

First Supplement to Memorandum 2006-43

**Mechanics Lien Law  
(Analysis of Comments: Private Work of Improvement)**

Memorandum 2006-43 contains discussion and analysis of comments on the part of the Commission’s *Mechanics Lien Law* tentative recommendation that relates to a private work of improvement.

This supplement continues that discussion and analysis. The contents of the supplement are organized as follows:

PRIVATE WORK OF IMPROVEMENT (CIVIL CODE SECTIONS 7000 - 7848) .....1

MECHANICS LIEN ISSUES (CONTINUED).....1

    Section 7456 (Priority of advances by lender) .....1

    Section 7460 (Time for commencement of enforcement action).....3

    Section 7466 (Dismissal for lack of prosecution) .....8

    Section 7474 (Personal liability).....9

    Section 7476 (Liability of contractor for lien enforcement) .....10

PETITION FOR RELEASE ORDER.....13

    Section 7480 (Petition for release order) .....13

    Section 7482 (Demand prerequisite to petition) .....19

    Section 7486 (Time of hearing) .....20

    Section 7488 (Hearing and order) .....22

    Section 7492 (Effect of court order).....23

    Effect of court order releasing lien.....24

    Res Judicata Effect of Court Order .....26

PRIVATE WORK OF IMPROVEMENT (CIVIL CODE SECTIONS 7000 - 7848)

**Mechanics Lien Issues (continued)**

*Section 7456 (Priority of advances by lender)*

**§ 7456. Priority of advances by lender**

7456. (a) This section applies to a construction loan secured by a mortgage or deed of trust that has priority over a lien under this chapter.

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

Mr. Abdulaziz suggests that subdivision (b) of this section should be deleted, particularly for advances a lender makes for interest, non-construction related costs, and loan fees. Exhibit p. 17. Mr. Abdulaziz reports that lenders are notorious for depleting a loan fund for the lender's benefit by making such advances, particularly after the default of the owner.

The staff notes that subdivision (b) only grants priority to a lender's optional advances for "construction costs." This term that would not appear to include the cost disbursements Mr. Abdulaziz references. As the subdivision does not appear to authorize the practice Mr. Abdulaziz describes, **the staff does not recommend deletion of the subdivision.**

Mr. Brown indicates he may not fully understand the existing statute on this subject (Civ. Code § 3136). Exhibit p. 39. However, he believes the draft statute's proposed section would be inconsistent with the understanding most lenders have of the existing provision.

Section 3136 reads:

3136. A mortgage or deed of trust which would be prior to the liens provided for in this chapter to the extent of obligatory advances made thereunder in accordance with the commitment of the lender shall also be prior to the liens provided for in this chapter as to any other advances, secured by such mortgage or deed of trust, **which are used in payment of any claim of lien which is recorded at the date or dates of such other advances and thereafter in payment of costs of the work of improvement.** Such priority shall not, however, exceed the original obligatory commitment of the lender as shown in such mortgage or deed of trust.

Civ. Code § 3136 (emphasis added).

Mr. Brown notes that Section 3136 makes reference to a lender's payment of liens, as well payment for other costs of the work of improvement. He asserts that proposed Section 7456 does not clearly provide whether advances for such purposes would be "optional" or mandatory.

Section 7456 does substantially rewrite the language of existing Section 3136. However, as indicated in a Note to the section, the rewrite is consistent with that of 5 Miller & Starr, California Real Estate § 11:132, at 334-35 (3d ed. 2001). **The staff continues to solicit comment from other practitioners as to the faithfulness of the rewrite.** Pending such comment, the staff believes that the term "construction costs" would be considered to include both payment of liens

as well as other “costs of the work of improvement,” and **does not recommend a further rewrite of the section.**

Mr. Brown also suggests that since mandatory (or “obligatory”) advances can relate only to an original construction loan, “optional” advances must relate to loans in excess of the original loan. He points out that these advances, such as for payment of liens or stop payment notices, necessarily increase the loan, and could be cause for default by the owner. He therefore urges that the section provide that advances beyond the original construction loan should *not* have priority over any liens.

Mr. Brown points out that otherwise, the payment bond that must be obtained to grant a construction loan priority over lien claims may be insufficient. Civil Code Section 3138 (which is continued without substantive change by proposed Section 7452), requires the recording of a payment bond of 75% of the original construction loan in order for a construction loan to be granted priority over lien claims. Mr. Brown urges that if optional advances for matters not included in the original construction loan are also given priority over lien claims, the 75% figure could be inadequate.

