions contained in Article 7 (commencing with Section 3143) of Chapter 2 of Title 15.

3081.6. This chapter does not affect the ability of a design professional to obtain a mechanic's lien pursuant to Title 15 (commencing with Section 3082) of this part.

3081.7. A design professional shall record a notice of lien pursuant to subdivision (c) of Section 3081.3 no later than 90 days after the design professional knows or has reason to know that the landowner is not commencing the work of improvement.

3081.8. The lien of a design professional perfected pursuant to this chapter shall not affect the ability of the design professional to pursue other remedies.

3081.9. (a) No lien created by this chapter shall affect or take priority over the interest of record of a purchaser, lessee, or encumbrancer, if the interest of the purchaser, lessee, or encumbrancer in the real property was duly recorded before recordation of the design professionals' lien.

(b) No lien created by this chapter shall affect or take priority over an encumbrance of a construction lender which funds the loan to commence the work

of improvement for which the design professional furnished services at the request of the landowner.

3081.10. The design professionals' lien provided in this chapter shall not apply to a work of improvement relating to a single-family owner occupied residence where the construction costs are less than one hundred thousand dollars (\$100,000) in value.

## COMMENTS OF DICK NASH

January 25, 2005

Nathaniel Sterling  
California Law Revision Commission

Dear Mr. Sterling:

During the meeting of the California Law Revision Commission regarding Mechanics' Liens on Friday, January 21, 2005, I stated that Government Code section 27297.5 requires the county recorder to send a copy of the mechanics' lien to the owner and that there is an extra charge for that service. Today I would like to stand corrected on this issue. In order to refresh my memory of the details of this code section I checked the California Legislative Information web site and discovered the code section states that the county "MAY" send a copy of the involuntary lien to the owner. My statement that the county is required to send the copy to the owner was based on an earlier version of this section wherein the word "SHALL" was used instead of "MAY". I do not know when the law was amended. So now the question is how many counties notify owners of involuntary liens. I know some counties specify a separate charge for this service while others (Los Angeles) just include it in their filing fee.

Assuming the commission would like to move ahead on 3083.55 requiring a lien claimant to give notice to the owner when a mechanics' lien is recorded, I would like to make the following comments regarding that notice::

1. A claimant is to "promptly" give the notice following the recording of the lien. I am not sure how "promptly" would be defined but it seems that it would be better to specify a time period such as within 10 days of recording the lien for sending the notice. Also I would like to suggest adding "or reputed owner" in describing to whom the notice is to be sent.
2. A claimant is to send a certified copy of the lien with the notice. At some counties obtaining a certified copy of the lien just recorded can require a wait of a number of hours. Instead I believe most counties, if not all, allow you to get a "conformed copy". When a claimant presents a lien to be recorded a copy (conformed copy) of that lien can be presented to be stamped with the recording date and recording number. This copy could be used to send to the owner.
3. The Book and Page Number are required to be given in the notice. I am not aware of any county, at least in southern California, that still uses book and page numbers to reference a lien. They use a document number whose digits start with the year the document was recorded and the balance of the number reflects the order in which that document was recorded in that year.
4. A legal description of the property on which the lien is filed is required in the notice. Since the property description required in a mechanics' lien is "a

description of the site sufficient for identification”, it seems that the notice to owner should require the same property description and not require a legal description.

5. We believe paragraph (d) goes too far. Filing a mechanics’ lien is privileged and should remain so.

6. The “Staff Note” indicated that the information required in the notice of recordation is the same information the owner must provide in a petition to discharge the lien. I submit to you that what information is readily available to the owner differs considerably from what information is readily, or even reasonably, available to a claimant. It appears to me that the information required in a notice is determined by who is filing notice and what action is being taken. For example an equipment company who is sending a preliminary notice or who is filing a mechanics’ lien on a job where they rented a backhoe to a sub of a sub is presently required to provide a “description of the site sufficient for identification”. Whereas an attorney who forecloses on a lien that arises from this job is required to provide a legal description in the foreclosure action.

During the discussion I mentioned that there was a code section relating to site improvement work such as work performed in streets for lighting and paving etc. (also referred to as offsite work) but I could not recall the section number. I would like to draw your attention to Government Code sections 66499.0 through 66499.10. These sections deal with the “Improvement Security” which is to be provided to those who make offsite improvements and describe the types of security available to claimants involved. Please see 66499.7 (b) which states that a lien claimant is to notify the “legislative body” once a mechanics’ lien is filed. Section 66499.10 explains against whom a suit for this remedy is maintained. It seems there should, at least, be some cross reference made between this government code section and the mechanics’ lien section in the civil code.

Finally I would like bring up an additional measure regarding the notice of completion. If there is to be a requirement that the owner send a copy of the notice of completion to those who served a preliminary 20-day notice, it would be especially helpful to those not dealing directly with the parties named in the notice of completion, such as material suppliers and equipment rental companies, to require that a copy of the 20-day preliminary notice be included along with the copy of the notice of completion.

Very truly yours,

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## COMMENTS OF SAM ABDULAZIZ

January 27, 2005  
Sent Via Email Only

Nathaniel Sterling  
California Law Revision Commission  
4000 Middlefield Rd. Room D-1  
Palo Alto, CA 94303-4739

RE: Memorandum 2005-4

Dear Mr. Sterling:

I have now had the opportunity to give a more thorough review of your Memorandum 2005-4. I have included my prior comments, if appropriate, in italics so that you would not have to go back and forth. My comments to the sections are as follows:

### PRELIMINARY:

#### “DIRECT CONTRACTOR”

The term “original contractor” is not used anywhere in the construction industry, except in the statutes. That is why we agree that the phrase “prime contractor,” is best. The suggested alternative use of the word “contractor” for one in privity with an owner, and “subcontractor” meaning someone not in privity (and no direct contractual relationship), would be confusing, particularly where a whole body of license law refers to a “contractor” as one who improves property, without any reference of the privity that person may have with the owner of the property. (see e.g. Business and Professions Code section 7026.)

### NOTICE AND OTHER PAPERS

I believe the inconsistencies that are noted should be addressed. I have no idea why the residence address is needed unless that is in fact where the work is being done.

I believe that your last proposal which is the one most commonly used, the term, “Sufficient for Identification” provides adequate notice.

### CHANGE ORDERS

There are two issues. As to subdivision (b), it is well established that a Mechanic’s Lien may include the value of the labor, services, equipment, or materials furnished, even if based upon oral modifications to the contract. See *Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App. 4th 1480. This is an expansion of subdivision (b), which states that the value of the lien can include written modifications of the contract. We would modify subdivision (b) to include oral modifications of the contract. We do not want anyone to argue that the new

statutes supercedes existing law. The same discussion applies to proposed section 3083.410(c).

As to subdivision (c), requiring notice of contract increases of five percent (5%) or greater, I previously mentioned that I believe that the construction lenders lobbied for this portion of the statute, but as to the prime contractor, this makes no sense.

#### PRELIMINARY NOTICE

What do you think of moving the Preliminary Notice requirements into Article 3, entitled "Conditions to Enforcing a Lien?"

#### CONFORMING PROVISIONS

You might review 2004's SB 30 for recent changes in the language as of July 1, 2005. I am not sure whether this will affect your changes.

#### COMPLETION ISSUES

As to a Notice of Cessation, and the combination of the two notices in Section 3089.430, an interpretation of the Notice of Cessation has been to terminate one construction project and start a new one. This issue can arise if one contractor leaves the project, and another starts. In that scenario, a Notice of Cessation is recorded to make sure that all subcontractors and suppliers to the first contractor take their actions before the second contractor starts and is subject to any Stop Notice or bond claims for the prior contractor's work. This is very important to construction lenders. The suggested language of the staff would thwart such use of the Notice of Cessation.

#### EXPUNGEMENT OF LIENS

While the concept of being able to file a petition for expungement on an untimely Mechanic's Lien in small claims court has some appeal, small claims court judges sometimes do not understand the issue. Moreover, the current type of petition for expungement only concerns whether a suit was filed within 90 days. The proposed scheme includes situations where a Notice of Non-Responsibility is recorded, but the timing of the document and the applicability of the Notice is a factual issue. Case law holds that a Notice of Non-Responsibility does not insulate the participating owner, such as where the tenant was contractually required to make the improvements. *Howard S. Wright Construction Company v. Superior Court* (2003) 106 Cal. App. 4th 314. These factual issues are too complex for a small claims court. Considering there is no right to appeal of the loss of a claim (petition) in small claims court, possibilities of grave errors by judge pro tems and other persons sitting in small claims court is great.

As to a petition to Release a Mechanic's Lien in other courts for additional reasons, the idea does have significant appeal.

#### PENALTY FOR FRAUDULENT CLAIM OF LIEN

This particular area is difficult, if not impossible to ascertain. Very few lien claims are actually "fraudulent." Many times, the claims are overstated, particularly where a contractor does not understand such a thing as that a lien may be limited to the value of the work, while on a contract theory, claimants can sue

for a greater amount. However, some cases have held that there is already the possibility of filing a petition to reduce the amount of a lien to its correct amount. We would endorse a recommendation for a penalty for a fraudulent claim if it can be shown by competent evidence that at the time the lien was recorded, the claimant knew he had no right to recover the amounts stated in the lien.

As to obtaining the recovery of sanctions for expunging a stale or invalid lien from the contractor's license bond, the sureties would likely have something to say on the matter, though we have no strong opposition. What I believe will happen, however, is that there will be a number of claims on bonds, increasing the costs of the bonds and increasing the number of interpleader actions on the bonds themselves.

#### NOTICE OF RECORDATION OF CLAIM OF LIEN

It is my understanding that virtually every county charges a nominal fee at the time of recording any type of adverse lien document, for purposes of sending a copy to the owner of record of the property. This should suffice without the need to create yet another required notice. Moreover, to require a proper lien claimant to release, or to allow an owner to file a petition to have that lien released, merely because an additional notice was not provided to the owner, seems objectionable in light of the Constitutional sanctity of the lien.

#### RULES OF PRACTICE

Regarding §3082.230 rules of practice, what happened to the second sentence of former §3259?

#### SECTION 3082.320 DESIGNATION OF CONSTRUCTION LENDER

I would point out that there is a relatively recent appellate decision *Kodiak Industries, Inc. v. Ellis* (1986) 185 Cal.App.3d 75, wherein the lender was not shown on documents of public record at the time the subcontractor served its Preliminary Notice. Sometime thereafter, the lender was designated yet the subcontractor was allowed to foreclose on the lien even though the construction lender was not listed on its Preliminary Notice. I am concerned that legislation passed after that case, would essentially make that case moot.

#### DISCUSSION ON SELECTED PROPOSED REVISED STATUTES:

##### §3082.025. CONTRACTOR:

As discussed above, we would use the word "prime contractor" instead of "direct contractor."

##### §3082.260. CO-OWNERS:

As to subdivision (b), we want to assure the portion of this proposed section dealing with the owner of a lesser interest does not negate a notice given the "reputed owner." See e.g., proposed section 3089.120(a) allowing preliminary notice to a reputed owner. I can see an argument that a "reputed owner," is an owner of "lesser interest."

§3082.340. CONTRACT FORMS:

As to subdivision (a)(2), the contract should have a place for the naming of the construction lender, so that the prime contractor can provide the information required under section 3089.170 to its subcontractors and material suppliers.

§3082.340. NOTIFICATION OF CHANGE ORDERS:

As discussed above, it seems superfluous for the owner to notify the prime contractor of changes in the contract.

§3082.420. NOTICE OF OVERDUE LABORER COMPENSATION:

It might be a good idea to place a similar provision in the Contractors' License Law. Business and Professions Code section 7000, et. seq.

§3083.310. PRELIMINARY NOTICE REQUIRED:

There are exceptions to the Preliminary Notice laws stated elsewhere, e.g. section 3114 (prime contractor, laborers, laborer's compensation fund), and section 3083.310 omits those, creating an ambiguity. You may wish to insert the language "...if required..." from section 3114.

§3083.320. TIME FOR CLAIM OF LIEN BY DIRECT CONTRACTOR:

I would suggest that the language that is used for claimants other than the direct contractor, as in section 3083.330, be used, such that the words "after the contractor completes the contract and before the earlier of the following times..." be replaced with, "after the contractor ceases to provide labor, service, equipment or material and before the earlier of the following times:" Otherwise, it could be read that the contractor cannot record a lien if he didn't complete the work. This is inconsistent with current law.

§3083.350. CLAIM OF LIEN:

The requirement in a claim of lien for the claimant's address would be a good idea. However, the Mechanic's Lien typically has an address for the Recorder to return the document, and that is usually the same address.

PRELIMINARY NOTICE

With respect to §3083.355, it is not always that easy to get a certified copy from the County Recorder's office. Indeed, some contractors may not even be able to obtain the book and page, or even the legal description of the property easily.

§3083.410. AMOUNT OF LIEN:

The lien should not be for the "lesser" of the amounts. Rather the lien should primarily be for the contract amount, as adjusted by change orders, or if that amount cannot be ascertained, then for the reasonable value of the labor, materials, equipment, etc. The contract amount might be more than the reasonable value of the work, though if a party agreed to pay a contract amount, the claimant should be entitled to that amount, plus any modifications to the contract (as discussed in subdivision (b)).

As to subdivision (b), as discussed above, including in the Preliminary Comments, an oral modification should also increase the amount of the lien.

As to subdivision (c), I have the same problem with a limitation to the reasonable value of the labor, service, material or equipment.

#### SECTION 3083.410 AMOUNT LIENABLE

It should be pointed out that oral change orders, that are fully executed, have been held to be part of the contract and therefore lienable. I am again concerned that any modification of the law would make those decisions moot.

#### §3083.520(B). INTEREST SUBJECT TO LIEN:

I am troubled by the last sentence of subdivision (b), which reads, "This subdivision does not apply to the interest of a person who gives notice of nonresponsibility under Section 3083.530." A Notice of Non-Responsibility does not insulate the participating owner. *Howard S. Wright Construction Company v. Superior Court* (2003) 106 Cal. App. 4th 314. Again, I do not want to see the new statute overcoming existing law. See below also.

#### WHO IS ENTITLED TO A LIEN

With respect to who is entitled to a Lien, in that you have the general agency principal (Section 3082.270), I would also like to see the language from Section 3110 dealing with contractors, subcontractors, architects, etc. They are deemed to be agents of the owner for Mechanic's Lien purposes. That would keep people from having to go from one section to another.

#### §3083.530. NOTICE OF NONRESPONSIBILITY:

While the proposed section is essentially the same as the existing statute, we are concerned that any omission of an exception for the participating owner may be interpreted as superseding the *Howard S. Wright Construction* case cited above. Thus, a subdivision (d) should be added that reads,

"A Notice of Non-Responsibility shall not apply to an owner of property who contracted for, or contractually required his or her tenant to contract for, improvements to the property, or in some way gave value to the tenant or the provider of the improvement."

#### §3083.550. CLAIM AGAINST SEPARATE RESIDENTIAL UNITS:

I would suggest that a new subdivision be added to §3083.550 that states that where labor or material is provided in a residential structure that includes separate residential units, and where work is provided to the common area as well as one or more separate residential units, the time for recording the claim of lien shall occur on the later of the completion of the work to the common areas or the work in any residential units. The reason for that is that there are problems with determining completion in structures that are attached. It may be hard to determine what is "common."

