

Memorandum 2006-3

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

This memorandum continues our review of the mechanics lien law, pursuant to a legislative request. The object of the study is to produce a revised statute that will be more user friendly than existing law, but not necessarily to make major changes in the mechanics lien law. Our goal is to circulate a tentative recommendation for public comment this summer, and to prepare a final recommendation for the 2007 legislative session.

Attached as an Exhibit to this memorandum are staff drafts and recent communications we have received relating to this project:

	<i>Exhibit p.</i>
• Design Professionals Lien (staff draft)	1
• Gordon Hunt, Pasadena (10/10/05)	6
• Herman Construction Co., Westlake Village (11/30/05)	11
• Fred Magid, Los Angeles (12/12/05).....	13
• Paul Atmajian (1/11/06)	13

These materials are discussed in the memorandum.

This memorandum also discusses issues previously raised by John A. Cape of the Department of Water Resources and Michael Schoenfeld of Sacramento. Their letters were distributed to the Commission at the November 2005 meeting and are attached to the First Supplement to Memorandum 2005-43 (available at www.clrc.ca.gov).

Also attached to this memorandum is the latest staff redraft of the mechanics lien law, incorporating Commission decisions to date. The staff draft includes a number of "notes". Some notes identify a technical matter on which we seek input from experts before we circulate a tentative recommendation. Others serve to call attention to a proposed change in the law that we wish to single out.

OUTLINE OF MEMORANDUM

The issues discussed in this memorandum are outlined below:

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LOCATION, NUMBERING, AND ORGANIZATION OF STATUTE

General Considerations

We anticipate some further reorganization of the statute before we release a tentative recommendation. For example, the provisions on preliminary notice, if not the provisions on completion and waiver and release, probably ought to be at the beginning of the statute rather than the end.

We also need to settle on a location and numbering scheme for the entire statute. We have preliminarily divided it into two parts — the private work material to remain in the Civil Code and the public work material to be relocated to the Public Contract Code. This division is subject to further consideration as we continue to work with the statute, and particularly as we review general provisions that would be applicable to both parts.

With respect to numbering, we have thought in the past that it might be useful at least to keep the same start number as existing law — Civil Code Section 3082. That would simplify matters by minimizing conforming changes in other codes, which typically cross-refer to the mechanics lien law by its start number. There are more than 50 of these cross-references. It should be noted, however, that the bulk of the cross-references relate to a public work, not to a private work. If we stick with our decision to relocate the public work material to the Public Contract Code, it will be necessary to change most of these 50 cross-references anyway.

We should be able to fit the revised statute into the same space the current statute occupies, even though we are breaking up existing sections into smaller pieces. The current statute is found at Civil Code Sections 3082 to 3267, for a total of 185 sections. Our current draft is approximately 170 sections, excluding the public work material. That would allow us to use whole numbers, although there might be considerable confusion between old Section 3097 and new Section 3097, for example. Moreover, there wouldn't be much room for expansion, so it might be necessary to use decimal numbers for new sections in the future.

A better approach could be to **relocate the statute to a new spot in the Civil Code** using new numbers that cannot cause confusion. This is particularly true if we remove the public works material and need to correct most of the statutory cross-references to the mechanics lien law anyway.

For example, the mechanics lien law could become Part 5 (commencing with Section 3600) of Division 4 of the Civil Code:

- Division 4. General Provisions
- Part 1. Relief (§ 3247)
- Part 2. Special Relations of Debtor and Creditor (§ 3429)
- Part 3. Nuisance (§ 3479)
- Part 4. Maxims of Jurisprudence (§ 3509)
- Part 5. Works of Improvement (§ 3600)
- Part 7. Automatic Checkout System (§ 7100)

That would permit the use of unique numbers and allow plenty of room for future expansion by appropriate spacing of numbers. The statute would also be easily locatable in the code books, a mere page or two from the very end of the Civil Code.

Design Professionals Lien

An architect, engineer, or land surveyor who provides design services to the owner and is not paid is entitled to a lien under the mechanics lien law. Civ. Code § 3110. The mechanics lien right of a design professional is supplemented by a separate lien — the Design Professionals Lien under Civil Code Sections 3081.1-3081.10.

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 unless construction is commenced. *D'Orsay Intern. Partners v. Superior Court*, 123 Cal. App. 4th 836, 20 Cal. Rptr. 3d 399 (2004).

The Design Professionals Lien parallels the mechanics lien, incorporates by reference the mechanics lien enforcement procedure, and is terminated by commencement of construction. (In that circumstance the design professional would be able to use the mechanics lien remedy).

The Commission preliminarily decided not to make an effort to integrate the Design Professionals Lien into the mechanics lien law. The statute is unique, is relatively recently enacted, and its incorporation would add to the complexity of the mechanics lien law.

The Commission requested that the staff take another look at the possibility of integrating the Design Professionals Lien in light of our development of general provisions for use in the mechanics lien law that may also have application to the Design Professionals Lien. The staff has made a mock up of how the statute might look as revised for incorporation into the mechanics lien law, showing changes in strikeout and underscore. See Exhibit pp. 1-5. (There may be some further standardization of language with the remainder of the mechanics lien law if we decide to proceed on this path.)

The drafting exercise suggests to the staff that some simplification can be achieved, and some unanswered questions addressed, by incorporating the Design Professionals Lien into the mechanics lien law. Standard terminology, processes, and forms can be used.

In addition, useful provisions of the mechanics lien law would be appropriately applied to the Design Professionals Lien. For example, the lien release procedures, whether by release bond or release order, should probably apply to the Design Professionals Lien as well as to the mechanics lien. Likewise remedies for a fraudulent claim of lien, and the like.

On the other hand, parts of the mechanics lien law would be inappropriately applied to the Design Professionals Lien. Priorities under the Design Professionals Lien are unique, for example, and should not be determined by the mechanics lien law. Similarly, the statutory recitation of who may obtain a mechanics lien should not apply to the Design Professionals Lien, which includes its own limitations. If the Commission decides to proceed with the incorporation, **the staff will need to prepare appropriate limiting language.** It will take some care, but the staff believes it is a manageable task.

One big picture question is whether the constitutional authority for a mechanics lien extends to design services for a work of improvement that is never built. The mechanics lien is based on an unjust enrichment theory —

recoupment of value provided by a person who has improved the property of another. But if the improvement is never built, no property is improved, and there is no enrichment.

The staff sees no impediment here. The constitutional language appears sufficiently broad to encompass work done for the benefit of property whether or not construction has been commenced:

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.

Cal. Const. Art 14, § 3.

In any event, the Legislature may create a statutory remedy for this circumstance whether or not it falls within the mandate of the constitutional provision.

GENERAL PROVISIONS

Multiple Owners

What rules should govern the situation where there are co-owners of property? Does notice to one bind all? Does a lien against the interest of one bind all? We have attempted to deal with these issues in the draft statute.

Ownership

To begin with, what is an “owner”? There are two types of owners under the mechanics lien law — the owner of the work of improvement contracted for, and the owner of the property on which the work of improvement is constructed. These are often the same person, but not always.

Our working draft defines owner:

§ 3082.100. Owner

3082.100. “Owner” means:

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

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

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

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

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

Whether the term has one meaning or the other depends on the context in which it is used. We think we have been careful throughout the draft to clarify the context where it is not otherwise apparent.

Co-Ownership

Particularly with respect to ownership of property, there may be issues of multiple ownership. The property may be held as community property or as tenancy in common, for example. The fee may be fragmented into lesser interests, including leaseholds, easements, reversionary interests, and the like.

We have tried to deal with the practicalities of those circumstances as well:

§ 3082.260. Co-owners

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

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

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

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

Reputed Ownership

Dick Nash of the Building Industry Credit Association has been concerned about the provision of proposed Section 3082.260(b) that notice to the owner of a

leasehold does not bind the owner of the fee. He thinks this may undermine the doctrine of reputed ownership:

We believe this provision would run counter to the preliminary notice provision set forth in 3089.120 which requires that the claimant give the preliminary notice to the "owner or reputed owner". The reputed owner option has always been available and normally it would be up to a court to determine if a claimant used due diligence to establish the owner's name and address or reputed name and address. The second sentence of paragraph (b) requires that complete accuracy be achieved in environment where complete accuracy is not achievable without undue expense.

The doctrine of reputed ownership is explained by Gordon Hunt:

Because claimants often do not know who the actual owner of the real estate is (note that the Court in [*Allen v. Wilson*, 178 Cal. 674 (1918)] noted that the name of the owner or reputed owner is not presumed to be within the knowledge of the claimant) and must rely on what the claimant is told as to the name of the owner and therefore, the Legislature has always used the word "reputed" and the Courts have rendered the decisions cited above with that in mind. Should a material supplier or an equipment rental company, dealing with a subcontractor or a sub-subcontractor, be required to do a title search to send a Preliminary Notice or record a lien to determine who the actual owner is? The answer is simply no. That would be an unreasonable burden and thus, notice to the "reputed owner" satisfies the requirements of the statute and notice to the "reputed owner" is sufficient to give notice to the actual owner.

Exhibit p. 10.

We don't want to revoke the doctrine of reputed ownership. But a claimant required to give notice to the owner of the property should not be able to evade that obligation by notifying a tenant.

Of course, where the tenant is contracting for the project, the tenant should receive the notice. But in that circumstance it is the tenant, not the owner of the fee, that is considered the "owner" for purposes of the mechanics lien law. Indeed, it is important that the owner also receive notice, since the owner needs to have an opportunity to protect itself in that situation by recording a notice of nonresponsibility.

A lien claimant that is required to notify the owner and that knows the identity of the owner should not be able to satisfy that obligation by notifying a tenant instead. The doctrine of reputed ownership is intended to deal with the situation where the claimant does not know the actual owner.

We could make that clear by **adding language to the section** or Comment or both:

§ 3082.260. Co-owners

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

(b) Notice to the owner of an interest in property is effective as to a co-owner of that interest. Notice to the owner of a leasehold or other interest in property that is less than a fee is not effective as to the owner of the fee. Nothing in this subdivision limits the effect of notice to a reputed owner where that notice is authorized by statute.

Comment. Section 3082.260 is new. It generalizes provisions found in former Sections 3092 (notice of cessation) and 3093 (notice of completion), and clarifies the effect of giving or receiving notice by co-owners. Under subdivision (b), notice to the owner of a leasehold may be effective as to the owner of the fee where the owner of the leasehold is the reputed owner of the fee and notice is given pursuant to statutory authority to notify the reputed owner. See, e.g., Section 30898.120 (preliminary notice requirement).

See also Sections 3082.100 ("owner" defined), 3082.190 ("work of improvement" defined).

Contract Change

Standardization

The existing mechanics lien law deals haphazardly with the effect of a contract change on provisions of the statute relating to the terms of the contract, particularly the contract price. We have attempted in the attached draft to deal with the issue globally by defining the terms "contract" and "contract price" to include a contract change, and using those terms consistently throughout the draft.

§ 3082.022. Contract

3082.022. "Contract" means an agreement between an owner and a direct contractor that provides for all or part of a work of improvement **and includes a contract change.**

Comment. Section 3082.022 continues former Section 3088 and adds a reference to a contract change. The term "contract change" has replaced "written modification of the contract" as used in former Section 3123. This codifies the effect of *Basic Modular*

Facilities, Inc. v. Ehsanipour, 70 Cal. App. 4th 1480, 83 Cal. Rptr. 2d 462 (1990).

This definition does not apply if the provision or context requires otherwise. Section 3082 (application of definitions). See, e.g., Sections 3082.100 (contract of purchase), 3082.310 (subcontract).

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

§ 3082.023. Contract price

3082.023. “Contract price” means the price agreed to by the parties for labor, services, equipment, or material provided pursuant to a contract, **including a contract change**. If the parties have not agreed to a price for labor, services, equipment, or material, the contract price is the reasonable value of the labor, services, equipment, or material provided pursuant to the contract.

Comment. Section 3082.023 generalizes provisions found in former Section 3123 (amount of lien) and throughout the mechanics lien law.

See also Sections 3082.022 (“contract” defined), 3082.030 (“labor, services, equipment, or material” defined).

Incidentally, existing law defines a “contract” as an agreement between an owner and direct (or “original”) contractor. That definition is problematic since the defined term is often used in the statute in an undefined sense (e.g., agreement between contractor and subcontractor). We might wish to **broaden the definition**:

§ 3082.022. Contract

3082.022. “Contract” means an agreement ~~between an owner and a direct contractor~~ that provides for all or part of a work of improvement and includes a contract change.

Comment. Section 3082.022 continues former Section 3088 and adds a reference to a contract change. The term “contract change” has replaced “written modification of the contract” as used in former Section 3123. This codifies the effect of *Basic Modular Facilities, Inc. v. Ehsanipour*, 70 Cal. App. 4th 1480, 83 Cal. Rptr. 2d 462 (1990).

This definition does not apply if the provision or context requires otherwise. Section 3082 (application of definitions). See, e.g., Sections 3082.100 (contract of purchase), ~~3082.310 (subcontract)~~.

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

If we do that, we will need to review usage in the draft to ensure that a provision intended to be limited to the direct contractor remains so limited. A similar issue arises in connection with a first tier subcontractor and lower tier subcontractors.

Effect of Contract Change on Amount of Lien

Existing law governing the amount of the lien states that the lien is for the lesser of the contract price or the reasonable value of the labor, services, equipment or material provided. On the other hand, the law says in the same breath that, “The lien shall not be limited in amount by the price stated in the contract as defined in Section 3088 [agreement between owner and direct contractor] ...” Civ. Code § 3123(a). How can these two contrary statements be reconciled?

Presumably, these provisions are intended to allow for recovery of “extras” agreed to by the owner but not included in the contract. But isn’t the owner’s agreement to extras in effect a modification of the contract? The agreement may be oral rather than written, but it is still compensable under the case law. See *Basic Modular Facilities*, cited in the Comment to proposed Section 3082.022, above. We do not limit a contract change for purposes of the statute to a written modification.

In light of these revisions, it would be logical to delete the words, “The lien shall not be limited in amount by the price stated in the contract.” However, our practical sense is that people would be worried that we are somehow changing the law relating to recovery for extras. They might also be concerned that the deletion could be interpreted to preclude recovery by a subcontractor or material supplier if the owner has paid the direct contractor the contract price. Probably **we are better off leaving the apparent inconsistency in the law**, for now.

Effect of Contract Change on Amount of Bond

The amount of the contract may affect more than lien recovery rights. For example, a payment bond or a lien release bond may be given, or security for a large project may be given, based on the contract price. What happens when a contract change increases the contract price? Does that invalidate the bond or security based on the original amount?

Theoretically, there should be a procedure in the law for demanding an increase in the amount of a bond or other security if there is an increase in the

contract price after the bond or other security is given. However, the staff would be reluctant to make this area of law more complex than it already is. Much as we are loth to do so, **we would leave the matter to case law resolution.**

NOTICE PROVISIONS

The mechanics lien law is replete with notices. There is preliminary notice, stop notice, notice of overdue laborer compensation, notice of nonresponsibility, notice to principal and surety, stop work notice, notice of completion, notice of cessation, etc. A major improvement to the law would be to reduce the number and types of notices that are flying about. However, we are resigned to the fact that we will be unable to make any significant inroads on the fundamental structure of the law. The most we can hope to achieve is some standardization.

In this memorandum we look at a number of notice issues, from the perspective of standardization:

- Terminology
- Contents of notice
- Manner of notice
 - General notice provision
 - Mailed notice
 - Posted notice
 - Recorded notice
 - Electronic notice
- Proof of notice
 - Proof of mailed notice
 - Proof of personal delivery
 - Proof of recording
- Address of person to be notified
 - Existing law
 - General provision
 - Public entity
- When notice is complete

Some provisions require service of a notice or other paper in connection with a court proceeding. We do not address those provisions here. Because they are court proceedings, they are governed by general rules of civil procedure. However, we do note that some of these provisions appear to be non-standard,

including unique service and proof of service provisions. We may be able to take a separate look at possibly standardizing these variants before this project is complete.

Terminology

The existing law employs a variety of terms for communicating information, besides “give notice”. For example, a party may be required to “notify” another party, to make a “demand” on a party, or to “advise” a party. In an effort to prepare groundwork for application of standard notice procedures, the staff has in this draft recast the various formulations in terms of giving notice.

Existing law also uses the terms “give notice” and “serve notice” inconsistently and interchangeably. The staff draft standardizes usage, and speaks in terms of giving notice.

We’re wondering now whether this was the right decision — **would it be better to speak in terms of serving notice?** The factors that influence us include (1) the formalities required for notice under the statute — registered or certified mail or personal delivery — are akin to service formalities, and (2) the consequences of the notice are significant, e.g., the person notified must halt contract payments pursuant to a stop payment notice.

Similarly, it may be more consistent with the formality of the notice requirements to make proof of service than to make proof of notice.

Contents of Notice

Obviously, each notice under the mechanics lien law serves a different purpose, so the contents of each notice will be unique. But each notice also includes some basic identifying information about the contract, the parties, the job location, etc. It appears to the staff that this formulaic material varies unnecessarily and is **readily susceptible to standardization**. The staff envisions something along the following lines:

§ 3082.236. Contents of notice

3082.236. (a) Except as otherwise provided by statute, notice under this title shall include all of the following information, to the extent known to the person giving the notice:

- (1) The name and address of the owner or reputed owner, and the nature of the owner’s interest.
- (2) The name and address of the direct contractor.
- (3) The name and address of the construction lender, if any.

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

(5) The name, address, and relationship to the parties of the person giving the notice.

(6) If the person giving the notice is a claimant:

(i) A general statement of the kind of labor, services, equipment, or material provided.

(ii) The name of the person to or for which the labor, services, equipment, or material is provided.

(iii) A statement of the claimant's demand, after deducting all just credits and offsets.

(b) Notice is not invalid by reason of any defect in form if the notice is sufficient to substantially inform the person given notice of the information required by this section and other information required in the notice.

Comment. Section 3082.236 is new. It generalizes and standardizes provisions found throughout former law. See, e.g., former Sections 3092 (notice of cessation), 3093 (notice of completion), 3097 (preliminary notice), 3103 (stop notice), 3252 (notice to principal and surety).

If a provision like this is added to the draft, that will enable us to clean out and substantially shorten the various notice statutes. One benefit will be that the key operative language of each type of notice will stand out and not be buried in repetitive verbiage.

Manner of Notice

Most notices under the mechanics lien law must be given by personal delivery, by leaving the notice at a specified place or with a specified person, or by deposit in the mail. Some notices are posted on the jobsite.

Some notices do not specify a manner — the information is simply communicated by notifying a person, making a demand, advising someone, providing a copy, making something available, etc. There is no indication in the statute how this is to be done.

Then there is constructive notice by recording — a key feature of the mechanics lien law.

We have already made significant efforts at standardization in the current draft, but that is just the tip of the iceberg. For example, we have recast most of the communications as notices, have added a general requirement that notices be

written, and have prescribed general rules governing mailed notice. See, e.g., proposed Sections 3082.235 (written notice), 3082.240 (mailed notice).

General Notice Provision

The staff thinks we can strike a further blow for standardization by providing a single general notice procedure, to be applied throughout the mechanics lien law. The general procedure would replace the individual variants applicable to one type of notice or another.

The staff proposes the following provision:

§ 3082.237. Manner of giving notice

3082.237. Except as otherwise provided by statute, notice under this title may be given by any of the following means:

- (a) Personal delivery.
- (b) Mail in the manner provided in Section 3082.240.
- (c) Leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons in a civil action.

Comment. Section 3082.237 is new. It generalizes and standardizes provisions found throughout former law. See, e.g., former Sections 3097 (preliminary notice), 3103 (stop notice), 3144.5 (notice of release bond), 3227 (notice to principal and surety), 3259.5 (notice of recordation of notice of completion), 3260.2 (stop work notice).

This title may prescribe a different or more limited manner of giving a particular notice. See, e.g., [to be provided].

This would enable us to **simplify and standardize the draft statute** by replacing the following provisions:

Notice to principal and surety on bond

- **mail, personal delivery, or service** in the manner provided by law for the service of a summons in a civil action

Notice to claimant of lien release bond

- **mailing** a copy of the bond

Stop payment notice

- given by **mail** with the same effect as by **personal delivery**

Stop work notice

- **delivering** it personally
- **leaving** it at the person's address of residence or place of business with a person in charge
- **mailing** it to the person

- if the person to be notified does not reside in the state, notice shall be given by any method provided above or, if the person cannot be notified by any method provided above, by **mail** addressed to the construction lender, if any
- the owner shall forward to the construction lender, a copy of the notice by **first-class mail**

Preliminary notice (private work)

- **delivering** it personally
- **leaving** it at the person's address of residence or place of business with a person in charge
- **mailing** it to the person
- if the person to be notified does not reside in the state, a preliminary notice (private work) shall be given by any method provided in subdivision (a) or, if the person cannot be notified by any method provided in subdivision (a), by **mail** addressed to the construction lender or the direct contractor

Notice of completion

- copy of the notice by **mail**

Preliminary notice (public work)

- given by **mail** or **personal delivery**.

Stop payment notice (public work)

- **mailing** or **personally delivering** the notice

Notice to principal and surety on a payment bond (public work)

- notice by **mail**, **personal delivery**, or **service** in the manner provided by law for the service of a summons in a civil action

Mailed Notice

Although some provisions of existing law permit notice simply by first class mail, most require registered or certified mail. The Commission decided to standardize this approach in the current draft:

§ 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 or by another method of delivery providing for overnight delivery.

(b) Notice is complete when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure.

(c) Proof that the notice was given in the manner provided in this section shall be made by (1) a return receipt or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself, (2) proof of mailing certified by the United States Postal Service, or (3) a tracking record or other documentation certified by an express service carrier showing delivery of the notice.

Comment. Section 3082.240 is a new provision included for drafting convenience. It generalizes a number of provisions of former law, expands the methods of proof to include a certification of the mailing by the United States Postal Service, and expands the methods of giving notice to include delivery by express service carrier.

The provision for delivery by a private express service carrier is an innovation. The Commission decided to request public comment on this provision when it is circulated as a tentative recommendation.

One issue that has been called to our attention is that, as drafted, subdivision (a) appears to require overnight mail, not just overnight delivery service as we had intended. John A. Cape of the Department of Water Resources suggests that any method of delivery that provides proof of delivery should be sufficient.

The staff is concerned about that suggestion. Prompt delivery should be required, since notice would be complete when deposited with an express service carrier. The staff would make clear that the **overnight delivery requirement does not apply to registered or certified mail**, but that registered or certified mail must be sent first class:

(a) Notice shall be given by (i) first class registered or certified mail or by (ii) Express Mail or another method of delivery providing for overnight delivery.

Posted Notice

A few notices under the mechanics lien law are required to be posted:

Notice of nonresponsibility

- **post** the notice in a conspicuous place on the site

Stop work notice

- **post** in a conspicuous location at the site and at the main office of the site, if one exists, notice of intent to give a stop work notice

Notice of cancellation of stop work notice

- **post**, in a conspicuous location at the site and at the main office, if one exists

We assume there is good reason to post these particular notices. The posting requirement is generally supplemented by recording, giving a copy to subcontractors, or the like. But we could **simplify and standardize the posting statute** with a general provision, such as:

§ 3082.245. Posting

3082.245. A notice required by this title to be posted shall be posted in a conspicuous location at the site and at the main office of the site, if one exists.

Comment. Section 3082.236 is new. It generalizes and standardizes provisions found in former law. See, e.g., former Sections 3094 (notice of nonresponsibility), 3260.2 (stop work notice).

Recorded Notice

Recording is used to give constructive notice under the mechanics lien law. We have drafted a standard recordation provision:

§ 3082.250. Filing and recording of papers

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

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

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

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

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

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

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

The staff believes this provision will generally work well with the various recorded notice provisions in their current form.

Electronic Notice

The Commission has previously considered the possibility of moving towards electronic notification under the statute. That would have a number of beneficial effects, including (1) reducing the flow of paperwork, (2) reducing the time required for notice, (3) lessening the cost of mailed or delivered notice, and (4) facilitating monitoring of claims, deadlines, etc., by means of electronic databases. However, the Commission concluded that, while the high end of the construction industry might be ready for this, the low end is still paper based and it would be a mistake to get the law ahead of the curve. This is something for the future.

Nonetheless, the staff thinks that we should at least consider making it clear that **electronic notification is permissible where the party to be notified has agreed to it**. The Commission developed a workable system for this in the context of administrative rulemaking under the state’s administrative procedure act. This appears to be adaptable for mechanics liens:

§ 3082.235. Written notice

3082.235. (a) Notice under this title shall be in writing.

(b) Written notice under this title may be given by electronic communication to the extent authorized under Section 3082.243.

Comment. Subdivision (a) of Section 3082.235 generalizes various provisions of existing law. See, e.g., former Civ. Code §§ 3092 (notice of cessation), 3093 (notice of completion), 3094 (notice of nonresponsibility), 3097 (preliminary notice (private work)), 3098 (preliminary notice (public work)), 3103 (stop notice).

Subdivision (b) is new.

See also Section 14 (writing includes printing and typewriting).

3082.243. Electronic communication

3082.243. (a) As used in this section, “electronic communication” includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) A notice under this title may be given to a person by means of electronic communication if the person has expressly indicated a

willingness to receive the notice by means of electronic communication.

Comment. Section 3082.243 is new. It is drawn from Government Code Section 11340.85 (administrative procedure act). See also Section 14 (writing includes printing and typewriting). See also Section 3082.110 (“person” defined).

What would constitute an “express indication” of willingness under this provision? The staff can visualize work orders, etc., that include boilerplate to the effect that any person that provides, or accepts, labor, services, equipment, or material pursuant to the work order is deemed to have agreed to receive notices electronically.

We are also somewhat concerned about requiring an express indication of willingness to receive a fax. We suspect that a faxed notice is widely accepted and treated with the same effect as an original in the industry. A provision like that set out above could give a person a technical excuse to avoid the effect of a faxed notice.

The **input of practitioners** on these issues would be helpful.

Proof of Notice

Proof of Mailed Notice

The general mailed notice provision we have drafted includes standardized proof of notice procedures:

§ 3082.240. Mailed notice

3082.240. ...

(c) Proof that the notice was given in the manner provided in this section shall be made by (1) a return receipt or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself (2) proof of mailing certified by the United States Postal Service, or (3) a tracking record or other documentation certified by an express service carrier showing delivery of the notice.

The provision for proof of notice by mail has been expanded to include the United States Postal Service’s certificate of mailing. Norm Widman of the Lumber Association of California and Nevada has previously raised the point that this certificate has limited value — it shows only that something was mailed, not that it was delivered.

The staff agrees that a certificate of mailing is not as good as a signed receipt. The question is whether the delivery service provided by the United States Postal Service is sufficiently reliable that proof of mailing should be all that is necessary to demonstrate that notice has been given. This is perhaps a matter on which the Commission should seek **comment from people in the field**.

Mr. Widman also raises the question of changing technology, and whether the statute as drafted adequately accounts for it. For example, the United States Postal Service provides tracking information, and will email a PDF record of the tracking information on request. Some delivery services use electronic signature capture as their proof of delivery.

The staff thinks the draft statute could perhaps be **further generalized** to allow for changing methods of proof of delivery:

(c) Proof that the notice was given in the manner provided in this section shall be made by (1) a return receipt, delivery confirmation, signature confirmation, or other proof of delivery or attempted delivery provided by the United States Postal Service, or a photocopy of the record of delivery and receipt maintained by the United States Postal Service, showing the date of delivery and to whom delivered, or in the event of nondelivery, by the returned envelope itself (2) proof of mailing certified by the United States Postal Service, or (3) a tracking record or other documentation certified by an express service carrier showing delivery of the notice.

Proof of Personal Delivery

Our draft statute does not include general provisions on proof of notice by personal delivery. There are proof of delivery models in the statutes governing preliminary notice and the stop work notice. See Civ. Code §§ 3097, 3199, 3260.2. The staff would **generalize these provisions**:

§ 3082.239. Proof of notice

3082.239. (a) Proof that notice was given to a person in the manner required by this title shall be made by the proof of notice affidavit described in subdivision (b) and, if given by mail, shall be accompanied by proof in the manner provided in Section 3082.240.

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

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

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

Comment. Section 3082.239 is new. It generalizes and standardizes provisions found throughout former law. See, e.g., former Sections 3097 (preliminary notice), 3260.2 (stop work notice).

Proof of Recording

The staff does not think we need any special provisions for proof of recording. The recorded document itself is evidence of the fact of recordation. There may be an issue with a delay between the time a document is filed for record and the time it is actually recorded by the county recorder. This is examined below under “When Notice is Complete”.

Address of Person to be Notified

Existing Law

The address at which notice is to be given may vary, apparently inconsistently, with the type of notice to be given. Standards used in the statute include:

Notice to Owner

- Address of residence or place of business (preliminary notice or stop work notice)
- Address shown on building permit (preliminary notice or stop work notice)
- Address on construction trust deed (preliminary notice or stop work notice)
- Address of construction lender if owner resides out of state and cannot otherwise be notified (stop work notice)

Notice to Construction Lender

- Address of residence or place of business (preliminary notice)
- Address on construction trust deed (preliminary notice)
- Address in construction loan agreement (stop work notice)

Notice to Direct Contractor

- Address of residence or place of business (preliminary notice)
- Address shown on building permit (preliminary notice)
- Any place contractor maintains an office or conducts business or at the contractor’s residence (preliminary notice (public work))

Notice to Claimant

- Address on claim of lien (release bond)
- Address as shown in any of the following (release petition):
 - (1) Preliminary notice (private work) given by claimant
 - (2) Records of the Contractors' State License Board
 - (3) Contract on which claim of lien is based
 - (4) Claim of lien
- Address shown in stop payment notice (notice of non-withhold)
- Address shown on stop payment notice (public work)
- Last known address (release of funds withheld (public work))

Notice to Principal and Surety

- Principal's last known address
- Admitted surety insurer, at the office of or in care of (i) the statutory agent of the surety in this state, (ii) an officer of the surety in this state, or (iii) the agent designated by the surety in the bond as the address at which notice is to be given.
- Personal surety, at the surety's residence or place of business, if known; or if not known, in care of the clerk of the county in which the bond is recorded.

Notice to Public Entity

- If Department of Transportation or Department of General Services, address of disbursing office of department (preliminary notice (public work))

General Provision

Can we cut through some of this complexity and try to **standardize the scheme**? For example:

§ 3082.238. Address at which notice is given

3082.238. (a) Notice under this title shall be given to the person to be notified at an address prescribed in this section. If the person giving notice knows of more than one address for the person to be notified, notice shall be given at the last known address of the person to be notified.

(b) Notice under this title shall be given to the person to be notified at the address of the person's residence or place of business, or at any of the following addresses:

(1) If the person to be notified is an owner, at the address shown on the contract, the building permit, or a construction trust deed.

(2) If the person to be notified is a construction lender, at the address shown on the construction loan agreement or construction trust deed.

(3) If the person to be notified is a direct contractor, at the address shown on the contract or building permit, or on the records of the Contractors' State License Board.

(4) If the person to be notified is a claimant, at the address shown on the contract, preliminary notice, claim of lien, stop payment notice, or claim against a payment bond, or on the records of the Contractors' State License Board.

(5) If the person to be notified is the principal or surety on a bond, at the address provided in the bond for service of notices, papers, and other documents.

Such a statute would enable us to greatly simplify the recitation of proper addresses for giving notice sprinkled throughout the mechanics lien law.

There are several noteworthy points about this attempt at standardization:

- The statute does not continue the unique provision of existing law enabling a **stop work notice** to be given to the owner at the address of the construction lender if the owner resides out of state and cannot otherwise be notified. The general provisions on notification appear to be adequate to handle this situation.
- The statute does not continue the unique provision under existing law enabling notice to a **personal surety** to be given in care of the clerk of the county in which the bond is recorded, if the surety's residence or business address is unknown. The bond and undertaking law requires every bond to include the address at which the principal and sureties may be served with notices, papers, and other documents. Code Civ. Proc. § 995.320.
- The statute does not continue the unique provision under existing law enabling notice to an **admitted surety insurer** to be given at the office of or in care of (i) the statutory agent of the surety in this state, (ii) an officer of the surety in this state, or (iii) the agent designated by the surety in the bond as the address at which notice is to be given. The bond and undertaking law requires every bond to include the address at which the principal and sureties may be served with notices, papers, and other documents. Code Civ. Proc. § 995.320.

- The statute does not address notice to a **public entity**. That matter is dealt with separately, below.

Public Entity

We would provide a **special rule for notice to a public entity** under a public works contract:

§ 42065. Notice to public entity

42065. Notice to a public entity shall be addressed to the public entity at the office of the disbursing officer of the public entity or at another address specified in the contract.

Comment. Section 42065 supersedes former Section 3098 (preliminary notice of public work). Notice under this part may be given by mail or personal delivery as provided in Section [3082.237 (manner of giving notice)].

This would generalize the existing provision applicable to preliminary notice to the Department of General Services or Department of Transportation. Civ. Code § 3098.

The proposed expansion is derived from a suggestion by John A. Cape of Department of Water Resources, who states:

This section should designate the disbursing officer of the public entity as the default recipient of the preliminary notice and permit the entity to designate another address if it so chooses. The disbursing officer issues the payments to the direct contractor and is in the best position to keep the file of preliminary notices and verify that they are in hand when it receives a stop payment notice. There is no reason to single out two state agencies as the only ones to have the notices given to the disbursing officer. This situation arises because some agencies sponsor legislation that suits their needs without taking into account that other agencies should be included.