While there may be some merit in Mr. Brown’s contention, Mr. Brown appears to be arguing for a change in existing law relating to priorities. The staff **does not recommend revising the law in this area, in the context of this study.**

The staff recommends that **Section 7456 be retained as drafted.**

*Section 7460 (Time for commencement of enforcement action)*

**§ 7460. Time for commencement of enforcement action**

7460. (a) The claimant shall commence an action to enforce a lien within 90 days after recordation of the claim of lien and record a notice of the pendency of the action under Title 4.5 (commencing with Section 405) of Part 2 of the Code of Civil Procedure within 100 days after recordation of the claim of lien. If the claimant does not commence an action and record notice of the pendency of the action within the time provided in this subdivision, **the claim of lien expires and is unenforceable.**

(b) Subdivision (a) does not apply if the claimant and owner agree to extend credit, and notice of the fact and terms of the extension of credit is recorded (1) within 90 days after recordation of the claim of lien or (2) more than 90 days after recordation of the claim of lien but before a purchaser or encumbrancer for value and in good faith acquires rights in the property. In that event 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 the action within the time provided in this subdivision, the claim of lien expires and is unenforceable.

This section provides that a lien claim expires and is unenforceable if the claimant does not file an action to enforce the claim within 90 days of the date the lien is recorded. This requirement is a continuation of existing law. Civ. Code § 3144.

Mr. Brown suggests that this section should be modified to also preclude a claimant from *refiling* a lien claim, if an initial filing is determined to have occurred more than 90 days after the claim was recorded. Exhibit pp. 39-40. He notes that language in the section provides that the *claim* of lien expires and is unenforceable, but the section does not extinguish the underlying inchoate lien *right*. Mr. Brown asserts that permitting the refiling of an expired lien claim “appears unfair and unjustified.”

Under existing law, continued by the draft statute, a claimant’s lien *right* may survive for years, depending on the length of a project and when the claimant performed work. A claimant is generally only required by statute to convert that inchoate lien right into a recorded *claim* of lien within a certain number of days after completion of the project.

However, a claimant is permitted to and often does record a claim of lien well before completion. If a lien claim is recorded sufficiently in advance of completion, and the claim becomes unenforceable because of failure to timely commence an enforcement action, the still existing lien right would arguably entitle the claimant to simply record a new (identical) lien claim, and then file a new (and now timely) enforcement action.

In support of his contention that this practice should not be permitted, Mr. Brown points out that Civil Code Section 3144, the existing section on this issue, does not refer to a “claim of lien.” Instead, Section 3144 states that if a claimant fails to timely commence an enforcement action, “the *lien* automatically shall be null and void and of no further effect.”

However, as Mr. Brown candidly acknowledges, the court in *Solit v. Tokai Bank, Ltd. New York Branch*, 68 Cal. App. 4th 1435, 81 Cal. Rptr. 2d 243 (1999) construed the “lien” reference in Section 3144 to mean a claim of lien, rather than the inchoate lien right itself. The *Solit* court first argued that the most reasonable

construction of the entire mechanics lien statute dictated that result. The court further held that any ambiguity as to the term's meaning in the statute must be resolved in a claimant's favor, given that a claimant's lien right has a constitutional basis.

Mr. Brown has an interesting personal perspective on this issue, as he was the trial attorney in *Solit* who prevailed in the lower court on the same argument he makes now (only to have his client — represented by new counsel — suffer a reversal on appeal).

While reasonable persons may differ as to the policy considerations served by this provision, Mr. Brown appears to be arguing for a fairly significant change in the law. In the context of the instant study, the staff **does not recommend incorporating this change, which could substantially hinder a claimant's ability to enforce a lien.**

Section 7460 also adds a new requirement to existing law, obligating a claimant to record a lis pendens no later than 100 days after the lien is recorded.

Mr. Abdulaziz believes this lis pendens recording requirement puts too much pressure on the rights of a lien claimant. Exhibit pp. 17-18. He asserts that if a lien claimant utilizes the full 90 day period allowed by law to commence the action, the claimant will be left with only 10 calendar days to record the lis pendens, or the lien claim will be rendered unenforceable.