#### §3083.730. LIS PENDENS:

As to the staff note, recordation of a Lis Pendens serves the purpose of assuring that title companies do not ignore a recorded lien. Oftentimes, a title company will

ignore what appears to be a stale lien, if it believes that an action has not been commenced. The Lis Pendens assures that the title company will not ignore the lien. Moreover, the Lis Pendens puts the owner on notice that the lien claimant has filed suit on its lien.

**§3083.790. LIABILITY OF CONTRACTOR FOR LIEN CLAIMANT:**

I previously suggested that this section be limited to labor or material provided to a prime contractor. I also believe that any indemnity obligations should not exist where the owner has not paid the contractor for the labor, material, or services provided.

**§3083.830. NOTICE OF HEARING:**

I do not believe that the service of a court petition should be valid by certified or first-class mail, rather than service in the manner of a Summons, as is presently required by the Code of Civil Procedure. Notice and an opportunity to be heard is the watchword of due process in this country, and we are dealing with lien rights. Notice by certified or first-class mail should only be allowed once process has been achieved in a pending action.

**§3089.120. PRELIMINARY NOTICE REQUIREMENT:**

We agree with Gordon Hunt that the term “owner” should be left ambiguous. In the instance that it is tenant improvement work and there is an owner of the real property as well as the owner of the tenant improvement (leasehold interest), then the claimant should serve both parties, which is clear in the cases that interpret such notices. Moreover, there are instances where lack of service of the notice on the owner can be excused, such as where the owner has required the tenant to contract for such improvements. It should be left vague, to be argued in the future, rather than to create a barrier to the enforcement of a lien.

**§3089.150. GIVING PRELIMINARY NOTICE:**

Subsection (c), which itself references section 3082.240, raises a recurring problem where the green card (proof of mailing) does not come back through the post office, and the envelope is also not returned as undelivered. In that case, sometimes there is difficulty to attest to the fact that the envelope was delivered. Perhaps a presumption that it was delivered, if properly mailed, should be written into the statutes.

**§3089.170. DIRECT CONTRACTOR'S DUTY TO PROVIDE INFORMATION:**

I believe that section 3082.310(a)(2) should require the inclusion on the contract of information regarding the lenders on Home Improvement Contracts or swimming pool work. We then believe the owner and prime contractor have a continuing obligation to provide this information to the subcontractor(s) and material suppliers.

**§3089.210. NOTICES FILED WITH COUNTY RECORDER:**

The Staff's comments show that they are not continuing with the ability to file a Preliminary Notice with the county Recorder. The practice should be continued, even if it is sometimes flawed.

§3089.430. NOTICE OF COMPLETION:

As to subsection 3089.430(b)(6), as noted in the introductory comments, the provision eviscerates the purpose of the notice of cessation of labor where there has been a change of direct contractors on the project. Perhaps the solution would be to modify section 3089.440 to include a Notice of Cessation.

§3089.450. NOTICE OF RECORDATION BY OWNER:

As to the staff note, the notice by the owner is a more effective remedy than by the notice of the county Recorder only if the owner notifies the claimants. I believe the ability to obtain notice from the county Recorder should continue. Without the county Recorder's notice (or right to obtain said notice), if the owner does not notify the claimant, then the only sanction is that the time to file suit would be 90 days from the actual recordation of the Notice of Completion. If the claimant does not know the notice was recorded, the claimant could lose its valuable lien rights.

This is particularly problematic for persons who perform their work early in the life of the project, including site work (which may be affected by other statutes), or foundation, as mere examples only.

Thank you for considering my suggestions.

Very truly yours,

ABDULAZIZ & GROSSBART

SAM K. ABDULAZIZ

SKA:tmw

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Emphasizing Construction Law

## COMMENTS OF JAMES STIEPAN

From: Jim Stiepan <JStiepan@irvinecompany.com>  
To: "'sterling@clrc.ca.gov'" <sterling@clrc.ca.gov>  
Subject: Comments Re Study H-821 - Mechanics Lien Law  
Date: Mon, 14 Feb 2005 14:58:20 -0800

Mr. Sterling,

I had been a long-distance participant in the initial round of review of the mechanics lien statutes a few years back, but have refrained from further comment due perhaps to my cynicism that anything positive would be accomplished. However, after reading the January 17 letter from Mr. Hunt to the Commission, I feel compelled to offer some thoughts about the issue of notices of nonresponsibility. As usual, my perspective will be considerably different from that of Mr. Hunt.

Let me begin by making the hyperbolic observation that in California, notices of nonresponsibility are, as a practical matter, virtually meaningless. The reason is not the statutory construct, but the degree of judicial activism in this area. Essentially, the "participating owner" exception has swallowed the entire rule.

The culmination of this judicial trend was the case cited by Mr. Hunt, *Howard S. Wright Construction Co. v. Superior Court*. In *Wright*, the California Court of Appeals miraculously determined that because a tenant needed to make certain significant leasehold improvements due to the nature of its proposed use, and (by dictum) because the landlord required that it be permitted to supervise the work being done by the tenant, the landlord was effectively mandating that the work be performed! Since those criteria will come to play in virtually all tenant leases, the landlord/owner will never be able to post a valid notice of nonresponsibility (except perhaps for de minimis projects where it is not worth the time and trouble to deal with the notice procedures in the first place).

I also want to challenge the blithe assertion by Mr. Hunt in his letter that even if an owner posts a valid notice, the lien claimant will still have a valid lien on the tenant's leasehold estate and "on the building down to the surface of the ground". In support, Mr. Hunt refers to his own treatise, the pertinent portion of which is attached. Upon review of that treatise section, the relevant case cited is *Ecker Bros. v. Jones*. However, in *Ecker*, the improvements in question were for the construction of the entire building. Contrast that situation with the much more common project in the commercial real estate world where a tenant wishes to make some internal renovations in an existing building. Surely a contractor relocating one demising wall in a high-rise office building should not be able to acquire title to the entire building even though a valid notice of nonresponsibility had been provided! If that is the law in California, then in the immortal words of Charles Dickens, the law is indeed an ass. Clearly, the claimant in that case should at most be entitled to a claim on the leasehold interest (which may include the right to remove certain improvements); any other result would be ludicrous.

I felt it important to raise these issues because this is one area where the Commission could truly make an important difference. The law regarding notices of nonresponsibility has been almost completely usurped by the judiciary and other third party commentators. It is time that some clear and sensible statutory rules are established.

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## CONSTRUCTION REMEDIES

### **Cal. Const. Art 14, § 3 (unchanged). Lien on property for labor and material**

SEC. 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.

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### **Civ. Code §§ 3082-3267 (repealed). Works of improvement**

SEC. \_\_\_\_\_. Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code is repealed.

**Comment.** Former Title 15 (former Sections 3082-3267) is replaced by new Title 15 (new Sections 3082-3089.680). For the disposition of the provisions of former Title 15, see [Table, to be provided.] The source of each section in the new law is indicated in its Comment.

### **Civ. Code §§ 3082-3089.680 (added). Works of improvement**

SEC. \_\_\_\_\_. Title 15 (commencing with Section 3082) is added to Part 4 of Division 3 of the Civil Code, to read:

## TITLE 15. WORKS OF IMPROVEMENT

### CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

#### Article 1. Definitions

#### **§ 3082. Application of definitions**

3082. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this title.

**Comment.** Section 3082 continues former Section 3082 without substantive change.

#### **§ 3082.010. Claimant**

3082.010. “Claimant” means a person that has the right under this title to record a claim of lien, file a notice to withhold funds, or assert a claim against a payment bond.

**Comment.** Section 3082.010 restates former Section 3085 without substantive change. See also Sections 3082.060 (“lien” defined), 3082.110 (“person” defined).

#### **§ 3082.020. Construction lender**

3082.020. “Construction lender” means either of the following:

1 (a) A mortgagee or beneficiary under a deed of trust lending funds for payment  
2 of construction costs for all or part of a work of improvement, or the assignee or  
3 successor in interest of the mortgagee or beneficiary.

4 (b) An escrow holder or other person holding funds provided by an owner,  
5 lender, or another person as a fund for payment of construction costs for all or part  
6 of a work of improvement.

7 **Comment.** Section 3082.020 continues former Section 3087 without substantive change.

8 See also Sections 14 (present includes future), 3082.100 (“owner” defined), 3082.110 (“person”  
9 defined), 3082.190 (“work of improvement” defined).

#### 10 § 3082.022. Contract

11 3082.022. “Contract” means an agreement between an owner and a direct  
12 contractor that provides for all or part of a work of improvement.

13 **Comment.** Section 3082.022 continues former Section 3088 without substantive change. This  
14 definition does not apply if the provision or context requires otherwise. Section 3082 (application  
15 of definitions). See, e.g., Sections 3082.100 (contract of purchase), 3082.310 (subcontract).

16 See also Sections 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined),  
17 3082.190 (“work of improvement” defined).

18 ☞ **Staff Note.** Existing law defines “contract” as an agreement between an owner and direct or  
19 original contractor. That definition is problematic since the defined term is often used in the  
20 statute in an undefined sense (e.g., agreement between contractor and subcontractor). It is also  
21 unclear whether the term includes contract changes. Cf. Section 3083.420. We have in this draft  
22 preserved the definition, relying on context to determine whether the definition applies or not.

23 **Does the definition serve a useful purpose?**

#### 24 § 3082.025. Direct contractor

25 3082.025. “Direct contractor” means a person that has a direct contractual  
26 relationship with an owner.

27 **Comment.** Section 3082.025 supersedes former Section 3095 “original contractor”. A direct  
28 contractor is not limited to a builder, and may include a surveyor, engineer, material supplier,  
29 artisan, or other person that contracts directly with the owner.

30 See also Sections 3082.100 (“owner” defined), 3082.110 (“person” defined).

#### 31 § 3082.027. Express trust fund

32 3082.027. “Express trust fund” means a laborer’s compensation fund to which a  
33 portion of a laborer’s total compensation is to be paid under an employment  
34 agreement or a collective bargaining agreement for the provision of benefits,  
35 including, but not limited to, employer payments described in Section 1773.1 of  
36 the Labor Code and implementing regulations.

37 **Comment.** Section 3082.027 continues a portion of former Section 3111 without substantive  
38 change.

39 See also Sections 3082.040 (“laborer” defined), 3082.050 (“laborer’s compensation fund”  
40 defined).

41 ☞ **Staff Note.** Is there any reason to distinguish between a laborer’s compensation fund and an  
42 express trust fund, as defined? See Section 3082.050 (“laborer’s compensation fund” defined).

1    **§ 3082.030. Labor, service, equipment, or material**

2    3082.030. “Labor, service, equipment, or material” includes but is not limited to  
3    labor, skills, services, material, supplies, equipment, appliances, transportation,  
4    power, surveying, construction plans, and construction management provided to a  
5    work of improvement.

6    **Comment.** Section 3082.030 is a new definition. It is included for drafting convenience. The  
7    phrase is intended to encompass all things of value provided for a work of improvement, and  
8    replaces various phrases used throughout the former law, including “labor or material,” “labor,  
9    services, equipment, or materials,” “appliances, teams, or power,” and the like. The definition  
10   applies to variant grammatical forms of the phrase used in this title, such as “labor, service,  
11   equipment, *and* material.”

12    See also Section 3082.190 (“work of improvement” defined).

13    ☞ **Staff Note.** We have not yet integrated the Design Professionals’ Lien (Civ. Code §§ 3081.1-  
14    3081.10) with this material.

15    **§ 3082.040. Laborer**

16    3082.040. “Laborer” means a person who, acting as an employee, provides  
17    labor, skill, or other necessary services for a work of improvement.

18    **Comment.** Section 3082.040 continues former Section 3089(a) without substantive change.  
19    “Laborer” is no longer defined to include a compensation fund, which is treated separately in this  
20    title. Cf. Section 3082.050 (“laborer’s compensation fund” defined).

21    See also Section 3082.190 (“work of improvement” defined).

22    ☞ **Staff Note.** In this draft we have not defined “laborer” to include a compensation fund. The  
23    rights of a laborer’s compensation fund are dealt with directly in the statute, rather than by  
24    definition. See Sections 3082.050 (“laborer’s compensation fund” defined), 3082.410 (standing to  
25    enforce laborer’s rights), 3083.220 (lien right of express trust fund), 3089.120 (preliminary notice  
26    prerequisite to remedies).

27    **§ 3082.050. Laborer’s compensation fund**

28    3082.050. “Laborer’s compensation fund” means a person, including an express  
29    trust fund, to which a portion of the compensation of a laborer is paid by  
30    agreement with the laborer or the collective bargaining agent of the laborer.

31    **Comment.** Section 3082.050 continues the first sentence of former Section 3089(b) without  
32    substantive change. See also Section 3082.410 (standing to enforce laborer’s rights).

33    See also Sections 3082.027 (“express trust fund” defined), 3082.040 (“laborer” defined),  
34    3082.110 (“person” defined).

35    ☞ **Staff Note.** Is there any reason to distinguish between a laborer’s compensation fund and an  
36    express trust fund, as defined? See Section 3082.027 (“express trust fund” defined).

37    **§ 3082.060. Lien**

38    3082.060. “Lien” means a lien under Chapter 2 (commencing with Section  
39    3083.110) (mechanics lien for private work), and includes both a lien for a work of  
40    improvement under Section 3083.210 and a lien for a site improvement under  
41    Section 3083.230.

1       **Comment.** Section 3082.060 is a new definition. It is included for drafting convenience. There  
2 are instances in this title where the term is not used in its defined sense. See, e.g., Sections  
3 3083.540 (d) (multiple works of improvement), 3083.610 (a) (priority of lien).

4       See also Sections 3082.170 (“site improvement” defined), 3082.190 (“work of improvement”  
5 defined).

6       **§ 3082.070. Material supplier**

7       3082.070. (a) “Material supplier” means a person that provides material or  
8 supplies to be used or consumed in a work of improvement.

9       (b) Materials or supplies delivered to a site are presumed to have been used or  
10 consumed in the work of improvement. The presumption established by this  
11 subdivision is a presumption affecting the burden of proof.

12       **Comment.** Subdivision (a) of Section 3082.070 replaces the term “materialman” with the term  
13 “material supplier” to conform to contemporary usage under this title. It continues former Section  
14 3082.070 without substantive change.

15       Subdivision (b) is new.

16       See also Sections 3082.110 (“person” defined), 3082.190 (“work of improvement” defined).

17       ☞ **Staff Note.** At this point, the defined term is used in only one section — 3083.210 (persons  
18 entitled to lien). We have preserved the definition for the time being, since it may be used in the  
19 notice to withhold funds and payment bond provisions, when we get there. Otherwise, this  
20 provision should be relocated to Section 3083.210.

21       Addition of subdivision (b), creating a presumption in favor of a material supplier, is contingent  
22 on development of a balanced package that provides offsetting benefits to other persons affected.