When Notice is Complete

A variety of rules determine when notice is complete:

- The general rule for mailed notice is that it is complete when deposited in the mail.
- Some provisions of the stop notice statute refer to the time of receipt of a notice, rather than the time notice is given.
- Notice of a hearing on a lien release petition is complete on the fifth day following deposit in mail.

- A stop work notice given by certified mail is effective on receipt, but if given by registered mail is effective five days after mailing.

The staff would **standardize these provisions** by eliminating the variants and providing one set of general rules. A general provision dealing with the matter might look something like this:

§ 3082.255. When notice complete

3082.255. Notice under this title is complete at the following time:

- (a) If given by personal delivery, when delivered.
- (b) If given by mail, when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure.
- (c) If given by leaving the notice and mailing a copy in the manner provided in Section 415.20 of the Code of Civil Procedure for service of summons in a civil action, five days after leaving the notice.
- (d) If given by posting, when posted.
- (e) If given by recording, when filed for record in the office of the county recorder.

We believe this provision will be generally workable. Granted, there may be a few days' delay between the time a notice is deposited in the mail and the time it is delivered, but as far as we can tell the delay will not be significant enough to substantially prejudice the recipient's rights. If the shortening of time would be problematic for a particular type of procedure, we will need to lengthen the response time accordingly.

The staff is aware of a potential problem with recorded notice that is worth mentioning. Under the statute as drafted, recording is complete when the notice is filed for record with the county recorder. But there may be some delay before the county recorder actually takes steps to make the recorded notice a matter of public record. We do not know if that could cause a problem for a person that relies on apparent nonrecording of a notice that actually has been filed for record. **The staff would flag this issue for public comment** in the tentative recommendation.

PRELIMINARY NOTICE

Preliminary Notice in Small Contract

We have received a comment critical of the general requirement that a claimant must give a preliminary notice in order to exercise the lien remedy, particularly where the amount involved is small:

I am a licensed general contractor and my business of choice is handyman work. Many of my jobs are two hours to a few days. Filing a preliminary notice is not practical and sometimes clients don't want to pay after I have completed a job that they state they are happy with my work but just don't want to pay. I would appreciate if your study would be of some help to contractors like myself.

Charlie Crites, Daddy Can Fix It (email 10/20/05).

Does the preliminary notice serve a useful purpose? Or is it simply a technical requirement that creates paperwork and expense without a corresponding benefit, that may enable an owner to avoid an otherwise proper lien?

We have heard differing views on the value of the preliminary notice requirement. Although the preliminary notice system may complicate the mechanics lien process for marginal benefit, there are a number of significant considerations that argue for its retention:

(1) **Project management.** It has been urged to us that preliminary notice is essential to enable the owner to monitor potential claims against the property by subcontractors and material providers. The owner can then structure payments to the direct contractor in such a way as to ensure that claimants are paid, e.g. by use of joint checks, releases, and the like.

(2) **Constitutionality.** The mechanics lien law as presently constituted is of borderline constitutionality. It has been upheld by a divided California Supreme Court against a due process challenge. It enables a person unilaterally to impose a lien on another's property without the owner of the property having prior notice or an opportunity to be heard. In upholding the constitutionality of the remedy, the court noted that there is a rough approximation of due process in the form of the preliminary notice and an opportunity for the owner to seek judicial relief. Elimination of the preliminary notice would undermine the basis for the constitutionality of the mechanics lien.

(3) **Political reality.** We learned early on in this study that we cannot make a major improvement to the mechanics lien process. The best we can hope for is

clarification and minor streamlining. That is because there are numerous stakeholders involved in a work of improvement and none is willing to give up any rights it has under the law. A consensus of all stakeholders would be necessary, and that is not possible under current conditions.

In any event, the staff's reading is that the minor streamlining we have tentatively developed so far routinely favors a claimant over the property owner. We will not be able to obtain enactment of an unbalanced proposal. Elimination of the preliminary notice for a small project would go the opposite direction from where we need to be.

Time of Preliminary Notice

Under existing law, the preliminary notice must be served promptly. It is referred to as a "20-day preliminary notice" because it activates a claimant's rights for labor, service, equipment, or material provided within 20 days before the notice and thereafter.

We have received a communication suggesting that a notice given 20 days after material is provided is too late. Preliminary notice should be given before the material is provided. See comments of Paul Atmajian, Exhibit p. 13.

Dr. Atmajian relates his experience with a concrete supply company that provided concrete for his project. The company gave the 20-day preliminary notice to the owner after the concrete was delivered, and after the owner had paid the direct contractor for the work. The direct contractor never paid the concrete supplier. The concrete supplier brought action to recover from the owner. It's the classic double liability problem that arises under our mechanics lien law in its present form.

In this case, there is the added twist that apparently the direct contractor was known to the concrete supplier to be delinquent in paying bills. "If a supplier knows that a certain contractor is at risk of not paying, but delivers materials to a property anyway, they are simply participating in fraud, plain and simple. But the supplier knows that they can use the mechanics lien law; therefore, there is no incentive for the supplier to refuse delivery to contractors with a bad record or inform a property owner of possible anticipated problems BEFORE the fact!" Exhibit p. 14.

Dr. Atmajian's proposed remedy is to require that preliminary notice be given before delivery of materials, and that the advance notice should include information about the direct contractor's payment record.

This is an interesting idea. The staff does not recollect that we considered this option at the time we were working on the double liability problem. We suspect that type of notice requirement could cause operational problems in the construction industry, but we should hear from experts on the matter. Also, whether as a practical matter the owner will actually read the notice, and question the owner's own contractor, is dubious.

MECHANICS LIEN

Notice of Filing Claim of Lien for Record

We have been working on a provision that requires a lien claimant to notify the owner when a claim of lien is recorded. Our latest draft provides:

3083.355. (a) At the time of filing a claim of lien for record the claimant shall give notice of the filing to the owner or reputed owner of property subject to the claim of lien.

(b) Notice of filing a claim of lien for record shall include a copy of the claim of lien and a statement of the date and place where the claim of lien is filed.

(c) The claimant shall mail notice of filing a claim of lien for record to the owner at an address reasonably calculated to give the owner actual notice.

Comment. Section 3083.355 is new. A claim of lien may not be recorded unless accompanied by proof of notification of the owner. Section 3083.353 (notice prerequisite to recording claim of lien). An unenforceable lien may be expunged. Section 3083.810 (petition for release order).

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

We have tried to deal with some of the logistical problems of notifying the owner that a claim of lien has been recorded by keying the notice to the filing rather than to the recordation of the claim of lien. We would also revise this provision for consistency with our general provisions on the address to which notice is given and when notice is complete.

Gordon Hunt points out that the proposed notice requirement is new and, when combined with a provision for expungement of a lien where notice is not given, would seem to violate the overall thrust of this project to simplify and clarify but not to make significant substantive changes to the lien law. Exhibit p. 9.

The staff would **expunge from the Comment the reference to expungement.** That reference is a relic from an earlier draft and is no longer apt.

Mr. Hunt is correct that a notification requirement would be a substantive change to the law. But whether it amounts to a major change in procedure is questionable. Requiring a lien claimant to notify the owner when a claim of lien is recorded is a fairly modest addition to the statute and, in comparison with what is involved with recording a claim of lien and the significant consequences of recordation, a fairly modest burden on the lien claimant.

The Commission has tentatively agreed to a number of revisions to the statute at the suggestion of Mr. Hunt and of others representing the interests of claimants. While none is overwhelming in itself, cumulatively they substantially bias the proposed statute in favor of claimants. The staff believes that some balance needs to be built into our proposal, or it will go nowhere in the Legislature. Notice to the owner that a claim of lien has been filed for record is one area where we can help right the imbalance, if only modestly.

Moreover, it is a change that most people would agree is reasonable. A claim of lien can easily be recorded by a claimant, but once recorded it is difficult to free the property from its encumbrance. We have heard numerous instances of a contractor recording a claim of lien without just cause, or failing or refusing to release a recorded lien even though the claim has been satisfied. An owner can be surprised to find a stale lien encumbering the property when the owner seeks to refinance or sell the property, but the lien claimant is nowhere to be found or refuses to execute a release.

We received a phone call recently from an owner who was in a dispute with his contractor over the workmanship on a project. The contractor was threatening to impose a mechanic's lien. The owner was incredulous that the law could allow a contractor to impose a lien without any notice, leaving it to the owner to continuously monitor the land records to determine if a claim of lien had in fact been recorded.

The staff believes it is a fairly modest step to require notice to the owner, so that the owner can take whatever protective action may be called for.

Another, though more intrusive, way to get at the same problem would be to require that a claim of lien be bonded. And why not? The law allows anyone to record a claim of lien and tie up property simply by filing a piece of paper with the recorder and paying a small fee. There is no requirement of a showing of the validity of the claim, other than the claimant's say-so.

If the owner wants to clear a false claim of lien from the record without going to court, the owner must give the claimant a release bond. It would be perfectly

parallel to require up front that a claimant that wants to impose an involuntary lien, without the need to go to court and demonstrate probable validity, should give a recording bond. That would also help the fairness (and the constitutionality) of the lien remedy.

The staff does not recommend a lien bond. It would impose an unwarranted cost in the routine case where the claim of lien is perfectly correct and appropriate. But requiring a lien claimant simply to notify the owner when filing a claim of lien for record is an inexpensive and unintrusive alternative to build a little balance into the system.

Penalty for Recording False Claim of Lien

We have received a letter from a general contractor, Herman Construction Co., detailing its experience with a false claim of lien. See Exhibit pp. 11-12.

According to Mr. Herman (who was the direct contractor on the project), one of the subcontractors that had already been paid recorded a false claim of lien against the property. Since the direct contractor was required by the contract with the owner to keep the property free of liens, the direct contractor tried to get the subcontractor to release the lien, without success. Eventually, short of incurring the expense and delay of going to court, the direct contractor had to record a release bond in the amount of 150 percent of the false claim of lien in order to free the property of the lien.

Mr. Herman notes that a claim of lien may be overstated, and the requirement that a person come up with a bond in the amount of 150 percent of the overstated demand in order to obtain a release is onerous. "This is not easy to do and could force a General Contractor into a Contract Breach situation with an Owner and hold up regular Contract Work progress payments until the property title could be cleared. A lot more needs to be done regarding the misuse and malicious use of Mechanics Lien Rights." Exhibit p. 12. Mr. Herman observes that some other states impose penalties for false, fraudulent liens — "This would help."

The Commission has in the past considered proposals along these lines. The Commission concluded that something needs to be done to deter a fraudulent claim of lien. Common law remedies should be adequate. However, there is some case law to the effect that recordation of a claim of lien is privileged.

The Commission's current draft reads:

§ 3083.370. Damages for false claim of lien

3083.370. (a) If a claimant records a claim of lien containing erroneous information with intent to slander title or defraud, the claimant is liable for damages caused by the recordation, including costs and a reasonable attorney's fee incurred in a proceeding to invalidate the lien and recover damages.

(b) An owner may not commence an action for damages under this section unless at least 10 days before commencement the owner gave the claimant notice demanding that the claimant execute and record a release of the claim of lien and the claimant failed to do so. A demand given under Section 3083.815 (demand prerequisite to petition for release order) satisfies the requirement of this subdivision.

(c) The owner has the burden of proof of all elements of an action for damages under this section.

Comment. Section 3083.370 is new. It reverses case law to the effect that recordation of a claim of mechanics lien is privileged. See, e.g., *Pisano & Associates v. Hyman*, 29 Cal. App. 3d 1, 105 Cal. Rptr. 414 (1972).

See also Sections 3082.010 ("claimant" defined), 3082.060 ("lien" defined), 3082.100 ("owner" defined).

Does the Commission think anything further needs to be done in light of Mr. Herman's experience?

Time for Commencement of Enforcement Action

The Commission has been seeking cost effective ways to expunge from the record a claim of lien that is unenforceable due to the passage of time. One approach is to give statutory protection to a bona fide purchaser that acquires property beyond the 90-day enforceability period of a mechanics lien. The intent is to enable a title insurer to insure around the recorded claim of lien. We have sent draft language to the title insurers, and are awaiting their response.

The current version of our proposed statute revision reads:

§ 3083.710. Time for commencement of enforcement action

3083.710. (a) The claimant shall (1) commence an action to enforce a lien and record either a notice of the pendency of the action or of an extension of credit under subdivision (b) within 90 days after recordation of the claim of lien. If the claimant does not record either notice of the pendency of an action or an extension of credit within the time provided in this subdivision, the claim of lien expires and is unenforceable.

(b) If the claimant and owner agree to extend 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 and record a notice of the pendency of the action within 90 days after the expiration of the credit, but in no case later than one year after completion of the work of improvement. If the claimant does not record notice of the pendency of an action within the time provided in this subdivision, the claim of lien expires and is unenforceable.

Comment. Section 3083.710 restates former Section 3144 and adds the requirement that a claim of lien is unenforceable if a *lis pendens* is not recorded within the statutory periods.

Subdivision (b) makes clear that the owner must be a party to the extension of credit. This codifies the rule in *Richards v. Hillside Development Co*, 177 Cal. App. 2d 776, 2 Cal. Rptr. 693 (1960) and overrules *Dorer v. McKinsey*, 188 Cal. App. 2d 199, 10 Cal. Rptr. 287 (1961)

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. All of the following provisions apply to a claim of lien that expires and is unenforceable under Section 3083.710:

(a) The rights of a purchaser or encumbrancer for value and in good faith acquired after the claim of lien expires and is unenforceable are not affected by an extension of credit, or by an extension of the lien or of the time to enforce the lien, recorded before or after the acquisition of the rights by the purchaser or encumbrancer.

(b) The claim of lien does not constitute actual or constructive notice of any of the matters contained, claimed, alleged, or contended in the claim of lien, or create a duty of inquiry in any person thereafter dealing with the affected property.

Comment. Subdivision (a) of Section 3083.720 supersedes former Section 3145. It makes clear that an extension of credit or of the time to enforce a lien after expiration of a claim of lien does not resurrect the claim of lien.

Subdivision (b) is drawn from Code of Civil Procedure Section 405.60 (*lis pendens*).

See also Section 3082.060 (“lien” defined).

We have not yet heard from the title insurers on this issue. However, he have received a note from Gordon Hunt to the effect that requiring a *lis pendens* by the 90th day is not workable. He explains that in many cases a lien claimant files an enforcement action on the 90th day. When that occurs, due to the logistics of the court filing system, it may take as long as a week to make the *lis pendens* a matter of record. “I would suggest that a possible way of addressing this practical problem would be to allow the claimant to record the Notice of

Pendency of Action within ten days after the foreclosure action is filed.” Exhibit p. 2.

This sounds reasonable to the staff. **We would make the following adjustment** to the proposal:

§ 3083.710. Time for commencement of enforcement action

3083.710. (a) The claimant shall commence an action to enforce a lien ~~and record either a notice of the pendency of the action or of an extension of credit under subdivision (b)~~ within 90 days after recordation of the claim of lien. If and record a notice of the pendency of the action within 100 days after recordation of the claim of lien. Except as provided in subdivision (b), if the claimant does not record either commence an action and record notice of the pendency of ~~an action or an extension of credit~~ the action within the time provided in this subdivision, the claim of lien expires and is unenforceable.

(b) If the claimant and owner agree to extend 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 and record a notice of the pendency of the action within 90 days after the expiration of the credit, but in no case later than one year after completion of the work of improvement. If the claimant does not commence an action and record notice of the pendency of an action within the time provided in this subdivision, the claim of lien expires and is unenforceable.

Effect of Expungement of Lien

Herman Construction Co. is concerned about the lien expungement process. Mr. Herman notes that under the law, even after he goes to court and gets an order canceling a false claim of lien, that does not preclude the claimant from filing another false claim of lien.

Now if I understand the law, the Solit v Tokai Bank case in 1999 (81 Cal. Rptr. 2d 243) ruled that after we petition the court to release a lien, only the referenced Mechanics Lien is released and not the right of someone to file another bogus lien for the same bogus work until the project is complete and the statutory lien period lapses and then anyone can still file another bogus, fraudulent lien if they feel like it because the penalty for doing this is very little.

Exhibit p. 11.

Mr. Herman’s reading of the law is correct. The theory is that even though a particular claim of lien may be cancelled — typically for failure to timely enforce

it — that does not cancel the underlying lien right. As long as the underlying lien right is still enforceable, a new claim of lien may be filed and enforcement action taken.

That analysis does not quite address Mr. Herman's hypothetical, in which a court determines that the underlying claim is false and not lienable. In that situation the court determination would be res judicata and there would be no right to record a claim of lien on the same underlying claim.

However, this theory does not cure the reality that there is nothing in the lien law to stop a person from recording a false claim of lien at any time. The California Supreme Court has held that due process does not require a prior determination of probable validity of the claim. The property owner's remedy is to go to court to get the lien released, with the award of costs and attorneys fees as a deterrent, supplemented in our current draft by possible damages for slander of title.

Short of making a radical change to the system, such as requiring a court determination of probable validity or requiring the lien claimant to give a lien bond, the staff does not see any practical alternative. One would hope that, if we are able to make clear that a fraudulent claim of lien is not privileged, the prospect of civil damages would act as a deterrent.

Small Claims

Are the procedures for obtaining a release of lien adequate in the event of a small claim? We have received a note reciting one person's adverse experience in trying to get an invalid lien removed from the record:

Situation is as follows. Back in summer of 2005 I rented a trash container from a company that later claimed that I owed them more than I paid. The company recorded a Mechanic's Lien on my property and also opened a small claims court case. In small claims court the company lost the case and the judge ruled the judgment in my favor. However up until today I'm having a very hard time removing this lien. I have contacted Los Angeles County Recorders office but they will not release the lien without a court order. But the court will not give me any papers. They tell me that they do not deal with Mechanic's Liens.

Fred Magid, Exhibit p. 13 (edited).

Mr. Magid's situation presents an interesting test of the statutory scheme. The superior court has limited civil case jurisdiction in a proceeding to enforce, foreclose, or release, a mechanics lien of \$25,000 or less. Code Civ. Proc. §

86(a)(6). May a limited civil case of this type be handled in small claims court where the claim of lien is within the small claims jurisdictional limit?

Effective January 1, 2006, an action may be brought in small claims court for recovery of money if the amount of the demand does not exceed \$7,500 in the case of a natural person or \$5,000 in the case of other persons. Code Civ. Proc. §§ 116.220(a), 116.221. The court may, in lieu of or in addition to money damages, grant equitable relief in the form of rescission, restitution, reformation, or specific performance. Code Civ. Proc. § 116(b). This provision has not been construed, but the staff does not believe it would encompass enforcement or release of a mechanics lien.

The claimant's action in Mr. Magid's case was not brought to enforce the lien in small claims court — it was brought as an independent civil action for damages. Had the claimant recovered judgment in the small claims action, the claimant would not have been able to enforce the mechanics lien, but would have been required to bring a separate mechanics lien enforcement action. The small claims judgment would not have res judicata effect in a mechanics lien enforcement action. However, the claimant could obtain a judgment lien on the basis of the small claims judgment and enforce that.

By parity of reasoning, Mr. Magid's small claims judgment denying the claim would be insufficient to release the mechanics lien, since lien release authority is not within the jurisdiction of the small claims court. But the judgment in Mr. Magid's favor would be given res judicata effect in a lien expungement proceeding. The differential res judicata treatment of a small claims judgment derives from the fact that it is the plaintiff that selected the forum and is therefore bound by a judgment of that forum.

These issues are not new to the Commission:

Another writer — homeowner Paula Gelber Dromi — has a similar tale to tell. Her contractor did shoddy work, they reached an impasse, and the contractor filed a claim of lien. The homeowner attempted mediation; the contractor refused. The homeowner got the Contractor's State License Board involved, and won \$4,000 in arbitration. When the contractor failed to pay, his license was revoked. There ensued a long saga of the homeowner trying to get the lien removed through small claims court, and failing after several orders. "I haven't taken the next step of getting it certified and going back to the County recorder's office which has said it will only accept a form stating the lien has been satisfied from the contractor. ... This has been a continuing nightmare."

Memo. 2004-31 (available at www.clrc.ca.gov).

The draft statute we are developing tentatively proposes a number of revisions to address this sort of problem, such as allowing use of the expungement procedure for other reasons besides expiration of the time to enforce a lien, making clear the availability of damages in case of a fraudulent claim of lien, and removing the \$2,000 cap on the award of attorneys fees in an expungement proceeding. See proposed Section 3083.810 et seq. (release order).

The Commission has also considered a possible expansion of small claims jurisdiction to include an expungement proceeding:

§ 3082.805. Court proceedings

3082.805. Proceedings under this article may be maintained in the small claims division of the superior court if the claimant's demand after deducting all just credits and offsets does not exceed \$5,000.

Comment. Section 3082.805 clarifies the rule that a mechanics lien release order may be made in small claims court. See Code Civ. Proc. §§ 86(a)(6) (petition to release mechanics lien of \$25,000 or less is limited civil case), 87 (limited civil case may be brought in small claims court). See also Section 3082.220 (jurisdiction and venue).

Memo. 2005-4 (available at www.clrc.ca.gov).

The Commission rejected this proposal. Sam Abdulaziz' comments were instructive:

Generally, I have a problem with small claims courts deciding contested issues dealing with a subject as complicated as Mechanic's Liens. I would also suggest that the \$5,000.00 relate to the "claim," rather than "the claim after deducting credits and offsets." The determination of credits and offsets alone could be a significant problem.

First Supp. to Memo. 2005-4 (available at www.clrc.ca.gov).

Is the Commission inclined to revisit this issue? One option would be to make clear that **a court determination on the merits is entitled to res judicata effect** in the expungement proceeding:

§ 3083.810. Petition for release order

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

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

(2) The claim of lien is invalid under Section 3083.360.

(3) The claimant's demand stated in the claim of lien has been paid in full.

(4) None of the labor, services, equipment, or material stated in the claim of lien has been provided.

(5) The claimant was not licensed to provide the labor, services, equipment, or material stated in the claim of lien for which a license was required by statute.

(6) There is a final judgment in another proceeding that the petitioner is not indebted to the claimant for the demand on which the claim of lien is based.

(b) This article does not bar any other cause of action or claim for relief by the owner of the property, nor does a release order bar any other cause of action or claim for relief by the claimant, other than an action to enforce the lien. However, another action or claim for relief may not be joined with a petition under this article.

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

Comment. Subdivision (a)(1) of Section 3083.810 continues former Section 3154(a) without substantive change. Subdivisions (a)(2)-(5)(6) are new. The owner need not wait until expiration of the time to commence an enforcement action before bringing a petition to release an invalid claim of lien under this section. Cf. Section 3083.360 (forfeiture of lien for false claim).

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

See also Sections 3082.010 ("claimant" defined), 3082.030 ("labor, services, equipment, or material" defined), 3082.060 ("lien" defined).

PAYMENT BOND

An owner or a construction lender may require the direct contractor to give a payment bond as a condition of awarding the contract to the direct contractor. The payment bond covers the direct contractor's default in passing a contract payment through to a subcontractor or material supplier, thereby protecting the owner against the risk of double liability. Under the statute, if the owner records the direct contractor's payment bond in the amount of 50% of the contract price, the owner's liability exposure is limited to the contract price.

In order to enforce the liability on a bond under the statute, a claimant must (1) give a preliminary notice or (2) notify the principal and surety within 75 days after completion (or if a notice of completion is recorded, with 15 days after recordation). If the payment bond is recorded, the claimant must commence an enforcement action within six months after completion.

Gordon Hunt suggests that the statute be revised to require the owner to provide a copy of a payment bond to any claimant that gives a preliminary notice. The consequence of failure to comply would be to toll the six month statute of limitations for enforcement of a recorded bond until a copy of the bond is provided. In the case of an unrecorded bond, the claimant would be unaware of its existence, and would simply pursue lien and stop notice remedies instead. Exhibit pp. 7-8.

Mr. Hunt suggests a number of beneficial consequences of this proposal, that has the potential to save substantial time and expense for both the claimant and the owner. In the case of a recorded payment bond:

- (1) A claimant that is aware of the bond will seek payment from the surety without resorting to a lien or stop payment notice (unless the claimant is unsuccessful in collecting from the surety).
- (2) Where the claimant is represented by counsel, the claimant will be advised that its primary remedy is against the bond (due to the double liability protection of the statute), thereby short circuiting the filing of a lien and the serving of a stop payment notice.

In the case of an unrecorded payment bond:

- (1) The owner can attempt to convince the claimant that it ought to seek recovery from the surety rather than encumbering the owner's property with a lien or the construction funds with a stop payment notice.
- (2) The claimant may find it more attractive to proceed against a solvent surety than go to the expense of recording a lien and serving a bonded stop notice.

That all sounds logical to the staff. But if it's in the owner's interest to give each claimant a copy of the payment bond, wouldn't the owner just do it? Do we need a statute to require it?

We have heard that it's not so easy to collect from a surety on a bond, particularly a corporate surety that may be well represented by counsel. The easier collection route may be through a lien or a stop payment notice, regardless of the existence of a payment bond.

We wonder whether the bonding industry would think that giving a copy of the bond to each claimant is a good idea. As the staff has noted on numerous occasions, we will need to develop a consensus among stakeholders that the proposed changes are sound, or we won't get very far in the Legislature.

If the Commission is interested in pursuing this concept, we will highlight the change in the tentative recommendation and try to **get input from stakeholders** before, rather than after, legislation is introduced.

COMPLETION ISSUES

Completion is a critical concept under the mechanics lien law. Completion of a work of improvement triggers time limits for recording a claim of lien, enforcing the liability on a payment bond, and paying the direct contractor a retention withheld by the owner, among other consequences.

Completion may be deemed to have occurred in a number of circumstances, besides actual completion, for purposes of triggering the time limits. For example, completion occurs on cessation of labor for a continuous period of 60 days, or on occupation or use by the owner accompanied by cessation of labor.

The owner may shorten time limits by recording a notice of completion. Under existing law, to be effective, a notice of completion must be recorded within 10 days after actual completion. Our proposed law allows a notice of completion to be recorded more than 10 days after actual completion, and simply starts the time limits running later.

The Commission concluded to allow a notice of completion more than 10 days after actual completion, based on comments we had received. The following discussion is from Memorandum 2004-31 (available at www.clrc.ca.gov):

The owner may record a notice of completion. The notice must be recorded within ten days after the date of completion. Civ. Code § 3093. Recordation triggers the statutory period for a claimant to record a claim of lien. See Civ. Code §§ 3115, 3116.

Mr. Stiepan suggests that, rather than requiring a notice of completion to be recorded within a narrow window of ten days, the provision should be revised to provide that the lien filing period is extended on a day-for-day basis for any notice of completion recorded after the ten day period. Mr. Hunt thinks it's unnecessary to revise the statute along these lines since case law gives the same result. *Doherty v. Carruthers*, 171 Cal.App.2d 214, 340 P.2d 58 (1959). The staff notes that case is based on an estoppel theory. It may be helpful to spell it out by statute rather than relegating the matter to case law.

Dick Nash has been concerned about the effect of a late recorded notice of completion. Under the proposed law, a direct contractor must record a claim of lien within 90 days after completion or, if a notice of completion is recorded, within 60 days after recordation. See proposed Section 3083.320 (time for claim of lien by direct contractor). A claimant other than a direct contractor also has 90 days after completion, but if a notice of completion is recorded, that is cut down to 30 days after recordation. See proposed Section 3083.330 (time for claim of lien by claimant other than direct contractor).

Suppose completion occurs, and the 90 day period starts running. After 80 days, the owner, for reasons we are unable to fathom, suddenly decides to record a notice of completion. Does this trigger a new 60 day period for the direct contractor, and a new 30 day period for other claimants? Or does the original 90 day period continue to run?

The proposed law takes the position that in this situation the 90-day-since-completion rule prevails over the 60- or 30-day-since-recordation rule. This position is based on the concept that recordation of a notice of completion is intended to give the owner a way of shortening the time for recording a claim of lien; it should not have the opposite effect of lengthening it.

Mr. Nash objects to this resolution. He argues, "Under the proposed language if an owner recorded a notice of completion on the 80th day, claimants would have only 10 days to record their liens. When a notice of completion is recorded more than 10 days after completion, we believe that only the recording date of the notice of completion should operate to trigger the 30 or 60 day lien period."

For support, Mr. Nash refers to the case of *Doherty v. Carruthers*, 171 Cal. App. 2d 214, 340 P.2d 58 (1959), which is mentioned in the Comment to proposed Section 3089.430 (notice of completion). In that case the owner (or the direct contractor, acting as the owner's agent) recorded a notice of completion on the 70th day after completion. (It is not clear why, since absent that recordation the lien claim period would have expired in 20 more days.) The notice of completion falsely stated that completion had occurred just three days earlier. Lien claimants, relying on the recorded notice, filed their claims within 30 days after recordation, but more than 90 days after actual completion. The court found that the claimants had detrimentally relied on the false statement in the notice of completion, and the owner was estopped from asserting the true date of completion and the running of the 90-day period.

The staff believes the Commission's position on this issue is sound, but the Commission may want to give this matter further review in light of Mr. Nash's comments. In any event, the staff would **revise the reference to *Doherty* in the Comment** to make clear that the statutory limits for recording a claim of lien are subject to estoppel principles.

TIME FOR ENFORCEMENT OF REMEDIES

As it worked its way through the various remedies in the mechanics lien law, the Commission decided it would consider the possibility of harmonizing the times for enforcing a claim of lien, a stop payment notice, and a payment bond.

Claim of Lien

A claim of lien must be recorded within 90 days after completion or 60 or 30 days after recordation of a notice of completion, depending on the type of claimant. An action to enforce the lien must be commenced within 90 days after recordation of the claim of lien. Civ. Code § 3144.

Stop Payment Notice

A stop payment notice must be given within the time within which a claim of lien must be recorded. An action to enforce the stop payment notice must be commenced not earlier than 10 days after giving the notice and not later than 90 days after expiration of the time within which a notice must be given. Civ. Code §§ 3172 (private work), 3210 (public work).

Payment Bond

An action to enforce a private work payment bond must be commenced within six months after completion. Civ. Code § 3240.

An action to enforce a public work payment bond must be commenced within six months after the period in which a stop payment notice may be given. Civ. Code § 3249.

Staff Analysis

The staff would be **reluctant to try to standardize** the enforcement times for these various remedies. The enforcement times seem roughly appropriate for the nature of the remedy. For example, it makes sense to allow a claimant a longer enforcement time on a public work payment bond than on a private work

payment bond because that may be the claimant's principal remedy on a public work (the lien remedy not being available).

Although we like the concept of standardization, we learned early on in this project that every stakeholder jealously guards its existing rights, and there is not much interest in giving up anything substantial for the sake of clarity, simplification, or standardization. That appears to be the case even if the right that is given up will be offset by another right that may be more beneficial.

The staff does not believe that any party hurt by changing an enforcement period for the sake of uniformity would agree that is a change worth making.

PUBLIC WORKS CONTRACT

Payment Bond

The payment bond requirements for a public works contract are confusing, both in their application and in their coverage. The Commission decided to investigate what is being done in practice with respect to public work payment bonds, and to see whether there is any possibility of creating some uniform provisions applicable to all public work payment bonds.

Existing Practice

Public Contract Code Section 7103 requires a payment bond in every construction contract over \$5,000 awarded by a "state entity":

For purposes of this section, "state entity" means every state office department, [sic] division, bureau, board, or commission, but does not include the Legislature, the courts, any agency in the judicial branch of government, or the University of California. All other public entities shall be governed by the provisions of Section 3247 of the Civil Code.

Gov't Code § 7103(d). Section 3247 of the Civil Code requires a payment bond in every contract over \$25,000 awarded by a public entity, "except as provided in subdivision (d) of Section 7103 of the Public Contract Code".

This bit of circularity leaves us in doubt as to the rule applicable to the Legislature, the judiciary, and the University of California. Are they exempted from any payment bond requirement, or are they subject to the \$25,000 requirement of Section 3247? The law is unclear.

The judicial branch, for example, believes that the intent of the existing statutory scheme is that it be exempted from any payment bond requirement.

The judicial branch believes that, in any event, separation of powers doctrine would immunize it from any statutory payment bond requirement. However, the judicial branch voluntarily requires a payment bond in a contract over \$25,000. This has not been a significant issue in the past because most court facilities were county owned. The judicial branch will be more heavily involved with construction contract matters in the future, now that the state has taken control of the trial courts.

The University of California also believes it is constitutionally exempt from any statutory payment bond requirement. See Cal. Const. art. IX, § 9. Nonetheless, UC voluntarily adheres to the rule of Section 7103 and requires a payment bond in contracts over \$5,000. However, UC would resist, on principle, any legislation that purports to require a payment bond in a UC construction contract.

State Contract Act

To complicate matters, there are additional payment bond requirements applicable to a public works contract under the State Contract Act. Pub. Cont. Code §§ 10100-10285.1. Subject to a number of exceptions, that act applies to a state project for which the total cost exceeds \$100,000, as adjusted to reflect changes in the annual California Construction Index. Pub. Cont. Code § 10105.

The State Contract Act requires that every contract covered by it include a payment bond executed by an admitted surety insurer. Pub. Cont. Code § 10221. Subject to exceptions, the bond must be at least one-half the contract price. Pub. Cont. Code § 10222.