Mr. Abdulaziz points out that a few of those 10 days may be consumed waiting for the return of the endorsed copy of the filed complaint which provides a case number necessary to record the lis pendens. He suggests that if the county recorder then "bounces" the attempted lis pendens recording, the lien claimant may have none of the 10 days left to re-record.

Mr. Abdulaziz believes an additional 10 days to record the lis pendens would be reasonable, and suggests that the section require recording of the lis pendens either 20 days from commencement of the enforcement action, or 110 days from the recording of the lien.

GGLT similarly warns that the lis pendens requirement could be a "big trap" for claimants and their attorneys. Exhibit pp. 150-151. It reports that some courts take as much as two weeks to return a conformed copy of a filed complaint, meaning that claimants who wait until the last minute to commence enforcement actions could have their lien claims invalidated, and their attorneys could find themselves exposed to malpractice claims.

GGLT also points out that the requirement of recording a lis pendens could hurt the ability of a claimant to resolve a lien claim without extensive litigation, because a claimant in negotiation with a contractor may not want to reveal that a lawsuit has been filed.

GGLT recommends deletion of the provision entirely. If the Commission decides to retain the provision, GGLT alternatively suggests language be added to the section providing that a failure to record a lis pendens only invalidates the lien claim as against a subsequent bona fide purchaser or encumbrancer without notice.

The draft statute includes this new requirement to let title insurers know whether a recorded lien claim more than 90 days old is still viable. Without the lis pendens recording requirement, a title company discovering a recorded lien claim has no easy way to know whether an enforcement action has been filed (thereby extending the viability of the claim). The Commission has been informed that, without such knowledge, many title companies will refuse to provide title insurance until a lien is at least a year old.

The staff does not agree the lis pendens recording requirement represents a “trap” for claimants or their attorneys, any more than the requirement that the enforcement action be commenced within 90 days represents such a trap. Any litigation deadline requires a litigant to count backward to determine how much time will be required to satisfy every necessary prerequisite to filing (i.e., obtaining client review, necessary signatures, copying, transmission to the court for filing, hours of court operation, etc.). The section’s requirement that a litigant take steps to obtain a case number sufficiently in advance of the lis pendens recording deadline would be just one more similar requirement.

GGLT’s concern about negotiating strategy is fairly subtle, and the staff does not believe the lis pendens requirement would significantly detract from a claimant’s ability to resolve a claim. Even with no recording requirement, a lien enforcement action will generally still need to be filed within 90 days of recording, and the filing will be public information available to any contractor who really wants to know. All the lis pendens requirement does is make it easier for title companies to be able to efficiently learn of the filing (or its absence) as part of a standard title search.

However, if the two week turnaround time suggested by GGLT to obtain case numbers occurs on any regular basis, it may be that allowing only 10 days after the filing of the enforcement action is too restrictive. The trade-off for each

additional day given to record the lis pendens would be an additional day title insurers would be delayed in providing insurance on properties with seemingly stale recorded liens.

The staff believes that extending this period by an additional 10 days as suggested by Mr. Abdulaziz is not unreasonable.

However, the staff believes Mr. Abdulaziz's alternative suggestion that the section provide a deadline tied to the commencement of the enforcement action would not be workable. In order to allow title insurers to know with certainty whether a recorded lien has expired, the statute has to provide a hard deadline for recording a lis pendens based on a number of days *from lien recording*. A deadline based on number of days from commencement of the action would still leave title insurers with no way to know if a seemingly stale lien had been perfected.

To extend the lis pendens recording requirement by 10 days, the staff recommends that **subdivision (a) of Section 7460 be modified as follows:**

**§ 7460. Time for commencement of enforcement action**

7460. (a) The claimant shall commence an action to enforce a lien within 90 days after recordation of the claim of lien and record a notice of the pendency of the action under Title 4.5 (commencing with Section 405) of Part 2 of the Code of Civil Procedure within ~~100~~ 110 days after recordation of the claim of lien. If the claimant does not commence an action and record notice of the pendency of the action within the time provided in this subdivision, the claim of lien expires and is unenforceable.

It is also possible that GGLT's alternative suggestion — providing that the failure to record the lis pendens renders the claim invalid only against a later bona fide purchaser or encumbrancer without knowledge — might be workable.