23       **§ 3082.090 [reserved]. Notice to withhold funds**

24       ☞ **Staff Note.** The Commission has tentatively decided to replace the term “stop notice” with the  
25 term “notice to withhold funds.” Notice to withhold was the term used in the statute prior to the  
26 current stop notice terminology. This section will be fleshed out later.

27       **§ 3082.100. Owner**

28       3082.100. “Owner” means:

29       (a) With respect to a work of improvement, a person that contracts for the work  
30 of improvement.

31       (b) With respect to property on which a work of improvement is situated, a  
32 person that owns the fee or a lesser interest in the property, including but not  
33 limited to an interest as lessee or as vendee under a contract of purchase.

34       (c) A successor in interest of a person described in subdivision (a) or (b), or an  
35 agent or person acting pursuant to authority of a person described in subdivision  
36 (a) or (b).

37       **Comment.** Section 3082.100 is a new definition. It is included for drafting convenience. For  
38 the authority of an owner to act on behalf of co-owners, and for the effect of notice to a co-owner  
39 or the owner of a lesser interest, see Section 3082.260 (co-owners). For general provisions on the  
40 authority of an agent, see Section 3082.270 (agency).

41       See also Sections 3082.110 (“person” defined), 3082.190 (“work of improvement” defined).

1    **§ 3082.110. Person**

2    3082.110. “Person” means an individual, corporation, public entity, business  
3 trust, estate, trust, partnership, limited liability company, association, or other  
4 entity.

5    **Comment.** Section 3082.110 is a new definition. It is included for drafting convenience. It  
6 supplements Section 14 (“person” includes corporation as well as natural person).

7    See also Section 3082.140 (“public entity” defined).

8    **§ 3082.120. Preliminary notice (private work)**

9    3082.120. “Preliminary notice (private work)” means the notice provided for in  
10 Article 1 (commencing with 3089.110) of Chapter 8, relating to preliminary notice  
11 of private work.

12    **Comment.** Section 3082.120 supersedes former Section 3097. The substantive requirements  
13 for a preliminary notice (private work) have been relocated to Section 3089.110 *et seq.*

14    See also Section 3082.130 (“private work” defined).

15    ☞ **Staff Note.** The current draft does not make reference to the preliminary notice for public  
16 work, since the mechanics lien remedy is available only for private work. When we incorporate  
17 the notice to withhold funds and payment bond remedies into the draft, we will review  
18 terminology relating to both private work and public work preliminary notices.

19    **§ 3082.130. Private work**

20    3082.130. “Private work” means a work of improvement other than a public  
21 work.

22    **Comment.** Section 3082.130 is a new definition. It is included for drafting convenience. This  
23 title does not apply to a work of improvement governed by federal law. See Section 3082.210  
24 (application of title).

25    See also Sections 3082.150 (“public work” defined), 3082.190 (“work of improvement”  
26 defined).

27    **§ 3082.140. Public entity**

28    3082.140. “Public entity” means the state, Regents of the University of  
29 California, a county, city, district, public authority, public agency, and any other  
30 political subdivision or public corporation in the state.

31    **Comment.** Section 3082.140 continues former Section 3099 without substantive change. This  
32 title does not apply to a work of improvement governed by federal law. See Section 3082.210  
33 (application of title).

34    See also Section 14 (“county” includes city and county).

35    **§ 3082.150. Public work**

36    3082.150. “Public work” means a work of improvement contracted for by a  
37 public entity.

38    **Comment.** Section 3082.150 continues former Section 3100 without substantive change. This  
39 title does not apply to a work of improvement governed by federal law. See Section 3082.210  
40 (application of title).

41    See also Sections 3082.140 (“public entity” defined), 3082.190 (“work of improvement”  
42 defined).

1    **§ 3082.160. Site**

2    3082.160. “Site” means the property on which a work of improvement is  
3    situated.

4    **Comment.** Section 3082.160 continues former Section 3101 without substantive change.  
5    See also Section 3082.190 (“work of improvement” defined).

6    **§ 3082.170. Site improvement**

7    3082.170. “Site improvement” means any of the following work on property:

8    (a) Demolition or removal of improvements, trees, or other vegetation.

9    (b) Drilling test holes.

10   (c) Grading, filling, or otherwise improving the property or a street, highway, or  
11   sidewalk in front of or adjoining the property.

12   (d) Construction or installation of sewers or other public utilities.

13   (e) Construction of areas, vaults, cellars, or rooms under sidewalks.

14   (f) Any other work or improvements to infrastructure or in preparation of the site  
15   for a work of improvement.

16   **Comment.** Section 3082.170 continues former Section 3102 without substantive change.  
17   Subdivision (f) makes clear that the reference in former law to “making any improvements”  
18   means preparatory work and does not include construction of a structure.

19   See also Sections 3082.160 (“site” defined), 3082.190 (“work of improvement” defined).

20   **§ 3082.180. Subcontractor**

21   3082.180. “Subcontractor” means a contractor that does not have a direct  
22   contractual relationship with an owner.

23   **Comment.** Section 3082.180 continues former Section 3104 without substantive change.  
24   See also Section 3082.100 (“owner” defined).

25   **§ 3082.190. Work of improvement**

26   3082.190. (a) “Work of improvement” includes but is not limited to:

27   (1) Construction, alteration, repair, demolition, or removal, in whole or in part,  
28   of, or addition to, a building, wharf, bridge, ditch, flume, aqueduct, well, tunnel,  
29   fence, machinery, railroad, or road.

30   (2) Seeding, sodding, or planting of property for landscaping purposes.

31   (3) Filling, leveling, or grading of property.

32   (b) Except as otherwise provided in this title, “work of improvement” means the  
33   entire structure or scheme of improvement as a whole, and includes site  
34   improvement.

35   **Comment.** Section 3082.190 restates former Section 3106. The section is revised to reorganize  
36   and tabulate the different types of works falling within the definition, to expand the coverage of  
37   the definition, and to make various technical, nonsubstantive revisions. The term “property” has  
38   replaced “lot or tract of land.”

39   A site improvement is treated under this title in the same manner as a work of improvement  
40   generally, except as specifically provided in this title. See Sections 3083.550 (claim against  
41   separate residential units), 3083.610 (priority of lien), 3083.640 (priority of site improvement  
42   lien). See also Section 3082.170 (“site improvement” defined).

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## Article 2. General Provisions

### § 3082.210. Application of title

3082.210. Except as otherwise provided in this title, this title applies to both a private work and a public work. This title does not apply to a work of improvement governed by federal law.

**Comment.** Section 3082.210 is new. Chapter 2 (commencing with Section 3083.110) relating to mechanics liens applies only to a private work and does not apply to a public work. See Section 3083.110 (scope of chapter).

See also Sections 3082.130 (“private work” defined), 3082.150 (“public work” defined).

### § 3082.220. Jurisdiction and venue

3082.220. The proper court for proceedings under this title is the superior court in the county in which a work of improvement, or part of it, is situated.

**Comment.** Section 3082.220 is a new provision included for drafting convenience. It generalizes a number of provisions of former law.

See also Section 3082.190 (“work of improvement” defined).

### § 3082.230. Rules of practice

3082.230. Except as otherwise provided in this title, Part 2 (commencing with Section 307) of the Code of Civil Procedure provides the rules of practice in proceedings under this title.

**Comment.** Section 3082.230 continues the first sentence of former Section 3259 without substantive change. The second sentence of former Section 3259 is not continued; this title does not include special provisions relating to new trials or appeals.

Section 3082.230 makes former Section 3149, relating to consolidation of actions, unnecessary. Part 2 of the Code of Civil Procedure enables persons claiming liens on the same property to join in the same action to enforce their liens. See Code Civ. Proc. § 378 (permissive joinder). If separate actions are commenced the court may consolidate them. See Code Civ. Proc. § 1048 (consolidation of actions).

### § 3082.240. Mailed notice

3082.240. The following provisions apply to notice given by mail under this title:

(a) Notice shall be given by registered or certified mail.

(b) Notice is complete when deposited in the mail.

(c) Proof that the notice was given in the manner provided in this section shall be made by a return receipt or a photocopy of the record of delivery and receipt maintained by the post office, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself.

**Comment.** Section 3082.240 is a new provision included for drafting convenience. It generalizes a number of provisions of former law.

1    **§ 3082.250. Filing and recording of papers**

2       3082.250. (a) If this title provides for filing a contract, plan, or other paper with  
3 the county recorder the provision is satisfied by filing the paper in the office of the  
4 county recorder of the county in which the work of improvement or part of it is  
5 situated.

6       (b) If this title provides for recording a notice, claim of lien, payment bond, or  
7 other paper, the provision is satisfied by filing the paper for record in the office of  
8 the county recorder of the county in which the work of improvement or part of it is  
9 situated. A paper in otherwise proper form, verified and containing the information  
10 required by this title, shall be accepted by the recorder for recording and is deemed  
11 duly recorded without acknowledgment.

12       (c) The county recorder shall number, index, and preserve a contract, plan, or  
13 other paper presented for filing under this title, and shall number, index, and  
14 transcribe into the official records, in the same manner as a conveyance of real  
15 property, a notice, claim of lien, payment bond, or other paper recorded under this  
16 title.

17       (d) The county recorder shall charge and collect the fees provided in Article 5  
18 (commencing with Section 27360) of Chapter 6 of Part 3 of Division 2 of Title 3  
19 of the Government Code for performing duties under this section.

20       **Comment.** Subdivisions (a) and (b) of Section 3082.250 are new. They generalize a number of  
21 provisions of former law.

22       Subdivisions (c) and (d) continue former Section 3258 without substantive change.

23       See also Sections 3082.060 (“lien” defined), 3082.190 (“work of improvement” defined).

24    **§ 3082.260. Co-owners**

25       3082.260. (a) An owner may give a notice or execute or file a document under  
26 this title on behalf of a co-owner if the owner acts on the co-owner’s behalf and  
27 includes in the notice or document the name and address of the co-owner on whose  
28 behalf the owner acts.

29       (b) Notice to the owner of an interest in property is effective as to a co-owner of  
30 that interest. Notice to the owner of a leasehold or other interest in property that is  
31 less than a fee is not effective as to the owner of the fee.

32       **Comment.** Section 3082.260 is new. It generalizes provisions found in former Sections 3092  
33 (notice of cessation) and 3093 (notice of completion), and clarifies the effect of giving or  
34 receiving notice by co-owners.

35       See also Sections 3082.100 (“owner” defined), 3082.190 (“work of improvement” defined).

36    **§ 3082.270. Agency**

37       3082.270. An act that may be done by or to a person under this title may be done  
38 by or to the person’s authorized agent to the extent the act is within the scope of  
39 the agent’s authority.

40       **Comment.** Section 3082.270 is a specific application of Section 2305 (agent may perform acts  
41 required of principal by code). This section makes clear that an agent’s authority is limited to the  
42 scope of the agency. Thus to the extent a direct contractor is deemed to be the agent of the

1 principal for the purpose of engaging a subcontractor, the scope of the agency does not include  
2 other acts, such as compromise of litigation.

3 For provisions relating to the agent of an owner and to the agency authority of co-owners, see  
4 Sections 3082.100 (“owner” defined) and 380.260 (co-owners).

5 See also Section 3082.110 (“person” defined).

6 **§ 3082.280. Relation to other statutes**

7 3082.280. (a) This title does not apply to a transaction governed by the Oil and  
8 Gas Lien Act, Chapter 2.5 (commencing with Section 1203.50) of Title 4 of Part 3  
9 of the Code of Civil Procedure.

10 (b) This title does not apply to a transaction governed by Sections 20457 to  
11 20464, inclusive, of the Public Contract Code (street work bond).

12 **Comment.** Subdivision (a) of Section 3082.280 restates former Section 3266(a) without  
13 substantive change.

14 Subdivision (b) restates former Section 3266(b) without substantive change. This provision  
15 updates the former cross-reference to Streets and Highways Code Sections 5290-5297, which  
16 were repealed in 1982 when the Public Contract Code was created. See 1982 Cal. Stat. ch. 465, §  
17 56. The repealed sections were superseded by Public Contract Code Sections 20457-20464. See  
18 1982 Cal. Stat. ch. 465, § 11. The new sections apply to bonds in “street work” projects under  
19 Division 2 (commencing with Section 1600) (general provisions) of the Public Contract Code.  
20 See Pub. Cont. Code § 20457.

21  **Staff Note.** We have not yet integrated the Design Professionals’ Lien (Civ. Code §§ 3081.1-  
22 3081.10) with this material.

23 **Article 3. Construction Documents**

24 **§ 3082.310. Contract forms**

25 3082.310. (a) A written contract entered into between an owner and a direct  
26 contractor shall provide a space for the owner to enter the following information:

27 (1) The owner’s name and residence address, and place of business if any.

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

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

35 **Comment.** Section 3082.310 continues without substantive change the parts of former Section  
36 3097(l)-(m) relating to the content of contracts. The reference to “written” contract has been  
37 added to subdivision (b) for consistency with subdivision (a). The reference to “lender or lenders”  
38 in subdivision (a) has been shortened to “lender” for consistency with subdivision (b). See  
39 Section 14 (singular includes plural, and plural includes singular). These and other minor wording  
40 changes are technical, nonsubstantive revisions. For the direct contractor’s duty to provide  
41 information to persons seeking to serve a preliminary notice, see Section 397.070.

42 See also Sections 3082.020 (“construction lender” defined), 3082.025 (“direct contractor”  
43 defined), 3082.100 (“owner” defined), 3082.180 (“subcontractor” defined).

1    **§ 3082.320. Designation of construction lender on building permit**

2       3082.320. (a) A public entity that issues building permits shall, in its application  
3 form for a building permit, provide space and a designation for the applicant to  
4 enter the name, branch designation, if any, and address of the construction lender  
5 and shall keep the information on file open for public inspection during the regular  
6 business hours of the public entity.

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

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

12       **Comment.** Section 3082.320 continues former Section 3097(i) without substantive change.

13       See also Sections 3082.020 (“construction lender” defined), 3082.110 (“person” defined),  
14 3082.120 (“preliminary notice (private work)” defined), 3082.140 (“public entity” defined).

15       ☞ **Staff Note.** The staff in this draft has corrected a typographical error in the existing statute,  
16 which includes a stray comma between the words “branch” and “designation” in subdivision (a).

17       In any event, a random sampling of building permit application forms indicates that half the  
18 cities don’t provide any space for construction lender information at all, and those that do provide  
19 space don’t inquire about branches. There may be provisions of the stop notice procedure that  
20 involve branch offices. We will deal with this provision in that context.

21    **§ 3082.330. Construction trust deed**

22       3082.330. (a) A mortgage, deed of trust, or other instrument securing a loan, any  
23 of the proceeds of which may be used for a work of improvement, shall bear the  
24 designation “Construction Trust Deed” prominently on its face and shall state all  
25 of the following:

26       (1) The name and address of the construction lender.

27       (2) The name and address of the owner of the property described in the  
28 instrument.

29       (3) A legal description of the property that secures the loan and, if known, the  
30 street address of the property.

31       (b) Failure to comply with subdivision (a) does not affect the validity of the  
32 mortgage, deed of trust, or other instrument.

33       (c) Failure to comply with subdivision (a) does not relieve a person required to  
34 give a preliminary notice (private work) from that duty.