A key exception to the one-half contract price requirement of Section 10222 is “except as otherwise provided in Section 3248 of the Civil Code.” At the time Section 10222 was written, Civil Code Section 3248 provided a sliding scale for the amount of the payment bond required for a public work, based on the contract price. That scheme was changed beginning in 1998 and 2000, so that now Section 3248 requires that, “The bond shall be in a sum not less than one hundred percent of the total amount payable by the terms of the contract.” Civ. Code § 3248(a).

Another problem is that the exact scope of the State Contract Act is not defined. A bond under that act is subject to approval of the “department” (see Pub. Cont. Code § 10221), which is defined to mean the Department of Water Resources, General Services, Boating and Waterways, or Corrections, with

respect to a project within its jurisdiction, or the Department of Transportation with respect to all other projects (see Pub. Cont. Code § 10106). This may suggest a limited scope. There is no case law on the matter.

Bottom Line

As nearly as we can tell, reading all these statutes together and interpreting legislative intent as charitably as possible, and running roughshod over perhaps unintended tricky exceptions to exceptions, and assuming there are no other statutes lurking out there, the staff would sum up the current state of affairs in this way:

- A public entity other than the state must require a 100% payment bond in a construction project over \$25,000.
- The state, other than Legislature, the judiciary, or the University of California, must require a 100% payment bond in a construction project over \$5,000.
- It is unclear what, if any, requirements apply to the Legislature, the judiciary, and the University of California. There are constitutional considerations affecting these entities, and their practices with respect to requiring a payment bond in their construction contracts vary.
- Special rules may apply to specific types of state projects that are the subject of an express statute. For example, CalTrans may specify a smaller than 100% payment bond in a project over \$250,000,000, subject to limitations.

Assuming our reading of existing law and practice is correct, the staff would not try to provide uniform rules applicable to all public works contracts, state and local. The public cost implications are too great, and such a proposal would undoubtedly sink into oblivion. We would **maintain the status quo** when we circulate the tentative recommendation for comment.

Preliminary Notice

Michael Schoenfeld has written to suggest that the preliminary notice requirement for a public and private work of improvement be made uniform. He notes two differences in particular that are problematic.

Preliminary Notice by Subcontractor

A first tier subcontractor is required to give preliminary notice for a private work but not for a public work. Mr. Schoenfeld believes this is a problem — there will be claimants that the public entity and direct contractor do not know about:

These include union trust funds. While a sub on a private job needs to identify in the preliminary notice the trust funds it is signatory to, the same is not true on a public works job as no preliminary notice is required. Therefore, there is no way a prime or owner is provided notice of what union trust funds who are signatories to first tier subs may claim money via stop notice or bond claims.

First Supp. to Memo. 2005-43, Ex. p. 10 (available at www.clrc.ca.gov).

Mr. Schoenfeld gives a recent example of a general contractor on a public work that experienced double payment liability because it had not received notice of potential trust fund rights. “Why should the result on a public project be different than on a private project? I cannot think of a valid reason. The fairness and equity of the checks and balances which are set up in the work of improvement section of the civil code is missing from this area and needs to be corrected.” *Ibid.*

Mr. Schoenfeld argues for consolidating the public and private work preliminary notice provisions into a single uniform scheme. He believes this would be workable:

My suggestion is not burdensome on subs. Most who perform public work also perform private work in my experience as well. Therefore, they are aware of the preliminary notice requirements. Further, to be licensed, the qualifiers are educated about the preliminary notice requirements and, simply stated, it is good practice to send such a notice when a job is started regardless of what tier a sub may be.

The need to plug this hole exists and upon reflection I cannot think of a valid reason why there are different rules for public and private projects. I recommend CLRC seriously consider merging the two statutes.

Ibid.

This position makes sense to the staff. We suggest that the draft tentative recommendation **require a first tier subcontractor on a public work to give preliminary notice**, just as on a private work. With any luck, that will generate

comment indicating whether Mr. Schoenfeld is correct that this would not be burdensome on a subcontractor.

Post-Completion Notice

Generally, preliminary notice is a prerequisite to exercise of any of the statutory remedies for a public or private work of improvement. But the statutes include a unique remedy for a claimant that has failed to give the required preliminary notice. Such a claimant may still recover against a payment bond if the claimant gives notice to the principal and surety on the bond within 75 days after completion of the public work (or within 15 days after a notice of completion is recorded). See, e.g., Civ. Code § 3252 (public work).

This statutory scheme was enacted in 1994. It replaced a system that required a claimant to give a bond notice within 90 days after the claimant last provided labor, services, equipment, or materials for which the claim was made. Under the new scheme, the claimant must give the same 20-day preliminary notice generally required or, failing that, may give the 75/15 day post completion notice.

According to the Senate Judiciary Committee analysis of the 1994 legislation, the purpose of the change in law was to require a payment bond claimant to give earlier notice of the claim than the former 90 day post-completion notice. The post completion notice provision was a compromise added to the bill:

Default rights for unsophisticated subcontractors

While existing law requires licensed contractors to file 20-day preliminary notices, that same requirement does not apply to material suppliers and other subs eligible to assert claims against a payment bond. Thus, while the proposed symmetrical structure for all the notices may work for licensed contractors, it could unfairly cut off the rights of some laborers and material suppliers who are unsophisticated or simply unaware of the mechanics' lien law procedures. In response to this concern, AB 3357 has been amended to allow a person to assert a claim against the payment bond for full payment of provided services or materials so long as a claim is made with 15 days after recordation of a notice of completion. Operationally, this reduces a claimant's time to file a payment bond claim for payment from 90 days under existing law to 15 days. This is fair compromise, asserts AGC, because it preserves the right of a material or labor supplier to recover full payment from the payment bond if he provides early notice of his claim.

Sen. Judic. Comm., *Analysis of AB 3357* (6/16/94).

Mr. Schoenfeld argues that the post-completion notice provision causes a problem by allowing a belated claim to be filed. It undermines the orderly payment of funds, since a bond principal must always be concerned about the possibility that an unknown claimant that did not give a preliminary notice may make a bond claim after the fact. Although the provision was included in the law as a safety valve for a claimant unaware of the preliminary notice requirement, "After more than a decade I know of no facts ever arising that illustrate that this provision is needed." First Supp. to Memo. 2005-43, Ex. p. 11 (available at www.clrc.ca.gov).

The staff would be reluctant to disturb a legislative compromise such as this. On the other hand, the compromise perhaps was intended primarily to protect an unsuspecting claimant who might have been unaware of the change in law from a 90 day post-completion notice to a 20 day preliminary notice. To that extent, Mr. Schoenfeld may be correct that the passage of time has rendered the safety valve of Section 3252 unnecessary.

The staff notes, however, that the Senate Judiciary Committee's analysis of cleanup legislation enacted in 1995 does not speak of transitional concerns:

To address concerns that an all-inclusive strict requirement to file a "preliminary 20-day notice" would create a trap for "unsophisticated" laborers and material suppliers who may be unaware of the requirement and therefore fail to file, provisions were enacted to allow the filing of a claim on payment bond within 15 days if a notice of completion was recorded, and within 75 days after completion of the work of improvement if no notice is recorded.

Sen. Judic. Comm., *Analysis of AB 901* (6/12/95).

The staff notes that this statutory scheme is not unique to a public works contract. A parallel scheme also applies to a private work of improvement. Civ. Code § 3242.

The staff believes it is at least worth **making inquiry of subcontractors and material suppliers as to the continued need for the post completion safety valve**. It can be expected that, looking out for their own interests, they will maintain that it remains essential. On the other hand, the staff believes that we must create a balance in any proposed changes in the law if we are to develop an enactable legislative proposal. So far our tentatively approved changes routinely favor subcontractors and material suppliers. Maybe this is one they can agree to

in favor of general contractors, in the interest of a balanced and enactable package.

Completion Issues

Under existing law, cessation of labor for 30 days on a public work is deemed completion, and for 60 days on a private work is deemed completion. Civ. Code § 3086. Gordon Hunt has suggested that the public work cessation period be extended to 60 days, both for uniformity and because a 60 day period is more realistic. The Commission has asked the staff for background on the differential treatment.

The legislative intent behind this provisions is lost in the mists of time. The concept that cessation of labor for 30 days is deemed completion entered California law in 1887. That was extended to 60 days in the case of a private work in 1951, but there is no legislative history to shed light on the reasons, if any, for the differential treatment.

As with the mechanics' lien statutes in general, no legislative history is available to explain the legislative intent underlying the amendments to the completion equivalents. Thus, it is uncertain if the subtle changes in punctuation and paragraph structure, which gradually altered the original meaning and context of the completion equivalents, represent substantive legislative intent or merely sloppy drafting.

Bronstein, *Trivial(?) Imperfections: The California Mechanics' Lien Recording Statutes*, 27 Loy. L.A. L. Rev. 735, 763 (1994) (fn. omitted).

Since we cannot ascertain the original reasons for the differential treatment, our focus should shift to whether the 30 day cessation of labor period for a public work is causing problems in practice. Mr. Hunt has indicated that it can. Perhaps the best way to proceed at this point is to **solicit comment on the issue** from the public entities and others reviewing the tentative recommendation.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

DESIGN PROFESSIONALS LIEN

Article 1. Definitions

§ 3082.024. Design professional

~~3081.1. For purposes of this chapter, “design~~ 3082.024. “Design professional” means ~~any a~~ a certificated architect, registered professional engineer, or licensed land surveyor ~~who furnishes that provides~~ services pursuant to a written contract with ~~a landowner~~ an owner 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.~~

Comment. Section 3082.024 restates the first paragraph of former Section 3081.1. The introductory clause and the second paragraph of former Section 3081.1 are not continued because they are surplus. See Section 3082 (application of definitions).

See also Sections 3082.022 (“contract” defined), 3082.190 (“work of improvement” defined).

Staff Note. As currently drafted, the term “design professional” is used only in the definition of “lien” below, and in the “Design Professionals Lien” article below. However, it may be convenient to use the term in other places in the mechanics lien law, such as preliminary notice, which deals with preliminary notice by a “certificated architect, registered professional engineer, or licensed land surveyor”. Civ. Code § 3097(c)(6)§3.

The term “certificated architect” may be intentionally narrower than the term “architect” used elsewhere in the mechanics lien law, although that is not clear. Presumably it excludes design services provided under a “design-build” contract from the Design Professionals Lien. Perhaps we should we try to clarify these matters as part of our general mechanics lien law cleanup.

§ 3082.060. Lien

3082.060. “Lien” means a lien under Chapter 2 (commencing with Section 3083.110) and includes ~~both~~ a lien for a work of improvement under Section 3083.210 ~~and~~ ; a lien for a site improvement under Section 3083.230, and a lien of a design professional under Section 3083.250.

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

See also Sections 3082.024 (“design professional” defined), 3082.170 (“site improvement” defined), 3082.190 (“work of improvement” defined).

§ 3082.160. Site

3082.160. “Site” means the property on which a work of improvement is situated or is planned to be constructed.

Comment. Section 3082.160 continues former Section 3101, with the addition of a reference to planned construction. See Section 3082.250 (design professionals lien).

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

Article 2.5. Design Professionals Lien

§ 3083.250. Lien

~~3081.2.~~ 3083.250. (a) A design professional ~~shall~~ has, 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,~~ of a claim of lien under this article, a lien on the site notwithstanding the absence of commencement of actual construction of the planned work of improvement, if the ~~landowner~~ owner contracted for the design professional’s services and is also the owner of the ~~real property site~~ at the time of recordation of the claim of lien. ~~The~~

(b) ~~The~~ lien of the design professional ~~shall be~~ is for the amount of the design professional’s fee for ~~any services rendered prior to~~ services provided before commencement of the work of improvement or the reasonable value of those services, whichever is less. The amount of the lien ~~shall be~~ is 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 payment under the contract.~~

(c) ~~A~~ A design professional may not record a ~~notice of lien pursuant to subdivision (e) of Section 3081.3, a claim of lien, and a lien may not be created, under this article~~ 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~~ provided by the design professional.

Comment. Section 3083.250 restates former Section 3081.2. See also Section 3082.270 (agency).

See also Sections 3082.024 (“design professional” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.160 (“site” defined), 3082.190 (“work of improvement” defined).

Staff Note. The concept of “services provided before commencement of a work of improvement”, where the work of improvement is never commenced, is confusing. Perhaps it would be better to say something like, “The lien of the design professional is for the amount of the design professional’s fee for services provided under the contract or the reasonable value of those services, whichever is less.”

§ 3083.251. Prerequisites for lien

~~3081.3.~~ In order for the 3083.251. A design professional to be is not entitled to a lien pursuant to Section 3081.2, all of the following shall occur under this article unless all of the following conditions are satisfied:

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

~~(b) Not less than 10 days prior to recordation pursuant to subdivision (c) before recording a claim of lien,~~ the design professional mails ~~by first class registered or certified mail, postage prepaid,~~ addressed to the ~~landowner,~~ the owner a written demand for payment ~~specifying stating~~ that a default has occurred pursuant to the ~~contract or agreement~~ under the contract 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~~ a claim of lien. The claim of lien shall include all of the following information:

(1) The name of the design professional, ~~specifies the.~~

(2) The amount thereof, ~~identifies the of the claim.~~

(3) The current owner of record of the real property, ~~provides a site.~~

(4) A legal description of the real property to be improved, ~~and specifies the site.~~

(5) Identification of 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.

Comment. Section 3083.251 restates former Section 3081.3. See also Sections 3082.240 (mailed notice), 3082.250 (filing and recording of papers).

A building permit or other governmental approval for the work of improvement obtained in connection with or utilizing the services provided by the design professional is required as a condition of recording the claim of lien under Section 3083.250 (lien).

See also Sections 3082.022 (“contract” defined), 3082.024 (“design professional” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.160 (“site” defined), 3082.190 (“work of improvement” defined).

§ 3083.252. Creation and release of lien

~~3081.4. (a) Upon 3083.252. (a) On~~ recordation of the ~~notice~~ claim 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 automatically expires and is null and void and of no further force or effect on the occurrence of either of the following events:~~

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

~~(2) The expiration of 90 days after recording the notice claim of lien, unless the design professional files suit commences an action to enforce the lien within 90 days of recordation that time.~~

~~(c) In the event the landowner~~ If the owner partially or fully satisfies the lien of the ~~design professional,~~ the design professional shall execute and record a document which ~~that~~ evidences a partial or full satisfaction and release of the lien,

~~as the case may be~~ waiver and release under Article 5 (commencing with Section 3089.610) of Chapter 7.

Comment. Section 3083.252 restates former Section 3081.4.

See also Sections 3082.024 (“design professional” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.190 (“work of improvement” defined).

§ 3083.253. Enforcement of lien

~~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.~~

3083.253. A lien created under this article is enforceable under Article 7 (commencing with Section 3083.710).

Comment. Section 3083.253 restates former Section 3081.5.

See also Section 3082.060 (“lien” defined).

§ 3083.254. Mechanics lien right not affected

~~3081.6. This chapter~~ 3083.254. This article 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~~ lien for a work of improvement under Section 3083.210.

Comment. Section 3083.254 restates former Section 3081.6.

See also Sections 3082.024 (“design professional” defined), 3082.060 (“lien” defined), 3082.190 (“work of improvement” defined).

§ 3083.255. Time for claim of lien

~~3081.7. 3083.255.~~ A design professional shall record ~~a notice of lien pursuant to subdivision (c) of Section 3081.3~~ a claim of lien under this article no later than 90 days after the design professional knows or has reason to know that the ~~landowner~~ owner is not commencing the work of improvement.

Comment. Section 3083.255 restates former Section 3081.7.

See also Sections 3082.024 (“design professional” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.190 (“work of improvement” defined).

§ 3083.256. Right to pursue other remedies

~~3081.8. 3083.256.~~ The ~~lien of a design professional perfected pursuant to this chapter shall~~ creation of a lien under this article does not affect the ability of the design professional to pursue other remedies.

Comment. Section 3083.256 restates former Section 3081.8.

See also Sections 3082.024 (“design professional” defined), 3082.060 (“lien” defined).

§ 3083.257. Priorities

~~3081.9. 3083.257.~~ (a) No lien created ~~by this chapter shall affect or take under this article~~ affects or takes 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' claim of lien.

(b) No lien created by this chapter shall affect or take under this article affects or takes priority over an encumbrance of a construction lender ~~which~~ that funds the loan to commence the work of improvement for which the design professional furnished services at the request of the ~~landowner~~ owner.

Comment. Section 3083.257 restates former Section 3081.9.

See also Sections 3082.020 ("construction lender" defined), 3083.024 ("design professional" defined), 3082.060 ("lien" defined), 3082.100 ("owner" defined), ("work of improvement" defined).

§ 3083.258. Exemption

~~3081.10. The design professionals' lien provided in this chapter shall not apply to~~ 3083.258. A design professional may not obtain a lien under this article for services provided for a work of improvement relating to a single-family owner occupied residence where the construction costs are for which the contract price is less than one hundred thousand dollars (\$100,000) in value.

Comment. Section 3083.258 restates former Section 3081.10.

See also Sections 3082.023 ("contract price" defined), 3083.024 ("design professional" defined), 3082.060 ("lien" defined), 3082.100 ("owner" defined), 3082.190 ("work of improvement" defined).

Staff Note. Throughout the mechanics lien law we have tried to standardize usage whenever possible. We have defined contract price to mean the agreed price, including contract changes, or if there is no agreed price, the reasonable value of the labor, service, equipment, or material provided.

Nonetheless, this section is odd. The design professionals lien only applies if no construction is ever commenced. But if no construction is ever commenced, how are construction costs for the work of improvement determined? Arguably, the \$100,000 limitation is meaningless and could be eliminated.

Alternatively, an adjustment in the wording could be made, such as, "This article does not apply to services for the design, engineering, or planning of a work of improvement for a single-family owner occupied residence for which the anticipated contract price is less than one hundred thousand dollars."

How workable this would be is debatable.

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Law Revision Commission
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GORDON HUNT
A Professional Corporation

October 10, 2005

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

Re: Mechanic's Lien Law Study

Dear Mr. Sterling:

I apologize for the fact that I have not been able to comment upon developments being discussed in some of the recent memorandums. I have been extremely busy and simply have not had time to devote substantial time to the memorandums, their contents or my thoughts in regard thereto. The purpose of this letter is to make certain comments within the time I currently have to address the issue and reserve the right to make further comments as time permits. This letter will discuss some, but not all of the current issues and current proposed statutes pending before the Commission.

I will, first of all, direct my attention to Memorandum 2005-19 dated April 29, 2005. I will not address all the issues set forth in that memorandum, but those with which I have had time to review and study.

I would just note in passing that under the heading "Background", the Memorandum states that the best that the Commission can hope to accomplish in this project is to "modernize and clarify the law, without making significant substantive changes". Some of the comments hereinafter set forth are made in relationship to that statement.

Pages 2, 3 and 4, of the Memorandum discusses proposed Section 3083.710 "Time for Commencement of Enforcement Action". That proposed section provides that the lien claimant must record a Notice of Pendency of the action within ninety days after the recordation of the lien. As a practical matter, in many instances, that will be impossible to accomplish. It is not uncommon for lien claimants to wait until the ninetieth day before filing an action to enforce a Mechanic's Lien. There are numerous reasons for that procedure. Generally, the lien claimants make a substantial effort to receive payment before they have to go to the expense of filing a foreclosure action. Often times they will wait until the last minute before consulting an attorney

to prepare the foreclosure action. When the Complaint is filed on the ninetieth day, a case number is not assigned to the matter until the Complaint is, in fact, filed. That information is then returned to the attorney's office usually on the next business day. The attorney needs the case number in order to affix it to the Notice of Pendency of Action. The attorney would then have to draft the Notice of Pendency of Action, have it typed and then give it to the process server for recording. All of the foregoing could take as much as a week to accomplish. As a practical matter, it is extremely difficult, if not impossible, to record the Notice of Pendency of Action where the suit to foreclose the lien is filed on the ninetieth day or very close thereto. I would suggest that a possible way of addressing this practical problem would be to allow the claimant to record the Notice of Pendency of Action within ten days after the foreclosure action is filed.

Sending Copies of the Payment Bond

I would again respectfully request that the Commission adopt the requirement that the owner be required to provide a copy of the payment bond to any claimant who has served a Preliminary Notice. This has the potential of saving substantial time and expense for both the claimant and the owner. If the claimant knows that a payment bond has, in fact, been recorded, the claimant will attempt to seek payment for the amount due from the surety company without recording a lien or serving a Stop Notice unless that effort proves to be unsuccessful. Furthermore, with a payment bond in place, there would be situations where the claimant would not exercise its lien or Stop Notice rights. In those circumstances, the owner would be benefited by providing a copy of the payment bond to the lien claimant. When owners eventually seek the services of an attorney in a case where a payment bond has, in fact, been recorded, the attorney will take the position, under the statute, that the claimant's primary remedy lies against the payment bond. As counsel for the owner, it would be appropriate for the attorney for the owner to take the position (where the owner has paid the contractor in full) that the lien would not be enforced against the owner's equity in the real estate and furthermore, the construction lender would not be obligated to respond or hold money pursuant to a bonded Stop Notice filed by the claimant (with the exception of a bonded Stop Notice filed by the original contractor) and therefore, the claimant should seek recovery against the surety on the payment bond. For those reasons, I think the requirement of the owner to send a copy of the payment bond that has been recorded to those claimants which have served the owner with a Preliminary Notice is a good statute and may ultimately inure to the substantial benefit of the owner.

Clearly, where the payment bond is not recorded, it likewise makes sense for the owner to provide the claimant with a copy of the bond. That way, the owner can attempt to convince the claimant that it ought to seek recovery from the surety on the payment rather than encumbering the owner's real estate with a Mechanic's Lien or its construction funds with a bonded Stop Notice. Obviously where the bond is not recorded, the claimant retains its Mechanic's Lien and Stop Notice rights, but with a solvent surety in the picture, the claimant may seek to recover from the surety rather than go to the expense of recording a lien and serving a bonded Stop Notice. Staff raises the inquiry as to what should be the consequence of the

owner not providing a copy of the payment bond. With regard to the recorded payment bond, one suggestion would be to extend the time to sue on the payment bond to six months following the time that the claimant receives notice of the recording of the bond, which is similar to the requirement of the owner in connection with a release of lien bond. As to an unrecorded bond, the penalty is built into the statutory scheme. The Claimant may still pursue its Mechanic's Lien and Stop Notice remedies and the owner obtains no benefit from the unrecorded bond. As noted above, however, where the owner does send the claimant a copy of the unrecorded payment bond, that may induce the claimant to pursue its remedies against the surety and not encumber the owner's property with a lien or the owner's construction funds with a bonded Stop Notice.

For the reasons set forth above, I respectfully suggest that the requirement that the owner provide a claimant who has served a Preliminary Notice with a copy of any payment on the project is a good idea and ought to be adopted.

Payment Bonds for Public Works

The foregoing subject is discussed on Pages 7 and 8 of Memorandum 2005-19. The undersigned would respectfully suggest that the Commission make no changes in the statute. The industry and their counsel all look to the Mechanic's Lien Law for all of their statutory remedies, to-wit, Mechanic's Liens, Stop Notices and bond remedies. It makes sense to leave all of those statutory remedies in the same code sections in the Civil Code.

The undersigned would also respectfully suggest to the Commission that the bond amount should be left as is, to-wit, \$5,000 for a state entity and \$25,000 for all other public entities.

Finally, all public entities should be required to bond their projects, including the legislative, judicial, and University of California. The case law has repeated over and over that a party improving public property cannot have a lien on public works. See *Cooley v. Freeman*, 204 Cal. 59 (1928) and *Pneucrete Co. v. U.S. Fidelity & Guar. Corp.*, 7 Cal.App.2d 733 (1935). The payment bond substitutes for the Mechanic's Lien right. The Legislature and Courts have recognized that from a public policy standpoint, it would not be a good practice to have improvers of public property foreclosing on the Courthouse, the State Capitol, schools, the City Hall, and other public works of improvement. Since the parties who improve public works do not have lien rights, they must, in fact, have bond rights as a substitution for the Mechanic's Lien. Without the bond right, the claimants would be left with only the Stop Notice remedy. As a result, all claimants assume that all public works projects are bonded. That should be the law. The Memorandum states that it is probably intended that the legislative and judicial branches of State government and the University of California not be subject to any payment bond requirement. I believe that that is not the intent of the Legislature and that all public works projects should be bonded. The Courts have continually held that where a public entity fails to bond a project, they can be sued for negligence. See *Walt Rankin & Associates, Inc. v. City of*

Murrieta, 84 Cal.App.4th 605 (2000) and *N.V. Heathorn, Inc. v. County of San Mateo*, 126 Cal.App.4th 1526 (2005). Thus, it is clear that all public entities should provide payment bonds on their projects. I would note that proposed *Civil Code* §3082.140 defines a public entity as including the Regents of the University of California.

Proposed Civil Code § 3083.355 "Notice of Recordation of Claim of Lien"

Proposed Section 3083.355 presents similar practical problems as those presented with regard to Notice of Recordation of a Pendency of Action. Many claimants mail their Mechanic's Liens to the County Recorder's Office for recording. Often times, the County Recorder takes several days before the lien is recorded. The lien is not returned to the claimant sometimes for as long as thirty days. Thus, the claimant does not know the date it was recorded or the recording identification number. The section, as drafted, provides that at the time of the recordation of the claim of lien, the claimant shall give notice of the recordation and include the date of recordation and the recording identification number.

The comment to this new section is that it is new and makes reference to the fact that an unenforceable lien may be expunged under Section 3083.810, which provides for the Petition for Release Order. Thus, this Section 3083.355 and new Section 3083.810 are new sections introduced into the lien law and seem to be contrary to the direction taken by the Commission to "modernize and clarify the law without making substantive changes". This new section, along with Section 3083.810 is a substantive change to the lien law. More will be said regarding this in my comments on Section 3083.810.

Comments to Proposed Section 3083.540

This section deals with liens on multiple works of improvement, whether or not they are owned by the same owner. The Staff comments on this section and asks the question if, in fact, the two properties do not have the same owner, how can a claim of lien against a reputed owner bind another person who is an actual owner. The answer to that question is simple. The lien law has always used the words "reputed owner", both in regard to the Preliminary Notice and the Mechanic's Lien itself. The reason has been stated above. Often times the claimant doesn't know the actual owner of the real estate and the Courts have recognized that the phrase "reputed owner" means the owner that is reputed to be the owner. For example, see *Brown Co. v. Superior Court*, 148 Cal.App.3d 891 (1983), where the Preliminary Notice was sent by the claimant to the "reputed owner" who was not, in fact, the owner and the Preliminary Notice was still deemed valid. In *Kodiak Industries, Inc. v. Ellis*, 185 Cal.App.3d 75 (1986), the Court stated that a "reputed" construction lender is the person or entity that the claimant believes reasonably and in good faith to be the actual construction lender. In that case, the claimant was not required to give a Preliminary Notice to a "reputed" construction lender at the time the claimant

commenced work by reason of the fact that the Construction Trust Deed had not been recorded. The Court in the *Kodiak* case went on to state that possession by the lien claimant of presumptably reliable information protects the lien claimant from a mistake. Again, acknowledging that both the owner and the lender can be a "reputed" owner or lender. In *Westfour Corp. v. California First Bank*, 3 Cal.App.4th 1554 (1992), a contractor who had no contractual relationship with the actual owner of the property, but with a "reputed owner" of the property did not have to serve a Preliminary Notice. In *Allen v. Wilson*, 178 Cal. 674 (1918), a lien claimant who stated in the Mechanic's Lien itself in the blank for the name of the "reputed owner" inserted the words "unknown" by reason of the fact that the lien claimant did not know who the owner was. The Court held that inserting the name "unknown" in the blank for the name of the "reputed owner" did not render the lien invalid. In *Frank Pisano & Associates v. Taggart*, 29 Cal.App.3d 1 (1972), the Court stated, "It is sufficient to give only the name of the reputed owner. Where an individual does so in good faith, he does not lose his lien if he subsequently determines that some other individual is the actual owner."

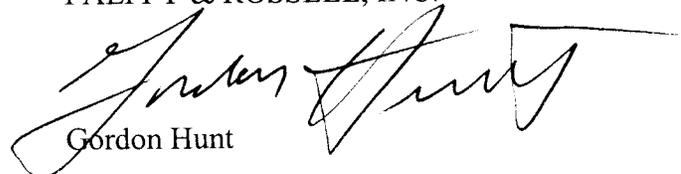
Because claimants often do not know who the actual owner of the real estate is (note that the Court in the *Allen v. Wilson* case cited supra noted that the name of the owner or reputed owner is not presumed to be within the knowledge of the claimant) and must rely on what the claimant is told as to the name of the owner and therefore, the Legislature has always used the word "reputed" and the Courts have rendered the decisions cited above with that in mind. Should a material supplier or an equipment rental company, dealing with a subcontractor or a sub-subcontractor, be required to do a title search to send a Preliminary Notice or record a lien to determine who the actual owner is? The answer is simply no. That would be an unreasonable burden and thus, notice to the "reputed owner" satisfies the requirements of the statute and notice to the "reputed owner" is sufficient to give notice to the actual owner.

The foregoing is all that I have had time to review at the present time. As time permits, I will forward additional input that I have with regard to the revisions that are currently being discussed.

I hope the comments in this correspondence will be helpful to the Commission.

Very truly yours,

HUNT, ORTMANN, BLASCO,
PALFFY & ROSSELL, INC.



Gordon Hunt

GH:slg

COMMENTS OF HERMAN CONSTRUCTION Co.

Subject: False or Fraudulent Lien

Date: November 30, 2005

To: sterling@clrc.ca.gov

I spoke to you some time ago and decided that the facts surrounding my situation may be useful for your project. I am a General Building Contractor, Herman Construction Co. and hired a Grading Subcontractor, New Horizon Demolition to perform grading operations on one of our projects. On June 7, 2005 we received a Conditional Waiver and Release Upon Final Payment for the final payment of \$5,693.16 with a stated Zero Dollar disputed claims amount. On June 9, 2005 the final payment to New Horizon Demolition cleared our account which satisfied the condition of the final payment release.

On August 18, 2005 New Horizon Demolition recorded a lien claim against my clients property in the amount of \$11,000.00. No work was conducted by New Horizon and no outstanding invoices remained after the final payment and final payment release date. New Horizon would not respond to our telephone requests inquiring about the reason for the lien. Since our prime contract with the Owner requires us to keep the project lien free, which is a typical contractual requirement, we were forced to hire an attorney to determine the cause of the lien and obtain a release of lien bond to clear the property title. To obtain the Release of Lien Bond we were required to give the Surety \$16,500.00 (1.5 times the amount of the lien) as security for the Release Bond. We had an attorney send a letter to New Horizon Demolition requesting the reason for the Lien. New Horizon fabricated an invoice backdated to May 26, 2005 for bogus work and work included in their Lump Sum contract that had been previously paid for. The bogus work invoice stated work conducted as far back as January and amounting to \$6,045. Over 90 days has lapsed without an action to foreclose on the lien therefore, the lien is null and void, however we need the lien released from the property and New Horizon will probably be unwilling to release the lien, therefore we will need our attorney to get the court to release the lien. After we petition the court and release the lien, we are entitled to a very small amount of attorney fees from New Horizon.

Now if I understand the law, the *Solit v Tokai Bank* case in 1999 (81 CAL. Rptr. 2d 243) ruled that after we petition the court to release a lien, only the referenced Mechanics Lien is released and not the right of someone to file another bogus lien for the same bogus work until the project is complete and the statutory lien period lapses and then anyone can still file another bogus, fraudulent lien if they feel like it because the penalty for doing this is very little.

The Maris Mgmt. Corp. v Assured Drywall & Textures case in 1984 (152 Cal. App. 3d 268) held that if a stale Mechanics Lien was released by the court after petition by the Owner then the lien was released and the claimants right to file a lien for the same work. This sounded great to me. Why did the Solit case reverse this.

Not much protects the Prime Contractor even if the Prime Contractor follows the rules regarding lien releases Etc.

Some other States impose penalties for false, fraudulent Liens. This would help. Let's just say for argument sake that I don't have the Final Payment Release and incurred a lien base on some of the above facts. New Horizon liened for double the bogus amount that New Horizon thinks they are owed. So, in a case where a disputed amount exists that results in a lien and the lien is porously overstated, the General Contractor is forced to come up with 1.5 times the amount of the lien which includes the overstated amount to procure a Release Bond. This is not easy to do and could force a General Contractor into a Contract Breach situation with an Owner and hold up regular Contract Work progress payments until the property title could be cleared. A lot more needs to be done regarding the misuse and malicious use of Mechanics Lien Rights.

I am interested to find out what changes in the law take place with respect to the Commissions recommendations.

Ralph Herman Jr.
Herman Construction Co.
31316 Via Colinas
Westlake Village, CA 91362
818-706-8806

COMMENTS OF FRED MAGID

From: graffarid@hotmail.com
Subject: Mechanic's Lien problem
Date: December 12, 2005
To: sterling@clrc.ca.gov

Hi Mr. Sterling,

Following our phone conversation I'm sending you my feedback regarding Mechanic's Lien that was recorded on my property.

Situation is as following. Back in summer of 2005 I have rented a trash container from a company that later claimed that I owe them more that I paid and they the same company recorded a Mechanic's Lien on my property and also open a small claims court case. In small claims court they have lost the case and the judge ruled the judgment into my favor however up until today I'm having a very hard time removing this lien. I have contacted Los Angeles County Recorders office but they will not release the lien without a court order but the court will not give me any papers that they tell me that they do not deal with Mechanic's Lien.