35       (d) The county recorder of the county in which the instrument is recorded shall  
36 indicate in the general index of the official records of the county that the  
37 instrument secures a construction loan.

38       **Comment.** Section 3082.330 continues former Section 3097(j) without substantive change.

39       See also Sections 3082.020 (“construction lender” defined), 3082.100 (“owner” defined),  
40 3082.110 (“person” defined), 3082.120 (“preliminary notice (private work)” defined), 3082.190  
41 (“work of improvement” defined).

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## Article 4. Laborer’s Compensation Fund

### § 3082.410. Standing to enforce laborer’s rights

3082.410. (a) A laborer’s compensation fund that has standing under applicable law to maintain a direct legal action in its own name or as an assignee to collect any portion of compensation owed for a laborer, has standing to enforce rights under this title to the same extent as the laborer.

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

**Comment.** Section 3082.410 continues the last two sentences of former Section 3089(b) without substantive change.

See also Sections 3082.040 (“laborer” defined), 3082.050 (“laborer’s compensation fund” defined), 3082.190 (“work of improvement” defined).

### § 3082.420. Notice of overdue laborer compensation

3082.420. (a) A contractor or subcontractor that employs a laborer and fails to pay the full compensation due the laborer or laborer’s compensation fund shall, not later than the date the compensation became delinquent, give the laborer, the laborer’s bargaining representative, if any, and the construction lender or reputed construction lender, if any, written notice containing all of the following information:

- (1) The name of the owner and the contractor.
- (2) A description of the site sufficient for identification.
- (3) The name and address of any express trust fund to which employer payments are due.
- (4) The total number of straight time and overtime hours on each job.
- (5) The amount then past due and owing.

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

**Comment.** Section 3082.420 restates former Section 3097(k) without substantive change. The reference to the Registrar of Contracts in the final sentence of former Section 3097(k) has been revised to refer to the Contractors’ State License Law. This is a technical, nonsubstantive change.

See also Sections 3082.020 (“construction lender” defined), 3082.027 (“express trust fund” defined), 3082.040 (“laborer” defined), 3082.050 (“laborer’s compensation fund” defined), 3082.100 (“owner” defined), 3082.160 (“site” defined), 3082.180 (“subcontractor” defined), 3082.210 (application of title).

☞ **Staff Note.** Should this section be relocated to the Contractor’s State License Law or the Labor Code, or is it so closely tied to mechanics liens it should remain here?

1                                    CHAPTER 2. MECHANICS LIEN FOR PRIVATE WORK

2                                    Article 1. Application of Chapter

3    § 3083.110. Scope of chapter

4    3083.110. This chapter applies only to a private work and does not apply to a  
5 public work.

6    **Comment.** Section 3083.110 continues former Section 3109 without substantive change.  
7    See also Sections 3082.130 (“private work” defined), 3082.150 (“public work” defined).

8                                    Article 2. Who Is Entitled to Lien

9    § 3083.210. Persons entitled to lien

10   3083.210. A person that provides labor, service, equipment, or material pursuant  
11 to a contract for a work of improvement, including but not limited the following  
12 persons, has a lien right under this chapter:

- 13    (a) Direct contractor.
- 14    (b) Subcontractor.
- 15    (c) Material supplier.
- 16    (d) Equipment lessor.
- 17    (e) Laborer.
- 18    (f) Architect.
- 19    (g) Registered engineer.
- 20    (h) Licensed land surveyor.
- 21    [(i) Builder.]

22    **Comment.** Section 3083.210 supersedes the part of former Section 3110 providing a lien for  
23 contributions to a work of improvement. It implements the directive of Article XIV, Section 3, of  
24 the California Constitution that, “Mechanics, persons furnishing materials, artisans, and laborers  
25 of every class, shall have a lien upon the property upon which they have bestowed labor or  
26 furnished material for the value of such labor done and material furnished; and the Legislature  
27 shall provide, by law, for the speedy and efficient enforcement of such liens.”

28    The reference in the introductory portion of Section 3083.210 to labor, service, equipment or  
29 material provided “pursuant to a contract” replaces the references in former Section 3110 to the  
30 “instance or request of the owner (or any other person acting by his authority or under him, as  
31 contractor or otherwise).” See Section 3083.240 (who may authorize work).

32    The type of contribution to the work of improvement that qualifies for a lien right is described  
33 in the introductory portion of Section 3083.210 as provision of “labor, service, equipment, or  
34 material.” Elimination of the former references to “bestowing skill or other necessary services” or  
35 “furnishing appliances, teams, or power” or “work done or materials furnished” is not a  
36 substantive change. See Section 3082.030 (“labor, service, equipment, or material” defined).

37    The listing of classes of persons with lien rights in subdivisions (a)-(h) restates without  
38 substantive change the comparable part of former Section 3110. This provision does not continue  
39 the former listing of types of contractors, subcontractors, and laborers, such as mechanics,  
40 artisans, machinists, builders, teamsters, and draymen. This is not a substantive change; these  
41 classes are included in the defined terms used in this section.

42    For provisions concerning architects, engineers, and surveyors, see Section 3181.1 *et seq.*

1 See also Sections 3082.025 (“direct contractor” defined), 3082.030 (“labor, service, equipment,  
2 or material” defined), 3082.040 (“laborer” defined), 3082.060 (“lien” defined), 3082.070  
3 (“material supplier” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined),  
4 3082.190 (“work of improvement” defined).

5 ☞ **Staff Note.** We have not yet integrated the Design Professionals’ Lien (Civ. Code §§ 3081.1-  
6 3081.10) with this material.

7 We have bracketed subdivision (i). The term “builder” was not defined in former law and was  
8 used only in former Section 3110. **Can there be a builder who is not either a direct contractor  
9 or subcontractor, or a laborer, by definition?**

#### 10 § 3083.220. Lien right of express trust fund

11 3083.220. An express trust fund has the same lien right under this chapter as a  
12 laborer on a work of improvement, to the extent of the compensation agreed to be  
13 paid to the express trust fund for labor on that work of improvement only.

14 **Comment.** Section 3083.220 continues a portion of former Section 3111 without substantive  
15 change. The duplicative description of the laborer’s lien right and other unneeded language is  
16 omitted. These are technical, nonsubstantive changes.

17 See also Sections 3082.027 (“express trust fund” defined), 3082.040 (“laborer” defined),  
18 3082.060 (“lien” defined).

19 ☞ **Staff Note.** Is this section redundant to the general provision of Section 3082.410 (standing to  
20 enforce laborer’s rights)? **The staff would appreciate input from knowledgeable sources.**

#### 21 § 3083.230. Site improvement lien

22 3083.230. A person that provides labor, service, equipment, or material pursuant  
23 to a contract for a site improvement has a lien right under this chapter.

24 **Comment.** Section 3083.230 supersedes former Section 3112. The reference to work done or  
25 material furnished is superseded by the reference to labor, service, equipment, or material. See  
26 Section 3082.030 (“labor, service, equipment, or material” defined). The reference to work at the  
27 instance or request of the owner or any person acting by or under authority of the owner as  
28 contractor or otherwise is replaced by the reference to work done pursuant to a contract. See  
29 Section 3083.240 (who may authorize work).

30 A site improvement is treated in the same manner as a work of improvement under this chapter,  
31 except as provided in Sections 3083.550 (claim against separate residential units), 3083.610  
32 (priority of lien), 3083.640 (priority of site improvement lien). See also Section 3082.190 (“work  
33 of improvement” defined).

34 See also Sections 3082.060 (“lien” defined), 3082.110 (“person” defined), 3082.170 (“site  
35 improvement” defined).

#### 36 § 3083.240. Who may authorize work

37 3083.240. For the purpose of this chapter, labor, service, equipment, or material  
38 is provided pursuant to a contract for a work of improvement or for a site  
39 improvement if:

40 (a) Provided at the request of the owner.

41 (b) Provided or authorized by a direct contractor, subcontractor, architect,  
42 project manager, or other person having charge of all or part of the work of  
43 improvement.

44 **Comment.** Section 3083.240 restates parts of former Sections 3110 and 3112.

1 The reference to work provided at the request of an owner in subdivision (a) includes work  
2 provided at the instance of the owner, or of a person acting by or under the owner’s authority. See  
3 Section 3082.100 (“owner” defined).

4 The references in former law to sub-subcontractors and builders have been omitted as surplus.  
5 A contractor either has a contract with the owner (direct contractor) or does not (subcontractor).  
6 This title does not distinguish among levels of subcontractor. The term “builder” was not defined  
7 in former law and was used only in former Section 3110. A work of improvement includes a site  
8 improvement. See Section 3082.190 (“work of improvement” defined).

9 See also Sections 3082.025 (“direct contractor” defined), 3082.030 (“labor, service, equipment,  
10 or material” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined).

11 ☞ **Staff Note.** We have added project manager to the list of work authorizers.

## 12 Article 3. Conditions to Enforcing a Lien

### 13 § 3083.310. Preliminary notice required

14 3083.310. A claimant may enforce a lien only if the claimant has given a  
15 preliminary notice (private work) and made proof of service to the extent required  
16 by Article 1 (commencing with Section 3089.110) of Chapter 8.

17 **Comment.** Section 3083.310 continues former Section 3114 without substantive change. A  
18 claimant must give preliminary notice to the extent provided in the preliminary notice provisions  
19 of this titled. See Section 3089.110 *et seq.* A preliminary notice is not required of a direct  
20 contractor or a laborer or laborer’s compensation fund. Section 3089.110.(b) (preliminary notice  
21 prerequisite to remedies).

22 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.120  
23 (“preliminary notice (private work)” defined).

24 ☞ **Staff Note.** This provision may need to be generalized or duplicated when we get to notice to  
25 withhold funds and bond provisions.

### 26 § 3083.320. Time for claim of lien by direct contractor

27 3083.320. A direct contractor may not enforce a lien unless the contractor  
28 records a claim of lien after the contractor completes the contract and before the  
29 earlier of the following times:

30 (a) Ninety days after completion of the work of improvement.

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

32 **Comment.** Section 3083.320 restates former Section 3115. For “completion” of a work of  
33 improvement, see Section 3089.410. For recordation of a notice of completion, see Section  
34 3089.430 (notice of completion). The notice of completion includes notice of cessation.

35 See also Sections 3082.025 (“direct contractor” defined), 3082.060 (“lien” defined), 3082.100  
36 (“owner” defined), 3082.190 (“work of improvement” defined).

37 ☞ **Staff Note.** The Commission has approved the concept of making this provision applicable to  
38 a notice to withhold funds. How this will be done mechanically (so to speak) will be determined  
39 when we start work on the notice to withhold funds and bond provisions. We may duplicate it for  
40 those purposes.

41 The Commission also will consider the possibility of harmonizing the time for recording a  
42 claim of lien with the times for filing a notice to withhold funds and the time for making a claim  
43 against a payment bond.

1    **§ 3083.330. Time for claim of lien by claimant other than direct contractor**

2       3083.330. A claimant other than a direct contractor may not enforce a lien unless  
3 the claimant records a claim of lien after the claimant ceases to provide labor,  
4 service, equipment, or material and before the earlier of the following times:

- 5       (a) Ninety days after completion of the work of improvement.
- 6       (b) Thirty days after the owner records a notice of completion.

7       **Comment.** Section 3083.330 restates former Section 3116. For “completion” of a work of  
8 improvement, see Section 3089.410. For recordation of a notice of completion, see Section  
9 3089.430 (notice of completion). The notice of completion includes notice of cessation.

10       An express trust fund may have a longer period in the case of a claim against a separate  
11 residential unit. See Section 3083.340.

12       See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined),  
13 3082.030 (“labor, service, equipment, or material” defined), 3082.060 (“lien” defined), 3082.100  
14 (“owner” defined), 3082.190 (“work of improvement” defined).

15       ☞ **Staff Note.** The Commission has approved the concept of making this provision applicable to  
16 a notice to withhold funds. How this will be done mechanically (so to speak) will be determined  
17 when we start work on the notice to withhold funds and bond provisions. We may duplicate it for  
18 those purposes.

19       The Commission also will consider the possibility of harmonizing the time for recording a  
20 claim of lien with the times for filing a notice to withhold funds and the time for making a claim  
21 against a payment bond.

22    **§ 3083.340. Special rule for express trust fund claim on separate residential unit in**  
23       **condominium**

24       3083.340. Notwithstanding any other provision of this chapter, completion of a  
25 separate residential unit within the meaning of Section 3083.550 does not operate  
26 in any manner to impair the lien right of an express trust fund under Section  
27 3083.220 if the claim of lien is recorded within 120 days after completion of the  
28 separate residential unit.

29       **Comment.** Section 3083.340 continues the last paragraph of former Section 3131 without  
30 substantive change.

31       See also Sections 3082.010 (“claimant” defined), 3082.027 (“express trust fund” defined),  
32 3082.060 (“lien” defined).

33    **§ 3083.350. Claim of lien**

34       3083.350. A claim of lien shall be in writing, signed and verified by the  
35 claimant, and shall contain all of the following information:

- 36       (a) A statement of the claimant’s demand after deducting all just credits and  
37 offsets.
- 38       (b) The name of the owner or reputed owner, if known.
- 39       (c) A general statement of the kind of labor, service, equipment, or material  
40 provided by the claimant.
- 41       (d) The name of the person that contracted for the labor, service, equipment, or  
42 material.
- 43       (e) A description of the site sufficient for identification.
- 44       [(f) The claimant’s address.]



1 (b) This section does not preclude the claimant from including in a claim of lien  
2 an amount due for labor, service, equipment, or material provided pursuant to a  
3 contract change.

4 (c) This section does not preclude the claimant from including in a claim of lien  
5 an amount due as a result of rescission, abandonment, or breach of the contract. In  
6 the event of rescission, abandonment, or breach of the contract, the amount of the  
7 lien may not exceed the reasonable value of the labor, service, equipment, and  
8 material provided by the claimant.

9 **Comment.** Section 3083.410 continues subdivisions (a) and (b) of former Section 3123 and a  
10 portion of former Section 3110 without substantive change. As used in this section, the  
11 reasonable value of labor, service, equipment, and material includes the reasonable use value of  
12 appliances, equipment, teams, and power.

13 In subdivision (b) the term “contract change” has replaced “written modification of the  
14 contract”. This codifies the effect of *Basic Modular Facilities, Inc. v. Ehsanipour*, 70 Cal. App.  
15 4th 1480, 83 Cal. Rptr. 2d 462 (1990).

16 The provision of former Section 3123(c) that required an owner to give notice of a change of 5  
17 percent or more) is not continued.

18 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, service, equipment, or  
19 material” defined), 3082.060 (“lien” defined), 3082.110 (“person” defined), Section 3083.350  
20 (claim of lien).

21 ☞ **Staff Note.** The reference in subdivision (a)(2) to Sections 3235 and 3236 relates to a  
22 payment bond. We will review this provision in connection with our review of payment bonds.

23 Likewise, notice to withhold funds provisions will be reviewed in light of this section.  
24 Presumably the amount recoverable pursuant to a notice to withhold funds would be the same as  
25 the amount recoverable pursuant to a lien. We will look at this issue separately.

26 This draft omits from the law the provision of former Section 3123(c) that required an owner to  
27 give notice of a change of 5 percent or more. This provision did not appear to have an effective  
28 enforcement mechanism. **The Commission particularly solicits comment on this proposed  
29 change.**

### 30 § 3083.420. Lien limited to amount of contract or modification

31 3083.420. (a) A lien does not extend to labor, service, equipment, or material not  
32 included in a contract between the owner and direct contractor or a modification of  
33 the contract if the labor, service, equipment, or material was contracted for by the  
34 direct contractor or subcontractor and the claimant had actual knowledge or  
35 constructive notice of the contract or modification before providing the labor,  
36 service, equipment, or material.

37 (b) The filing of a contract or of a modification of the contract with the county  
38 recorder, before the commencement of work, is equivalent to giving actual notice  
39 of the provisions of the contract or modification by the owner to a person  
40 providing labor, service, equipment, or material.

41 **Comment.** Section 3083.420 restates former Section 3124 without substantive change. “Direct  
42 contractor” is substituted for the undefined “contractor” in subdivision (a). The concept of  
43 “contracted for” is substituted for “employed” in subdivision (a). See Section 3083.240 (who may  
44 authorize work).

45 See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined),  
46 3082.030 (“labor, service, equipment, or material” defined), 3082.060 (“lien” defined), 3082.100  
47 (“owner” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined).

1 Article 5. Property Subject to Lien

2 **§ 3083.510. Property subject to lien**

3 3083.510. A lien attaches to the work of improvement and property on which the  
4 work of improvement is situated, together with a convenient space about the work  
5 of improvement or as much space as is required for the convenient use and  
6 occupation of the work of improvement.

7 **Comment.** Section 3083.510 restates the parts of former Sections 3128 and 3112 (site  
8 improvement lien on lot or tract of land) that described property subject to the lien, without  
9 substantive change. References to “property” have been substituted for references to “land.”

10 See also Sections 3082.060 (“lien” defined), 3082.190 (“work of improvement” defined),  
11 3082.190 (“work of improvement” defined).

12 **§ 3083.520. Interest subject to lien**

13 3083.520. A lien attaches to the following interests in the property on which the  
14 work of improvement is situated:

15 (a) The interest of a person that contracted for the work of improvement.

16 (b) The interest of a person that did not contract for the work of improvement, if  
17 labor, service, equipment, or material for which the lien is claimed was provided  
18 with the knowledge of the person. This subdivision does not apply to the interest  
19 of a person that gives notice of nonresponsibility under Section 3083.530.

20 **Comment.** Section 3083.520 restates former Section 3129 and the last portion of former  
21 Section 3128. A reference to “labor, service, equipment, or material” has been substituted for the  
22 former reference to “commencement of the work or of the furnishing of the materials”. Cf.  
23 Section 3082.030 (“labor, service, equipment, or material” defined).

24 See also Sections 3082.060 (“lien” defined), 3082.110 (“person” defined), 3082.190 (“work of  
25 improvement” defined).

26 **§ 3083.530. Notice of nonresponsibility**

27 3083.530. (a) An owner of property on which a work of improvement is situated  
28 that did not contract for the work of improvement may give notice of  
29 nonresponsibility.

30 (b) A notice of nonresponsibility shall be in writing, signed and verified by the  
31 owner, and shall contain all of the following information:

32 (1) A description of the site sufficient for identification.

33 (2) The name and nature of the owner’s title or interest.

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

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

37 (c) A notice of nonresponsibility is not effective unless, within 10 days after the  
38 person giving notice has knowledge of the work of improvement, the person posts  
39 the notice in a conspicuous place on the site and records the notice.

40 **Comment.** Section 3083.530 restates former Section 3094 without substantive change. The  
41 notice of nonresponsibility may be signed and verified by the owner or person owning or  
42 claiming an interest in the property, or by the owner or other person’s agent. See Section

1 3082.100 (“owner” defined). A notice of nonresponsibility is recorded in the office of the county  
2 recorder of the county in which the site or part of it is situated. Section 3082.250 (filing and  
3 recording of papers).

4 See also Sections 3082.110 (“person” defined), 3082.160 (“site” defined), 3082.190 (“work of  
5 improvement” defined).

6 **§ 3083.540. Multiple works of improvement**

7 3083.540. A claimant may record one claim of lien on two or more works of  
8 improvement, subject to the following conditions:

9 (a) The works of improvement have or are reputed to have the same owner, or  
10 the labor, service, equipment, or material was contracted for by the same person  
11 for the works of improvement whether or not they have the same owner.

12 (b) The claimant in the claim of lien designates the amount due for each work of  
13 improvement. If the claimant contracted for a lump sum payment for labor,  
14 service, equipment, and material provided for the works of improvement and the  
15 contract does not segregate the amount due for each work of improvement  
16 separately, the claimant may estimate an equitable distribution of the sum due for  
17 each work of improvement based on the proportionate amount of labor, service,  
18 equipment, or material provided for each. If the claimant does not designate the  
19 amount due for each work of improvement, the lien is subordinate to other liens.

20 (c) If there is a single structure on property of different owners, the claimant  
21 need not segregate the proportion of labor, service, equipment, or material  
22 provided for the portion of the structure situated on property of each owner. In the  
23 lien enforcement action the court may, if it determines it equitable to do so,  
24 designate an equitable distribution of the lien among the property of the owners.

25 (d) The lien does not extend beyond the amount designated as against other  
26 creditors having liens, by judgment, mortgage, or otherwise, on either the works of  
27 improvement or the property on which the works of improvement are situated.

28 **Comment.** Section 3083.540 restates former Section 3130 without substantive change. The  
29 concept of “contracted for” is substituted for “employed” in subdivisions (a) and (b). See Section  
30 3083.240 (who may authorize work).

31 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, service, equipment, or  
32 material” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.110 (“person”  
33 defined), 3082.190 (“work of improvement” defined).

34  **Staff Note.** Subdivision (a) refers to recording one claim of lien against multiple works of  
35 improvement that have, or are “reputed” to have, the same owner. **If in fact they do not have the**  
36 **same owner, how can a claim of lien against a reputed owner bind another person who is an**  
37 **actual owner?**

38 **§ 3083.550. Claim against separate residential units**

39 3083.550. (a) As used in this section, “separate residential unit” means one  
40 residential structure, including a residential structure containing multiple  
41 condominium units, together with any common area, garage, or other appurtenant  
42 improvements.

1 (b) If a work of improvement consists of the construction of two or more  
2 separate residential units:

3 (1) Each unit is deemed a separate work of improvement, and completion of  
4 each unit is determined separately for purposes of the time for recording a claim of  
5 lien on that unit. This paragraph does not affect any lien right under Section  
6 3083.230 (site improvement lien) or 3083.540 (multiple works of improvement).

7 (2) Material provided for the work of improvement is deemed to be provided for  
8 use or consumption in each separate residential unit in which the material is  
9 actually used or consumed; but if the claimant is unable to segregate the amounts  
10 used or consumed in separate residential units, the claimant has the right to all the  
11 benefits of Section 3083.540 (multiple works of improvement).

12 **Comment.** Section 3083.550 restates the first paragraph of former Section 3131 without  
13 substantive change. The reference to “filing” a claim of lien has been changed to recording. See  
14 Sections 3083.320, 3083.330 (recordation of claim of lien). For the purpose of this section, a  
15 claim of lien is not considered recorded unless done in the manner provided by Section 3082.250  
16 (filing and recording of papers).

17 The second paragraph of former Section 3131 is continued in Section 3083.340 (special rule for  
18 express trust fund claim on separate residential unit in condominium).

19 For “completion” of a work of improvement, see Section 3089.410.

20 See also Sections 3083.350 (claim of lien), 3082.010 (“claimant” defined), 3082.060 (“lien”  
21 defined), 3082.190 (“work of improvement” defined).

## 22 § 3083.560. Release bond

23 3083.560. (a) An owner of property subject to a recorded claim of lien or a direct  
24 contractor or subcontractor affected by the claim of lien that disputes the  
25 correctness or validity of the claim may obtain release of the property from the  
26 claim of lien by recording a lien release bond. The principal on the bond may be  
27 the owner of the property or the contractor or subcontractor.

28 (b) The bond shall be conditioned on payment of any judgment and costs the  
29 claimant recovers on the lien. The bond shall be in an amount equal to 1-1/2 times  
30 the amount of the claim of lien or 1-1/2 times the amount allocated in the claim of  
31 lien to the property to be released. The bond shall be executed by an admitted  
32 surety insurer.

33 (c) The bond may be recorded either before or after commencement of an action  
34 to enforce the lien. On recordation of the bond the property is released from the  
35 claim of lien and from any action to enforce the lien.

36 (d) A person that obtains and records a lien release bond shall give notice to the  
37 claimant by mailing a copy of the bond to the claimant at the address on the claim  
38 of lien. Failure to give the notice required by this section does not affect the  
39 validity of the bond, but the statute of limitations for an action on the bond is  
40 tolled until notice is given. The claimant shall commence an action on the bond  
41 within six months after notice is given.

42 **Comment.** Subdivisions (a)-(c) of Section 3083.560 continue former Section 3143 without  
43 substantive change. The language of the section has been harmonized with the Bond and

1 Undertaking Law, Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the  
2 Code of Civil Procedure.

3 Subdivision (d) continues former Section 3144.5 without substantive change. For service and  
4 proof of service by mail, see. Section 3082.240 (mailed notice).

5 The owner of an interest in property may obtain a release bond. See Section 3082.100 (“owner”  
6 defined). The reference to recordation of the bond in the county in which the claim of lien is  
7 recorded is omitted as unnecessary. Both the claim of lien and the bond are recorded in the office  
8 of the county recorder of the county in which the work of improvement or part of it is situated.  
9 Section 3082.250 (filing and recording of papers).

10 See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined),  
11 3082.060 (“lien” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined).

## 12 Article 6. Priorities

13 ☞ **Staff Note.** A payment bond affects priorities among parties. Civ. Code §§ 3138, 3139. We  
14 have not included these provisions in this draft, but will integrate them in connection with our  
15 review of payment bond provisions generally.

### 16 § 3083.610. Priority of lien

17 3083.610. (a) A lien under this chapter is superior to a lien, mortgage, deed of  
18 trust, or other encumbrance on the work of improvement or the property on which  
19 the work of improvement is situated, that (1) attaches after commencement of the  
20 work of improvement, or (2) was unrecorded at the commencement of the work of  
21 improvement and of which the claimant had no notice.

22 (b) Subdivision (a) does not apply to either of the following:

23 (1) A lien provided for in Section 3083.230 (site improvement lien).

24 (2) The exception provided for in Section 3138 (payment bond).

25 **Comment.** Section 3083.610 continues former Section 3134 without substantive change. For a  
26 site improvement lien, see Section 3083.640 (priority of site improvement lien).

27 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.170 (“site  
28 improvement” defined), 3082.190 (“work of improvement” defined).

29 ☞ **Staff Note.** Subdivision (b)(2) refers to the effect of a payment bond. We will review payment  
30 bond provisions later in this project.

### 31 § 3083.620. Separate contract for site improvement

32 3083.620. If a site improvement is provided for in a contract separate from the  
33 contract for the remainder of the work of improvement, the site improvement is  
34 deemed a separate work of improvement and commencement of the site  
35 improvement is not commencement of the remainder of the work of improvement.

36 **Comment.** Section 3083.620 restates former Section 3135 without substantive change.

37 See also Sections 3082.170 (“site improvement” defined), 3082.190 (“work of improvement”  
38 defined).

### 39 § 3083.630. Priority of advances by lender

40 3083.630. (a) This section applies to a construction loan secured by a mortgage  
41 or deed of trust that has priority over a lien under this chapter.

1 (b) An optional advance of funds by the construction lender that is used for  
2 construction costs has the same priority as a mandatory advance of funds by the  
3 construction lender, provided that the total of all advances does not exceed the  
4 amount of the original construction loan.

5 **Comment.** Section 3083.630 rewrites former Section 3136 for clarity.

6 See also Sections 3082.020 (“construction lender” defined), 3082.060 (“lien” defined).

7 ☞ **Staff Note.** The Commission solicits comment on the fidelity of the rewrite to the original  
8 meaning of the section.

#### 9 § 3083.640. Priority of site improvement lien

10 3083.640. Except as provided in Section 3139 (payment bond), a lien provided  
11 for in Section 3083.230 (site improvement lien) is superior to:

12 (a) A mortgage, deed of trust, or other encumbrance that (1) attaches after  
13 commencement of the site improvement, or (2) was unrecorded at the  
14 commencement of the site improvement and of which the claimant had no notice.

15 (b) A mortgage, deed of trust, or other encumbrance that was recorded before  
16 commencement of the site improvement, if given for the sole or primary purpose  
17 of financing the site improvement. This subdivision does not apply if the loan  
18 proceeds are, in good faith, placed in the control of the lender under a binding  
19 agreement with the borrower to the effect that (1) the proceeds are to be applied to  
20 the payment of claimants and (2) no portion of the proceeds will be paid to the  
21 borrower in the absence of satisfactory evidence that all claims have been paid or  
22 that the time for recording a claim of lien has expired and no claim of lien has  
23 been recorded.

24 **Comment.** Section 3083.640 continues former Section 3137 without substantive change.

25 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.170 (“site  
26 improvement” defined).

27 ☞ **Staff Note.** The introductory clause refers to the effect of a payment bond. We will review  
28 payment bond provisions later in this project.

#### 29 § 3083.650. Amount of recovery

30 3083.650. A direct contractor or a subcontractor may enforce a lien only for the  
31 amount due under the terms of the contract after deducting all claims of other  
32 claimants for labor, service, equipment, and material provided and embraced  
33 within the contract.

34 **Comment.** Section 3083.650 continues former Section 3140 without substantive change.

35 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, service, equipment, or  
36 material” defined), 3082.060 (“lien” defined), 3082.025 (“direct contractor” defined), 3082.180  
37 (“subcontractor” defined).

38 ☞ **Staff Note.** The wording of this section needs to be correlated with the wording of Section  
39 3083.420 (amount of lien).

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## Article 7. Enforcement of Lien

### § 3083.710. Time for commencement of enforcement action

3083.710. (a) Except as provided in subdivision (b), the claimant shall commence an action to enforce a lien within 90 days after recordation of the claim of lien.

(b) If the claimant extends credit, and notice of the fact and terms of the extension of credit is recorded within 90 days after recordation of the claim of lien, the claimant shall commence an action to enforce the lien within 90 days after the expiration of the credit, but in no case later than one year after completion of the work of improvement.

(c) If an action to enforce a lien is not commenced within the time provided in this section, the claim of lien expires and is unenforceable.

**Comment.** Section 3083.710 restates former Section 3144.

For completion of a work of improvement, see Section 3089.410.

See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.190 (“work of improvement” defined).

### § 3083.720. Bona fide purchaser or encumbrancer

3083.720. The rights of a purchaser or encumbrancer for value and in good faith acquired after expiration of the time within which to commence an action to enforce a lien under Section 3083.710 are not affected by an extension of credit, or by an extension of the lien or of the time to enforce the lien, unless evidenced by a notice or agreement recorded before the acquisition of the rights by the purchaser or encumbrancer.