Please advise me what can I do to release the lien from my property.

Thank you,
Fred Magid

COMMENTS OF PAUL ATMAJIAN

From: p.atmajian@att.net
Subject: Mechanics Lien
Date: January 11, 2006
To: sterling@clrc.ca.gov

Dear Mr. Nathaniel Sterling

Having recently been served with a lawsuit, along with three other property owners (according to the process server), by a concrete supply company, because a single corrupt contractor failed to pay for materials, there is at least one change to the mechanics lien law which MUST be made in the name of fairness. Otherwise the materials supplier, with full knowledge that a contractor may not pay (due to previous knowledge) ends up participating in the contractors' fraud, as in this case.

Although the concrete supplier sent out a 20 day notice (AFTER the concrete was delivered and after the contractor was paid), the concrete supplier never notified the property owner PRIOR to delivering concrete for a contractor known to be delinquent in paying bills.

In order to make the law fair to property owners, a material supplier MUST be required to:

1. Notify a property owner PRIOR to delivery of materials, that materials will be delivered on a given day. You can't return concrete!
2. State the exact and precise cost is of those materials clearly, so that a property owner may pay for the materials directly if he/she so chooses.
3. State clearly if the contractor who ordered the materials has ever been late or in default on their bills to the supplier. If a supplier knows that a certain contractor is at risk of not paying, but delivers materials to a property anyway, they are simply participating in fraud, plain and simple. But the supplier knows that they can use the mechanics lien law; therefore, there is no incentive for the supplier to refuse delivery to contractors with a bad record or inform a property owner of possible anticipated problems BEFORE the fact!
4. Make it a crime (conspiracy to defraud) for any supplier to deliver materials to a property owner's site without clearly stating IN ADVANCE the ordering contractor's record of payment to the supplier. And make it impossible for any supplier who fails to inform a property owner in advance to use (abuse) the Mechanic's lien law.

Regards,

Paul Atmajian, M.D.

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1 **§ 3082.020. Construction lender**

2 3082.020. “Construction lender” means either of the following:

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

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

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

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

12 **§ 3082.022. Contract**

13 3082.022. “Contract” means an agreement between an owner and a direct
14 contractor that provides for all or part of a work of improvement and includes a
15 contract change.

16 **Comment.** Section 3082.022 continues former Section 3088 and adds a reference to a contract
17 change. The term “contract change” has replaced “written modification of the contract” as used in
18 former Section 3123. This codifies the effect of *Basic Modular Facilities, Inc. v. Ehsanipour*, 70
19 Cal. App. 4th 1480, 83 Cal. Rptr. 2d 462 (1990).

20 This definition does not apply if the provision or context requires otherwise. Section 3082
21 (application of definitions). See, e.g., Sections 3082.100 (contract of purchase), 3082.310
22 (subcontract).

23 See also Sections 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined),
24 3082.190 (“work of improvement” defined).

25 **§ 3082.023. Contract price**

26 3082.023. “Contract price” means the price agreed to by the parties for labor,
27 services, equipment, or material provided pursuant to a contract, including a
28 contract change. If the parties have not agreed to a price for labor, services,
29 equipment, or material, the contract price is the reasonable value of the labor,
30 services, equipment, or material provided pursuant to the contract.

31 **Comment.** Section 3082.023 generalizes provisions found in former Section 3123 (amount of
32 lien) and throughout the mechanics lien law.

33 See also Sections 3082.022 (“contract” defined), 3082.030 (“labor, services, equipment, or
34 material” defined).

35 **§ 3082.025. Direct contractor**

36 3082.025. “Direct contractor” means a person that has a direct contractual
37 relationship with an owner.

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

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

1 **§ 3082.027. Express trust fund**

2 3082.027. “Express trust fund” means a laborer’s compensation fund to which a
3 portion of a laborer’s total compensation is to be paid pursuant to an employment
4 agreement or a collective bargaining agreement for the provision of benefits,
5 including, but not limited to, employer payments described in Section 1773.1 of
6 the Labor Code and implementing regulations.

7 **Comment.** Section 3082.027 continues a portion of former Section 3111 without substantive
8 change.

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

11 **§ 3082.030. Labor, services, equipment, or material**

12 3082.030. “Labor, services, equipment, or material” includes but is not limited
13 to labor, skills, services, material, supplies, equipment, appliances, transportation,
14 power, surveying, construction plans, and construction management provided for a
15 work of improvement.

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

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

23 **§ 3082.040. Laborer**

24 3082.040. “Laborer” means a person who, acting as an employee, provides
25 labor, skill, or other necessary services for a work of improvement.

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

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

30 **§ 3082.050. Laborer’s compensation fund**

31 3082.050. “Laborer’s compensation fund” means a person, including an express
32 trust fund, to which a portion of the compensation of a laborer is paid by
33 agreement with the laborer or the collective bargaining agent of the laborer.

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

36 See also Sections 3082.027 (“express trust fund” defined), 3082.040 (“laborer” defined),
37 3082.110 (“person” defined).

38 **3082.055. Lending institution**

39 3082.055. “Lending institution” includes commercial bank, savings and loan
40 institution, credit union, or other organization or person engaged in the business of
41 financing loans.

42 **Comment.** Section 3082.055 continues the second paragraph of former Section 3237.

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

2 **§ 3082.060. Lien**

3 3082.060. “Lien” means a lien under Chapter 2 (commencing with Section
4 3083.110) and includes both a lien for a work of improvement under Section
5 3083.210 and a lien for a site improvement under Section 3083.230.

6 **Comment.** Section 3082.060 is a new definition. It is included for drafting convenience. There
7 are instances in this title where the term is not used in its defined sense. See, e.g., Sections
8 3083.540 (d) (multiple works of improvement), 3083.610 (a) (priority of lien).

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

11 **§ 3082.070. Material supplier**

12 3082.070. (a) “Material supplier” means a person that provides material or
13 supplies to be used or consumed in a work of improvement.

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

17 **Comment.** Subdivision (a) of Section 3082.070 replaces the term “materialman” with the term
18 “material supplier” to conform to contemporary usage under this title. It continues former Section
19 3082.070 without substantive change.

20 Subdivision (b) is new.

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

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

25 **§ 3082.100. Owner**

26 3082.100. “Owner” means:

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

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

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

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

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

40 **§ 3082.105. Payment bond**

41 3082.105. “Payment bond” means a bond given under Article 2 (commencing
42 with 3085.210) of Chapter 4.

1 **Comment.** Section 3082.105 supersedes former Section. 3096. See also Section 3085.110
2 (payment bond).

3 **§ 3082.110. Person**

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

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

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

10 **§ 3082.120. Preliminary notice**

11 3082.120. “Preliminary notice” means the notice provided for in Article 1
12 (commencing with 3089.110) of Chapter 7.

13 **Comment.** Section 3082.120 supersedes former Section 3097. The substantive requirements
14 for preliminary notice have been relocated to Section 3089.110 *et seq.*

15 **§ 3082.140. Public entity**

16 3082.140. “Public entity” means the state, Regents of the University of
17 California, a county, city, district, public authority, public agency, and any other
18 political subdivision or public corporation in the state.

19 **Comment.** Section 3082.140 continues former Section 3099 without substantive change. This
20 title does not apply to a public work, including a work of improvement governed by federal law.
21 See Section 3082.210 (application of title).

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

23 **§ 3082.160. Site**

24 3082.160. “Site” means the property on which a work of improvement is
25 situated.

26 **Comment.** Section 3082.160 continues former Section 3101 without substantive change.

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

28 **§ 3082.170. Site improvement**

29 3082.170. “Site improvement” means any of the following work on property:

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

31 (b) Drilling test holes.

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

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

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

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

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

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

2 **§ 3082.175. Stop payment notice**

3 3082.175. (a) “Stop payment notice” means the notice given under Chapter 3
4 (commencing with Section 3084.110).

5 (b) A stop payment notice may be bonded or unbonded. A “bonded stop
6 payment notice” is a notice given with a bond under Section 3084.320. An
7 “unbonded stop payment notice” is a notice not given with a bond under Section
8 3084.320.

9 (c) Except to the extent this title distinguishes between a bonded and an
10 unbonded stop payment notice, a reference in this title to a stop payment notice
11 includes both a bonded and an unbonded notice.

12 **Comment.** Subdivision (a) of Section 3082.175 is new. The term “stop payment notice”
13 replaces the term “stop notice” used in existing law.

14 Subdivision (b) supersedes former Section 3083.

15 **§ 3082.180. Subcontractor**

16 3082.180. “Subcontractor” means a contractor that does not have a direct
17 contractual relationship with an owner. The term includes a contractor that has a
18 contractual relationship with a direct contractor or with another subcontractor.

19 **Comment.** The first sentence of Section 3082.180 continues former Section 3104 without
20 substantive change. The second sentence is new; it makes clear that the term “subcontractor”
21 includes a subcontractor below the first tier.

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

23 **Note.** We have added the second sentence to this section to make clear that the term
24 “subcontractor” includes subcontractors below the first tier.

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. This title applies only to a private work of improvement.

Comment. Section 3082.210 is new. It subsumes various provisions of former law, including former Sections 3097 (preliminary notice of private work), 3109 (application of mechanics lien provisions), 3156 (stop notice provisions), 3260 (retention payment provisions), 3260.1 (progress payment provisions), 3260.2 (stop work notice provisions).

The provisions of the mechanics lien law governing a public work have been relocated to the Public Contract Code. See Pub. Cont. Code §§ 41010-46090 (public works contract remedies).

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

§ 3082.235. Written notice

3082.235. Notice under this title shall be in writing.

Comment. Section 3082.235 generalizes various provisions of existing law. See, e.g., former Civ. Code §§ 3092 (notice of cessation), 3093 (notice of completion), 3094 (notice of nonresponsibility), 3097 (preliminary notice (private work)), 3098 (preliminary notice (public work)), 3103 (stop notice).

See also Section 14 (writing includes printing and typewriting).

§ 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 or by another method of delivery providing for overnight delivery.

(b) Notice is complete when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure.

1 (c) Proof that the notice was given in the manner provided in this section shall
2 be made by (1) a return receipt or a photocopy of the record of delivery and receipt
3 maintained by the United States Postal Service, showing the date of delivery and
4 to whom delivered, or in the event of nondelivery, by the returned envelope itself,
5 (2) proof of mailing certified by the United States Postal Service, or (3) a tracking
6 record or other documentation certified by an express service carrier showing
7 delivery of the notice.

8 **Comment.** Section 3082.240 is a new provision included for drafting convenience. It
9 generalizes a number of provisions of former law, expands the methods of proof to include a
10 certification of the mailing by the United States Postal Service, and expands the methods of
11 giving notice to include delivery by express service carrier.

12 **§ 3082.250. Filing and recording of papers**

13 3082.250. (a) If this title provides for filing a contract, plan, or other paper with
14 the county recorder the provision is satisfied by filing the paper in the office of the
15 county recorder of the county in which the work of improvement or part of it is
16 situated.

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

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

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

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

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

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

35 **§ 3082.260. Co-owners**

36 3082.260. (a) An owner may give a notice or execute or file a document under
37 this title on behalf of a co-owner if the owner acts on the co-owner’s behalf and
38 includes in the notice or document the name and address of the co-owner on
39 whose behalf the owner acts.

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

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

4 **Comment.** Section 3082.310 continues without substantive change the parts of former Section
5 3097(l)-(m) relating to the content of contracts. The reference to “written” contract has been
6 added to subdivision (b) for consistency with subdivision (a). The reference to “lender or lenders”
7 in subdivision (a) has been shortened to “lender” for consistency with subdivision (b). See
8 Section 14 (singular includes plural, and plural includes singular). These and other minor wording
9 changes are technical, nonsubstantive revisions. For the direct contractor’s duty to provide
10 information to persons seeking to serve a preliminary notice, see Section 397.070.

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

13 **§ 3082.320. Designation of construction lender on building permit**

14 3082.320. (a) A public entity that issues building permits shall, in its application
15 form for a building permit, provide space and a designation for the applicant to
16 enter the name, branch designation, if any, and address of the construction lender
17 and shall keep the information on file open for public inspection during the regular
18 business hours of the public entity.

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

21 (c) Failure of the applicant to indicate the name and address of the construction
22 lender on the application does not relieve a person required to give the
23 construction lender preliminary notice from that duty.

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

25 See also Sections 3082.020 (“construction lender” defined), 3082.110 (“person” defined),
26 3082.120 (“preliminary notice” defined), 3082.140 (“public entity” defined).

27 **Note.** We have corrected a typographical error in the existing statute, which includes a stray
28 comma between the words “branch” and “designation” in subdivision (a). Branch information
29 may be important because a stop payment notice must be given at the office or branch of the
30 lender administering or holding construction funds.

31 A random sampling of building permit application forms, however, indicates that half the cities
32 don’t provide any space for construction lender information, and those that do provide space
33 don’t inquire about branches. Does this provision serve a useful purpose?

34 **§ 3082.330. Construction trust deed**

35 3082.330. (a) A mortgage, deed of trust, or other instrument securing a loan, any
36 of the proceeds of which may be used for a work of improvement, shall bear the
37 designation “Construction Trust Deed” prominently on its face and shall state all
38 of the following:

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

40 (2) The name and address of the owner of the property described in the
41 instrument.

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

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

3 (c) Failure to comply with subdivision (a) does not relieve a person required to
4 give preliminary notice from that duty.

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

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

9 See also Sections 3082.020 (“construction lender” defined), 3082.100 (“owner” defined),
10 3082.110 (“person” defined), 3082.120 (“preliminary notice” defined), 3082.190 (“work of
11 improvement” defined).

12 Article 4. Laborer’s Compensation Fund

13 § 3082.410. Standing to enforce laborer’s rights

14 3082.410. (a) A laborer’s compensation fund that has standing under applicable
15 law to maintain a direct legal action in its own name or as an assignee to collect
16 any portion of compensation owed for a laborer, has standing to enforce rights
17 under this title to the same extent as the laborer.

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

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

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

25 § 3082.420. Notice of overdue laborer compensation

26 3082.420. (a) A contractor or subcontractor that employs a laborer and fails to
27 pay the full compensation due the laborer or laborer’s compensation fund shall,
28 not later than the date the compensation became delinquent, give the laborer, the
29 laborer’s bargaining representative, if any, and the construction lender or reputed
30 construction lender, if any, notice containing all of the following information:

31 (1) The name of the owner and the contractor.

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

33 (3) The name and address of any express trust fund to which employer payments
34 are due.

35 (4) The total number of straight time and overtime hours on each job.

36 (5) The amount then past due and owing.

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

1 **Comment.** Section 3082.420 restates former Section 3097(k) without substantive change. Cf.
2 Section 3082.235 (written notice). The reference to the Registrar of Contracts in the final
3 sentence of former Section 3097(k) has been revised to refer to the Contractors' State License
4 Law. This is a technical, nonsubstantive change.

5 See also Sections 3082.020 ("construction lender" defined), 3082.027 ("express trust fund"
6 defined), 3082.040 ("laborer" defined), 3082.050 ("laborer's compensation fund" defined),
7 3082.100 ("owner" defined), 3082.160 ("site" defined), 3082.180 ("subcontractor" defined),
8 3082.210 (application of title).

9 **Article 5. Construction of and Terms and Conditions of Bonds**

10 **§ 3082.510. Application of Bond and Undertaking Law**

11 3082.510. The Bond and Undertaking Law, Chapter 2 (commencing with
12 Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure, applies to a
13 bond given under this title.

14 **Comment.** Section 3082.510 is new. It is a specific application of Code of Civil Procedure
15 Section 995.020 (application of Bond and Undertaking Law).

16 **§ 3082.520. Release of surety from liability**

17 3082.520. None of the following releases a surety from liability on a bond given
18 under this title:

19 (a) A change to a contract, plan, specification, or agreement for a work of
20 improvement or for labor, services, equipment or material provided for a work of
21 improvement.

22 (b) A change to the terms of payment or an extension of the time for payment
23 for a work of improvement.

24 (c) A rescission or attempted rescission of a contract, agreement, or bond.

25 (d) A condition precedent or subsequent in the bond purporting to limit the right
26 of recovery of a claimant otherwise entitled to recover pursuant to a contract,
27 agreement, or bond.

28 (e) In the case of a bond given for the benefit of claimants, the fraud of a person
29 other than the claimant seeking to recover on the bond.

30 **Comment.** Section 3082.520 restates former Section 3225 without substantive change.

31 See also Sections 3082.010 ("claimant" defined), 3082.022 ("contract" defined), 3083.030
32 ("labor, services, equipment, or material" defined), 3082.110 ("person" defined), 3082.190
33 ("work of improvement" defined).

34 **Note.** This section seems to distinguish between a contract and an agreement. Are these
35 distinct concepts under construction law, or is it simply loose use of language?

36 **§ 3082.530. Construction of bond**

37 3082.530. (a) A bond given under this title shall be construed most strongly
38 against the surety and in favor of the beneficiary.

39 (b) A surety is not released from liability to the beneficiary by reason of a
40 breach of the contract between the owner and direct contractor or on the part of the
41 beneficiary.

1 (c) The sole conditions of recovery on the bond are that the beneficiary is a
2 person described in Article 2 (commencing with Section 3083.210) of Chapter 2
3 and has not been paid the full amount of the claim.

4 **Comment.** Section 3082.530 restates former Section 3226 without substantive change. See
5 also Sections 3083.210-3083.240 (who is entitled to lien).

6 See also Sections 3082.022 (“contract” defined), 3082.025 (“direct contractor” defined),
7 3082.100 (“owner” defined), 3082.110 (“person” defined).

8 Cf. Code Civ. Proc. § 995.130 (“beneficiary” defined).

9 **§ 3082.540. Notice to principal and surety**

10 3082.540. (a) This section governs notice to a principal or a surety on a bond
11 given under this title.

12 (b) Notice shall include all of the following information:

13 (1) The kind of labor, services, equipment, or material provided or to be
14 provided by the claimant.

15 (2) The name of the person to or for which the labor, services, equipment, or
16 material was provided.

17 (3) A statement of the claimant’s demand, after deducting all just credits and
18 offsets, for the labor, services, equipment, or material already provided and for the
19 whole amount agreed to be provided.

20 (c) Notice shall be given by mail, personal delivery, or service in the manner
21 provided by law for the service of a summons in a civil action.

22 (d) Notice given by mail shall be at the following address:

23 (1) If given to the principal, at the principal’s last known address.

24 (2) If given to an admitted surety insurer, at the office of or in care of (i) the
25 statutory agent of the surety in this state, (ii) an officer of the surety in this state, or
26 (iii) the agent designated by the surety in the bond as the address at which notice is
27 to be given.

28 (3) If given to a personal surety, at the surety’s residence or place of business, if
29 known; or if not known, in care of the clerk of the county in which the bond is
30 recorded.

31 **Comment.** Section 3082.540 restates former Section 3227 without substantive change. See
32 also Sections 3082.235 (written notice), 3082.240 (mailed notice).

33 See also Sections 3082.010 (“claimant” defined), 3083.030 (“labor, services, equipment, or
34 material” defined), 3082.110 (“person” defined).

35 Cf. Code Civ. Proc. §§ 995.130 (“beneficiary” defined), 995.170 (“principal” defined).

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CHAPTER 2. MECHANICS LIEN

Article 1. [Reserved]

Article 2. Who Is Entitled to Lien

§ 3083.210. Persons entitled to lien

3083.210. A person that provides labor, services, equipment, or material properly authorized for a work of improvement, including but not limited the following persons, has a lien right under this chapter:

- (a) Direct contractor.
- (b) Subcontractor.
- (c) Material supplier.
- (d) Equipment lessor.
- (e) Laborer.
- (f) Architect.
- (g) Registered engineer.
- (h) Licensed land surveyor.
- (i) Builder.

Comment. Section 3083.210 supersedes the part of former Section 3110 providing a lien for contributions to a work of improvement. It implements the directive of Article XIV, Section 3, of the California Constitution that, “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.”

The reference in the introductory portion of Section 3083.210 to labor, services, equipment or material “properly authorized” replaces the references in former Section 3110 to the “instance or request of the owner (or any other person acting by his authority or under him, as contractor or otherwise).” See Section 3083.240 (who may authorize work).

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

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

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

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

1 **§ 3083.220. Lien right of express trust fund**

2 3083.220. An express trust fund has the same lien right under this chapter as a
3 laborer on a work of improvement, to the extent of the compensation agreed to be
4 paid to the express trust fund for labor on that work of improvement only.

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

8 See also Sections 3082.027 (“express trust fund” defined), 3082.040 (“laborer” defined),
9 3082.060 (“lien” defined).

10 **§ 3083.230. Site improvement lien**

11 3083.230. A person that provides labor, services, equipment, or material
12 properly authorized for a site improvement has a lien right under this chapter.

13 **Comment.** Section 3083.230 supersedes former Section 3112. The reference to work done or
14 material furnished is superseded by the reference to labor, services, equipment, or material. See
15 Section 3082.030 (“labor, services, equipment, or material” defined). The reference to work at the
16 instance or request of the owner or any person acting by or under authority of the owner as
17 contractor or otherwise is replaced by the reference to work properly authorized. See Section
18 3083.240 (who may authorize work).

19 A site improvement is treated in the same manner as a work of improvement under this
20 chapter, except as provided in Sections 3083.550 (claim against separate residential units),
21 3083.610 (priority of lien), 3083.640 (priority of site improvement lien). See also Section
22 3082.190 (“work of improvement” defined).

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

25 **§ 3083.240. Who may authorize work**

26 3083.240. For the purpose of this chapter, labor, services, equipment, or material
27 provided for a work of improvement or for a site improvement is properly
28 authorized if:

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

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

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

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

37 The inclusion of project managers in subdivision (b) is new.

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

43 See also Sections 3082.025 (“direct contractor” defined), 3082.030 (“labor, services,
44 equipment, or material” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor”
45 defined).

Article 3. Conditions to Enforcing a Lien

§ 3083.310. Preliminary notice required

3083.310. A claimant may enforce a lien only if the claimant has given preliminary notice and made proof of service to the extent required by Article 1 (commencing with Section 3089.110) of Chapter 7.

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

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

§ 3083.320. Time for claim of lien by direct contractor

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

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

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

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

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

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

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

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

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

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

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

3083.340. Notwithstanding any other provision of this chapter, completion of a separate residential unit within the meaning of Section 3083.550 does not operate

1 in any manner to impair the lien right of an express trust fund under Section
2 3083.220 if the claim of lien is recorded within 120 days after completion of the
3 separate residential unit.

4 **Comment.** Section 3083.340 continues the last paragraph of former Section 3131 without
5 substantive change.

6 See also Sections 3082.010 (“claimant” defined), 3082.027 (“express trust fund” defined),
7 3082.060 (“lien” defined).

8 **§ 3083.350. Claim of lien**

9 3083.350. A claim of lien shall be in writing, signed and verified by the
10 claimant, and shall contain all of the following information:

11 (a) A statement of the claimant’s demand after deducting all just credits and
12 offsets.

13 (b) The name of the owner or reputed owner, if known.

14 (c) A general statement of the kind of labor, services, equipment, or material
15 provided by the claimant.

16 (d) The name of the person that contracted for the labor, services, equipment, or
17 material.

18 (e) A description of the site sufficient for identification.

19 (f) The claimant’s address.

20 **Comment.** Subdivisions (a)-(e) of Section 3083.350 continue former Section 3084 without
21 substantive change. The claim of lien may be executed by the claimant’s authorized agent. See
22 Section 3082.270 (agency).

23 Subdivision (d) requires the name of the person that “contracted for” the labor, services,
24 equipment, or material, rather than who “employed” the claimant. See Section 3083.240 (who
25 may authorize work). See also Section 3082.250 (filing and recording of papers).

26 Subdivision (f) is new. It implements other provisions that invoke a claimant’s address. Cf.
27 Sections 3083.380 (release bond), 3083.830 (notice of hearing).

28 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, services, equipment, or
29 material” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.110 (“person”
30 defined), 3082.160 (“site” defined).

31 **§ 3083.353. Notice prerequisite to recording claim of lien**

32 3083.353. The county recorder shall not record a claim of lien that is filed for
33 record unless accompanied by the claimant’s affidavit showing compliance with
34 the Section 3083.355 (notice of filing claim of lien for record).

35 **Comment.** Section 3083.353 is new. Cf. Gov’t Code § 27297.5 (notification by county
36 recorder of person against which involuntary lien is recorded). See also Code Civ. Proc. § 2015.5
37 (declaration or certificate under penalty of perjury).

38 **§ 3083.355. Notice of filing claim of lien for record**

39 3083.355. (a) At the time of filing a claim of lien for record the claimant shall
40 give notice of the filing to the owner or reputed owner of property subject to the
41 claim of lien.

42 (b) Notice of filing a claim of lien for record shall include a copy of the claim of
43 lien and a statement of the date and place where the claim of lien is filed.

1 (c) The claimant shall mail notice of filing a claim of lien for record to the
2 owner at an address reasonably calculated to give the owner actual notice.

3 **Comment.** Section 3083.355 is new. A claim of lien may not be recorded unless accompanied
4 by proof of notice to the owner. Section 3083.353 (notice prerequisite to recording claim of lien).
5 An unenforceable lien may be expunged. Section 3083.810 (petition for release order).
6 For proof of notice, see Section 3082.240 (mailed notice).

7 **§ 3083.360. Forfeiture of lien for false claim**

8 3083.360. (a) Except as provided in subdivision (b), erroneous information
9 contained in a claim of lien relating to the claimant’s demand, credits and offsets
10 deducted, the labor, services, equipment, or material provided, or the description
11 of the site, does not invalidate the lien.

12 (b) Erroneous information contained in a claim of lien relating to the claimant’s
13 demand, credits and offsets deducted, or the labor, services, equipment, or material
14 provided, invalidates the lien if the court determines either of the following:

15 (1) The claim of lien was made with intent to slander title or defraud.

16 (2) An innocent third party, without notice, actual or constructive, became the
17 bona fide owner of the property since recordation of the claim of lien, and the
18 claim of lien was so deficient that it did not put the party on further inquiry in any
19 manner.

20 **Comment.** Section 3083.360 combines former Sections 3118 and 3261. The terminology of
21 the combined provision has been conformed to Section 3083.350 (claim of lien).

22 Subdivision (b)(1) expands the bases for invalidity to include intent to slander title. If the court
23 finds intent to slander (i.e., falsely disparage) title or defraud, common law damages are
24 available. See Section 3083.370 (damages for false claim of lien).

25 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, services, equipment, or
26 material” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.160 (“site”
27 defined).

28 **§ 3083.370. Damages for false claim of lien**

29 3083.370. (a) If a claimant records a claim of lien containing erroneous
30 information with intent to slander title or defraud, the claimant is liable for
31 damages caused by the recordation, including costs and a reasonable attorney’s fee
32 incurred in a proceeding to invalidate the lien and recover damages.

33 (b) An owner may not commence an action for damages under this section
34 unless at least 10 days before commencement the owner gave the claimant notice
35 demanding that the claimant execute and record a release of the claim of lien and
36 the claimant failed to do so. A demand given under Section 3083.815 (demand
37 prerequisite to petition for release order) satisfies the requirement of this
38 subdivision.

39 (c) The owner has the burden of proof of all elements of an action for damages
40 under this section.

41 **Comment.** Section 3083.370 is new. It reverses case law to the effect that recordation of a
42 claim of mechanics lien is privileged. See, e.g., *Pisano & Associates v. Hyman*, 29 Cal. App. 3d
43 1, 105 Cal. Rptr. 414 (1972).

1 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.100
2 (“owner” defined).

3 **§ 3083.380. Release bond**

4 3083.380. (a) An owner of property subject to a recorded claim of lien or a
5 direct contractor or subcontractor affected by the claim of lien that disputes the
6 correctness or validity of the claim may obtain release of the property from the
7 claim of lien by recording a lien release bond. The principal on the bond may be
8 the owner of the property or the contractor or subcontractor.

9 (b) The bond shall be conditioned on payment of any judgment and costs the
10 claimant recovers on the lien. The bond shall be in an amount equal to 125 percent
11 of the amount of the claim of lien or 125 percent of the amount allocated in the
12 claim of lien to the property to be released. The bond shall be executed by an
13 admitted surety insurer.

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

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

23 **Comment.** Subdivisions (a)-(c) of Section 3083.380 continue former Section 3143. The
24 amount of the release bond is reduced to 125 percent of the amount of the claim of lien,
25 consistent with the stop payment notice release bond. See Section 3084.170 (release bond). The
26 language of the section has been harmonized with the Bond and Undertaking Law, Chapter 2
27 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure.

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

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

35 See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined),
36 3082.060 (“lien” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined).

37 **Article 4. Amount of Lien**

38 **§ 3083.410. Amount of lien**

39 3083.410. (a) The lien is a direct lien for the lesser of the following amounts:

40 (1) The reasonable value of the labor, services, equipment, and material
41 provided by the claimant.

42 (2) The contract price. The lien is not limited in amount by the contract price
43 except as provided in Section 3085.220 (payment bond).

1 (b) This section does not preclude the claimant from including in a claim of lien
2 an amount due as a result of rescission, abandonment, or breach of the contract. If
3 there is a rescission, abandonment, or breach of the contract, the amount of the
4 lien may not exceed the reasonable value of the labor, services, equipment, and
5 material provided by the claimant.

6 **Comment.** Section 3083.410 restates subdivisions (a) and (b) of former Section 3123 and a
7 portion of former Section 3110. See also Section 3082.023 (“contract price” defined). As used in
8 this section, the reasonable value of labor, services, equipment, and material includes the
9 reasonable use value of appliances, equipment, teams, and power.

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

12 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, services, equipment, or
13 material” defined), 3082.060 (“lien” defined), 3082.110 (“person” defined), Section 3083.350
14 (claim of lien).

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

19 **§ 3083.420. Lien limited to amount of contract or modification**

20 3083.420. (a) A lien does not extend to labor, services, equipment, or material
21 not included in a contract between the owner and direct contractor if the labor,
22 services, equipment, or material was contracted for by the direct contractor or
23 subcontractor and the claimant had actual knowledge or constructive notice of the
24 contract before providing the labor, services, equipment, or material.

25 (b) The filing of a contract with the county recorder, before the commencement
26 of work, is equivalent to giving actual notice of the provisions of the contract by
27 the owner to a person providing labor, services, equipment, or material.

28 **Comment.** Section 3083.420 restates former Section 3124 without substantive change. “Direct
29 contractor” is substituted for the undefined “contractor” in subdivision (a). The concept of
30 “contracted for” is substituted for “employed” in subdivision (a). See Section 3083.240 (who may
31 authorize work). The reference to a modification of the contract is omitted in reliance of the
32 definition of “contract”, which includes a contract change. See Section 3082.022 (“contract”
33 defined).

34 See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined),
35 3082.030 (“labor, services, equipment, or material” defined), 3082.060 (“lien” defined), 3082.100
36 (“owner” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined).

37 **§ 3083.430. Amount of recovery**

38 3083.430. A direct contractor or a subcontractor may enforce a lien only for the
39 amount due pursuant to the contract after deducting all claims of other claimants
40 for labor, services, equipment, and material provided and embraced within the
41 contract.

42 **Comment.** Section 3083.430 continues former Section 3140 without substantive change.

43 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, services, equipment, or
44 material” defined), 3082.060 (“lien” defined), 3082.025 (“direct contractor” defined), 3082.180
45 (“subcontractor” defined).

1 **Staff Note.** The wording of this section needs to be correlated with the wording of Section
2 3083.420 (amount of lien).

3 Article 5. Property Subject to Lien

4 **§ 3083.510. Property subject to lien**

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

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

12 See also Sections 3082.060 (“lien” defined), 3082.190 (“work of improvement” defined),
13 3082.190 (“work of improvement” defined).

14 **§ 3083.520. Interest subject to lien**

15 3083.520. A lien attaches to the following interests in the property on which the
16 work of improvement is situated:

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

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

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

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

28 **§ 3083.530. Notice of nonresponsibility**

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

32 (b) A notice of nonresponsibility shall be signed and verified by the owner, and
33 shall contain all of the following information:

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

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

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

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

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

1 **Comment.** Section 3083.530 restates former Section 3094 without substantive change. Cf.
2 Section 3082.235 (written notice). The notice of nonresponsibility may be signed and verified by
3 the owner or person owning or claiming an interest in the property, or by the owner or other
4 person’s agent. See Section 3082.100 (“owner” defined). A notice of nonresponsibility is
5 recorded in the office of the county recorder of the county in which the work of improvement or
6 part of it is situated. Section 3082.250 (filing and recording of papers).

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

9 **§ 3083.540. Multiple works of improvement**

10 3083.540. A claimant may record one claim of lien on two or more works of
11 improvement, subject to the following conditions:

12 (a) The works of improvement have or are reputed to have the same owner, or
13 the labor, services, equipment, or material was contracted for by the same person
14 for the works of improvement whether or not they have the same owner.

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

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

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

32 **Comment.** Section 3083.540 restates former Section 3130 without substantive change. The
33 concept of “contracted for” is substituted for “employed” in subdivisions (a) and (b). See Section
34 3083.240 (who may authorize work).

35 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, services, equipment, or
36 material” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.110 (“person”
37 defined), 3082.190 (“work of improvement” defined).

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
18 for 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 Article 6. Priorities

23 § 3083.610. Priority of lien

24 3083.610. (a) A lien under this chapter has priority over a lien, mortgage, deed
25 of trust, or other encumbrance on the work of improvement or the property on
26 which the work of improvement is situated, that (1) attaches after commencement
27 of the work of improvement, or (2) was unrecorded at the commencement of the
28 work of improvement and of which the claimant had no notice.

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

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

31 (2) The exception provided for in Section 3083.615 (payment bond).

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

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

36 § 3083.615. Payment bond covering mechanics lien

37 3083.615. A mortgage or deed of trust, otherwise subordinate to a lien under
38 Section 3083.610, has priority over a lien for labor, services, equipment, or
39 material provided after recordation of a payment bond that satisfies all of the
40 following requirements:

41 (a) The bond refers to the mortgage or deed of trust.

1 (b) The bond is in an amount not less than 75 percent of the principal amount of
2 the mortgage or deed of trust.

3 **Comment.** Section 3083.615 continues former Section 3138 without substantive change. See
4 also Section 3082.250 (recordation of payment bond in county in which work of improvement is
5 situated).

6 See also Sections 3083.030 (“labor, services, equipment, or material” defined), 3082.060
7 (“lien” defined), 3082.105 (“payment bond” defined).

8 **§ 3083.620. Separate contract for site improvement**

9 3083.620. If a site improvement is provided for in a contract separate from the
10 contract for the remainder of the work of improvement, the site improvement is
11 deemed a separate work of improvement and commencement of the site
12 improvement is not commencement of the remainder of the work of improvement.

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

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

16 **§ 3083.630. Priority of advances by lender**

17 3083.630. (a) This section applies to a construction loan secured by a mortgage
18 or deed of trust that has priority over a lien under this chapter.

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

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

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

25 **§ 3083.640. Priority of site improvement lien**

26 3083.640. Except as provided in Section 3038.645 (payment bond), a lien
27 provided for in Section 3083.230 (site improvement lien) has priority over:

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

31 (b) A mortgage, deed of trust, or other encumbrance that was recorded before
32 commencement of the site improvement, if given for the sole or primary purpose
33 of financing the site improvement. This subdivision does not apply if the loan
34 proceeds are, in good faith, placed in the control of the lender pursuant to a
35 binding agreement with the borrower to the effect that (1) the proceeds are to be
36 applied to the payment of claimants and (2) no portion of the proceeds will be paid
37 to the borrower in the absence of satisfactory evidence that all claims have been
38 paid or that the time for recording a claim of lien has expired and no claim of lien
39 has been recorded.

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

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

1 **§ 3083.645. Payment bond covering site improvement lien**

2 3083.645. A mortgage or deed of trust, otherwise subordinate to a lien under
3 Section 3083.640, has priority over a lien provided for in Section 3083.230 (site
4 improvement lien) if a payment bond in an amount not less than 50 percent of the
5 principal amount of the mortgage or deed of trust is recorded before completion of
6 the work of improvement.

7 **Comment.** Section 3083.645 continues former Section 3139 without substantive change. See
8 also Section 3082.250 (filing and recording of papers).

9 See also Sections 3082.060 (“lien” defined), 3082.105 (“payment bond” defined), 3082.190
10 (“work of improvement” defined).

11 Article 7. Enforcement of Lien

12 **§ 3083.710. Time for commencement of enforcement action**

13 3083.710. (a) The claimant shall commence an action to enforce a lien and
14 record either a notice of the pendency of the action or of an extension of credit
15 under subdivision (b) within 90 days after recordation of the claim of lien. If the
16 claimant does not record either notice of the pendency of an action or an extension
17 of credit within the time provided in this subdivision, the claim of lien expires and
18 is unenforceable.

19 (b) If the claimant and owner agree to extend credit, and notice of the fact and
20 terms of the extension of credit is recorded within 90 days after recordation of the
21 claim of lien, the claimant shall commence an action to enforce the lien and record
22 a notice of the pendency of the action within 90 days after the expiration of the
23 credit, but in no case later than one year after completion of the work of
24 improvement. If the claimant does not record notice of the pendency of an action
25 within the time provided in this subdivision, the claim of lien expires and is
26 unenforceable.

27 **Comment.** Section 3083.710 restates former Section 3144 and adds the requirement that a
28 claim of lien is unenforceable if a *lis pendens* is not recorded within the statutory periods.

29 Subdivision (b) makes clear that the owner must be a party to the extension of credit. This
30 codifies the rule in *Richards v. Hillside Development Co.*, 177 Cal. App. 2d 776, 2 Cal. Rptr. 693
31 (1960) and overrules *Dorer v. McKinsey*, 188 Cal. App. 2d 199, 10 Cal. Rptr. 287 (1961)

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

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

35 **§ 3083.720. Bona fide purchaser or encumbrancer**

36 3083.720. All of the following provisions apply to a claim of lien that expires
37 and is unenforceable under Section 3083.710:

38 (a) The rights of a purchaser or encumbrancer for value and in good faith
39 acquired after the claim of lien expires and is unenforceable are not affected by an
40 extension of credit, or by an extension of the lien or of the time to enforce the lien,
41 recorded before or after the acquisition of the rights by the purchaser or
42 encumbrancer.

1 (b) The claim of lien does not constitute actual or constructive notice of any of
2 the matters contained, claimed, alleged, or contended in the claim of lien, or create
3 a duty of inquiry in any person thereafter dealing with the affected property.

4 **Comment.** Subdivision (a) of Section 3083.720 supersedes former Section 3145. It makes
5 clear that an extension of credit or of the time to enforce a lien after expiration of a claim of lien
6 does not resurrect the claim of lien.

7 Subdivision (b) is drawn from Code of Civil Procedure Section 405.60 (lis pendens).

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

9 **§ 3083.730. Lis pendens**

10 3083.730. After commencement of an action to enforce a lien, the claimant may
11 record a notice of the pendency of action under Title 4.5 (commencing with
12 Section 405) of Part 2 of the Code of Civil Procedure.

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

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

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

19 **§ 3083.740. Dismissal for lack of prosecution**

20 3083.740. Notwithstanding Section 583.420 of the Code of Civil Procedure, the
21 court may dismiss an action to enforce a lien that is not brought to trial within two
22 years after commencement.

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

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

28 **§ 3083.750. Dismissal of action or judgment of no lien**

29 3083.750. Dismissal of an action to enforce a lien, unless the dismissal is
30 expressly stated to be without prejudice, or a judgment that no lien exists, is
31 equivalent to cancellation of the lien and its removal from the record.

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

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

35 **§ 3083.760. Costs**

36 3083.760. In addition to any other costs allowed by law, the court in an action to
37 enforce a lien shall allow as costs to each claimant whose lien is established the
38 amount paid to verify and record the claim of lien, whether the claimant is a
39 plaintiff or defendant.

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

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

1 **§ 3083.770. Deficiency**

2 3083.770. If there is a deficiency of proceeds from the sale of property on a
3 judgment for enforcement of a lien, a deficiency judgment may be entered against
4 a party personally liable for the deficiency in same the manner and with the same
5 effect as in an action to foreclose a mortgage.

6 **Comment.** Section 3083.770 restates former Section 3151 without substantive change.
7 See also Section 3082.060 (“lien” defined).

8 **§ 3083.780. Personal liability**

9 3083.780. This chapter does not affect any of the following rights of a claimant:

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

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

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

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

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

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

26 **§ 3083.790. Liability of contractor for lien enforcement**

27 3083.790. In an action to enforce a lien for labor, services, equipment, or
28 material provided to a contractor:

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

32 (b) If the judgment in the action is against the owner or the owner’s property, the
33 owner may deduct the amount of the judgment and costs from any amount owed to
34 the direct contractor. If the amount of the judgment and costs exceeds the amount
35 owed to the direct contractor, or if the owner has settled with the direct contractor
36 in full, the owner may recover from the contractor, or the sureties on a bond given
37 by the contractor for faithful performance of the contract, the amount of the
38 judgment and costs that exceed the contract price and for which the contractor was
39 originally liable.

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

41 See also Sections 3082.023 (“contract price” defined), 3082.030 (“labor, services, equipment,
42 or material” defined), 3082.060 (“lien” defined), 3082.025 (“direct contractor” defined),
43 3082.100 (“owner” defined).

1

Article 8. Release Order

2 **§ 3083.810. Petition for release order**

3 3083.810. (a) The owner of property subject to a claim of lien may petition the
4 court for an order to release the property from the claim of lien for any of the
5 following causes:

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

8 (2) The claim of lien is invalid under Section 3083.360.

9 (3) The claimant's demand stated in the claim of lien has been paid in full.

10 (4) None of the labor, services, equipment, or material stated in the claim of lien
11 has been provided.

12 (5) The claimant was not licensed to provide the labor, services, equipment, or
13 material stated in the claim of lien for which a license was required by statute.

14 (b) This article does not bar any other cause of action or claim for relief by the
15 owner of the property, nor does a release order bar any other cause of action or
16 claim for relief by the claimant, other than an action to enforce the lien. However,
17 another action or claim for relief may not be joined with a petition under this
18 article.

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

22 **Comment.** Subdivision (a)(1) of Section 3083.810 continues former Section 3154(a) without
23 substantive change. Subdivisions (a)(2)-(5) are new. The owner need not wait until expiration of
24 the time to commence an enforcement action before bringing a petition to release an invalid claim
25 of lien under this section. Cf. Section 3083.360 (forfeiture of lien for false claim).

26 Subdivision (b) continues former Section 3154(h) without substantive change. Subdivision (c)
27 continues former Section 3154(i) without substantive change. As used in this section, the owner
28 of property includes the owner of an interest in the property. See Section 3082.100 ("owner"
29 defined).

30 See also Sections 3082.010 ("claimant" defined), 3082.030 ("labor, services, equipment, or
31 material" defined), 3082.060 ("lien" defined).

32 **§ 3083.815. Demand prerequisite to petition**

33 3083.815. An owner of property may not petition the court for a release order
34 under this article unless at least 10 days before filing the petition the owner gave
35 the claimant notice demanding that the claimant execute and record a release of
36 the claim of lien.

37 **Comment.** Section 3083.815 is new. If the lien claimant complies with the demand, a release
38 proceeding is unnecessary.

39 See also Sections 3082.010 ("claimant" defined), 3082.060 ("lien" defined), 3082.100
40 ("owner" defined).

1 **§ 3083.820. Contents of petition**

2 3083.820. A petition for a release order shall be verified and shall allege all of
3 the following:

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

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

7 (c) The book and page or series number of the place in the official records where
8 the claim of lien is recorded.

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

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

14 (f) That the owner has given the claimant notice demanding that the claimant
15 execute and record a release of the lien and that the claimant is unable or unwilling
16 to do so or cannot with reasonable diligence be found.

17 **Comment.** Section 3083.820 supersedes subdivision (b) of former Section 3154. As used in
18 this section, the owner of property includes the owner of an interest in the property. See Section
19 3082.100 (“owner” defined). See also Section 3082.235 (written notice).

20 The information included in the petition is intended to facilitate the court’s order under Section
21 3083.840 (hearing and order). The reference to series number is added to cover a county in which
22 the recorder uses a sequence number for record location.

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

24 **§ 3083.830. Time of hearing**

25 3083.830. (a) On the filing of a petition for a release order, the clerk shall set a
26 hearing date. The date shall be not more than 30 days after the filing of the
27 petition. The court may continue the hearing beyond the 30-day period on a
28 showing of good cause, but in any event the court shall rule and make any
29 necessary orders on the petition not later than 75 days after the filing of the
30 petition.

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

35 (1) The preliminary notice given by the claimant.

36 (2) The records of the Contractors’ State License Board.

37 (3) The contract on which the claim of lien is based.

38 (4) The claim of lien.

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

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

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

4 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.120
5 (“preliminary notice” defined).

6 **§ 3083.840. Hearing and order**

7 3083.840. (a) At the hearing both the petition and the issue of compliance with
8 the service requirements of this article are deemed controverted by the claimant.
9 The petitioner has the burden of proof that service was made in compliance with
10 this article.

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

13 (1) The date of recordation of the claim of lien.

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

15 (3) The book and page or series number of the place in the official records
16 where the claim of lien is recorded.

17 (4) The legal description of the property.

18 (c) The prevailing party is entitled to a reasonable attorney’s fee.

19 **Comment.** Subdivision (a) of Section 3083.840 continues the last sentence of former Section
20 3154(b)(5) and the last two sentences of former Section 3154(e) without substantive change.
21 Subdivision (b) continues former Section 3154(f). The reference to sequence number is added to
22 cover a county in which the recorder uses a series number for record location. The reference to
23 the city where the claim of lien is recorded is omitted as superfluous. Subdivision (c) continues
24 former Section 3154(g) with the exception of the \$2,000 limitation.

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

26 **§ 3083.850. Release of property from claim of lien**

27 3083.850. (a) A release order is a recordable instrument.

28 (b) On recordation of a certified copy of a release order, the property described
29 in the order is released from the claim of lien.

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

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

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

35 **CHAPTER 3. STOP PAYMENT NOTICE**

36 **Article 1. General Provisions**

37 **§ 3084.120. Stop payment notice exclusive remedy to reach construction funds**

38 3084.120. (a) A person may not assert a legal or equitable right in a fund for
39 payment of construction costs, other than a right created by direct written contract
40 between the person and the holder of the fund, except as provided in this chapter.

1 (b) This chapter provides the exclusive remedy of a person that provides labor,
2 services, equipment, or material against a fund for payment of construction costs.

3 **Comment.** Section 3084.120 restates former Section 3264, but is limited to a private work. See
4 Section 3082.210 (application of title). For a comparable provision applicable to a public work,
5 see Pub. Cont. Code § 44110 (stop payment notice exclusive remedy to reach construction funds).

6 See also Sections 3082.030 (“labor, services, equipment, or material” defined), 3082.110
7 (“person” defined).

8 **§ 3084.130. Contents of stop payment notice**

9 3084.130. (a) A stop payment notice shall be signed and verified by the
10 claimant, and shall contain all of the following information:

11 (1) A general statement of the kind of labor, services, equipment, or material
12 provided or agreed to be provided by the claimant.

13 (2) The name of the person to or for which the labor, services, equipment, or
14 material was provided or agreed to be provided.

15 (3) A statement of the claimant’s demand, after deducting all just credits and
16 offsets, for the labor, services, equipment, or material already provided and for the
17 whole amount agreed to be provided pursuant to the contract.

18 (4) The name and address of the claimant.

19 (b) This section does not preclude the claimant from including in a stop payment
20 notice an amount due as a result of rescission, abandonment, or breach of the
21 contract. If there is a rescission, abandonment, or breach of the contract, the
22 amount of the stop payment notice may not exceed the reasonable value of the
23 labor, services, equipment, and material provided by the claimant.

24 (c) A stop payment notice is not invalid by reason of any defect in form if the
25 notice is sufficient to substantially inform the person given the notice of the
26 information required by this section.

27 **Comment.** Subdivision (a) of Section 3084.130 restates subdivisions (a)-(d) of former Section
28 3103 without substantive change. Cf. Section 3082.235 (written notice). A stop payment notice
29 may be executed by the claimant’s agent. See Section 3082.270 (agency). This section does not
30 preclude the claimant from including in a stop payment notice an amount due for labor, services,
31 equipment, or material provided pursuant to a contract change. See Section 3082.022 (“contract”
32 defined).

33 Subdivision (b) applies provisions applicable to a claim of lien to the stop payment notice. Cf.
34 Section 3083.410 (amount of lien).

35 Subdivision (c) restates the last sentence of the second paragraph of Section 3103 and expands
36 its coverage to include the construction lender.

37 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
38 3082.030 (“labor, services, equipment, or material” defined), 3082.110 (“person” defined),
39 3082.175 (“stop payment notice” defined).

40 **§ 3084.140. False stop payment notice**

41 3084.140. A claimant that willfully gives a false stop payment notice or that
42 willfully includes in the notice labor, services, equipment, or material not provided
43 or agreed to be provided to or for the person named in the notice forfeits all right

1 to participate in the distribution of the funds withheld and all right to a lien under
2 Chapter 2 (commencing with Section 3083.110).

3 **Comment.** Section 3084.140 restates former Section 3168 without substantive change.

4 See also Sections 3082.010 (“claimant” defined), Section 3082.030 (“labor, services,
5 equipment, or material” defined), 3082.060 (“lien” defined), 3082.110 (“person” defined),
6 3082.175 (“stop payment notice” defined).

7 **§ 3084.150. Manner of giving stop payment notice**

8 3084.150. (a) A stop payment notice given to an owner shall be delivered to the
9 owner personally or left at the owner’s residence or place of business with a
10 person in charge, or delivered to the owner’s architect, if any.

11 (b) A stop payment notice given to a construction lender holding construction
12 funds shall be delivered to the manager or other responsible officer or person at
13 the office or branch of the lender administering or holding the construction funds.

14 (c) A stop payment notice may be given by mail with the same effect as by
15 personal delivery.

16 **Comment.** Subdivisions (a) and (b) of Section 3084.150 restate a portion of the second
17 paragraph of former Section 3103 and the last two sentences of former Section 3083 without
18 substantive change. A notice given to a construction lender under subdivision (b) is not effective
19 as against the lender unless given as provided in that paragraph.

20 Subdivision (c) restates the last paragraph of former Section 3103 without substantive change.
21 Mailed notice under this title may be given by registered or certified mail or by another method
22 providing for overnight delivery. See Section 3082.240 (mailed notice).

23 See also Sections 3082.020 (“construction lender” defined), 3082.100 (“owner” defined),
24 3082.110 (“person” defined), 3082.175 (“stop payment notice” defined).

25 **§ 3084.160. Requirements for valid stop payment notice**

26 3084.160. A stop payment notice is not valid unless both of the following
27 conditions are satisfied:

28 (a) The claimant has given preliminary notice and made proof of service to the
29 extent required by Article 1 (commencing with Section 3089.110) of Chapter 7.

30 (b) The claimant gave the stop payment notice before expiration of the time
31 within which a claim of lien must be recorded under Chapter 2 (commencing with
32 Section 3083.110).

33 **Comment.** Section 3084.160 restates former Section 3160 and a portion of the first sentence of
34 former Section 3159 without substantive change. For the time within which a claim of lien must
35 be recorded, see Sections 3083.320-3083.340 (time for claim of lien); see also Section 3089.440
36 (notice of completion of contract for portion of work of improvement).

37 See also Sections 3082.010 (“claimant” defined), 3082.100 (“owner” defined), 3082.120
38 (“preliminary notice” defined), 3082.175 (“stop payment notice” defined), 3082.190 (“work of
39 improvement” defined).

40 **§ 3084.170. Release bond**

41 3084.170. (a) An interested person may obtain release of funds withheld
42 pursuant to a stop payment notice by giving the person withholding the funds a
43 release bond.

1 (b) A release bond shall be given by an admitted surety insurer and shall be
2 conditioned for payment of any amount the claimant recovers on the claim,
3 together with any costs the claimant is awarded in the action. The bond shall be in
4 an amount equal to 125 percent of the amount claimed in the stop payment notice.

5 (c) On receipt of a release bond, the person withholding funds pursuant to the
6 stop payment notice shall release them.

7 **Comment.** Section 3084.170 restates former Section 3171 but eliminates the restrictions on the
8 persons and the conditions under which a release bond may be given. The bond must be given by
9 an admitted surety insurer. See Section 3082.510 (application of Bond and Undertaking Law);
10 Code Civ. Proc. § 995.120 (“admitted surety insurer” defined).

11 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
12 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined), 3082.110 (“person”
13 defined), 3082.175 (“stop payment notice” defined), 3082.180 (“subcontractor” defined).

14 Article 2. Stop Payment Notice to Owner

15 § 3084.210. Stop payment notice to owner

16 3084.210. (a) A person that has a lien right under Chapter 2 (commencing with
17 Section 3083.110), other than a direct contractor, may give the owner a stop
18 payment notice.

19 (b) The owner may give notice demanding that a person give the owner a stop
20 payment notice. If the person fails to give the owner a bonded or unbonded stop
21 payment notice, the person forfeits the right to a lien under Chapter 2
22 (commencing with Section 3083.110).

23 **Comment.** Section 3084.210 restates former Section 3158. It makes clear that the owner’s
24 demand under this section covers only an unbonded stop payment notice. See also Section
25 3082.235 (written notice).

26 See also Sections 3082.025 (“direct contractor” defined), 3082.060 (“lien” defined), 3082.100
27 (“owner” defined), 3082.110 (“person” defined), 3082.175 (“stop payment notice” defined).

28 § 3084.220. Duty of owner

29 3084.220. (a) Except as provided in subdivision (b), an owner shall on receipt of
30 a stop payment notice withhold from the direct contractor or from any person
31 acting under authority of a direct contractor a sufficient amount due or to become
32 due to the direct contractor to pay the claim stated in the notice.

33 (b) The owner may, but is not required to, withhold funds if the owner has
34 recorded a payment bond under Section 3085.220. If the owner does not withhold
35 funds, the owner shall, within 30 days after receipt of the stop payment notice,
36 give notice to the claimant that a payment bond has been recorded and provide the
37 claimant a copy of the bond. The claimant shall be given notice at the address
38 shown in the stop payment notice.

39 **Comment.** Section 3084.220 restates former Section 3161 and makes it parallel to the stop
40 payment notice for a public work. See Pub. Cont. Code § 44150 (duty to withhold funds). Cf.
41 Section 3082.235 (written notice).

1 See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined),
2 Section 3082.030 (“labor, services, equipment, or material” defined), 3082.060 (“lien” defined),
3 3082.100 (“owner” defined), 3082.105 (“payment bond” defined), 3082.110 (“person” defined),
4 3082.175 (“stop payment notice” defined).

5 **Note.** This draft deletes the provision of existing law that requires the owner to withhold an
6 amount due to pay the amount of the claim stated in the notice “and any claim of lien that is
7 recorded.” Under the draft, the amount claimed in a stop payment notice is the same as the
8 amount in a claim of lien. Any amount paid pursuant to the stop payment notice reduces the claim
9 of lien.

10 Article 3. Stop Payment Notice to Construction Lender

11 § 3084.310. Stop payment notice to construction lender

12 3084.310. (a) A person that has a lien right under Chapter 2 (commencing with
13 Section 3083.110) may give a construction lender a stop payment notice.

14 (b) If the person that gives a construction lender a stop payment notice is a
15 claimant other than a direct contractor, the notice may only be given for labor,
16 services, equipment, or material provided by the claimant.

17 **Comment.** Subdivision (a) of Section 3084.310 restates a portion of the first sentence of
18 former Section 3159 without substantive change. See also Sections 3082.175 (“stop payment
19 notice” defined), 3084.160 (requirements for valid stop payment notice).

20 Subdivision (b) restates the last sentence of former Section 3159(a)(3) without substantive
21 change.

22 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
23 3082.025 (“direct contractor” defined), Section 3082.030 (“labor, services, equipment, or
24 material” defined), 3082.060 (“lien” defined), 3082.110 (“person” defined).

25 § 3084.320. Bonded stop payment notice

26 3084.320. A claimant may give a construction lender a stop payment notice
27 accompanied by a bond in an amount equal to 125 percent of the amount of the
28 claim. The bond shall be conditioned that if the defendant recovers judgment in an
29 action to enforce the stop payment notice or to enforce a claim of lien recorded by
30 the claimant, the claimant will pay all costs that are awarded the owner, direct
31 contractor, or construction lender, and all damages to the owner, direct contractor,
32 or construction lender that result from the stop payment notice or recordation of
33 the claim of lien, not exceeding the amount of the bond.

34 **Comment.** Section 3084.320 restates the first sentence of former Section 3083 without
35 substantive change. The former reference to “good and sufficient sureties” on the bond is omitted
36 as unnecessary. See Code Civ. Proc. § 995.310 (sufficient sureties on bond required). The second
37 two sentences of former Section 3083 are continued in Section 3084.150(a)(2) (manner of giving
38 notice).

39 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
40 3082.025 (“direct contractor” defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined),
41 3082.175 (“stop payment notice” defined).

42 **Note.** Existing law states that the claimant’s bond covers costs that may be awarded “against”
43 the defendant. This is evidently a garbled way of saying that the claimant must cover the
44 prevailing defendant’s court costs. We have revised the provision accordingly.

1 § 3084.330. **Objection to bond**

2 3084.330. (a) A construction lender that objects to the sufficiency of sureties on
3 the bond given with a bonded stop payment notice shall give notice to the claimant
4 of the objection within 20 days after the bonded stop payment notice is given.

5 (b) The claimant may within 10 days after notice of the objection is given
6 substitute for the initial bond a bond executed by an admitted surety insurer. If the
7 claimant does not substitute a bond executed by an admitted surety insurer, the
8 construction lender may disregard the bonded stop payment notice and release all
9 funds withheld in response to that notice.

10 **Comment.** Section 3084.330 restates former Section 3163 without substantive change. Cf.
11 Section 3082.235 (written notice); Code Civ. Proc. § 995.120 (“admitted surety insurer” defined).

12 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
13 3082.175 (“stop payment notice” defined).

14 § 3084.340. **Duty of construction lender**

15 3084.340. (a) Except as provided in subdivision (b), a construction lender shall
16 on receipt of a stop payment notice withhold from the borrower or other person to
17 which the lender or the owner is obligated to make payments or advancement out
18 of the construction fund sufficient funds to pay the claim.

19 (b) The construction lender may, at its option, elect not to withhold funds in any
20 of the following circumstances:

21 (1) The stop payment notice is unbonded.

22 (2) A payment bond is recorded before the lender is given the first stop payment
23 notice. This paragraph does not apply to a bonded stop payment notice given by a
24 direct contractor.

25 **Comment.** Section 3084.340 restates paragraphs (1) and (2) of subdivision (a) of former
26 Section 3159, and subdivision (a)(1)-(2) of former Section 3162. The requirement that the lender
27 withhold sufficient funds to pay “any claim of lien that is recorded” is omitted; any amount paid
28 pursuant to a stop payment notice reduces the claim of lien. The reference to recordation of a
29 payment bond “in the office of the county recorder where the site is located” is omitted from
30 subdivision (b)(2) as unnecessary. See Section 3082.250 (filing and recording of papers).

31 If a bonded stop payment notice is given by a direct contractor, the construction lender must
32 withhold funds regardless of whether a payment bond has previously been recorded under Section
33 3085.220.

34 See also Sections 3082.020 (“construction lender” defined), 3082.025 (“direct contractor”
35 defined), 3082.060 (“lien” defined), 3082.100 (“owner” defined), 3082.105 (“payment bond”
36 defined), 3082.110 (“person” defined), 3082.175 (“stop payment notice” defined).

37  **Note.** We have radically recast this provision in an effort to simplify it. Knowledgeable
38 persons should examine the provision to ensure that we have not inadvertently changed its
39 meaning.

40 This draft deletes the provision of existing law that requires the owner to withhold an amount
41 due to pay the amount of the claim stated in the notice “and any claim of lien that is recorded.”
42 Under the draft, the amount claimed in a stop payment notice is the same as the amount in a claim
43 of lien. Any amount paid pursuant to the stop payment notice reduces the claim of lien.

1 required is determined under Article 5 (commencing with Section 3084.510) (enforcement of stop
2 payment notice).

3 See also Sections 3082.010 (“claimant” defined), 3082.110 (“person” defined), 3082.175
4 (“stop payment notice” defined).

5 **Note.** We believe this recasting of existing Section 3167 captures its meaning. Experts should
6 examine the rewrite closely.

7 **§ 3084.420. Amount withheld**

8 3084.420. Notwithstanding Section 3084.410:

9 (a) A direct contractor or a subcontractor may recover pursuant to a stop
10 payment notice given to a construction lender only the net amount due the direct
11 contractor or subcontractor after deducting the claims of all subcontractors and
12 material suppliers that have given a bonded stop payment notice for work done on
13 behalf of the direct contractor or subcontractor.

14 (b) In no event is the construction lender required to withhold, pursuant to a
15 bonded stop payment notice, more than the net amount provided in subdivision
16 (a). Notwithstanding any other provision of this chapter, a construction lender is
17 not liable for failure to withhold more than that net amount on receipt of a bonded
18 stop payment notice.

19 **Comment.** Section 3084.420 restates subdivisions (b) and (c) of former Sections 3159 and
20 3162.

21 See also Sections 3082.020 (“construction lender” defined), 3082.025 (“direct contractor”
22 defined), 3082.070 (“material supplier defined), 3082.175 (“stop payment notice” defined),
23 3082.180 (“subcontractor” defined).

24 **Note.** This is a confusing provision; we would like to clarify it, but can’t without
25 understanding what it means. Subdivision (a) relates to either a bonded or an unbonded notice,
26 and subdivision (b) relates only to a bonded notice. Yet they both seem to state the same rule. We
27 would appreciate some input on whether we can simply delete subdivision (b), or whether it
28 serves a useful purpose.

29 In any event, the statute seems to be an exception to the general rules on priorities, so we have
30 relocated it among the priorities statutes for ease of reference.

31 **§ 3084.430. Effect of stop payment notice on assignment of funds**

32 3084.430. The rights of a claimant that gives a construction lender a stop
33 payment notice are not affected by an assignment of construction loan funds made
34 by the owner or direct contractor, and the stop payment notice has priority over the
35 assignment, whether the assignment is made before or after the stop payment
36 notice is given.

37 **Comment.** Section 3084.430 restates former Section 3166 without substantive change.

38 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
39 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined), 3082.175 (“stop payment
40 notice” defined).

Article 5. Enforcement of Stop Payment Notice

§ 3084.510. Time for enforcement of stop payment notice

3084.510. (a) A claimant shall commence an action to enforce a stop payment notice not earlier than 10 days after the date the claimant gives the notice and not later than 90 days after expiration of the time within which a stop payment notice must be given. The action may not be brought to trial or judgment entered before expiration of the time prescribed in this subdivision.

(b) If a claimant does not commence an action to enforce a stop payment notice within the time prescribed in subdivision (a), the notice ceases to be effective and the person withholding funds pursuant to the notice shall release them.

(c) Within five days after commencement of an action to enforce a stop payment notice, the claimant shall give notice of commencement of the action to the persons and in the manner that a stop payment notice is given.

Comment. Section 3084.510 restates former Section 3172 without substantive change. A stop payment notice must be given before expiration of the time within which a claim of lien must be recorded under Chapter 2 (commencing with Section 3083.110). See Section 3084.160 (requirements for valid stop payment notice).

For the manner that notice of commencement of an enforcement action is to be given, see Section 3084.150 (manner of giving notice).

Funds released for failure to timely commence an enforcement action must be paid or delivered to the person to which they are due.

See also Sections 3082.010 (“claimant” defined), 3082.110 (“person” defined), 3082.175 (“stop payment notice” defined).

Note. The Commission solicits comment on whether subdivision (c), purporting to require a five day notice, should be made mandatory. Under existing law, the provision is directory. *Sunlight Elec. Supply Co. v. McKee*, 226 C.A. 2d 47, 37 Cal. Rptr. 782 (1964).

§ 3084.520. Joinder, consolidation, and interpleader

3084.520. If more than one claimant has given a stop payment notice:

(a) Any number of claimants may join in the same enforcement action.

(b) If claimants commence separate actions, the court first acquiring jurisdiction may order the actions consolidated.

(c) On motion of the owner or construction lender the court shall require all claimants to be impleaded in one action, to the end that the rights of all parties may be adjudicated in the action.

Comment. Section 3084.520 restates former Section 3175 without substantive change.

See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined), 3082.100 (“owner” defined), 3082.175 (“stop payment notice” defined).

Note. The reference in this section to the court “first acquiring jurisdiction” is evidently a relic of pre-unification days when jurisdiction under the mechanics lien law could be in the municipal or the superior court, depending on the amount in controversy. We have not eliminated this provision because it arguably could still have relevance in the context of a work of improvement that straddles a county line, in which case the superior court in either county would have jurisdiction. See proposed Section 3082.220 (jurisdiction and venue). Is this a common enough occurrence that it is worth addressing in the statute?

1 **§ 3084.530. Dismissal of enforcement action for lack of prosecution**

2 3084.530. Notwithstanding Section 583.420 of the Code of Civil Procedure, the
3 court may dismiss an action to enforce a stop payment notice that is not brought to
4 trial within two years after commencement.

5 **Comment.** Section 3084.530 restates former Section 3173 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. Cf. Section 3082.230 (rules of practice).

8 See also Section 3082.175 (“stop payment notice” defined).

9 **§ 3084.540. Dismissal of action or judgment against claimant**

10 3084.540. A stop payment notice ceases to be effective, and a person
11 withholding funds pursuant to the notice shall release them, if an action to enforce
12 the stop payment notice is dismissed (unless expressly stated to be without
13 prejudice) or if judgment in the action is against the claimant.

14 **Comment.** Section 3084.540 restates former Section 3174 without substantive change. Funds
15 released as a result of dismissal of the action or judgment against the claimant must be paid or
16 delivered to the person to which they are due.

17 See also Sections 3082.010 (“claimant” defined), 3082.110 (“person” defined), 3082.175
18 (“stop payment notice” defined).

19 **§ 3084.550. Attorney’s fee in action to enforce bonded stop payment notice**

20 3084.550. (a) In an action to enforce a bonded stop payment notice, the
21 prevailing party is entitled to a reasonable attorney’s fee in addition to costs and
22 damages.

23 (b) The court, on notice and motion by a party, shall determine which is the
24 prevailing party for the purpose of this section, regardless of whether the action
25 proceeds to final judgment. The prevailing party is the party that recovers greater
26 relief in the action, subject to the following limitations:

27 (1) The court may determine that there is no prevailing party.