**Comment.** Section 3083.720 restates former Section 3145 without substantive change.

See also Section 3082.060 (“lien” defined).

### § 3083.730. Lis pendens

3083.730. After commencement of an action to enforce a lien, the claimant may record a notice of the pendency of action under Title 4.5 (commencing with Section 405) of Part 2 of the Code of Civil Procedure.

**Comment.** Section 3083.730 restates former Section 3146 without substantive change. The reference to the lis pendens statute has been corrected, to reflect the repeal of Code of Civil Procedure 409. See 1992 Cal. Stat. ch. 883, § 1. See also Section 3082.230 (rules of practice).

The second sentence of former Section 3146 is omitted because it is unnecessary. See Code Civ. Proc. § 405.24 (constructive notice).

See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined).

 **Staff Note.** It is arguable that this section can be omitted altogether in reliance on Section 3082.230 (rules of practice). On the other hand, Code of Civil Procedure Section 405.4 now limits the lis pendens statute to actions that affect title to, or the right to possession of, property. The new language probably covers a lien enforcement action, but there is not yet case law on the point. It probably doesn’t hurt to include express language here.

1    **§ 3083.740. Dismissal for lack of prosecution**

2       3083.740. Notwithstanding Section 583.420 of the Code of Civil Procedure, the  
3       court may dismiss an action to enforce a lien that is not brought to trial within two  
4       years after commencement.

5       **Comment.** Section 3083.740 continues former Section 3147 without substantive change. The  
6       cross-reference to the Code of Civil Procedure is added to make clear that this section modifies  
7       the general three-year period for discretionary dismissal. See also Section 3082.230 (rules of  
8       practice).

9       See also Section 3082.060 (“lien” defined).

10   **§ 3083.750. Dismissal of action or judgment of no lien**

11       3083.750. Dismissal of an action to enforce a lien, unless the dismissal is  
12       expressly stated to be without prejudice, or a judgment that no lien exists, is  
13       equivalent to cancellation of the lien and its removal from the record.

14       **Comment.** Subdivision (a) of Section 3083.750 continues former Section 3148 without  
15       substantive change.

16       See also Section 3082.060 (“lien” defined).

17   **§ 3083.760. Costs**

18       3083.760. In addition to any other costs allowed by law, the court in an action to  
19       enforce a lien shall allow as costs to each claimant whose lien is established the  
20       amount paid to verify and record the claim of lien, whether the claimant is a  
21       plaintiff or defendant.

22       **Comment.** Section 3083.760 continues former Section 3150 without substantive change.

23       See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined).

24       ☞ **Staff Note.** The statutes allow attorneys fees in some types of stop notice and payment bond  
25       enforcement actions, but not for enforcement of a mechanics lien. *Abbett Elec. Corp. v.*  
26       *California Fed. Sav. & Loan Ass’n*, 230 Cal. App. 3d 355 (1991). **The Commission solicits**  
27       **comment on whether this differential treatment is appropriate.**

28   **§ 3083.770. Deficiency**

29       3083.770. If there is a deficiency of proceeds from the sale of property on a  
30       judgment for enforcement of a lien, a deficiency judgment may be entered against  
31       a party personally liable for the deficiency in same the manner and with the same  
32       effect as in an action to foreclose a mortgage.

33       **Comment.** Section 3083.770 restates former Section 3151 without substantive change.

34       See also Section 3082.060 (“lien” defined).

35   **§ 3083.780. Personal liability**

36       3083.780. This chapter does not affect any of the following rights of a claimant:

37       (a) The right to maintain a personal action to recover a debt against the person  
38       liable, either in a separate action or in an action to enforce a lien.

39       (b) The right to a writ of attachment. In an application for a writ of attachment,  
40       the claimant shall refer to this section. The claimant’s recording of a claim of lien  
41       does not affect the right to a writ of attachment.

1 (c) The right to enforce a judgment. A judgment obtained by the claimant in a  
2 personal action described in subdivision (a) does not impair or merge the claim of  
3 lien, but any amount collected on the judgment shall be credited on the amount of  
4 the lien.

5 **Comment.** Section 3083.780 restates former Section 3152 without substantive change. The  
6 reference in the introductory portion of the section to “this title” has been changed to “this  
7 chapter” consistent with the scope of the chapter.

8 For provisions relating to attachment, see Code Civ. Proc. § 481.010 *et seq.* For provisions  
9 relating to enforcement of a money judgment, see Code Civ. Proc. § 681.010 *et seq.*

10 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.110  
11 (“person” defined).

### 12 § 3083.790. Liability of contractor for lien enforcement

13 3083.790. In an action to enforce a lien for labor, service, equipment, or material  
14 provided to a contractor:

15 (a) The contractor shall defend the action at the contractor’s own expense.  
16 During the pendency of the action the owner may withhold from the direct  
17 contractor the amount claimed in the action.

18 (b) If the judgment in the action is against the owner or the owner’s property, the  
19 owner may deduct the amount of the judgment and costs from any amount owed to  
20 the direct contractor. If the amount of the judgment and costs exceeds the amount  
21 owed to the direct contractor, or if the owner has settled with the direct contractor  
22 in full, the owner may recover from the contractor, or the sureties on a bond given  
23 by the contractor for faithful performance of the contract, the amount of the  
24 judgment and costs that exceed the contract price and for which the contractor was  
25 originally liable.

26 **Comment.** Section 3083.790 restates former Section 3153 without substantive change.

27 See also Sections 3082.030 (“labor, service, equipment, or material” defined), 3082.060 (“lien”  
28 defined), 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined).

29 ☞ **Staff Note.** Should this section be limited to an action for labor, service, equipment, or  
30 material provided to a direct contractor?

## 31 Article 8. Release Order

### 32 § 3083.810. Petition for release order

33 3083.810. (a) The owner of property subject to a claim of lien may petition the  
34 court for an order to release the property from the claim of lien for any of the  
35 following causes:

36 (1) The claimant has not commenced an action to enforce the lien within the  
37 time provided in Section 3083.710.

38 (2) The claim of lien is invalid under Section 3083.360 or is for any other reason  
39 invalid or unenforceable.

40 (b) This article does not bar any other cause of action or claim for relief by the  
41 owner of the property, nor does a release order bar any other cause of action or

1 claim for relief by the claimant, other than an action to enforce the lien. However,  
2 another action or claim for relief may not be joined with a petition under this  
3 article.

4 (c) Notwithstanding Section 3082.230 (rules of practice), Chapter 2.5  
5 (commencing with Section 1141.10) of Title 3 of Part 3 of the Code of Civil  
6 Procedure does not apply to a proceeding under this article.

7 **Comment.** Subdivision (a)(1) of Section 3083.810 continues former Section 3154(a) without  
8 substantive change. Subdivision (a)(2) is new. The owner need not wait until expiration of the  
9 time to commence an enforcement action before bringing a petition to release an invalid claim of  
10 lien. Cf. Section 3083.360 (forfeiture of lien for false claim).

11 Subdivision (b) continues former Section 3154(h) without substantive change. Subdivision (c)  
12 continues former Section 3154(i) without substantive change. As used in this section, the owner  
13 of property includes the owner of an interest in the property. See Section 3082.100 (“owner”  
14 defined).

15 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined).

16 **§ 3083.820. Contents of petition**

17 3083.820. A petition for a release order shall be verified and shall allege all of  
18 the following:

19 (a) The date of recordation of the claim of lien. A certified copy of the claim of  
20 lien shall be attached to the petition.

21 (b) The county in which the claim of lien is recorded.

22 (c) The book and page of the place in the official records where the claim of lien  
23 is recorded.

24 (d) The legal description of the property subject to the claim of lien.

25 (e) The facts on which the petition is based. If the petition is based on expiration  
26 of the time to enforce the lien, the facts shall include that no extension of credit  
27 has been recorded within the time required by Section 3083.710 and that the time  
28 for commencement of an action to enforce the lien has expired.

29 (f) That the claimant is unable or unwilling to execute a release of the claim of  
30 lien or cannot with reasonable diligence be found.

31 **Comment.** Section 3083.820 supersedes subdivision (b) of former Section 3154. As used in  
32 this section, the owner of property includes the owner of an interest in the property. See Section  
33 3082.100 (“owner” defined).

34 The information included in the petition is intended to facilitate the court’s order under Section  
35 3083.840 (hearing and order).

36 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined).

37 **§ 3083.830. Time of hearing**

38 3083.830. (a) On the filing of a petition for a release order, the clerk shall set a  
39 hearing date. The date shall be not more than 30 days after the filing of the  
40 petition. The court may continue the hearing beyond the 30-day period on a  
41 showing of good cause, but in any event the court shall rule and make any  
42 necessary orders on the petition not later than 75 days after the filing of the  
43 petition.

1 (b) The petitioner shall serve a copy of the petition and notice of hearing on the  
2 claimant at least 10 days before the hearing. Service shall be made in the same  
3 manner as service of summons, or by mail addressed to the claimant at the  
4 claimant's address as shown in any of the following:

- 5 (1) The preliminary notice (private work) given by the claimant.
- 6 (2) The records of the Contractors' State License Board.
- 7 (3) The contract on which the claim of lien is based.
- 8 (4) The claim of lien.

9 (c) Notwithstanding Section 3082.240, when service is made by mail, service is  
10 complete on the fifth day following deposit of the petition and notice in the mail.

11 **Comment.** Section 3083.830 continues subdivisions (c), (d), and the first sentence of (e) of  
12 former Section 3154, with the addition of the requirement that the court act no later than 75 days  
13 after the petition is filed. The reference to "if there is no clerk, the judge" has been deleted. All  
14 courts now have a clerk. See also Section 3082.220 (proper court).

15 For service and proof of service by mail, see. Section 3082.240 (mailed notice). However, the  
16 time when service by mail is complete under this section is governed by subdivision (c) and not  
17 by Section 3082.240.

18 See also Sections 3082.010 ("claimant" defined), 3082.060 ("lien" defined), 3082.120  
19 ("preliminary notice (private work)" defined).

#### 20 § 3083.840. Hearing and order

21 3083.840. (a) At the hearing both the petition and the issue of compliance with  
22 the service requirements of this article are deemed controverted by the claimant.  
23 The petitioner has the burden of proof that service was made in compliance with  
24 this article.

25 (b) If judgment is in favor of the petitioner, the court shall order release of the  
26 property from the claim of lien. The release order shall state:

- 27 (1) The date of recordation of the claim of lien.
- 28 (2) The county in which the claim of lien is recorded.
- 29 (3) The book and page of the place in the official records where the claim of lien  
30 is recorded.
- 31 (4) The legal description of the property.

32 (c) The prevailing party is entitled to reasonable attorneys fees.

33 **Comment.** Subdivision (a) of Section 3083.840 continues the last sentence of former Section  
34 3154(b)(5) and the last two sentences of former Section 3154(e) without substantive change.  
35 Subdivision (b) continues former Section 3154(f) without substantive change. The reference to  
36 the city where the claim of lien is recorded is omitted as superfluous. Subdivision (c) continues  
37 former Section 3154(g) with the exception of the \$2,000 limitation.

38 See also Sections 3082.010 ("claimant" defined), 3082.060 ("lien" defined).

#### 39 § 3083.850. Release of property from claim of lien

40 3083.850. (a) A release order is a recordable instrument.

41 (b) On recordation of a certified copy of a release order, the property described  
42 in the order is released from the clam of lien.

43 **Comment.** Subdivision (a) of Section 3083.850 is intended to help effectuate the purpose of  
44 the lien release procedure.

1 Subdivision (b) continues the second sentence of former Section 3154(f)(4) without substantive  
2 change.

3 See also Section 3082.060 (“lien” defined).  
4

5 CHAPTER 3. NOTICE TO WITHHOLD FUNDS FOR PRIVATE  
6 WORK

7 [Reserved]

8 CHAPTER 4. NOTICE TO WITHHOLD FUNDS FOR PUBLIC WORK

9 [Reserved]

10 CHAPTER 5. GENERAL PROVISIONS RELATING TO BONDS

11 [Reserved]

12 CHAPTER 6. PAYMENT BOND FOR PRIVATE WORK

13 [Reserved]

14 CHAPTER 7. PAYMENT BOND FOR PUBLIC WORK

15 [Reserved]

16 CHAPTER 8. MISCELLANEOUS PROVISIONS

17 Article 1. Preliminary Notice of Private Work

18 **§ 3089.110. Preliminary notice prerequisite to remedies**

19 3089.110. (a) Except as otherwise provided in this section, a preliminary notice  
20 (private work) is a necessary prerequisite to the validity of a lien, notice to  
21 withhold funds, or payment bond claim with respect to a private work.

22 (b) A preliminary notice (private work) is not required of a laborer or laborer’s  
23 compensation fund.

24 (c) A preliminary notice (private work) is not required of a direct contractor  
25 except with respect to a construction lender.

26 **Comment.** Subdivision (a) of Section 3089.110 restates part of the introductory clause of  
27 former Section 3097 without substantive change.

28 Subdivision (b) restates part of former Section 3097(a) without substantive change.

29 Subdivision (c) restates parts of former Section 3097(a) and (b), omitting the exception of “the  
30 contractor”. Although a direct contractor is generally excused from the preliminary notice  
31 requirement, the direct contractor must give preliminary notice to the construction lender pursuant  
32 to Section 3089.120(c).

1 See also Sections 3082.010 (“claimant” defined), 3082.040 (“laborer” defined), 3082.050  
2 (“laborer’s compensation fund” defined), 3082.060 (“lien” defined), 3082.025 (“direct  
3 contractor” defined), 3082.130 (“private work” defined).

4 **§ 3089.120. Preliminary notice requirement**

5 3089.120. Before recording a claim of lien, filing a notice to withhold funds, or  
6 asserting a claim against a payment bond, the claimant shall give a preliminary  
7 notice (private work) to each of the following persons:

- 8 (a) The owner or reputed owner.
- 9 (b) The direct contractor or reputed contractor.
- 10 (c) The construction lender or reputed lender, if any.

11 **Comment.** Section 3089.120 restates parts of the introductory clause and subdivision (a) of  
12 former Section 3097, without substantive change. Some repetitive detail has been omitted in  
13 reliance on defined terms and other substantive provisions. The preliminary notice must be in  
14 writing. Section 3089.130 (contents of preliminary notice).

15 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),  
16 3082.060 (“lien” defined), 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined),  
17 3082.110 (“person” defined).

18 ☞ **Staff Note. It is not clear whether preliminary notice is required to the owner of the**  
19 **work of improvement or to the owner of the property, if these two are not the same person.**

20 The staff would argue that notice to both should be necessary. The owner of the work of  
21 improvement needs to be able to protect against double payment liability. The owner of the  
22 property needs to be able to give notice of nonresponsibility.

23 Gordon Hunt would leave the matter ambiguous. It would be for the courts to decide as to what  
24 is or is not compliance with the requirement. To require notice to both the owner of the work of  
25 improvement and the owner of the property would place an additional unreasonable burden on a  
26 claimant.