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

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

34 **Comment.** Section 3084.550 restates former Section 3176 without substantive change.

35 See also Sections 3082.010 (“claimant” defined), 3082.175 (“stop payment notice” defined).

36 **Note.** The existing statute refers to an action against an owner or construction lender to
37 enforce a bonded stop payment notice. But a bonded notice is only given to a construction lender
38 under existing Section 3083, not to an owner. We have omitted the reference to particular
39 defendants from this draft.

1 **§ 3085.230. Bond required by lending institution**

2 3085.230. If a lending institution requires that a payment bond be given as a
3 condition of lending money to finance a work of improvement, and accepts in
4 writing as sufficient a bond given in fulfillment of the requirement, the lending
5 institution may not thereafter object to the borrower as to the validity of the bond
6 or refuse to make the loan based on an objection to the bond if the bond is given
7 by an admitted surety insurer.

8 **Comment.** Section 3085.230 supersedes former Section 3237. It makes clear that the lender
9 may not object to the bond if given by an admitted surety insurer. Cf. Code Civ. Proc. § 995.120
10 ("admitted surety insurer" means corporate insurer to which Insurance Commissioner has issued
11 certificate of authority to transact surety insurance in state).

12 See also Sections 3082.055 ("lending institution" defined), 3082.105 ("payment bond"
13 defined), 3082.110 ("person" defined), 3082.190 ("work of improvement" defined).

14 See also Code Civ. Proc. §§ 995.130 ("beneficiary" defined), 995.140 ("bond" defined),
15 995.185 ("surety" defined).

16 **Note.** This draft would reverse the apparent rule of existing law that a lender may object to
17 a bond writer only if licensed by the Department of Insurance.

18 **§ 3085.250. Statute of limitations against surety on recorded bond**

19 3085.250. If a payment bond is recorded before completion of a work of
20 improvement, an action to enforce the liability on the bond may not be
21 commenced later than six months after completion of the work of improvement.

22 **Comment.** Section 3085.250 restates former Section 3240, and broadens it to cover
23 enforcement of any liability on the bond, not limited to the liability of the surety. Cf. Code Civ.
24 Proc. § 996.440 (judgment on bond against principal and sureties). It supersedes former Section
25 3239 (provision shortening statute of limitations). See also Section 3082.250 (filing and recording
26 of papers), completion.

27 See also Sections 3082.105 ("payment bond" defined), 3082.190 ("work of improvement"
28 defined).

29 See also Code Civ. Proc. §§ 995.130 ("beneficiary" defined), 995.140 ("bond" defined).

30 **§ 3085.260. Preliminary notice required**

31 3085.260. A claimant may not enforce the liability on a payment bond unless
32 either of the following conditions is satisfied:

33 (a) The claimant has given preliminary notice and made proof of service to the
34 extent required by Article 1 (commencing with Section 3089.110) of Chapter 7.

35 (b) The claimant has given notice to the principal and surety as provided in
36 Section 3082.540. Notice under this subdivision shall be given within 75 days
37 after completion of the work of improvement or, if a notice of completion is
38 recorded, within 15 days after recordation.

39 **Comment.** Section 3085.260 restates former Section 3242 without substantive change. Cf.
40 Section 3082.235 (written notice). The former limitation to a contract entered into on or after
41 January 1, 1995, is omitted due to lapse of time.

42 See also Sections 14 (singular includes plural), 3082.240 (mailed notice and proof of notice),
43 3089.410 (completion), 3085.420 (notice of completion).

44 See also Sections 3082.010 ("claimant" defined), 3082.105 ("payment bond" defined),
45 3082.120 ("preliminary notice" defined), 3082.190 ("work of improvement" defined).

CHAPTER 5. SECURITY FOR LARGE PROJECT

Article 1. Application of Chapter

§ 3086.110. Application of chapter

3086.110. (a) This chapter applies if any of the following conditions is satisfied:

(1) The owner of the fee interest in property contracts for a work of improvement on the property with a contract price greater than five million dollars (\$5,000,000).

(2) The owner of a less than fee interest in property contracts for a work of improvement on the property with a contract price greater than one million dollars (\$1,000,000).

(b) For the purpose of this section:

(1) The owner of the fee interest in property is not deemed to be the owner of a less than fee interest by reason of a mortgage, deed of trust, ground lease, or other lien or encumbrance or right of occupancy that encumbers the fee interest.

(2) A lessee of property is deemed to be the owner of a fee interest in the property if all of the following conditions are satisfied:

(A) The initial term of the lease is at least 35 years.

(B) The lease covers one or more lawful parcels under the Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7 of the Government Code, and any applicable local ordinance adopted under that Act, in their entirety, including but not limited to a parcel approved pursuant to a certificate of compliance proceeding.

Comment. Subdivision (a) of Section 3086.110 restates former Section 3110.5(a)(2) without substantive change. Subdivision (b) restates former Section 3110.5(a)(1) without substantive change.

This section standardizes terminology consistent with the remainder of the mechanics lien law. A less than fee interest includes a leasehold interest in the property. See Section 3082.100 (“owner” defined). See also Section 3082.190 (“work of improvement” defined).

Under this section, if the owner that contracts for the work of improvement owns the fee interest in the property, the owner of a less than fee interest that does not contract for the work of improvement is not required to provide security or to comply with any other obligation of an owner under this chapter.

If the owner that contracts for a work of improvement owns a less than fee interest in the property, the owner of the fee interest that does not contract for the work of improvement is not required to provide security or to comply with any other obligation of an owner under this chapter.

Note. We have replaced the ambiguous term “value of the contract” with the more precise term commonly used in the mechanics lien law — “contract price.”

§ 3086.120. Single-family residence and low income housing, excluded

3086.120. This chapter does not apply to any of the following works of improvement:

1 (a) A single-family residence, including a single-family residence located within
2 a subdivision, and any associated fixed work that requires the services of a general
3 engineering contractor as defined in Section 7056 of the Business and Professions
4 Code. As used in this subdivision, “single-family residence” means a real property
5 improvement used or intended to be used as a dwelling unit for one family.

6 (b) A housing development eligible for a density bonus under Section 65915 of
7 the Government Code.

8 **Comment.** Section 3086.120 restates former Section 3110.5(e) without substantive change,
9 omitting reference to a public work. This title does not apply to a public work. See Section
10 3082.210 (application of title).

11 **§ 3086.130. Qualified publicly traded company and qualified private company excluded**

12 3086.130. This chapter does not apply to any of the following owners of
13 property:

14 (a) A qualified publicly traded company or a wholly owned subsidiary of a
15 qualified publicly traded company, if the obligations of the subsidiary pursuant to
16 the contract for the work of improvement are guaranteed by the parent. As used in
17 this subdivision, “qualified publicly traded company” means a company having a
18 class of equity securities listed for trading on the New York Stock Exchange, the
19 American Stock Exchange, or the NASDAQ stock market, and the
20 nonsubordinated debt securities of which are rated as “investment grade” by either
21 Fitch ICBA, Inc., Moody’s Investor Services, Inc., Standard & Poor’s Ratings
22 Services, or a similar statistical rating organization that is nationally recognized
23 for rating the creditworthiness of a publicly traded company. If at any time before
24 final payment of all amounts due pursuant to the contract the nonsubordinated debt
25 securities of the qualified publicly traded company are downgraded to below
26 “investment grade” by any of those rating organizations, the owner is no longer
27 exempt from this chapter.

28 (b) A qualified private company or a wholly owned subsidiary of a qualified
29 private company, if the obligations of the subsidiary pursuant to the contract for
30 the work of improvement are guaranteed by the parent. As used in this
31 subdivision, “qualified private company” means a company that has no equity
32 securities listed for trading on the New York Stock Exchange, the American Stock
33 Exchange, or the NASDAQ stock market, and that has a net worth determined in
34 accordance with generally accepted accounting principles in excess of fifty million
35 dollars (\$50,000,000). If at any time before final payment of all amounts due
36 pursuant to the contract the net worth of the qualified private company is reduced
37 below that level, the owner is no longer exempt from this chapter.

38 **Comment.** Section 3086.130 restates former Section 3110.5(f) without substantive change.
39 See also Sections 3082.022 (“contract” defined), 3082.100 (“owner” defined), 3082.190
40 (“work of improvement” defined).

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Article 2. Security Requirement

§ 3086.210. Security for owner’s payment obligation

3086.210. An owner of property to which this chapter applies shall provide the direct contractor all of the following:

(a) Security for the owner’s payment obligation pursuant to the contract. The security shall be used only if the owner defaults on the payment obligation to the direct contractor. This subdivision does not apply to an owner of property that is the majority owner of the direct contractor.

(b) A copy, certified by the county recorder, of any recorded mortgage or deed of trust that secures the construction loan of a lending institution for the work of improvement, disclosing the amount of the loan.

Comment. Section 3086.210 restates the first parts of subdivisions (a) and (b) of former Section 3110.5 without substantive change. As used in this section, “owner of property” includes the owner of the fee simple absolute interest or any lesser interest in the property. See Section 3082.100 (“owner” defined). The reference to a “work of improvement” includes construction, alteration, addition to, or repair upon, the property. See Section 3082.190 (“work of improvement” defined).

See also Sections 3082.235 (written notice), 3082.240 (mailed notice), 3082.330 (construction trust deed).

See also Sections 3082.022 (“contract” defined), 3082.025 (“direct contractor” defined), 3082.055 (“lending institution” defined).

Note. We have applied the term “lending institution”, as used in the mechanics lien law in subdivision (b). The term includes commercial bank, savings and loan institution, credit union, or other organization or person engaged in the business of financing loans. The term apparently differs from “financial institution”, used elsewhere in this chapter.

§ 3086.220. Demand for security

3086.220. If an owner of property to which this chapter applies fails to provide or maintain the security required by this chapter, the direct contractor may give the owner notice demanding security. If the owner does not provide or maintain the security within 10 days after notice demanding security is given, the direct contractor may suspend work until the owner provides or maintains the security.

Comment. Section 3086.220 restates the second sentence of former Section 3110.5(c) without substantive change.

See also Sections 3082.235 (written notice), 3082.240 (mailed notice).

See also Sections 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined).

§ 3086.230. Security not waivable

3086.230. It is against public policy by contract to waive the provisions of this chapter.

Comment. Section 3086.230 restates former Section 3110.5(g) without substantive change. This title does not apply to a public work. See Section 3082.210 (application of title).

See also Section 3082.022 (“contract” defined).

1 See also Sections 3082.022 (“contract” defined), 3082.023 (“contract price” defined), 3082.100
2 (“owner” defined), 3082.190 (“work of improvement” defined).

3 **Note.** We have replaced the term “total amount of the contract” with the term commonly used
4 in the mechanics lien law — “contract price.”

5 **§ 3086.330. Irrevocable letter of credit**

6 3086.330. An irrevocable letter of credit under this chapter shall satisfy all of the
7 following requirements:

8 (a) The letter of credit shall be issued by a financial institution, as defined in
9 Section 5107 of the Financial Code, inuring to the benefit of the direct contractor.

10 (b) The letter of credit shall be in an amount not less than 15 percent of the
11 contract price for the work of improvement or, if the work of improvement is to be
12 substantially completed within six months after the commencement of work, not
13 less than 25 percent of the contract price.

14 (c) The maturity date and other terms of the letter of credit shall be determined
15 by agreement between the owner, the direct contractor, and the financial
16 institution, except that the owner shall maintain the letter of credit in effect until
17 the owner has satisfied its payment obligation to the direct contractor.

18 **Comment.** Section 3086.330 restates former Section 3110.5(b)(2) without substantive change.
19 See also Sections 3082.023 (“contract price” defined), 3082.025 (“direct contractor” defined),
20 3082.100 (“owner” defined), 3082.190 (“work of improvement” defined).

21 **Note.** We have replaced the term “total amount of the contract” with the term commonly used
22 in the mechanics lien law — “contract price.”

23 **§ 3086.340. Escrow account**

24 3086.340. An escrow account under this chapter shall satisfy all of the following
25 requirements:

26 (a) The account shall be designated as a “construction security escrow account”.

27 (b) The account shall be located in this state and maintained with an escrow
28 agent licensed under the Escrow Law, Division 6 (commencing with Section
29 17000) of the Financial Code, or with any person exempt from the Escrow Law
30 under paragraph (1) or (3) of subdivision (a) of Section 17006 of the Financial
31 Code.

32 (c) The owner shall deposit funds in the account in the amount provided in
33 Section 3086.350. This chapter does not require a construction lender to agree to
34 deposit proceeds of a construction loan in the account.

35 (d) The owner shall grant the direct contractor a perfected, first priority security
36 interest in the account and in all funds deposited by the owner in the account and
37 in their proceeds, established to the reasonable satisfaction of the direct contractor,
38 which may be by a written opinion of legal counsel for the owner.

39 (e) The funds on deposit in the account shall be the sole property of the owner,
40 subject to the security interest of the direct contractor. The owner and the direct
41 contractor shall instruct the escrowholder to hold the funds on deposit in the
42 account for the purpose of perfecting the direct contractor’s security interest in the

1 account and to disburse those funds only on joint authorization of the owner and
2 the direct contractor, or pursuant to a court order that is binding on both of them.

3 **Comment.** Section 3086.340 restates portions of former Section 3110.5(b)(3) without
4 substantive change.

5 See also Sections 3082.020 (“construction lender” defined), 3082.025 (“direct contractor”
6 defined), 3082.100 (“owner” defined).

7 **Note.** It is unclear what it means for an escrow account to be “located” in this state. Do
8 deposits to the account have to be held in the form of bullion on site? Suppose the escrowholder
9 deposits receipts to, and issues checks drawn against, an account in a financial institution that is
10 headquartered elsewhere? Should this requirement be dropped as essentially meaningless?

11 **§ 3086.350. Deposits to and disbursements from escrow account**

12 3086.350. The following provisions govern a deposit to or disbursement from a
13 construction security escrow account under this chapter:

14 (a) Before the commencement of work the owner shall make an initial deposit to
15 the account in an amount not less than 15 percent of the contract price for the work
16 of improvement or, if the work of improvement is to be substantially completed
17 within six months after the commencement of work, not less than 25 percent of the
18 contract price.

19 (b) If the contract provides for a retention to be withheld from a periodic
20 payment to the direct contractor, the owner shall deposit the amount withheld as
21 retention at the time the owner makes the corresponding payment to the direct
22 contractor from which the retention is withheld.

23 (c) The amount required to be maintained on deposit shall not exceed the total
24 amount remaining to be paid to the direct contractor pursuant to the contract. If the
25 amount on deposit equals or exceeds the total amount remaining to be paid to the
26 direct contractor, the owner and the direct contractor shall authorize disbursement
27 to the direct contractor for progress payments then due the direct contractor, but a
28 party is not obligated to authorize disbursement that would cause the amount
29 remaining on deposit following the disbursement to be less than the total amount
30 remaining to be paid to the direct contractor.

31 (d) The owner and the direct contractor shall authorize the disbursement to the
32 owner of any funds remaining on deposit after the direct contractor has been paid
33 all amounts due pursuant to the contract. The owner and the direct contractor shall
34 authorize the disbursement of funds on deposit pursuant to a court order that is
35 binding on both of them. The owner and the direct contractor may agree in the
36 contract to additional conditions for the disbursement of funds on deposit, except
37 that the conditions may not cause the amount remaining on deposit to be less than
38 the amount required under this section.

39 **Comment.** Section 3086.350 restates portions of former Section 3110.5(b)(3) without
40 substantive change.

41 See also Sections 3082.022 (“contract” defined), 3082.023 (“contract price” defined), 3082.025
42 (“direct contractor” defined), 3082.100 (“owner” defined), 3082.190 (“work of improvement”
43 defined).

1 (b) Unless the direct contractor and a subcontractor otherwise agree in writing,
2 within 21 days after receipt of a progress payment from the public utility the direct
3 contractor shall pay the subcontractor the amount allowed the direct contractor on
4 account of the work performed by the subcontractor to the extent of the
5 subcontractor's interest in the work. If there is a good faith dispute over all or part
6 of the amount due on a progress payment from the direct contractor to a
7 subcontractor, the direct contractor may withhold an amount not in excess of 150
8 percent of the disputed amount.

9 (c) A direct contractor that violates this section is liable to the subcontractor for
10 a penalty of two percent of the disputed amount due per month for every month
11 that payment is not made. In an action for collection of the amount wrongfully
12 withheld, the prevailing party is entitled to costs and a reasonable attorney's fee.

13 (d) This section does not limit or impair a contractual, administrative, or judicial
14 remedy otherwise available to a contractor or subcontractor in a dispute involving
15 late payment or nonpayment by the contractor or deficient performance or
16 nonperformance by the subcontractor.

17 **Comment.** Section 3088.120 restates former Section 3262.5, with the addition of a
18 reasonableness limitation on an attorney's fee. The reference to 15 "working days" is converted
19 to 21 "days", consistent with the remainder of the mechanics lien law. Cf. Section 9 (business
20 day).

21 See also Sections 3082.022 ("contract" defined), 3082.025 ("direct contractor" defined),
22 3082.180 ("subcontractor" defined), 3082.190 ("work of improvement" defined).

23 **Note.** Existing law makes this section applicable to a contract "to do business" with a public
24 utility. We have limited it to a work of improvement contracted for by a public utility, consistent
25 with placement of this section in the mechanics lien law.

26 Article 2. Retention Payment

27 § 3088.210. Application of article

28 3088.210. This article governs a retention withheld by an owner from a direct
29 contractor or by a direct contractor from a subcontractor.

30 **Comment.** Section 3088.210 restates subdivision (b) of former Section 3260 without
31 substantive change. This article is limited to a private work. See Section 3082.210 (application of
32 title). The transitional provision found in subdivision (a) of former Section 3260, relating to
33 contracts entered into before 1991, 1993, and 1994, are omitted due to lapse of time.

34 See also Sections 3082.025 ("direct contractor" defined), 3082.100 ("owner" defined),
35 3082.180 ("subcontractor" defined).

36 § 3088.220. Payment of retention by owner

37 3088.220. (a) If an owner has withheld a retention from a direct contractor, the
38 owner shall, within 45 days after completion of the work of improvement, pay the
39 retention to the contractor.

40 (b) If part of a work of improvement ultimately will become the property of a
41 public entity, the owner may condition payment of a retention allocable to that part
42 on acceptance of the part by the public entity.

1 (c) If there is a good faith dispute between the owner and direct contractor, the
2 owner may withhold from final payment an amount not in excess of 150 percent of
3 the disputed amount.

4 **Comment.** Section 3088.220 restates subdivision (c) of former Section 3260, except that
5 detailed provisions defining the date of completion have been eliminated in reliance on the
6 general provisions of this title governing completion. See Section 3089.410 (completion). The
7 right of the owner to withhold disputed amounts is made subject to a condition of good faith,
8 consistent with other provisions of this title.

9 See also Sections 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined),
10 3082.140 (“public entity” defined), 3082.190 (“work of improvement” defined).

11 **Note.** We have eliminated the definition of “date of completion” found in the existing statute,
12 in reliance on general provisions relating to completion. See Section 3089.410 (completion). We
13 have done this in the interest of simplification of the statute.

14 We have generalized subdivision (c), which under existing law could be read as limited to the
15 circumstances described in subdivision (b). However the existing ambiguity appears to be the
16 consequence of a defective amendment process, not the result of a policy decision.

17 It is unclear why, under existing law, the owner may withhold whether or not the dispute is in
18 good faith. The other provisions of this chapter require a good faith dispute. We have
19 incorporated the general standard here.

20 **§ 3088.230. Payment of retention by direct contractor**

21 3088.230. (a) If a direct contractor has withheld a retention from a
22 subcontractor, the direct contractor shall, within 10 days after receiving all or part
23 of a retention payment, pay the subcontractor its share of the payment.

24 (b) If a retention payment received by the direct contractor is specifically
25 designated for a particular subcontractor, the direct contractor shall pay the
26 retention to the designated subcontractor, if consistent with the terms of the
27 subcontract.

28 (c) If a good faith dispute exists between the direct contractor and a
29 subcontractor, the direct contractor may withhold from the retention payment to
30 the subcontractor an amount not in excess of 150 percent of the estimated value of
31 the disputed amount.

32 **Comment.** Section 3088.230 restates subdivisions (d) and (e) of former Section 3260 without
33 substantive change.

34 See also Sections 3082.025 (“direct contractor” defined), 3082.180 (“subcontractor” defined).

35 **§ 3088.240. Payment for disputed work**

36 3088.240. (a) If the direct contractor gives the owner, or a subcontractor gives
37 the direct contractor, notice that work in dispute has been completed in accordance
38 with the contract, the owner or direct contractor shall within 10 days give notice
39 advising the notifying party of the acceptance or rejection of the disputed work.

40 (b) Within 10 days after acceptance of disputed work, the owner or direct
41 contractor shall pay the portion of the retention relating to the disputed work.

42 **Comment.** Section 3088.240 restates subdivision (f) of former Section 3260 without
43 substantive change. Notice under this title must be written. See Section 3082.235 (written notice).
44 See also Section 3082.240 (mailed notice).

1 See also Sections 3082.022 (“contract” defined), 3082.025 (“direct contractor” defined),
2 3082.100 (“owner” defined), 3082.180 (“subcontractor” defined).

3 **§ 3088.250. Penalty**

4 3088.250. An owner or direct contractor that does not make a retention payment
5 within the time required by this article is liable to the person to which payment is
6 owed for a penalty of two percent per month on the amount wrongfully withheld,
7 in place of any interest otherwise due. In an action for collection of the amount
8 wrongfully withheld, the prevailing party is entitled to costs and a reasonable
9 attorney’s fee.

10 **Comment.** Section 3088.250 restates subdivision (g) of former Section 3260, with the addition
11 of a reasonableness limitation on an attorney’s fee.

12 See also Sections 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined),
13 3082.110 (“person” defined).

14 **§ 3088.260. Waiver against public policy**

15 3088.260. It is against public policy by contract to waive the provisions of this
16 article.

17 **Comment.** Section 3088.260 restates subdivision (h) of former Section 3260 without
18 substantive change.

19 **§ 3088.270. Construction loan exempt**

20 3088.270. This article does not apply to a retention withheld by a lender
21 pursuant to a construction loan agreement.

22 **Comment.** Section 3088.270 restates subdivision (i) of former Section 3260.

23 **Article 3. Stop Work Notice**

24 **§ 3088.305. “Stop work notice” defined**

25 3088.305. “Stop work notice” means notice given under this article by a direct
26 contractor to an owner that the contractor will stop work if the amount owed the
27 contractor is not paid within 10 days after notice is given.

28 **Comment.** Section 3088.305 restates a part of the first sentence of former Section 3260.2(a)
29 without substantive change. This article is limited to a private work. See Section 3082.210
30 (application of title).

31 See also Sections 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined).

32 **§ 3088.310. Stop work notice**

33 3088.310. If a direct contractor is not paid the amount due pursuant to a written
34 contract within 35 days after the date payment is due, and there is no dispute as to
35 the satisfactory performance of the contractor, the contractor may give the owner a
36 stop work notice.

37 **Comment.** Section 3088.310 restates a portion of the first sentence of former Section
38 3260.2(a) without substantive change.

1 See also Sections 3082.022 (“contract” defined), 3082.025 (“direct contractor” defined),
2 3082.100 (“owner” defined).

3 **§ 3088.320. Additional notice**

4 3088.320. A direct contractor that gives an owner a stop work notice shall give
5 the following additional notice:

6 (a) At least five days before giving the stop work notice, the contractor shall
7 post in a conspicuous location at the site and at the main office of the site, if one
8 exists, notice of intent to give a stop work notice,

9 (b) At the same time the contractor gives the stop work notice, the contractor
10 shall give a copy of the stop work notice to all subcontractors with which the
11 contractor has a direct contractual relationship on the work of improvement.

12 **Comment.** Section 3088.320 restates the second and third sentences of former Section
13 3260.2(a), and requires that the contractor give a copy of the stop work notice.

14 See also Sections 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined),
15 3082.160 (“site” defined), 3082.180 (“subcontractor” defined), 3082.190 (“work of
16 improvement” defined).

17 **§ 3088.330. Manner of notice**

18 3088.330. (a) Subject to subdivision (b), a direct contractor shall give a stop
19 work notice to the person to be given notice, or a copy of a stop work notice to the
20 person to be given a copy, by any of the following methods:

21 (1) Delivering it personally.

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

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

28 (b) If the person to be given notice does not reside in the state, notice shall be
29 given by any method provided in subdivision (a) or, if the person cannot be given
30 notice by any method provided in subdivision (a), by mail addressed to the
31 construction lender, if any.

32 (c) Proof that notice was given to a person in the manner required by this section
33 shall be made by the proof of notice affidavit described in subdivision (d) and, if
34 given by mail, shall be accompanied by proof in the manner provided in Section
35 3082.240.

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

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

39 (2) The name and address of the person to which notice was given, and, if
40 appropriate, the title or capacity in which the person was given notice.

41 (e) Notice under this section by certified mail is effective on receipt. Notice by
42 registered mail is effective five days after mailing.

1 **Comment.** Section 3088.330 restates former Section 3260.2(g), incorporating the details of
2 manner of service and proof of notice applicable to preliminary notice. See Section 3089.150
3 (giving preliminary notice). See also Section 3082.240 (mailed notice). Although mailed notice is
4 complete on deposit, it is not effective for purposes of this article until the time specified in
5 subdivision (e).

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

8 **§ 3088.340. Notice to construction lender**

9 3088.340. Within five days after receipt of a stop work notice from a direct
10 contractor, the owner shall give notice to the construction lender, if any, at the
11 address provided in the construction loan agreement, by providing a copy of the
12 notice by first-class mail.

13 **Comment.** Section 3088.340 restates the fourth sentence of former Section 3260.2(a) without
14 substantive change.

15 See also Sections 3082.020 (“construction lender” defined), 3082.025 (“direct contractor”
16 defined), 3082.100 (“owner” defined).

17 **§ 3088.350. Immunity from liability**

18 3088.350. (a) The direct contractor or the direct contractor’s surety is not liable
19 for delay or damage that the owner or a subcontractor may suffer as a result of the
20 direct contractor giving a stop work notice and subsequently stopping work for
21 nonpayment, if the notice and posting requirements of this article are satisfied.

22 (b) The direct contractor’s liability to a subcontractor or material supplier
23 resulting from stopping work under this article is limited to the amount of
24 monetary damages the subcontractor or material supplier could otherwise recover
25 under this title for labor, services, equipment, or material provided up to the date
26 the subcontractor ceases work, subject to the following exceptions:

27 (1) The direct contractor’s liability continues for labor, services, equipment, or
28 material provided up to and including the 10 day notice period and not beyond.

29 (2) This subdivision does not limit monetary damages for custom work,
30 including materials that have been fabricated, manufactured, or ordered to
31 specifications that are unique to the job.

32 **Comment.** Section 3088.350 restates former Section 3260.2(c), except that provisions that
33 appear to suggest that a subcontractor may give a stop work notice have been deleted.

34 See also Sections 3082.025 (“direct contractor” defined), 3082.030 (“labor, services,
35 equipment, or material” defined), 3082.070 (“material supplier” defined), 3082.100 (“owner”
36 defined), 3082.180 (“subcontractor” defined).

37 **§ 3088.360. Notice of resolution of dispute or cancellation of stop work notice**

38 3088.360. On resolution of the dispute or the direct contractor’s cancellation of
39 the stop work notice, the contractor shall post, in a conspicuous location at the site
40 and at the main office, if one exists, and give a notice to inform subcontractors
41 with which the contractor has a direct contractual relationship on the work of
42 improvement, of the resolution or cancellation.

1 **Comment.** Section 3088.360 restates the second paragraph of former Section 3260.2(a)
2 without substantive change.

3 See also Sections 3082.025 (“direct contractor” defined), 3082.160 (“site” defined), 3082.180
4 (“subcontractor” defined), 3082.190 (“work of improvement” defined).

5 **§ 3088.370. Stop work remedy not exclusive**

6 3088.370. A direct contractor’s right to stop work under this article is in addition
7 to other rights the direct contractor may have under the law.

8 **Comment.** Section 3088.370 restates former Section 3260.2(b) without substantive change.
9 See also Section 3082.025 (“direct contractor” defined).

10 **§ 3088.380. Judicial proceeding**

11 3088.380. If payment of the amount due is not made within 10 days after a stop
12 work notice is given, the direct contractor or the direct contractor’s surety may, in
13 an expedited proceeding seek a judicial determination of liability for the amount
14 due.

15 **Comment.** Section 3088.380 restates former Section 3260.2(d) without substantive change.
16 See also section 3082.220 (jurisdiction and venue).

17 See also Section 3082.025 (“direct contractor” defined).

18 ☞ **Note.** It’s not clear what sort of expedited proceeding is referred to here. Is this a trial setting
19 preference, or something else? The statute lacks detail. It may be best to simply delete the
20 reference to expedition.

21 **§ 3088.390. Waiver against public policy**

22 3088.390. It is against public policy by contract to waive the provisions of this
23 article.

24 **Comment.** Section 3088.390 restates former Section 3260.2(e) without substantive change.

25 **§ 3088.410. Application of article**

26 3088.410. (a) This article applies to a contract entered into on or after January 1,
27 1999.

28 (b) This article does not apply to a retention withheld by a lender pursuant to a
29 construction loan agreement.

30 **Comment.** Section 3088.410 restates the second sentence of former Section 3260.2(f) without
31 substantive change. The first sentence, limiting this article to a contract entered into on or after
32 January 1, 1999, is not continued due to lapse of time.

33 CHAPTER 7. MISCELLANEOUS PROVISIONS

34 Article 1. Preliminary Notice

35 **Comment.** The transitional provisions of former Section 3097(p) are not continued due to
36 lapse of time.

1 **§ 3089.110. Preliminary notice prerequisite to remedies**

2 3089.110. (a) Except as otherwise provided in this section, preliminary notice is
3 a necessary prerequisite to the validity of a lien, stop payment notice, or claim
4 against a payment bond.

5 (b) Preliminary notice is not required of a laborer or laborer’s compensation
6 fund.

7 (c) Preliminary notice is not required of a direct contractor except with respect
8 to a construction lender.

9 **Comment.** Subdivision (a) of Section 3089.110 restates part of the introductory clause of
10 former Section 3097 without substantive change. This article is limited to private work. See
11 Section 3082.210 (application of title).

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

13 Subdivision (c) restates parts of former Section 3097(a) and (b), omitting the exception of “the
14 contractor”. Although a direct contractor is generally excused from the preliminary notice
15 requirement, the direct contractor must give preliminary notice to the construction lender under
16 Section 3089.120(c).

17 See also Sections 3082.010 (“claimant” defined), 3082.040 (“laborer” defined), 3082.050
18 (“laborer’s compensation fund” defined), 3082.060 (“lien” defined), 3082.025 (“direct
19 contractor” defined).

20 **§ 3089.120. Preliminary notice requirement**

21 3089.120. Before recording a claim of lien, filing a stop payment notice, or
22 asserting a claim against a payment bond, the claimant shall give preliminary
23 notice to each of the following persons:

24 (a) The owner or reputed owner.

25 (b) The direct contractor or reputed contractor.

26 (c) The construction lender or reputed lender, if any.

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

31 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
32 3082.060 (“lien” defined), 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined),
33 3082.110 (“person” defined).

34 **§ 3089.130. Contents of preliminary notice**

35 3089.130. (a) A preliminary notice shall contain all of the following
36 information:

37 (1) A general description of the labor, services, equipment, or material provided,
38 or to be provided, and the contract price.

39 (2) The name and address of the person providing the labor, services,
40 equipment, or material.

41 (3) The name of the person that contracted for the labor, services, equipment, or
42 material.

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

44 (5) The following statement in boldface type:

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

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

4 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, services, equipment, or
5 material” defined), 3082.060 (“lien” defined), 3082.190 (“work of improvement” defined).

6 **§ 3089.150. Giving preliminary notice**

7 3089.150. (a) Subject to subdivision (b), preliminary notice shall be given to a
8 person by any of the following methods:

9 (1) Delivering it personally.

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

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

16 (b) If the person to be given notice does not reside in the state, preliminary
17 notice shall be given by any method provided in subdivision (a) or, if the person
18 cannot be given notice by any method provided in subdivision (a), by mail
19 addressed to the construction lender or the direct contractor.

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

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

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

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

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

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

34 For service and proof of service by mail, see Section 3082.240 (mailed notice). This expands
35 the permissible methods of mailing. See also Code Civ. Proc. § 2015.5 (declaration or certificate
36 under penalty of perjury).

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

39 **§ 3089.160. Coverage of preliminary notice**

40 3089.160. (a) Except as provided in subdivision (b), a claimant need give only
41 one preliminary notice to each person to which notice must be given under this
42 article with respect to all labor, services, equipment, and material provided by the
43 claimant for a work of improvement.

1 (b) If a claimant provides labor, services, equipment, or material pursuant to
2 contracts with more than one subcontractor, the claimant shall give a separate
3 preliminary notice with respect to labor, services, equipment, or material provided
4 to each contractor.

5 (c) A preliminary notice that contains a general description of labor, services,
6 equipment, or material provided by the claimant before the date of the notice also
7 covers labor, services, equipment, or material provided by the claimant after the
8 date of the notice whether or not they are within the scope of the general
9 description contained in the notice

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

11 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, services, equipment, or
12 material” defined), 3082.110 (“person” defined), 3082.180 (“subcontractor” defined), 3082.190
13 (“work of improvement” defined).

14 **§ 3089.170. Direct contractor’s duty to provide information**

15 3089.170. A direct contractor shall make available to any person seeking to give
16 preliminary notice the following information:

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

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

19 **Comment.** Section 3089.170 continues without substantive change the parts of former Section
20 3097(l)-(m) relating to the direct contractor’s duty to provide information. For provisions
21 concerning the content of contracts, see Section 3082.310 (contract forms).

22 See also Sections 14 (singular includes plural), 3082.020 (“construction lender” defined),
23 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined), 3082.110 (“person”
24 defined).

25 **§ 3089.180. Owner’s duty to give notice of construction loan**

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

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

32 See also Sections 3082.020 (“construction lender” defined), 3082.100 (“owner” defined),
33 3082.110 (“person” defined).

34 **§ 3089.190. Waiver void**

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

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

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

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

3 **§ 3089.430. Notice of completion**

4 3089.430. (a) On or after completion of a work of improvement an owner may
5 record a notice of completion.

6 (b) The notice of completion shall be signed and verified by the owner, and
7 contain all of the following information:

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

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

13 (3) The name of the direct contractor, if any, for the work of improvement or, if
14 the notice is given only of completion of a contract for a particular portion of the
15 work of improvement as provided in Section 3089.440, the name of the direct
16 contractor under that contract and a general statement of the kind of labor,
17 services, equipment, or material provided pursuant to the contract.

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

20 (5) The date of completion. An erroneous statement of the date of completion
21 does not affect the effectiveness of the notice if the true date of completion is on or
22 before the date of recordation of the notice.

23 (6) If the notice is based on cessation of labor, the date on or about which labor
24 ceased, and that cessation of labor has been continuous until recordation of the
25 notice.

26 (7) An affidavit of mailing in the manner provided in Section 1013a of the Code
27 of Civil Procedure, showing all persons given notice under Section 3089.450.

28 **Comment.** Section 3089.430 combines former Section 3093 (notice of completion) with
29 former Section 3092 (notice of cessation). For date of completion of a work of improvement, see
30 Section 3089.410. For the effect of a notice of completion, see Sections 3083.320-3083.330 (time
31 for claim of lien), 3083.710 (time for commencement of enforcement action). Cf. Section
32 3082.235 (written notice).

33 A notice of completion is ineffective to shorten the time for a claim of lien unless notice of
34 recordation is given to the person whose claim of lien is affected. See Section 3089.450 (notice of
35 recordation by owner). The requirement of an affidavit of mailing in subdivision (b)(7) is new.
36 See also Code Civ. Proc. § 2015.5 (declaration or certificate under penalty of perjury).

37 This section eliminates the 10-day period for recording a notice of completion under former
38 law. A claim of lien must be filed within 30 or 60 days after recording a notice of completion
39 (depending on the nature of the claimant), subject to a maximum of 90 days after actual
40 completion. See Sections 3083.320 and 3083.330 (recordation of claim of lien). This codifies the
41 effect of existing law. See, e.g., *Doherty v. Carruthers*, 171 Cal. App. 2d 214, 340 P.2d 58
42 (1959).

43 A notice of completion is recorded in the office of the county recorder of the county in which
44 the work of improvement or part of it is situated. Section 3082.250 (filing and recording of
45 papers). A notice of completion is recorded when it is filed for record. Section 3082.250 (filing
46 and recording of papers).

1 As used in this section, the owner is the person who causes a building, improvement, or
2 structure, to be constructed, altered, or repaired (or the owner’s successor in interest at the date of
3 a notice of completion is recorded) whether the interest or estate of the owner is in fee, as vendee
4 under a contract of purchase, as lessee, or other interest or estate less than the fee, and includes a
5 cotenant. A notice of completion may be signed and verified by the owner’s agent. See Sections
6 3082.100 (“owner” defined), 3082.260 (co-owners).

7 The reference to a successor’s “transferors” is omitted from subdivision (b)(4). See Section 14
8 (singular includes plural).

9 See also Sections 3082.030 (“labor, services, equipment, or material” defined), 3082.025
10 (“direct contractor” defined), 3082.160 (“site” defined), 3082.190 (“work of improvement”
11 defined), Section 3082.250 (filing and recording of papers).

12 **§ 3089.440. Notice of completion of contract for portion of work of improvement**

13 3089.440. If a work of improvement is made pursuant to two or more contracts,
14 each covering a portion of the work of improvement:

15 (a) The owner may record a notice of completion of a contract for a portion of
16 the work of improvement. On recordation of the notice of completion, for the
17 purpose of Sections 3083.320 and 3083.330 (recordation of claim of lien) a direct
18 contractor is deemed to have completed the contract for which the notice of
19 completion is recorded and a claimant other than a direct contractor is deemed to
20 have ceased providing labor, services, equipment, or material.

21 (b) If the owner does not record a notice of completion under this section, the
22 period for recording a claim of lien is that provided in Sections 3083.320 and
23 3083.330.

24 **Comment.** Section 3089.440 continues the substance of former Section 3117, but eliminates
25 the 10-day period for recording a notice of completion. A claim of lien must be filed within 60
26 days after recording a notice of completion, subject to a maximum of 90 days after actual
27 completion. See Sections 3083.320 and 3083.330 (recordation of claim of lien). This codifies the
28 effect of existing law, See, e.g., *Doherty v. Carruthers*, 171 Cal. App. 2d 214, 340 P.2d 58
29 (1959).

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

35 See also Sections 3082.010 (“claimant” defined), 3082.030 (“labor, services, equipment, or
36 material” defined), 3082.025 (“direct contractor” defined), 3082.100 (“owner” defined), 3082.190
37 (“work of improvement” defined).

38 **§ 3089.450. Notice of recordation by owner**

39 3089.450. (a) An owner that records a notice of completion shall at the time of
40 recordation give a copy of the notice by mail to all of the following persons:

41 (1) A direct contractor.

42 (2) A claimant that has given the owner preliminary notice.

43 (b) If the owner fails to give notice to a person under subdivision (a), the notice
44 of completion is ineffective to shorten the time within which the person may
45 record a claim of lien under Sections 3083.320 and 3083.330. The ineffectiveness

1 of the notice of completion is the sole liability of the owner for failure to give
2 notice to a person under subdivision (a).

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

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

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

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

9 **Comment.** Section 3089.450 restates former Section 3259.5, replacing the notice of
10 recordation with a copy of the recorded notice. This provision is limited to a private work. See
11 Section 3082.210 (application of title). The section eliminates the former 10 day notice period
12 and requires immediate notice. See also Section 3089.430(b)(7) and Code Civ. Proc. § 1013a(c)
13 (affidavit of mailing). As used in this section “owner” includes a person who has an interest in
14 property (or the person’s successor in interest on the date a notice of completion is recorded) that
15 causes a building, improvement, or structure, to be constructed, altered, or repaired on the
16 property), and includes a cotenant. See Section 3082.100 (“owner” defined). A notice is recorded
17 when it is filed for record. Section 3082.250 (filing and recording of papers). The references to a
18 “mechanic’s” lien in subdivision (a) have been deleted. Subdivision (a) is intended to apply to a
19 site improvement lien as well. For service and proof of service by mail, see Section 3082.240
20 (mailed notice).

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

23 See also Sections 3082.010 (“claimant” defined), 3082.060 (“lien” defined), 3082.025 (“direct
24 contractor” defined), 3082.110 (“person” defined), 3082.120 (“preliminary notice” defined).

25 Article 5. Waiver and Release

26 § 3089.610. Terms of contract

27 3089.610. (a) An owner or direct contractor may not, by contract or otherwise,
28 waive, affect, or impair a claimant’s rights under this title, whether with or without
29 notice, except with the claimant’s written consent, and any term of a contract that
30 purports to do so is void and unenforceable.

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

33 **Comment.** Section 3089.610 continues the first and second sentences of former Section
34 3262(a) without substantive change. See Section 3082.010 (“claimant” defined).

35 See also Sections 3082.010 (“claimant” defined), 3082.025 (“direct contractor” defined),
36 3082.100 (“owner” defined).

37 § 3089.620. Waiver and release

38 3089.620. A claimant’s waiver and release does not release the owner,
39 construction lender, or surety on a payment bond from a claim or lien unless both
40 of the following conditions are satisfied:

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

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

5 **Comment.** Section 3089.620 continues the third and fourth sentences of former Section
6 3262(a) without substantive change. The waiver and release may be signed by the claimant’s
7 agent. See Section 3082.270 (agency). The term “financial institution” has replaced “bank” in
8 subdivision (b) and in the forms provided in this article.

9 See also Sections 3082.010 (“claimant” defined), 3082.020 (“construction lender” defined),
10 3082.060 (“lien” defined), 3082.100 (“owner” defined).

11 **§ 3089.630. Statement of claimant**

12 3089.630. An oral or written statement purporting to waive, release, impair or
13 otherwise adversely affect a claim or lien is void and unenforceable and does not
14 create an estoppel or impairment of the claim or lien unless either of the following
15 conditions is satisfied:

16 (1) The statement is pursuant to a waiver and release under this article.

17 (2) The claimant has actually received payment in full for the claim.

18 **Comment.** Section 3089.630 continues former Section 3262(b) without substantive change.

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

20 **§ 3089.635. Reduction or release of stop payment notice**

21 3089.635. (a) A claimant may reduce the amount of, or release in its entirety, a
22 stop payment notice. The reduction or release shall be in writing and may be given
23 in a form other than a form of waiver and release prescribed in this article.

24 (b) A claimant’s reduction or release of a stop payment notice has the following
25 effect:

26 (1) The reduction or release releases the claimant's right to enforce the notice to
27 the extent of the reduction or release.

28 (2) The reduction or release releases the person given the notice from the
29 obligation to withhold funds pursuant to the notice to the extent of the reduction or
30 release.

31 (3) The reduction or release does not preclude the claimant from giving a
32 subsequent stop payment notice that is timely and proper.

33 (4) The reduction or release does not release any right of the claimant other than
34 the right to enforce the stop payment notice to the extent of the reduction or
35 release.

36 **Comment.** Section 3089.635 restates the second, third, and fourth sentences of subdivision (b)
37 of former Section 3262. The provisions apply to a stop payment notice given to a construction
38 lender as well as to a stop payment notice given to the owner.

39 See also Sections 3082.010 (“claimant” defined), 3082.110 (“person” defined), 3082.175
40 (“stop payment notice” defined).

1 **§ 3089.640. Accord and satisfaction or settlement agreement not affected**

2 3089.640. This article does not affect the enforceability of either an accord and
3 satisfaction concerning a good faith dispute or an agreement made in settlement of
4 an action pending in court if the accord and satisfaction or agreement and
5 settlement make specific reference to the claim or lien.

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

8 **§ 3089.650. Conditional waiver and release on progress payment**

9 3089.650. If a claimant is required to execute a waiver and release in exchange
10 for, or in order to induce the payment of, a progress payment and the claimant is
11 not, in fact, paid in exchange for the waiver and release or a single payee check or
12 joint payee check is given in exchange for the waiver and release, the waiver and
13 release shall be in substantially the following form:

14 **CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT**

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

18 **Identifying Information**

19 Name of Claimant: _____

20 Name of Customer: _____

21 _____
22 Job Location: _____

23 _____
24 Owner: _____

25 _____
26 Through Date: _____

27 _____
28 **Conditional Waiver and Release**

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

34 Maker of Check: _____

35 Amount of Check: _____

36 \$ _____

37 Check Payable to: _____

38 **Exceptions**

1 This document does not affect any of the following:

2 (1) Retentions.

3 (2) Extras for which the claimant has not received payment.

4 (3) The following progress payments for which the claimant has previously given
5 a conditional waiver and release but has not received payment:

6 Date of waiver and release: _____

7 Amount remaining unpaid: \$ _____

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

11 **Signature**

12 Claimant's Signature: _____

13 Claimant's Title: _____

14
15 **Comment.** Section 3089.650 restates former Section 3262(d)(1), with the addition of language
16 relating to progress payments covered by previous releases that have not been paid. The statutory
17 form is recast for clarity.

18 See also Section 3082.010 ("claimant" defined).

19 **§ 3089.660. Unconditional waiver and release on progress payment**

20 3089.660. If the claimant is required to execute a waiver and release in exchange
21 for, or in order to induce payment of, a progress payment and the claimant asserts
22 in the waiver it has, in fact, been paid the progress payment, the waiver and release
23 shall be in substantially the following form:

24 UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

25 NOTICE TO CLAIMANT: This document waives and releases rights
26 unconditionally and states that you have been paid for giving up those rights. This
27 document is enforceable against you if you sign it, even if you have not been paid.

28 If you have not been paid, use a conditional waiver and release form.

29 **Identifying Information**

30 Name of Claimant: _____

31 Name of Customer:
32 _____

33 Job Location:
34 _____

35 Owner:
36 _____

37 Through Date:
38 _____

1 **Unconditional Waiver and Release**

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

6 Amount of payment: \$ _____

7 **Exceptions**

8 This document does not affect any of the following:

9 (1) Retentions.

10 (2) Extras for which the claimant has not received payment.

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

14 **Signature**

15 Claimant's Signature: _____

16 Claimant's Title: _____

17
18 **Comment.** Section 3089.660 restates former Section 3262(d)(2) without substantive change.
19 The references to a "mechanic's" lien have been deleted from this section; it applies to a site
20 improvement lien as well. The statutory form is recast for clarity.

21 See also Section 3082.010 ("claimant" defined).

22 **§ 3089.670. Conditional waiver and release on final payment**

23 3089.670. If the claimant is required to execute a waiver and release in exchange
24 for, or in order to induce the payment of, a final payment and the claimant is not,
25 in fact, paid in exchange for the waiver and release or a single payee check or joint
26 payee check is given in exchange for the waiver and release, the waiver and
27 release shall be in substantially the following form:

28 **CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT**

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

32 **Identifying Information**

33 Name of Claimant: _____

34 Name of Customer: _____

35 _____
36 Job Location: _____

1 Owner: _____
2 _____
3 Date: _____

4 **Conditional Waiver and Release**

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

9 Maker of Check: _____
10 Amount of Check:
11 \$ _____
12 Check Payable to: _____

13 **Exceptions**

14 This document does not affect any of the following:
15 (1) Disputed claims for extras in the amount of \$ _____
16 (2) The following progress payments for which the claimant has previously given
17 a conditional waiver and release but has not received payment:
18 Date of waiver and release: _____
19 Amount remaining unpaid: \$ _____

20 **Signature**

21 Claimant's Signature: _____
22 Claimant's Title: _____
23 _____

24 **Comment.** Section 3089.670 continues former Section 3262(d)(3), with the addition of
25 language relating to progress payments covered by previous releases that have not been paid, and
26 the addition of a line for identification of the waivant's customer. The references to a
27 "mechanic's" lien have been deleted from this section; it applies to a site improvement lien as
28 well. The statutory form is recast for clarity.
29 See also Section 3082.010 ("claimant" defined).

30 **§ 3089.680. Unconditional waiver and release on final payment**

31 3089.680. If the claimant is required to execute a waiver and release in exchange
32 for, or in order to induce payment of, a final payment and the claimant asserts in
33 the waiver it has, in fact, been paid the final payment, the waiver and release shall
34 be in substantially the following form:

35 UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

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

1 **Identifying Information**

2 Name of Claimant: _____

3 Name of Customer:

4 _____

5 Job Location:

6 _____

7 Owner:

8 _____

9 Date: _____

10 **Unconditional Waiver and Release**

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

14 **Exceptions**

15 This document does not affect any of the following:

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

17 **Signature**

18 Claimant's Signature: _____

19 Claimant's Title: _____

20

21 **Comment.** Section 3089.680 continues former Section 3262(d)(4) without substantive change.
22 The references to a "mechanic's" lien have been deleted from this section; it applies to a site
23 improvement lien as well. The statutory form is recast for clarity.

24 See also Section 3082.010 ("claimant" defined).

25

PUBLIC WORKS CONTRACT

26 **Pub. Cont. Code §§ 41010-46090 (added). Public works contract remedies**

27 SEC. . Part 4 (commencing with Section 41010) is added to Division 2 of the
28 Public Contract Code, to read:

29

PART 4. PUBLIC WORKS CONTRACT

30

REMEDIES

31

CHAPTER 1. DEFINITIONS

32 **§ 41010. Application of definitions**

33 41010. Unless the provision or context otherwise requires, the definitions in this
34 chapter govern the construction of this part.

1 **Comment.** Section 41010 supersedes former Civil Code Section 3082.

2 **§ 41020. Claimant**

3 41020. “Claimant” means a person that gives a stop payment notice or asserts a
4 claim against a payment bond.

5 **Comment.** Section 41020 restates former Civil Code Section 3085, omitting as unnecessary
6 the reference to the claimant’s “entitlement” and to the combination of remedies. For persons
7 having the right to give a stop payment notice or assert a claim against a payment bond, see
8 Section 42030 (who may use remedies).

9 See also Sections 41090 (“payment bond” defined), 41100 (“person” defined), 41140 (“stop
10 payment notice” defined).

11 **§ 41040. Direct contractor**

12 41040. “Direct contractor” means a person that has a direct contractual
13 relationship with a public entity. With respect to the amount due or to become due
14 to a direct contractor, the term includes the direct contractor’s assignee.

15 **Comment.** Section 41040 supersedes former Civil Code Section 3095 (“original contractor”).
16 A direct contractor is not limited to a builder, and may include a surveyor, engineer, material
17 supplier, artisan, or other person that contracts directly with the public entity.

18 The definition generalizes provisions of former Civil Code Section 3187 relating to payment of
19 the assignee of a direct contractor. See also Section 44350 (effect of assignment or garnishment).

20 See also Sections 41100 (“person” defined), 41120 (“public entity” defined).

21 **§ 41050. Express trust fund**

22 41050. “Express trust fund” means a laborer’s compensation fund to which a
23 portion of a laborer’s total compensation is to be paid pursuant to an employment
24 agreement or a collective bargaining agreement for the provision of benefits,
25 including, but not limited to, employer payments described in Section 1773.1 of
26 the Labor Code and implementing regulations.

27 **Comment.** Section 41050 continues a portion of former Civil Code Section 3111 without
28 substantive change.

29 See also Section 41080 (“laborer’s compensation fund” defined).

30 **§ 41060. Funds**

31 41060. “Funds” means warrant, check, money, or bonds (if bonds are to be
32 issued in payment of the public works contract).

33 **Comment.** Section 41060 is a new definition. It is included for drafting convenience. It
34 generalizes provisions of former Civil Code Sections 3186, 3187, and 3196.

35 See also Section 41130 (“public works contract” defined).

36 **§ 41070. Labor, services, equipment, or material**

37 41070. “Labor, services, equipment, or material” includes but is not limited to
38 labor, skills, services, material, supplies, equipment, appliances, transportation,
39 power, surveying, construction plans, and construction management provided for a
40 public works contract.

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

6 See also Section 41130 (“public works contract” defined).

7 **§ 41080. Laborer’s compensation fund**

8 41080. “Laborer’s compensation fund” means a person, including an express
9 trust fund, to which a portion of the compensation of a laborer is paid by
10 agreement with the laborer or the collective bargaining agent of the laborer.

11 **Comment.** Section 41080 continues the first sentence of former Civil Code Section 3089(b)
12 without substantive change. See also Section 3082.410 (standing to enforce laborer’s rights).

13 See also Sections 41050 (“express trust fund” defined), 41100 (“person” defined).

14 **§ 41090. Payment bond**

15 41090. “Payment bond” means a bond given under any of the following
16 provisions:

17 (a) Section 7103.

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

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

20 **Comment.** Section 41090 supersedes former Civil Code Section 3096.

21 **§ 41100. Person**

22 41100. “Person” means an individual, corporation, public entity, business trust,
23 estate, trust, partnership, limited liability company, association, or other entity.

24 **Comment.** Section 41100 is a new definition. It is included for drafting convenience.

25 See also Section 41120 (“public entity” defined).

26 **§ 41110. Preliminary notice**

27 41110. “Preliminary notice” means the notice required by Chapter 3
28 (commencing with Section 43010) as a prerequisite to use of the remedies
29 provided in this part.

30 **Comment.** Section 41110 supersedes former Civil Code Section 3098. The substantive
31 requirements for preliminary notice have been relocated to Chapter 3 (commencing with Section
32 43010).

33 **§ 41120. Public entity**

34 41120. (a) “Public entity” has the meaning provided in Section 1100 and
35 includes all of the following:

36 (1) The Regents of the University of California.

37 (2) An officer authorized to act for a public entity.

38 (b) A reference in this part to a public entity means the public entity that
39 awarded the public works contract.

1 **Comment.** Subdivision (a) of Section 41120 restates former Civil Code Section 3099. Under
2 Section 1100, “public entity” means the state, county, city, city and county, district, public
3 authority, public agency, municipal corporation, or any other political subdivision or public
4 corporation in the state. This part does not apply to a public works contract governed by federal
5 law. See Section 42010 (application of part). The reference to an officer of the public entity is
6 included for drafting convenience. Cf. former Civ. Code §§ 3247, 3250, 3251 (public entity or
7 officer).

8 Subdivision (b) is new; it is intended for drafting convenience. Cf. former Civ. Code §§ 3247,
9 3250, 3251.

10 See also Section 41130 (“public works contract” defined).

11 **§ 41130. Public works contract**

12 41130. “Public works contract” has the meaning provided in Section 1101.

13 **Comment.** Section 41130 supersedes former Civil Code Section 3100 (“public work” defined).
14 Under Section 1101, “public works contract” means an agreement for the erection, construction,
15 alteration, repair, or improvement of any public structure, building, road, or other public
16 improvement of any kind. This part does not apply to a public works contract governed by federal
17 law. See Section 42010 (application of part).

18 **§ 41135. Site**

19 41135. “Site” means the property on which a public works contract is
20 performed.

21 **Comment.** Section 3082.160 restates former Section 3101 to the extent it applied to a public
22 works contract.

23 See also Section 41130 (“public works contract” defined).

24 **§ 41140. Stop payment notice**

25 41140. “Stop payment notice” means a notice given under Chapter 4
26 (commencing with Section 44110).

27 **Comment.** Section 41140 supersedes former Civil Code Section 3103.

28 CHAPTER 2. GENERAL PROVISIONS

29 Article 1. Miscellaneous Provisions

30 **§ 42010. Application of part**

31 42010. (a) This part applies to a public works contract awarded by a public
32 entity.

33 (b) This part does not apply to any of the following:

34 (1) A public works contract governed by federal law.

35 (2) A transaction governed by Sections 20457 to 20464, inclusive (street work
36 bond).

37 **Comment.** Subdivision (a) of Section 42010 restates former Civil Code Sections 3100 and
38 3179.

39 Paragraph (1) of subdivision (b) is new.

40 Paragraph (2) of subdivision (a) restates former Civil Code Section 3266(b). This provision
41 updates the former cross-reference to Streets and Highways Code Sections 5290-5297, which

1 were repealed in 1982 when the Public Contract Code was created. See 1982 Cal. Stat. ch. 465, §
2 56. The repealed sections were superseded by Public Contract Code Sections 20457-20464. See
3 1982 Cal. Stat. ch. 465, § 11. The new sections apply to bonds in “street work” projects under
4 Division 2 (commencing with Section 1600) (general provisions) of the Public Contract Code.
5 See Pub. Cont. Code § 20457.

6 See also Sections 41120 (“public entity” defined), 41130 (“public works contract” defined).

7 **§ 42020. Relation to other statutes**

8 42020. (a) This part does not limit, and is not affected by, improvement security
9 provided under the Subdivision Map Act, Division 2 (commencing with Section
10 66410) of Title 7 of the Government Code.

11 (b) The Bond and Undertaking Law, Chapter 2 (commencing with Section
12 995.010) of Title 14 of Part 2 of the Code of Civil Procedure, applies to a bond
13 given under this part.

14 **Comment.** Subdivision (a) of Section 42020 is new. It clarifies the interrelation between this
15 part and the Subdivision Map Act. For relevant provisions of that act, see Gov’t Code §§ 66499-
16 66499.10 (improvement security).

17 Subdivision (b) is new. It is a specific application of Code of Civil Procedure Section 995.020
18 (application of Bond and Undertaking Law).

19 **§ 42030. Who may use remedies**

20 42030. (a) Except as provided in subdivision (b), any of the following persons
21 that has not been paid may give a stop payment notice to the public entity or assert
22 a claim against a payment bond:

23 (1) A person that provides labor, services, equipment, or material properly
24 authorized for the public works contract.

25 (2) An express trust fund, to the extent of the compensation agreed to be paid to
26 the express trust fund for labor on that public works contract only.

27 (3) A person described in Section 4107.7.

28 (b) A direct contractor may not give a stop payment notice or assert a claim
29 against a payment bond under this part.

30 **Comment.** Section 42030 restates former Civil Code Section 3181. The former references to
31 site improvement work and to provisions, provender, or other supplies are included within the
32 meaning of subdivision (a). See Section 41070 (“labor, services, equipment, or material”
33 defined).

34 See also Sections 41040 (“direct contractor” defined), 41050 (“express trust fund” defined),
35 41070 (“labor, services, equipment, or material” defined), 41090 (“payment bond” defined),
36 41100 (“person” defined), 41120 (“public entity” defined), 41130 (“public works contract”
37 defined), 41140 (“stop payment notice” defined).

38 **§ 42040. Jurisdiction and venue**

39 42040. The proper court for proceedings under this part is the superior court in
40 the county in which a public works contract, or part of it, is to be performed.

41 **Comment.** Section 42040 is a new provision included for drafting convenience. It generalizes
42 a number of provisions of former law.

43 See also Section 41130 (“public works contract” defined).

1 **§ 42050. Rules of practice**

2 42050. Except as otherwise provided in this part, Part 2 (commencing with
3 Section 307) of the Code of Civil Procedure provides the rules of practice in
4 proceedings under this part.

5 **Comment.** Section 42050 continues the first sentence of former Civil Code Section 3259
6 without substantive change. The second sentence of former Civil Code Section 3259 is not
7 continued; this part does not include special provisions relating to new trials or appeals.

8 **§ 42060. Written notice**

9 42060. Notice under this part shall be in writing.

10 **Comment.** Section 42060 generalizes various provisions of former law. See, e.g., former Civ.
11 Code §§ 3092 (notice of cessation), 3093 (notice of completion), 3098 (preliminary notice), 3103
12 (stop notice).

13 **§ 42070. Mailed notice**

14 42070. The following provisions apply to notice given by mail under this part:

15 (a) Notice shall be given by registered or certified mail or by another method of
16 delivery providing for overnight delivery.

17 (b) Notice is complete when deposited in the mail or with an express service
18 carrier in the manner provided in Section 1013 of the Code of Civil Procedure.

19 (c) Proof that the notice was given in the manner provided in this section shall
20 be made by (1) a return receipt or a photocopy of the record of delivery and receipt
21 maintained by the United States Postal Service, showing the date of delivery and
22 to whom delivered, or in the event of nondelivery, by the returned envelope itself
23 (2) proof of mailing certified by the United States Postal Service, or (3) a tracking
24 record or other documentation certified by an express service carrier showing
25 delivery of the notice.

26 **Comment.** Section 42070 is a new provision included for drafting convenience. It generalizes
27 a number of provisions of former law, expands the methods of proof to include a certification of
28 the mailing by the United States Postal Service, and expands the methods of giving notice to
29 include delivery by express service carrier.

30 **§ 42080. Agency**

31 42080. An act that may be done by or to a person under this part may be done by
32 or to the person's agent to the extent the act is within the scope of the agent's
33 authority.

34 **Comment.** Section 42080 generalizes a provision of former Civil Code Section 3103. It makes
35 clear that an agent's authority is limited to the scope of the agency. Thus to the extent a direct
36 contractor is deemed to be the agent of the principal for the purpose of engaging a subcontractor,
37 the scope of the agency does not include other acts, such as compromise of litigation.

38 See also Section 41100 ("person" defined).

39 **§ 42090. Liability of surety**

40 42090. None of the following releases a surety from liability on a bond given
41 under this part:

1 (a) A change to a contract, plan, specification, or agreement for a public works
2 contract or for labor, services, equipment or material provided for a public works
3 contract.

4 (b) A change to the terms of payment or an extension of the time for payment
5 for a public works contract.

6 (c) A rescission or attempted rescission of a contract, agreement, or bond.

7 (d) A condition precedent or subsequent in the bond purporting to limit the right
8 of recovery of a claimant otherwise entitled to recover pursuant to a contract,
9 agreement, or bond.

10 (e) In the case of a bond given for the benefit of claimants, the fraud of a person
11 other than the claimant seeking to recover on the bond.

12 **Comment.** Section 42090 restates former Civil Code Section 3225.

13 See also Sections 41020 (“claimant” defined), 41070 (“labor, services, equipment, or material”
14 defined), 41100 (“person” defined), 41130 (“public works contract” defined).

15 Article 2. Completion

16 § 42210. Completion (including acceptance and cessation)

17 42210. For the purpose of this part, completion occurs at the earliest of the
18 following times:

19 (a) Acceptance by the public entity.

20 (b) Cessation of labor for a continuous period of 30 days. This subdivision does
21 not apply to a contract awarded under the State Contract Act, Part 2 (commencing
22 with Section 10100).

23 (c) Recordation by the public entity of a notice of completion.

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

26 See also Section 41120 (“public entity” defined).

27 **Note.** The Commission seeks comment on whether the 30 day cessation of labor period is
28 too short. Should it be changed to 60 days for consistency with the rule applicable to a private
29 work of improvement?

30 § 42220. Notice of completion

31 42220. A notice of completion recorded by a public entity shall contain all of the
32 following information:

33 (a) The name and address of the public entity.

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

38 (c) The name of the direct contractor for the public works contract.

39 **Comment.** Section 42220 combines former Section 3093 (notice of completion) with former
40 Section 3092 (notice of cessation), to the extent they applied to a public works contract. For the

1 effect of recordation of a notice of completion, see Sections 44140 (time for giving stop payment
2 notice) and 45070 (notice to principal and surety on payment bond).

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

6 See also Sections 41040 (“direct contractor” defined), 41120 (“public entity” defined), 41130
7 (“public works contract” defined), 41135 (“site” defined).

8 **§ 42230. Recordation of notice**

9 42230. (a) A notice of completion is recorded when filed for record in the office
10 of the county recorder of the county in which the public works contract or part of
11 it is performed. A notice in otherwise proper form containing the information
12 required by Section 42220, shall be accepted by the recorder for recording and is
13 deemed duly recorded without acknowledgment.

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

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

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

23 See also Section 41130 (“public works contract” defined).

24 **CHAPTER 3. PRELIMINARY NOTICE**

25 **§ 43010. Preliminary notice prerequisite to remedies**

26 43010. (a) Except as otherwise provided by statute, preliminary notice is a
27 necessary prerequisite to the validity of a stop payment notice or a claim against a
28 payment bond under this part.

29 (b) Preliminary notice is not required of a laborer or a laborer’s compensation
30 fund.

31 (c) Preliminary notice is not required of a claimant that has a direct contractual
32 relationship with the direct contractor.

33 **Comment.** Subdivision (a) of Section 43010 restates part of the introductory clause of former
34 Civil Code Section 3098. For a statutory exception to the preliminary notice requirement, see
35 Section 45070 (notice to principal and surety).

36 Subdivision (b) restates former Civil Code Section 3098(c).

37 Subdivision (c) restates a portion of former Civil Code Section 3098(a).

38 The transitional provision of former Civil Code Section 3098(e) is not continued due to lapse
39 of time.

40 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41080
41 (“laborer’s compensation fund” defined), 41090 (“payment bond” defined), 41110 (“preliminary
42 notice” defined), 41140 (“stop payment notice” defined).

1 **§ 43020. Persons to be given preliminary notice**

2 43020. Before giving a stop payment notice or asserting a claim against a
3 payment bond, a claimant that has provided labor, services, equipment, or material
4 and has not been paid shall give preliminary notice to the public entity and the
5 direct contractor.

6 **Comment.** Section 43020 restates part of the introductory clause and subdivision (a) of former
7 Civil Code Section 3098. Repetitive detail has been omitted, in reliance on defined terms and
8 other substantive provisions.

9 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41070
10 (“labor, services, equipment, or material” defined), 41090 (“payment bond” defined), 41110
11 (“preliminary notice” defined), 41120 (“public entity” defined), 41140 (“stop payment notice”
12 defined).

13 **§ 43030. Contents of preliminary notice**

14 43030. A preliminary notice shall state with substantial accuracy all of the
15 following:

16 (1) A general description of the labor, services, equipment, or material provided
17 or to be provided.

18 (2) The name and address of the person providing the labor, services,
19 equipment, or material.

20 (3) The name of the person that contracted for the labor, services, equipment, or
21 material.

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

23 **Comment.** Section 43030 restates part of the first sentence of former Civil Code Section
24 3098(a), and revises it for conformity with the preliminary notice for private work.

25 See also Section 41070 (“labor, services, equipment, or material” defined), 41100 (“person”
26 defined), 41110 (“preliminary notice” defined), 41135 (“site” defined).

27 **§ 43040. Giving preliminary notice**

28 43040. (a) Preliminary notice shall be given by mail or personal delivery.

29 (b) Notice to the direct contractor shall be addressed to the contractor at any
30 place the contractor maintains an office or conducts business or at the contractor’s
31 residence.