27 **§ 3089.130. Contents of preliminary notice**

28 3089.130. (a) A preliminary notice (private work) shall be in writing and shall  
29 contain all of the following information:

- 30 (1) A general description of the labor, service, equipment, or material provided,  
31 or to be provided, and an estimate of the total price.
- 32 (2) The name and address of the person providing the labor, service, equipment,  
33 or material.
- 34 (3) The name of the person that contracted for the labor, service, equipment, or  
35 material.
- 36 (4) A description of the site sufficient for identification.
- 37 (5) The following statement in boldface type:

38 **NOTICE TO PROPERTY OWNER**

39 **If the person or firm that has given you this notice is not paid in full for**  
40 **labor, service, equipment, or material provided or to be provided to your**  
41 **construction project, a lien may be placed on your property. Foreclosure of**  
42 **the lien may lead to loss of all or part of your property, even though you have**  
43 **paid your contractor in full. You may wish to protect yourself against this by**

1 **(1) requiring your contractor to provide a signed release by the person or**  
2 **firm that has given you this notice before making payment to your contractor,**  
3 **or (2) any other method that is appropriate under the circumstances.**

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

11 (b) If a preliminary notice (private work) is given by a subcontractor that has not  
12 paid all compensation due to a laborer or laborer's compensation fund, the notice  
13 shall contain the name and address of the laborer and any laborer's compensation  
14 fund to which payments are due.

15 (c) If an invoice for material or certified payroll contains the information  
16 required by this section, a copy of the invoice or payroll, given in the manner  
17 provided by this article for giving of notice, is sufficient.

18 **Comment.** Section 3089.130 continues the substance of former Section 3097(c)(1)-(6) and the  
19 unnumbered paragraph following paragraph (6) without substantive change. The reference to an  
20 "express trust fund" has been replaced by the defined term, "laborer's compensation fund." See  
21 Section 3082.050 ("laborer's compensation fund" defined). It also continues the requirement of  
22 former Section 3097(a) that the preliminary notice be written.

23 See also Sections 3082.030 ("labor, service, equipment, or material" defined), 3082.040  
24 ("laborer" defined), 3082.060 ("lien" defined), 3082.110 ("person" defined), 3082.160 ("site"  
25 defined), 3082.180 ("subcontractor" defined).

#### 26 **§ 3089.140. Effect of preliminary notice**

27 3089.140. (a) A claimant may record a claim of lien, file a notice to withhold  
28 funds, or assert a claim against a payment bond only for labor, service, equipment,  
29 or material provided within 20 days before giving a preliminary notice (private  
30 work) and at any time thereafter.

31 (b) Notwithstanding subdivision (a), a certificated architect, registered engineer,  
32 or licensed land surveyor may record a claim of lien, file a notice to withhold  
33 funds, or assert a claim against a payment bond for architectural, engineering, or  
34 surveying services provided for the design of the work of improvement if the  
35 claimant gives a preliminary notice (private work) not later than 20 days after the  
36 work of improvement has commenced.

37 **Comment.** Subdivision (a) of Section 3089.140 supersedes former Section 3097(d). The  
38 provision is simplified so that it refers only to the effect of giving the preliminary notice.

39 Subdivision (b) restates the unnumbered paragraph preceding former Section 3097(d).

40 See also Sections 3082.010 ("claimant" defined), 3082.030 ("labor, service, equipment, or  
41 material" defined), 3082.060 ("lien" defined), 3082.190 ("work of improvement" defined).

42 ☞ **Staff Note.** We have not yet integrated the Design Professionals' Lien (Civ. Code §§ 3081.1-  
43 3081.10) with this material.

1    **§ 3089.150. Giving preliminary notice**

2       3089.150. (a) Subject to subdivision (b), a preliminary notice (private work)  
3 shall be given to the person to be notified by any of the following methods:

4       (1) Delivering it personally.

5       (2) Leaving it at the person’s address of residence or place of business with a  
6 person in charge.

7       (3) Mailing it to the person addressed to (i) the person’s residence or place of  
8 business, (ii) the address shown by the building permit on file with the authority  
9 issuing a building permit for the work of improvement, or (iii) an address recorded  
10 under Section 3082.330 (construction trust deed).

11       (b) If the person to be notified does not reside in the state, a preliminary notice  
12 (private work) shall be given by any method provided in subdivision (a) or, if the  
13 person cannot be notified by any method provided in subdivision (a), by mail  
14 addressed to the construction lender or the direct contractor.

15       (c) Proof that preliminary notice was given to a person in the manner required by  
16 this section shall be made by the proof of notice affidavit described in subdivision  
17 (d) and, if given by mail, shall be accompanied by proof in the manner provided in  
18 Section 3082.240.

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

20       (1) The time, place, and manner of notice and facts showing that notice was  
21 given in the manner required by this section.

22       (2) The name and address of the person to which the preliminary notice was  
23 given, and, if appropriate, the title or capacity in which the person was given  
24 notice.

25       **Comment.** Subdivisions (a) and (b) of Section 3089.150 continue former Section 3097(f)  
26 without substantive change. Service of notice terminology has been changed to giving of notice  
27 terminology.

28       Subdivisions (c) and (d) continue former Section 3097.1 without substantive change. Service of  
29 notice terminology has been changed to giving of notice terminology.

30       For service and proof of service by mail, see Section 3082.240 (mailed notice). This expands  
31 the permissible methods of mailing.

32       See also Sections 3082.020 (“construction lender” defined), 3082.025 (“direct contractor”  
33 defined), 3082.110 (“person” defined), 3082.190 (“work of improvement” defined).

34    **§ 3089.160. Coverage of preliminary notice**

35       3089.160. (a) Except as provided in subdivision (b), a claimant need give only  
36 one preliminary notice (private work) to each person to which notice must be  
37 given under this article with respect to all labor, service, equipment, and material  
38 provided by the claimant for a work of improvement.

39       (b) If a claimant provides labor, service, equipment, or material under contracts  
40 with more than one subcontractor, the claimant shall give a separate preliminary  
41 notice with respect to labor, service, equipment, or material provided to each  
42 contractor.

1 (c) A preliminary notice that contains a general description of labor, service,  
2 equipment, or material provided by the claimant before the date of the notice also  
3 covers labor, service, equipment, or material provided by the claimant after the  
4 date of the notice whether or not they are within the scope of the general  
5 description contained in the notice

6 **Comment.** Section 3089.160 restates former Section 3097(g) without substantive change.

7 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, service, equipment, or  
8 material” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined), 3082.190  
9 (“work of improvement” defined).

10  **Staff Note. It is unclear whether the references to contractor and subcontractor in**  
11 **subdivision (b) are proper.**

12 **§ 3089.170. Direct contractor’s duty to provide information**

13 3089.170. A direct contractor shall make available to any person seeking to give  
14 a preliminary notice (private work) the following information:

15 (a) The name and residence address of the owner.

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

17 **Comment.** Section 3089.170 continues without substantive change the parts of former Section  
18 3097(l)-(m) relating to the direct contractor’s duty to provide information. For provisions  
19 concerning the content of contracts, see Section 3082.310 (contract forms).

20 See also Sections 14 (singular includes plural), 3082.020 (“construction lender” defined),  
21 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined), 3082.110 (“person”  
22 defined).

23 **§ 3089.180. Owner’s duty to give notice of construction loan**

24 3089.180. If a construction loan is obtained after commencement of work, the  
25 owner shall provide the name and address of the construction lender to each  
26 person that has given the owner a preliminary notice (private work).

27 **Comment.** Section 3089.180 continues former Section 3097(n) without substantive change.  
28 The reference to commencement of construction has been changed to commencement of work for  
29 consistency with the remainder of this title.

30 See also Sections 3082.020 (“construction lender” defined), 3082.100 (“owner” defined),  
31 3082.110 (“person” defined).

32 **§ 3089.190. Waiver void**

33 3089.190. An agreement made or entered into by an owner, whereby the owner  
34 agrees to waive the rights conferred on the owner by this article is void and  
35 unenforceable.

36 **Comment.** Section 3089.190 continues former Section 3097(e) without substantive change.

37 See also Section 3082.100 (“owner” defined).

38 **§ 3089.200. Disciplinary action**

39 3089.200. A licensed subcontractor is subject to disciplinary action under the  
40 Contractors’ State License Law, Chapter 9 (commencing with Section 7000) of

1 Division 3 of the Business and Professions Code, if all of the following conditions  
2 are satisfied:

3 (a) The subcontractor does not pay all compensation due to a laborer's  
4 compensation fund.

5 (b) The subcontractor fails to give a preliminary notice (private work) or include  
6 in the notice the information required by subdivision (b) of Section 3089.130.

7 (c) The subcontractor's failure results in the laborer's compensation fund  
8 recording a claim of lien, filing a notice to withhold funds, or asserting a claim  
9 against a payment bond.

10 (d) The amount due the laborer's compensation fund is not paid.

11 **Comment.** Section 3089.200 continues the substance of the second paragraph of former  
12 Section 3097(h), The first paragraph, relating to disciplinary action if a subcontractor fails to give  
13 preliminary notice on a work of improvement exceeding \$400, is not continued.

14 The reference to an "express trust fund" has been replaced by the defined term, "laborer's  
15 compensation fund" which arguably expands the scope of the provision. See Section 3082.050  
16 ("laborer's compensation fund" defined).

17 See also Sections 3082.060 ("lien" defined), 3082.120 ("preliminary notice (private work)"  
18 defined), 3082.180 ("subcontractor" defined), 3082.190 ("work of improvement" defined).

19 **§ 3089.210. Notices filed with county recorder**

20 3089.210. The county recorder may cause to be destroyed all documents filed  
21 under subdivision (o) of former Section 3097 on or after January 1, 2007.

22 **Comment.** Section 3089.210 supersedes former Section 3097(o) relating to filing the  
23 preliminary notice with the county recorder. This title no longer provides for filing a preliminary  
24 notice with the county recorder or for the county recorder to notify persons who filed a  
25 preliminary notice of the recording of a notice of completion or notice of cessation.

26 **§ 3089.220. Transitional provisions**

27 3089.220. (a) The inclusion of the language added to paragraph (5) of  
28 subdivision (c) of former Section 3097 by Chapter 795 of the Statutes of 1999  
29 does not affect the effectiveness of a preliminary notice given on or after January  
30 1, 2000, and before the operative date of the amendments of former Section 3097  
31 enacted at the 2000 portion of the 1999-2000 Regular Session, that otherwise  
32 meets the requirements of that subdivision.

33 (b) A preliminary notice given on or after January 1, 2000, and before the  
34 operative date of the amendments to former Section 3097 enacted at the 2000  
35 portion of the 1999-2000 Regular Session, is not ineffective because of failure to  
36 include the language added to paragraph (5) of subdivision (c) by Chapter 795 of  
37 the Statutes of 1999, if the notice otherwise complied with that subdivision.

38 (c) The failure to provide an affidavit form or notice of rights, or both, under the  
39 requirements of Chapter 795 of the Statutes of 1999, does not affect the validity of  
40 a preliminary notice under this article.

41 **Comment.** Section 3089.220 continues former Section 3097(p)(2) without substantive change.  
42 The transitional provision of former Section 3097(p)(1) is not continued due to lapse of time.

1 ☞ **Staff Note.** It is likely that these provisions will not have continued relevance by the time any  
2 Commission-proposed revisions would become effective — July 1, 2007, at the earliest.

3 Article 3. Completion

4 **§ 3089.410. Completion**

5 3089.410. (a) For the purpose of this title, completion of a private work occurs at  
6 the earliest of the following times:

7 (1) Actual completion.

8 (2) Occupation or use by the owner accompanied by cessation of labor.

9 (3) Cessation of labor for a continuous period of 60 days or, if a notice of  
10 completion is recorded, for a continuous period of 30 days.

11 (b) Notwithstanding subdivision (a), if a private work is subject to acceptance by  
12 a public entity, completion occurs on acceptance.

13 **Comment.** Section 3089.410 restates former Section 3086, but omits the provision of the  
14 former law that defined completion to include “acceptance” by the owner. References to  
15 occupation or use by an owner include those actions by the owner’s agent. See Section 3082.100  
16 (“owner” defined).

17 See also Sections 3082.130 (“private work” defined), 3082.140 (“public entity” defined).

18 ☞ **Staff Note.** We have simplified the draft of this section by limiting it to private works of  
19 improvement. We will expand it, or draft a parallel provision for public works, when we start  
20 working on remedies for public works. The lien remedy is not available on a public work.

21 This draft omits the provision of former law for completion on acceptance by the owner. That  
22 fact is not ordinarily communicated to a potential lien claimant. The notice of completion is a  
23 preferable substitute. See Section 3089.430 (notice of completion).

24 **The Commission particularly solicits comment on whether subdivision (b), relating to**  
25 **acceptance by a public entity, is useful.**

26 **§ 3089.430. Notice of completion**

27 3089.430. (a) On completion of a work of improvement an owner may record a  
28 notice of completion.

29 (b) The notice of completion shall be in writing, signed and verified by the  
30 owner, and contain all of the following information:

31 (1) The name and address of the owner and the nature of the owner’s interest.

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

36 (3) The name of the direct contractor, if any, for the work of improvement or, if  
37 the notice is given only of completion of a contract for a particular portion of the  
38 work of improvement as provided in Section 3089.440, the name of the direct  
39 contractor under that contract and a general statement of the kind of labor, service,  
40 equipment, or material provided under the contract.

41 (4) If signed by the owner’s successor in interest, the names and addresses of the  
42 successor’s transferor.

1 (5) The date of completion. An erroneous statement of the date of completion  
2 does not affect the effectiveness of the notice if the true date of completion is  
3 within 10 days preceding the date of recordation of the notice.

4 (6) If the notice is based on cessation of labor, the date on or about which labor  
5 ceased, and that cessation of labor has been continuous until recordation of the  
6 notice. If labor recommences before expiration of time for recording a claim of  
7 lien, the notice is ineffective.

8 **Comment.** Section 3089.430 combines former Section 3093 (notice of completion) with  
9 former Section 3092 (notice of cessation). For date of completion of a work of improvement, see  
10 Section 3089.410. For the effect of a notice of completion, see Sections 3083.320-.330 (time for  
11 claim of lien), 3083.710 (time for commencement of enforcement action).

12 This section eliminates the 10-day period for recording a notice of completion under former  
13 law. A claim of lien must be filed within 30 or 60 days after recording a notice of completion  
14 (depending on the nature of the claimant), subject to a maximum of 90 days after actual  
15 completion. See Sections 3083.320 and 3083.330 (recordation of claim of lien). This codifies the  
16 effect of existing law. See, e.g., *Doherty v. Carruthers*, 171 Cal. App. 2d 214, 340 P.2d 58  
17 (1959).

18 The second sentence of subdivision (b)(5), relating to recommencement of labor is new.

19 A notice of completion is recorded in the office of the county recorder of the county in which  
20 the site or part of it is situated. Section 3082.250 (filing and recording of papers). A notice of  
21 completion is recorded when it is filed for record. Section 3082.250 (filing and recording of  
22 papers).

23 As used in this section, the owner is the person who causes a building, improvement, or  
24 structure, to be constructed, altered, or repaired (or the owner's successor in interest at the date of  
25 a notice of completion is recorded) whether the interest or estate of the owner is in fee, as vendee  
26 under a contract of purchase, as lessee, or other interest or estate less than the fee, and includes a  
27 cotenant. A notice of completion may be signed and verified by the owner's agent. See Sections  
28 3082.100 ("owner" defined), 3082.260 (co-owners).

29 The reference to a successor's "transferors" is omitted from subdivision (b)(4). See Section 14  
30 (singular includes plural).

31 See also Sections 3082.030 ("labor, service, equipment, or material" defined), 3082.025  
32 ("direct contractor" defined), 3082.160 ("site" defined), 3082.190 ("work of improvement"  
33 defined), Section 3082.250 (filing and recording of papers).

34 ➡ **Staff Note.** The Commission particularly solicits comment on the workability of provision of  
35 subdivision (b)(6) that recommencement of labor after recordation of a notice of completion  
36 makes the notice ineffective.

### 37 § 3089.440. Notice of completion of contract for portion of work of improvement

38 3089.440. If a work of improvement is made under two or more contracts, each  
39 covering a portion of the work of improvement:

40 (a) The owner may record a notice of completion of a contract for a portion of  
41 the work of improvement. On recordation of the notice of completion, for the  
42 purpose of Sections 3083.320 and 3083.330 (recordation of claim of lien) a direct  
43 contractor is deemed to have completed the contract for which the notice of  
44 completion is recorded and a claimant other than a direct contractor is deemed to  
45 have ceased providing labor, service, equipment, or material.

1 (b) If the owner does not record a notice of completion under this section, the  
2 period for recording a claim of lien is that provided in Sections 3083.320 and  
3 3083.330.

4 **Comment.** Section 3089.440 continues the substance of former Section 3117, but eliminates  
5 the 10-day period for recording a notice of completion. A claim of lien must be filed within 60  
6 days after recording a notice of completion, subject to a maximum of 90 days after actual  
7 completion. See Sections 3083.320 and 3083.330 (recordation of claim of lien). This codifies the  
8 effect of existing law, See, e.g., *Doherty v. Carruthers*, 171 Cal.App.2d 214, 340 P.2d 58 (1959).

9 This section omits the rules found in former law governing the time for recording a claim of  
10 lien after a notice of completion for a portion of a work of improvement. The general rules  
11 governing the time for recording do not distinguish among types of notice of completion, and  
12 appear to be satisfactory for purposes of this section, with the clarification set out in subdivision  
13 (a). See Sections 3083.320 and 3083.330 (recordation of claim of lien).

14 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, service, equipment, or  
15 material” defined), 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined), 3082.190  
16 (“work of improvement” defined).

17  **Staff Note. The Commission solicits comment on the policy of this section.** Where there  
18 are two or more separate contracts on a single job, it may be advantageous for an owner-builder,  
19 for example, to narrow liability exposure. A notice of completion as to a portion of a project can  
20 also benefit subcontractors whose right to receive a retention may be triggered by the notice of  
21 completion. On the other hand, a notice of completion as to a portion of a project can also cause  
22 problems by triggering a lien claim or foreclosure as to that portion of the project. If that portion  
23 of the project is stand-alone, the foreclosure may be feasible; if it is part of an integrated whole,  
24 foreclosure may be difficult.

#### 25 § 3089.450. Notice of recordation by owner

26 3089.450. (a) An owner of a private work that records a notice of completion  
27 shall within 10 days after recordation give a copy of the notice by mail to all of the  
28 following persons:

29 (1) A direct contractor.

30 (2) A claimant that has given the owner a preliminary notice (private work). The  
31 owner shall enclose a copy of the preliminary notice (private work).

32 (b) If the owner fails to give notice to a person under subdivision (a), the time  
33 within which that person may record a claim of lien or file a notice to withhold  
34 funds is extended to 90 days after the date of recordation of the notice of  
35 completion. The extension of time is the sole liability of the owner for failure to  
36 give notice to a person under subdivision (a).

37 (c) This section does not apply to any of the following owners:

38 (1) A person that occupies the property as a personal residence, if the dwelling  
39 contains four or fewer residential units.

40 (2) A person that has a security interest in the property.

41 (3) A person that obtains an interest in the property pursuant to a transfer  
42 described in subdivision (b), (c), or (d) of Section 1102.2.

43 **Comment.** Section 3089.450 restates former Section 3259.5, replacing the notice of  
44 recordation with a copy of the recorded notice. As used in this section “owner” includes a person  
45 who has an interest in property (or the person’s successor in interest on the date a notice of  
46 completion is recorded) that causes a building, improvement, or structure, to be constructed,

1 altered, or repaired on the property), and includes a cotenant. See Section 3082.100 (“owner”  
2 defined). A notice is recorded when it is filed for record. Section 3082.250 (filing and recording  
3 of papers). The references to a “mechanic’s” lien in subdivision (a) have been deleted.  
4 Subdivision (a) is intended to apply to a site improvement lien as well. For service and proof of  
5 service by mail, see. Section 3082.240 (mailed notice).

6 Subdivision (b) is phrased in terms of the ineffectiveness of the notice of completion, in place  
7 of the existing references to extension of time.

8 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.025 (“direct  
9 contractor” defined), 3082.110 (“person” defined), 3082.120 (“preliminary notice (private work)”  
10 defined), 3082.130 (“private work” defined).

11 ➡ **Staff Note.** The provision of former Section 3097(o) relating to notice by the county recorder  
12 to persons who have filed the preliminary notice is not continued. Notice by the owner under  
13 Section 3089.450 is a more effective remedy.

## 14 Article 5. Waiver and Release

### 15 § 3089.610. Terms of contract

16 3089.610. (a) An owner or direct contractor may not, by contract or otherwise,  
17 waive, affect, or impair a claimant’s rights under this title, whether with or without  
18 notice, except with the claimant’s written consent, and any term of a contract that  
19 purports to do so is void and unenforceable.

20 (b) A claimant’s written consent is void and unenforceable unless and until the  
21 claimant executes and delivers a waiver and release under this article.

22 **Comment.** Section 3089.610 continues the first and second sentences of former Section  
23 3262(a) without substantive change. See Section 3082.010 (“claimant” defined).

24 See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined),  
25 3082.100 (“owner” defined).

### 26 § 3089.620. Waiver and release

27 3089.620. A claimant’s waiver and release does not release the owner,  
28 construction lender, or surety on a payment bond from a claim or lien unless both  
29 of the following conditions are satisfied:

30 (a) The waiver and release is in substantially the form provided in this article and  
31 is signed by the claimant.

32 (b) If the release is a conditional release, there is evidence of payment to the  
33 claimant. Evidence of payment may be (i) the claimant’s endorsement on a single  
34 or joint payee check that has been paid by the financial institution on which it was  
35 drawn or (ii) written acknowledgment of payment by the claimant.

36 **Comment.** Section 3089.620 continues the third and fourth sentences of former Section  
37 3262(a) without substantive change. The waiver and release may be signed by the claimant’s  
38 agent. See Section 3082.270 (agency). The term “financial institution” has replaced “bank” in  
39 subdivision (b) and in the forms provided in this article.

40 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),  
41 3082.060 (“lien” defined), 3082.100 (“owner” defined).

1 **§ 3089.630. Statement of claimant**

2 3089.630. An oral or written statement purporting to waive, release, impair or  
3 otherwise adversely affect a claim or lien is void and unenforceable and does not  
4 create an estoppel or impairment of the claim or lien unless either of the following  
5 conditions is satisfied:

- 6 (1) The statement is pursuant to a waiver and release under this article.  
7 (2) The claimant has actually received payment in full for the claim.

8 **Comment.** Section 3089.630 continues former Section 3262(b) without substantive change.  
9 See also Section 3082.010 (“claimant” defined).

10 **§ 3089.640. Accord and satisfaction or settlement agreement not affected**

11 3089.640. This article does not affect the enforceability of either an accord and  
12 satisfaction concerning a bona fide dispute or an agreement made in settlement of  
13 an action pending in court if the accord and satisfaction or agreement and  
14 settlement make specific reference to the claim or lien.

15 **Comment.** Section 3089.640 continues former Section 3262(c) without substantive change.  
16 See also Section 3082.060 (“lien” defined).

17 **§ 3089.650. Conditional waiver and release on progress payment**

18 3089.650. If a claimant is required to execute a waiver and release in exchange  
19 for, or in order to induce the payment of, a progress payment and the claimant is  
20 not, in fact, paid in exchange for the waiver and release or a single payee check or  
21 joint payee check is given in exchange for the waiver and release, the waiver and  
22 release shall be in substantially the following form:

23 **CONDITIONAL WAIVER AND RELEASE ON**  
24 **PROGRESS PAYMENT**

25 On receipt by the undersigned of a check from

26 \_\_\_\_\_  
27 (Maker of Check)

28 in the sum of \$ \_\_\_\_\_  
29 (Amount of Check)

30 payable to \_\_\_\_\_  
31 (Payee or Payees of Check)

32 and when the check has been properly endorsed and has  
33 been paid by the financial institution on which it is drawn,  
34 this document shall become effective to release any lien,  
35 notice to withhold funds, or bond right the undersigned has  
36 on the job of

37 \_\_\_\_\_  
38 (Owner)

39 located at \_\_\_\_\_  
40 (Job Description)

1 to the following extent. This release covers a progress  
2 payment for labor, service, equipment, or material provided  
3 to \_\_\_\_\_

4 (Your Customer)

5 through \_\_\_\_\_ only and

6 (Date)

7 does not cover any retentions retained before or after the  
8 release date; unpaid progress payments for which  
9 conditional waiver and releases have been given by the  
10 undersigned in the sum of  
11 \$ \_\_\_\_\_

12 (Amount)

13 dated \_\_\_\_\_;

14 (Date)

15 extras provided before the release date for which payment  
16 has not been received; extras or items provided after the  
17 release date. Rights based on work performed or items  
18 provided under a contract change which has been fully  
19 executed by the parties before the release date are covered  
20 by this release unless specifically reserved by the claimant  
21 in this release. This release of any lien, notice to withhold  
22 funds, or bond right shall not otherwise affect the contract  
23 rights of the parties, including rights between parties to the  
24 contract based on a rescission, abandonment, or breach of  
25 the contract, or the right of the undersigned to recover  
26 compensation for provided labor, service, equipment, or  
27 material covered by this release if that provided labor,  
28 service, equipment, or material was not compensated by the  
29 progress payment. Before any recipient of this document  
30 relies on it, the recipient should verify evidence of payment  
31 to the undersigned.

32 Dated: \_\_\_\_\_  
33 (Company Name)

34 By \_\_\_\_\_  
35 (Title)

36 **Comment.** Section 3089.650 continues former Section 3262(d)(1), with the addition of  
37 language relating to progress payments covered by previous releases that have not been paid. The  
38 references to a “mechanic’s” lien have been deleted from this section; it applies to a site  
39 improvement lien as well. The term “contract change” has replaced “written change order”.

40 See also Section 3082.010 (“claimant” defined).

41 **§ 3089.660. Unconditional waiver and release on progress payment**

42 3089.660. (a) If the claimant is required to execute a waiver and release in  
43 exchange for, or in order to induce payment of, a progress payment and the  
44 claimant asserts in the waiver it has, in fact, been paid the progress payment, the  
45 waiver and release shall be in substantially the following form:

46 UNCONDITIONAL WAIVER AND RELEASE ON  
47 PROGRESS PAYMENT



1 **Comment.** Section 3089.660 continues former Section 3262(d)(2) without substantive change.  
2 The references to a “mechanic’s” lien have been deleted from this section; it applies to a site  
3 improvement lien as well. The term “contract change” has replaced “written change order”.

4 See also Section 3082.010 (“claimant” defined).

5 **§ 3089.670. Conditional waiver and release on final payment**

6 3089.670. If the claimant is required to execute a waiver and release in exchange  
7 for, or in order to induce the payment of, a final payment and the claimant is not,  
8 in fact, paid in exchange for the waiver and release or a single payee check or joint  
9 payee check is given in exchange for the waiver and release, the waiver and  
10 release shall be in substantially the following form:

11 **CONDITIONAL WAIVER AND RELEASE ON**  
12 **FINAL PAYMENT**

13 On receipt by the undersigned of a check from  
14 \_\_\_\_\_ in the sum of \$ \_\_\_\_\_  
15 payable to \_\_\_\_\_ and when the check

16 has been properly endorsed and has been paid by the  
17 financial institution on which it is drawn, this document  
18 shall become effective to release any lien, notice to  
19 withhold funds, or bond right the undersigned has on the  
20 job of

21 \_\_\_\_\_  
22 (Owner)

23 located at \_\_\_\_\_  
24 (Job Description)

25 This release covers the final payment to the undersigned  
26 for all labor, service, equipment, or material provided to

27 \_\_\_\_\_  
28 (Your Customer)

29 on the job, except for disputed claims for additional work in  
30 the amount of \$ \_\_\_\_\_ unpaid progress payments for which  
31 conditional waiver and releases have been given by the  
32 undersigned

33 in the sum of \$ \_\_\_\_\_  
34 (Amount)

35 dated \_\_\_\_\_.  
36 (Dates)

37 Before any recipient of this document relies on it, the  
38 recipient should verify evidence of payment to the  
39 undersigned.

40 Dated: \_\_\_\_\_  
41 (Company Name)

42 By \_\_\_\_\_  
43 (Title)

44 **Comment.** Section 3089.670 continues former Section 3262(d)(3), with the addition of  
45 language relating to progress payments covered by previous releases that have not been paid, and

1 the addition of a line for identification of the waivant’s customer. The references to a  
2 “mechanic’s” lien have been deleted from this section; it applies to a site improvement lien as  
3 well.

4 See also Section 3082.010 (“claimant” defined).

5 **§ 3089.680. Unconditional waiver and release on final payment**

6 3089.680. (a) If the claimant is required to execute a waiver and release in  
7 exchange for, or in order to induce payment of, a final payment and the claimant  
8 asserts in the waiver it has, in fact, been paid the final payment, the waiver and  
9 release shall be in substantially the following form:

10 UNCONDITIONAL WAIVER AND RELEASE ON  
11 FINAL PAYMENT

12 The undersigned has been paid in full for all labor,  
13 service, equipment or material provided to

14 \_\_\_\_\_  
15 (Your Customer)

16 on the job of \_\_\_\_\_  
17 (Owner)

18 located at \_\_\_\_\_  
19 (Job Description)

20 and does hereby waive and release any right to a lien,  
21 notice to withhold funds, or any right against a labor and  
22 material bond on the job, except for disputed claims for  
23 extra work in the amount of \$\_\_\_\_\_.

24 Dated: \_\_\_\_\_  
25 (Company Name)

26 By \_\_\_\_\_  
27 (Title)

28 (b) Each unconditional waiver under this section shall contain the following  
29 language, in at least as large a type as the largest type otherwise on the document:

30 NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY  
31 AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE  
32 RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU  
33 SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN  
34 PAID, USE A CONDITIONAL RELEASE FORM.

35 **Comment.** Section 3089.680 continues former Section 3262(d)(4) without substantive change.  
36 The references to a “mechanic’s” lien have been deleted from this section; it applies to a site  
37 improvement lien as well.

38 See also Section 3082.010 (“claimant” defined).

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