32 (c) Notice to the Department of Transportation or the Department of General
33 Services shall be addressed to the office of the disbursing officer of the department
34 or delivered personally to the officer.

35 **Comment.** Subdivision (a) of Section 43040 restates the second and fourth sentences of former
36 Civil Code Section 3098(a). See also Section 42070 (mailed notice).

37 Subdivision (b) restates the third sentence of former Civil Code Section 3098(a). The former
38 reference to the Department of Public Works is replaced by a reference to Department of
39 Transportation. See Gov’t Code § 14001 (reference to Department of Public Works deemed to be
40 Department of Transportation).

41 Subdivision (c) restates the fourth sentence of former Civil Code Section 3098(a).

42 See also Sections 41040 (“direct contractor” defined), 41110 (“preliminary notice” defined).

1 **§ 44120. Contents of stop payment notice**

2 44120. (a) A stop payment notice shall be signed and verified by the claimant
3 and shall state in general terms all of the following:

4 (1) The kind of labor, services, equipment, or material provided or agreed to be
5 provided by the claimant.

6 (2) The name of the person to or for which the labor, services, equipment, or
7 material was provided.

8 (3) The amount in value, as near as may be, of that already provided and of the
9 whole agreed to be provided.

10 (4) The name and address of the claimant.

11 (b) A stop payment notice is not invalid by reason of any defect in form if it is
12 sufficient to substantially inform the public entity of the information required.

13 **Comment.** Subdivision (a) of Section 44120 restates subdivisions (a)-(d) of former Civil Code
14 Section 3103. See also Section 42080 (agency).

15 Subdivision (b) continues the third sentence of the first unnumbered paragraph of former Civil
16 Code Section 3103.

17 See also Sections 41020 (“claimant” defined), 41070 (“labor, services, equipment, or material”
18 defined) 41100 (“person” defined), 41120 (“public entity” defined), 41140 (“stop payment
19 notice” defined).

20 **§ 44130. Giving of stop payment notice**

21 44130. A stop payment notice shall be given to the public entity by mailing or
22 personally delivering the notice to the following person:

23 (a) In the case of a public works contract of the state, the director of the
24 department that awarded the contract.

25 (b) In the case of a public works contract of a public entity other than the state,
26 the office of the controller, auditor, or other public disbursing officer whose duty it
27 is to make payment pursuant to the contract, or the commissioners, managers,
28 trustees, officers, board of supervisors, board of trustees, common council, or
29 other body by which the contract was awarded.

30 **Comment.** Subdivision (a) of Section 44130 restates the second sentence of the first
31 unnumbered paragraph of former Civil Code Section 3103.

32 Subdivision (b) restates the second unnumbered paragraph of former Civil Code Section 3103.
33 See also Section 42070 (mailed notice).

34 See also Sections 41100 (“person” defined), 41120 (“public entity” defined), 41130 (“public
35 works contract” defined), 41140 (“stop payment notice” defined).

36 **§ 44140. Time for giving notice**

37 44140. A stop payment notice is not effective unless given within 30 days after
38 recordation of a notice of completion or, if a notice of completion is not recorded,
39 within 90 days after completion.

40 **Comment.** Section 44140 restates former Civil Code Section 3184. The former statutory
41 references to “notice of cessation” and “notice of acceptance” are not continued; they are
42 subsumed within the notice of completion. See Sections 42210 (completion (including acceptance
43 and cessation)) and 42220 (notice of completion).

44 See also Section 41140 (“stop payment notice” defined).

1 **§ 44150. Duty to withhold funds**

2 44150. (a) The public entity shall, on receipt of a stop payment notice, withhold
3 from the direct contractor sufficient funds due or to become due to the direct
4 contractor to pay the claim stated in the stop payment notice and to provide for the
5 public entity’s reasonable cost of any litigation pursuant to the stop payment
6 notice.

7 (b) The public entity may satisfy its duty under this section by refusing to
8 release funds held in escrow under Section 10263 or 22300.

9 **Comment.** Section 44150 restates former Civil Code Section 3186. See also Section 42080
10 (agency).

11 See also Sections 41040 (“direct contractor” defined), 41060 (“funds” defined), 41120 (“public
12 entity” defined), 41140 (“stop payment notice” defined).

13 **§ 44160. Payment notwithstanding stop payment notice**

14 44160. (a) This chapter does not prohibit payment of funds to a direct contractor
15 if a stop payment notice is not received before the disbursing officer actually
16 surrenders possession of the funds.

17 (b) This chapter does not prohibit payment of any amount due to a direct
18 contractor in excess of the amount necessary to pay the total amount of all claims
19 stated in stop payment notices received at the time of payment plus any interest
20 and court costs that might reasonably be anticipated in connection with the claims.

21 **Comment.** Section 44160 restates former Civil Code Section 3187. Authority in this section
22 for payment of a direct contractor includes payment of the direct contractor’s assignee. See
23 Section 41040 (“direct contractor” defined).

24 See also Sections 41040 (“direct contractor” defined), 41060 (“funds” defined), 41140 (“stop
25 payment notice” defined).

26 **§ 44170. Notice to claimant**

27 44170. (a) Not later than 10 days after completion of a public works contract,
28 the public entity shall give notice to each claimant that has given a stop payment
29 notice of the time within which a stop payment notice must be enforced.

30 (b) Notice under this section shall be by personal delivery or by mail addressed
31 to the claimant at the address shown on the stop payment notice.

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

35 **Comment.** Section 44170 restates former Civil Code Section 3185. See also 42070 (mailed
36 notice). See also Section 44420 (time for enforcement of stop payment notice. The \$2 fee is
37 increased to \$10 in recognition of the change in the value of the dollar since the fee’s enactment.

38 See also Sections 41020 (“claimant” defined), 41120 (“public entity” defined), 41130 (“public
39 works contract” defined), 41140 (“stop payment notice” defined).

40 **§ 44180. Release bond**

41 44180. (a) If the direct contractor or a subcontractor disputes the correctness,
42 validity, or enforceability of a stop payment notice, the public entity may, in its

1 discretion, permit the direct contractor to give the public entity a release bond. The
2 bond shall be executed by an admitted surety insurer, in an amount equal to 125
3 percent of the claim stated in the stop payment notice, conditioned for the payment
4 of any amount the claimant recovers in an action on the claim, together with court
5 costs, if the claimant prevails.

6 (b) On receipt of a release bond, the public entity shall not withhold funds from
7 the direct contractor pursuant to the stop payment notice.

8 (c) The surety on a release bond is jointly and severally liable to the claimant
9 with the sureties on any payment bond given under Chapter 5 (commencing with
10 Section 45010).

11 **Comment.** Section 44180 restates former Civil Code Section 3196.

12 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060
13 (“funds” defined), 41090 (“payment bond” defined), 41120 (“public entity” defined), 41140
14 (“stop payment notice” defined).

15 Article 2. Summary Proceeding for Release of Funds

16 § 44210. Grounds for summary proceeding

17 44210. A direct contractor may obtain release of funds withheld pursuant to a
18 stop payment notice under the summary proceeding provided in this article on any
19 of the following grounds:

20 (a) The claim on which the notice is based is not a type for which a stop
21 payment notice is authorized under this chapter.

22 (b) The claimant is not a person authorized under Section 42030 to give a stop
23 payment notice.

24 (c) The amount of the claim stated in the stop payment notice is excessive.

25 (d) There is no basis for the claim stated in the stop payment notice.

26 **Comment.** Section 44210 restates former Civil Code Section 3197.

27 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060
28 (“funds” defined), 41100 (“person” defined), 41140 (“stop payment notice” defined).

29 § 44220. Contractor’s affidavit and demand for release

30 44220. The direct contractor shall serve on the public entity an affidavit,
31 together with a copy of the affidavit, that includes all of the following information:

32 (a) An allegation of the grounds for release of the funds and a statement of the
33 facts supporting the allegation.

34 (b) A demand for the release of all or the portion of the funds that are alleged to
35 be withheld improperly or in an excessive amount.

36 (c) A statement of the address of the contractor within the state for the purpose
37 of permitting service by mail on the contractor of any notice or document.

38 **Comment.** Section 44220 restates former Civil Code Section 3198. The grounds for release are
39 provided in Section 44210.

40 See also Sections 41040 (“direct contractor” defined), 41060 (“funds” defined), 41120 (“public
41 entity” defined).

1 **§ 44230. Notice to claimant**

2 44230. (a) The public entity shall serve on the claimant a copy of the direct
3 contractor’s affidavit, together with a notice stating that the public entity will
4 release the funds withheld, or the portion of the funds demanded, unless the
5 claimant serves on the public entity a counteraffidavit on or before the time stated
6 in the notice. The time stated in the notice shall not be less than 10 nor more than
7 20 days after service on the claimant of the copy of the affidavit.

8 (b) Service under this section shall be made either personally or by registered or
9 certified mail, addressed to the last known address of the claimant. Proof of
10 service shall be made by affidavit.

11 **Comment.** Section 44230 restates former Civil Code Section 3199. See also Section 42060
12 (written notice).

13 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060
14 (“funds” defined), 41120 (“public entity” defined).

15 **§ 44240. Claimant’s counteraffidavit**

16 44240. (a) A claimant that contests the direct contractor’s affidavit shall serve
17 on the public entity a counteraffidavit alleging the details of the claim and
18 describing the specific basis on which the claimant contests or rebuts the
19 allegations of the contractor’s affidavit. The counteraffidavit shall be served
20 within the time stated in the public entity’s notice, together with proof of service
21 of a copy of the counteraffidavit on the direct contractor.

22 (b) If no counteraffidavit with proof of service is served on the public entity
23 within the time stated in the public entity’s notice, the public entity shall
24 immediately release the funds, or the portion of the funds demanded by the
25 affidavit, without further notice to the claimant. The public entity is not liable in
26 any manner for releasing the funds.

27 (c) The public entity is not responsible for the validity of an affidavit or
28 counteraffidavit under this article.

29 **Comment.** Section 44240 restates former Civil Code Section 3200.

30 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060
31 (“funds” defined), 41120 (“public entity” defined).

32 **§ 44250. Commencement of action**

33 44250. (a) If a counteraffidavit, together with proof of service, is served under
34 Section 44240, either the direct contractor or the claimant may commence an
35 action for a declaration of the rights of the parties.

36 (b) After commencement of the action, either the direct contractor or the
37 claimant may move the court for a determination of rights under the affidavit and
38 counteraffidavit. The party making the motion shall give not less than five days’
39 notice of the hearing to the public entity and to the other party.

40 (c) The court shall hear the motion within 15 days after the date of the motion,
41 unless the court continues the hearing for good cause.

1 **Comment.** Section 44250 restates former Civil Code Section 3201. See also Sections 42040
2 (jurisdiction and venue) and 42060 (written notice).

3 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41120
4 (“public entity” defined).

5 **§ 44260. Pleadings and burden of proof**

6 44260. (a) The affidavit and counteraffidavit shall be filed with the court by the
7 public entity and shall constitute the pleadings, subject to the power of the court to
8 permit an amendment in the interest of justice. The affidavit of the direct
9 contractor shall be deemed controverted by the counteraffidavit of the claimant,
10 and both shall be received in evidence.

11 (b) At the hearing, the direct contractor has the burden of proof.

12 **Comment.** Section 44260 restates former Civil Code Section 3202.

13 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41120
14 (“public entity” defined).

15 **§ 44270. Court determination**

16 44270. (a) No findings are required in a summary proceeding under this article.

17 (b) If the hearing is before the court sitting without a jury and no evidence other
18 than the affidavit and counteraffidavit is offered, the court may, if satisfied that
19 sufficient facts are shown, make a determination on the basis of the affidavit and
20 counteraffidavit. If the court is not satisfied that sufficient facts are shown, the
21 court shall order the hearing continued for production of other evidence, oral or
22 documentary, or the filing of other affidavits and counteraffidavits.

23 (c) At the conclusion of the hearing, the court shall make an order determining
24 whether the demand for release is allowed. The court’s order is determinative of
25 the right of the claimant to have funds further withheld by the public entity. The
26 direct contractor shall serve a copy of the order on the public entity.

27 **Comment.** Section 44270 restates former Civil Code Section 3203. Former Civil Code Section
28 3204 relating to jury trial is not continued; proceedings under this article are tried to the judge,
29 not to a jury.

30 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060
31 (“funds” defined), 41120 (“public entity” defined).

32 **§ 44280. Summary determination not res judicata**

33 44280. A determination in a summary proceeding under this article is not res
34 judicata with respect to a right of action by the claimant against either the principal
35 or surety on a payment bond or with respect to a right of action against a party
36 personally liable to the claimant.

37 **Comment.** Section 44280 restates former Civil Code Section 3205. The former reference to a
38 “labor or material bond” is replaced by a reference to a payment bond.

39 See also Sections 41020 (“claimant” defined), 41090 (“payment bond” defined).

1 Article 3. Distribution of Funds Withheld

2 § 44320. Distribution of funds withheld pursuant to stop payment notice

3 44320. If funds withheld pursuant to a stop payment notice are insufficient to
4 pay in full the claims of all persons that have given a stop payment notice, the
5 funds shall be distributed among the claimants in the ratio that the claim of each
6 bears to the aggregate of all claims for which a stop payment notice is given,
7 without regard to the order in which the notices were given or enforcement actions
8 were commenced.

9 **Comment.** Section 44320 restates former Civil Code Section 3190. Only valid claims, as
10 determined in an enforcement action, are entitled to participate in the distribution. Cf. Idaho
11 Lumber Co. v. Northwestern S. & L. Ass'n, 265 Cal. App. 2d 490, 71 Cal. Rptr. 422 (1968). The
12 amount of the claim for which payment is required is determined under Article 4 (commencing
13 with Section 40410) (enforcement of stop payment notice).

14 See also Sections 41020 ("claimant" defined), 41060 ("funds" defined), 41100 ("person"
15 defined), 41140 ("stop payment notice" defined).

16 § 44330. Stop payment notice remedy not exclusive

17 44330. Nothing in this chapter impairs the right of a claimant to recover from
18 the direct contractor or the contractor's sureties in an action on a payment bond
19 under Chapter 5 (commencing with Section 3247) any deficit that remains unpaid
20 after the distribution under Section 44320.

21 **Comment.** Section 44330 restates former Civil Code Section 3191.

22 See also Sections 41020 ("claimant" defined), 41040 ("direct contractor" defined), 41090
23 ("payment bond" defined).

24 § 44340. Forfeiture for false notice

25 44340. A person that willfully gives a false stop payment notice to the public
26 entity or that willfully includes in the notice labor, services, equipment, or material
27 not provided for the public works contract for which the stop payment notice is
28 given, forfeits all right to participate in the distribution under Section 44320.

29 **Comment.** Section 44340 restates former Civil Code Section 3192.

30 See also Sections 41070 ("labor, services, equipment, or material" defined), 41100 ("person"
31 defined), 41120 ("public entity" defined), 41130 ("public works contract" defined), 41140 ("stop
32 payment notice" defined).

33 § 44350. Effect of assignment or garnishment

34 44350. (a) A stop payment notice takes priority over an assignment by the direct
35 contractor of any amount due or to become due pursuant to a public works
36 contract, including contract changes, whether made before or after the giving of a
37 stop payment notice, and the assignment has no effect on the rights of the
38 claimant.

39 (b) Any garnishment of an amount due or to become pursuant to a public works
40 contract by a creditor of the direct contractor under Article 8 (commencing with
41 Section 708.710) of Chapter 6 of Division 2 of Title 9 of Part 2 of the Code of

1 Civil Procedure and any statutory lien on that amount is subordinate to the rights
2 of a claimant.

3 **Comment.** Section 44350 restates former Civil Code Section 3193.

4 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41140
5 (“stop payment notice” defined).

6 Article 4. Enforcement of Stop Payment Notice

7 § 44410. Prerequisites for enforcement of notice

8 44410. (a) A claimant may not enforce a stop payment notice unless the
9 claimant has complied with all of the following conditions:

10 (1) The claimant has given preliminary notice under Chapter 3 (commencing
11 with Section 43010).

12 (2) The claimant has given the stop payment notice within the time provided in
13 Section 44140.

14 (b) The claim filing procedures of Part 3 (commencing with Section 900) of
15 Division 3.6 of Title 1 of the Government Code do not apply to an action under
16 this article.

17 **Comment.** Subdivision (a) of Section 44410 restates former Civil Code Section 3183.

18 Subdivision (b) restates former Civil Code Section 3265.

19 See also Sections 41020 (“claimant” defined), 41110 (“preliminary notice” defined), 41140
20 (“stop payment notice” defined).

21 § 44420. Time for enforcement of stop payment notice

22 44420. (a) The claimant shall commence an action against the public entity and
23 the direct contractor to enforce a stop payment notice not earlier than 10 days after
24 the date the claimant gives the stop payment notice and not later than 90 days after
25 expiration of the time within which a stop payment notice must be given.

26 (b) An action under this section may not be brought to trial or judgment entered
27 before expiration of the time provided in subdivision (a).

28 (c) If a claimant does not commence an action to enforce a stop payment notice
29 within the time provided in subdivision (a), the notice ceases to be effective and
30 the public entity shall release funds withheld pursuant to the notice.

31 **Comment.** Section 44420 restates former Civil Code Section 3210. See also Section 44140
32 (time within which stop payment notice must be given).

33 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41060
34 (“funds” defined), 41120 (“public entity” defined), 41140 (“stop payment notice” defined).

35 § 44430. Notice of action

36 44430. Within five days after commencement of an action to enforce a stop
37 payment notice, the claimant shall give notice of commencement of the action to
38 the public entity in the same manner that a stop payment notice is given.

39 **Comment.** Section 44430 restates former Civil Code Section 3211. See Section 3101 (manner
40 of giving stop payment notice).

1 See also Sections 41020 (“claimant” defined), 41120 (“public entity” defined), 41140 (“stop
2 payment notice” defined).

3 **§ 44440. Joinder, consolidation, and interpleader**

4 44440. If more than one claimant has given a stop payment notice:

5 (a) Any number of claimants may join in the same enforcement action.

6 (b) If claimants commence separate actions, the court that first acquires
7 jurisdiction may order the actions consolidated.

8 (c) On request of the public entity the court shall require that all claimants be
9 impleaded in one action and shall adjudicate the rights of all parties in the action.

10 **Comment.** Section 44440 restates former Civil Code Section 3214 without substantive change.
11 See also Section 42040 (jurisdiction and venue).

12 See also Sections 41020 (“claimant” defined), 41120 (“public entity” defined), 41140 (“stop
13 payment notice” defined).

14 **§ 44450. Dismissal of enforcement action for lack of prosecution**

15 44450. The court may in its discretion dismiss an action to enforce a stop
16 payment notice that is not brought to trial within two years after commencement.

17 **Comment.** Section 44450 restates former Civil Code Section 3212.

18 See also Section 41140 (“stop payment notice” defined).

19 **§ 44460. Dismissal of action or judgment against claimant**

20 44460. A stop payment notice ceases to be effective, and the public entity shall
21 release funds withheld, in either of the following circumstances:

22 (a) The action to enforce the stop payment notice is dismissed, unless expressly
23 stated to be without prejudice.

24 (b) Judgment in the action is against the claimant.

25 **Comment.** Section 44460 restates former Civil Code Section 3213.

26 See also Sections 41020 (“claimant” defined), 41060 (“funds” defined), 41120 (“public entity”
27 defined), 41140 (“stop payment notice” defined).

28 **CHAPTER 5. PAYMENT BOND**

29 **§ 45010. Payment bond requirement**

30 45010. (a) Except as provided in subdivision (d) of Section 7103:

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

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

38 (b) A payment bond given and approved under this section is sufficient to permit
39 performance of work pursuant to a contract that supplements the contract for

1 which the bond is given, if the requirement of a new bond is waived by the public
2 entity.

3 (c) For the purpose of this section, a provider of architectural, engineering, or
4 land surveying services pursuant to a public works contract is not deemed a direct
5 contractor and is not required to give a payment bond.

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

9 See also Sections 41040 (“direct contractor” defined), 41090 (“payment bond” defined), 41120
10 (“public entity” defined), 41130 (“public works contract” defined).

11 **§ 45020. Consequences of failure to give bond**

12 45020. If a payment bond is not given and approved as required by statute:

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

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

17 **Comment.** Section 45020 restates former Civil Code Section 3251. The former operative date
18 provision is deleted due to lapse of time.

19 See also Sections 41020 (“claimant” defined), 41040 (“direct contractor” defined), 41090
20 (“payment bond” defined), 41120 (“public entity” defined), 41140 (“stop payment notice”
21 defined).

22 **§ 45030. Bond requirements**

23 45030. (a) A payment bond shall be in an amount not less than one hundred
24 percent of the total amount payable pursuant to the contract.

25 (b) The bond shall provide that if the direct contractor or a subcontractor fails to
26 pay any of the following, the surety will pay the obligation and, if an action is
27 brought to enforce the liability on the bond, a reasonable attorney’s fee, to be fixed
28 by the court:

29 (1) A person authorized under Section 42030 to assert a claim against a payment
30 bond.

31 (2) Amounts due under the Unemployment Insurance Code with respect to work
32 or labor performed pursuant to the contract.

33 (3) Amounts required to be deducted, withheld, and paid over to the
34 Employment Development Department from the wages of employees of the
35 contractor and subcontractors under Section 13020 of the Unemployment
36 Insurance Code with respect to the work and labor.

37 (c) The bond shall by its terms inure to the benefit of any person authorized
38 under Section 42030 to assert a claim against a payment bond so as to give a right
39 of action to that person or that person’s assigns in an action to enforce the liability
40 on the bond.

41 (d) The bond shall be in the form of a bond and not a deposit in lieu of bond.

1 (e) The direct contractor may require that a subcontractor give a bond to
2 indemnify the direct contractor for any loss sustained by the direct contractor
3 because of any default of the subcontractor under this section.

4 **Comment.** Section 45030 restates former Civil Code Section 3248 and supersedes former
5 Civil Code Section 3096.

6 See also Sections 41040 (“direct contractor” defined), 41090 (“payment bond “ defined),
7 41100 (“person” defined).

8 **§ 45040. Construction of bond**

9 45040. (a) A payment bond shall be construed most strongly against the surety
10 and in favor of the beneficiary.

11 (b) A surety is not released from liability to the beneficiary by reason of a
12 breach of the contract between the public entity and the direct contractor or on the
13 part of the beneficiary.

14 (c) The sole conditions of recovery on the bond are that the beneficiary is a
15 person authorized under Section 42030 to assert a claim against a payment bond
16 and has not been paid the full amount of the claim.

17 **Comment.** Section 45040 restates former Civil Code Section 3226.

18 See also Sections 41040 (“direct contractor” defined), 41090 (“payment bond” defined), 41100
19 (“person” defined), 41120 (“public entity” defined).

20 Cf. Code Civ. Proc. § 995.130 (“beneficiary” defined).

21 **§ 45050. Statute of limitations**

22 45050. A claimant may commence an action against a surety to enforce the
23 liability on a payment bond at any time after the claimant ceases to provide labor,
24 services, equipment, or material, but not later than six months after the period in
25 which a stop payment notice may be given under Section 44140.

26 **Comment.** Section 45050 restates former Civil Code Section 3249.

27 See also Sections 41020 (“claimant” defined), 41070 (“labor, services, equipment, or material”
28 defined), 41090 (“payment bond” defined), 41140 (“stop payment notice” defined).

29 **§ 45060. Notice required**

30 45060. A claimant may not enforce the liability on a payment bond unless the
31 claimant has given notice under one of the following provisions:

32 (a) Preliminary notice under Chapter 3 (commencing with Section 43010).

33 (b) Notice to the principal and surety under Section 45070.

34 **Comment.** Section 45060 supersedes former Civil Code Section 3252(a). The former
35 limitation to a contract entered into on or after January 1, 1995, is omitted due to lapse of time.

36 See also Sections 41020 (“claimant” defined), 41090 (“payment bond” defined), 41110
37 (“preliminary notice” defined).

38 **§ 45070. Notice to principal and surety**

39 45070. (a) Whether or not the claimant has given preliminary notice under
40 Chapter 3 (commencing with Section 43010), a claimant may enforce the liability
41 on a payment bond by giving the notice provided in this section to the principal

1 and surety within 15 days after recordation of a notice of completion or, if a notice
2 of completion is not recorded, within 75 days after completion.

3 (b) Notice to the principal and surety shall include all of the following
4 information:

5 (1) The kind of labor, services, equipment, or material provided or to be
6 provided by the claimant.

7 (2) The name of the person to or for which the labor, services, equipment, or
8 material was provided.

9 (3) A statement of the claimant's demand, after deducting all just credits and
10 offsets, for the labor, services, equipment, or material already provided and for the
11 whole amount agreed to be provided.

12 (c) Notice shall be given by mail, personal delivery, or service in the manner
13 provided by law for the service of a summons in a civil action.

14 (d) Notice given by mail shall be at the following address:

15 (1) If given to the principal, at the principal's last known address.

16 (2) If given to an admitted surety insurer, at the office of or in care of (i) the
17 statutory agent of the surety in this state, (ii) an officer of the surety in this state, or
18 (iii) the agent designated by the surety in the bond as the address at which notice is
19 to be given.

20 (3) If given to a personal surety, at the surety's residence or place of business, if
21 known; or if not known, in care of the clerk of the county in which the bond is
22 recorded.

23 **Comment.** Subdivision (a) of Section 45070 restates former Civil Code Section 3252. See also
24 42210 (completion (including acceptance and cessation)).

25 Subdivisions (b)-(d) restate former Civil Code Section 3227. See also Sections 42060 (written
26 notice), 42070 (mailed notice).

27 See also Sections 41020 ("claimant" defined), 41070 ("labor, services, equipment, or material"
28 defined), 41090 ("payment bond" defined), 41100 ("person" defined), 41110 ("preliminary
29 notice" defined), 41130 ("public works contract" defined).

30 Cf. Code Civ. Proc. §§ 995.130 ("beneficiary" defined), 995.170 ("principal" defined).

31 **§ 45080. Action on bond**

32 45080. (a) A claimant may maintain an action to enforce the liability of a surety
33 on a payment bond whether or not the claimant has given the public entity a stop
34 payment notice.

35 (b) A claimant may maintain an action to enforce the liability on the bond
36 separately from and without commencement of an action against the public entity.

37 (c) In an action to enforce the liability on the bond, the court shall award the
38 prevailing party a reasonable attorney's fee.

39 **Comment.** Section 45080 restates former Civil Code Section 3250. The provision that a
40 reasonable attorney's fee is "to be taxed as costs" is deleted as surplus. See Code Civ. Proc. §
41 1033.5(a)(10)(B) (attorney's fee allowable as costs). See also Section 42050 (rules of practice).

42 See also Sections 41020 ("claimant" defined), 41090 ("payment bond" defined), 41120 ("public
43 entity" defined), 41140 ("stop payment notice" defined).

1 **§ 46030. Statement of claimant**

2 46030. An oral or written statement purporting to waive, release, impair or
3 otherwise adversely affect a claim is void and unenforceable and does not create
4 an estoppel or impairment of the claim unless either of the following conditions is
5 satisfied:

6 (1) The statement is pursuant to a waiver and release under this chapter.

7 (2) The claimant has actually received payment in full for the claim.

8 **Comment.** Section 46030 continues former Civil Code Section 3262(b) without substantive
9 change, to the extent it related to a public works contract.

10 See also Section 41020 (“claimant” defined).

11 **§ 46040. Reduction or release of stop payment notice**

12 46040. (a) A claimant may reduce the amount of, or release in its entirety, a stop
13 payment notice. The reduction or release shall be in writing and may be given in a
14 form other than a form of waiver and release prescribed in this chapter.

15 (b) A claimant’s reduction or release of a stop payment notice has the following
16 effect:

17 (1) The reduction or release releases the claimant's right to enforce the notice to
18 the extent of the reduction or release.

19 (2) The reduction or release releases the public entity from the obligation to
20 withhold funds pursuant to the notice to the extent of the reduction or release.

21 (3) The reduction or release does not preclude the claimant from giving a
22 subsequent stop payment notice that is timely and proper.

23 (4) The reduction or release does not release any right of the claimant other than
24 the right to enforce the stop payment notice to the extent of the reduction or
25 release.

26 **Comment.** Section 46040 restates the second, third, and fourth sentences of subdivision (b) of
27 former Civil Code Section 3262, to the extent they related to a public works contract.

28 See also Sections 41020 (“claimant” defined), 41100 (“person” defined), 41120 (“public
29 entity” defined), 41140 (“stop payment notice” defined).

30 **§ 46050. Accord and satisfaction or settlement agreement not affected**

31 46050. This chapter does not affect the enforceability of either an accord and
32 satisfaction concerning a good faith dispute or an agreement made in settlement of
33 an action pending in court if the accord and satisfaction or agreement and
34 settlement make specific reference to the claim.

35 **Comment.** Section 46050 continues former Civil Code Section 3262(c) without substantive
36 change, to the extent it related to a public works contract.

37 **§ 46060. Conditional waiver and release on progress payment**

38 46060. If a claimant is required to execute a waiver and release in exchange for,
39 or in order to induce the payment of, a progress payment and the claimant is not,
40 in fact, paid in exchange for the waiver and release or a single payee check or joint

1 payee check is given in exchange for the waiver and release, the waiver and
2 release shall be in substantially the following form:

3 **CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT**

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

7 **Identifying Information**

8 Name of Claimant: _____

9 Name of Customer: _____

10 _____

11 Job Location: _____

12 _____

13 Public Entity: _____

14 _____

15 Through Date: _____

16 _____

17 **Conditional Waiver and Release**

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

23 Maker of Check: _____

24 Amount of Check: _____

25 \$ _____

26 Check Payable to: _____

27 **Exceptions**

28 This document does not affect any of the following:

29 (1) Retentions.

30 (2) Extras for which the claimant has not received payment.

31 (3) The following progress payments for which the claimant has previously given
32 a conditional waiver and release but has not received payment:

33 Date of waiver and release: _____

34 Amount remaining unpaid: \$ _____

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

1 **Signature**

2 Claimant's Signature: _____

3 Claimant's Title: _____

4
5 **Comment.** Section 46060 restates former Civil Code Section 3262(d)(1), to the extent it
6 related to a public works contract, with the addition of language relating to progress payments
7 covered by previous releases that have not been paid. The statutory form is recast for clarity.

8 See also Section 41020 ("claimant" defined).

9 **§ 46070. Unconditional waiver and release on progress payment**

10 46070. If the claimant is required to execute a waiver and release in exchange
11 for, or in order to induce payment of, a progress payment and the claimant asserts
12 in the waiver it has, in fact, been paid the progress payment, the waiver and release
13 shall be in substantially the following form:

14 UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

15 NOTICE TO CLAIMANT: This document waives and releases rights
16 unconditionally and states that you have been paid for giving up those rights. This
17 document is enforceable against you if you sign it, even if you have not been paid.

18 If you have not been paid, use a conditional waiver and release form.

19 **Identifying Information**

20 Name of Claimant: _____

21 Name of Customer:

22 _____

23 Job Location:

24 _____

25 Public Entity:

26 _____

27 Through Date:

28 _____

29 **Unconditional Waiver and Release**

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

34 Amount of payment: \$ _____

35 **Exceptions**

36 This document does not affect any of the following:

37 (1) Retentions.

38 (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, services, equipment, or material not compensated by the payment.

Signature

Claimant's Signature: _____

Claimant's Title: _____

Comment. Section 46070 continues former Civil Code Section 3262(d)(2) without substantive change, to the extent it related to a public works contract. The statutory form is recast for clarity. See also Section 41020 ("claimant" defined).

§ 46080. Conditional waiver and release on final payment

46080. If the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a final payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release shall be in substantially the following form:

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: _____

Public Entity: _____

Date: _____

Conditional Waiver and Release

This document waives and releases stop payment notice and payment bond rights the claimant has for all labor, services, 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: _____

1 **Exceptions**

2 This document does not affect any of the following:

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

4 (2) The following progress payments for which the claimant has previously given
5 a conditional waiver and release but has not received payment:

6 Date of waiver and release: _____

7 Amount remaining unpaid: \$ _____

8 **Signature**

9 Claimant's Signature: _____

10 Claimant's Title: _____

11

12 **Comment.** Section 46080 continues former Civil Code Section 3262(d)(3), to the extent it
13 related to a public works contract, with the addition of language relating to progress payments
14 covered by previous releases that have not been paid, and the addition of a line for identification
15 of the waivant's customer. The statutory form is recast for clarity.

16 See also Section 41020 ("claimant" defined).

17 **§ 46090. Unconditional waiver and release on final payment**

18 46090. If the claimant is required to execute a waiver and release in exchange
19 for, or in order to induce payment of, a final payment and the claimant asserts in
20 the waiver it has, in fact, been paid the final payment, the waiver and release shall
21 be in substantially the following form:

22 UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

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

27 **Identifying Information**

28 Name of Claimant: _____

29 Name of Customer: _____

30 _____

31 Job Location: _____

32 _____

33 Public Entity: _____

34 _____

35 Date: _____

36 **Unconditional Waiver and Release**

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

1 **Exceptions**

2 This document does not affect any of the following:

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

4 **Signature**

5 Claimant's Signature: _____

6 Claimant's Title: _____

7

8 **Comment.** Section 46090 continues former Civil Code Section 3262(d)(4) without substantive
9 change, to the extent it related to a public works contract. The statutory form is recast for clarity.

10 See also Section 41020 ("claimant" defined).