**The staff solicits input from title insurers about the impact of this modification of the lis pendens recording requirement.** Exempting later bona fide purchasers or encumbrancers from a lien claim is likely the biggest concern title insurers have when deciding whether to “insure around” a recorded lien. If notwithstanding the existence of a lien claim of uncertain status, the inclusion of such an exemption would be sufficient to allow most or all title insurers to issue a policy, GGLT's suggestion could serve as an alternative to *any* lis pendens recording requirement.

Pending input from title insurers on this issue, **the staff tentatively recommends modifying Section 7460 to incorporate GGLT's suggested exemption, but only in addition to the 10 day extension discussed above:**

**§ 7460. Time for commencement of enforcement action**

7460. (a) The claimant shall commence an action to enforce a lien within 90 days after recordation of the claim of lien ~~and record a notice of the pendency of the action under Title 4.5 (commencing with Section 405) of Part 2 of the Code of Civil Procedure within 100 days after recordation of the claim of lien.~~ If the claimant does not commence an action ~~and record notice of the pendency of the action~~ within the time provided in this subdivision, the claim of lien expires and is unenforceable.

(b) The claimant shall record a notice of the pendency of the action to enforce the lien under Title 4.5 (commencing with Section 405) of Part 2 of the Code of Civil Procedure within 110 days after recordation of the claim of lien. If the claimant does not record notice of the pendency of the action within the time provided in this subdivision, the claim of lien is unenforceable against a purchaser or encumbrancer for value that in good faith and without knowledge of the pending action acquires rights in the property.

(c) Subdivision (a) does Subdivisions (a) and (b) do not apply if the claimant and owner agree to extend credit,....

Mr. Brown also urges that the extension of credit referenced in the section should be signed by any entity affected by it, such as a construction lender. He suggests that otherwise, if "there is a break in priority, the claimant may be barred from asserting a lien claim against a non-consenting lender."

Mr. Brown suggestion seems to imply that under current law, a valid extension of credit requires the consent of a lender. **The staff is not aware of any such requirement under existing law, but solicits comment from practitioners on the point.** If such requirement does not exist under current law, **the staff does not recommend adding it.** Obtaining this additional consent would make it more difficult for an owner and a claimant to negotiate an extension, and would create new litigation arguments that could invalidate a lien.

*Section 7466 (Dismissal for lack of prosecution)*

**§ 7466. Dismissal for lack of prosecution**

7466. Notwithstanding Section 583.420 of the Code of Civil Procedure, the court may dismiss an action to enforce a lien that is not brought to trial within two years after commencement.

Mr. Brown urges that two years is not sufficient to allow a matter to proceed to trial in certain jurisdictions, and requests that this provision be deleted. Exhibit p. 40. He suggests that if the intention of the section is to require claimants to expeditiously process their claims, a defendant may always seek an early trial date.

Section 7466 continues existing law. Civ. Code § 3147. Discretionary dismissal provisions, similar to statutes of limitation, typically involve a legislative balance of competing interests. While Mr. Brown's contention about crowded trial courts may have merit, in the context of this study **the staff does not recommend altering the balance established under existing law.**

*Section 7474 (Personal liability)*

**§ 7474. Personal liability**

7474. (a) This chapter does not affect any of the following rights of a claimant:

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

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

(3) The right to enforce a judgment.

(b) A judgment obtained by the claimant in a personal action described in subdivision (a) does not impair or merge the claim of lien, but any amount collected on the judgment shall be credited on the amount of the lien.

Mr. Sackman suggests a modification of subdivision (b) of this section, to address a situation in which a claimant obtains a judgment against a contractor who has failed to pay the claimant on more than one project. Exhibit p. 66.

Mr. Sackman notes that the statute does not provide how an amount collected on such a judgment would be credited against the *multiple* liens the claimant would have in that situation (assuming the amount collected was insufficient to satisfy all liens).

Mr. Sackman indicates that in his experience common practice is to prorate any collected amount to each lien, based on the ratio of the amount of the lien to the amount of the total judgment. He urges that this practice be mandated by statute.

Mr. Sackman has identified another statutory gap in current mechanics lien law. Unfortunately, providing a legislative resolution of the issue may not be easy.

Certainly, the proration suggested by Mr. Sackman would be one solution. However, questions occur to the staff if that procedure were to be mandated. For example, what if questions existed about the procedural validity of a particular lien claim (i.e., it arguably hadn't been timely recorded, or timely enforced, the contractor wasn't licensed, or there was some other procedural defect)? Would the validity of each lien claim vying to share in the judgment have to be litigated before the apportionment could be made? If not, credit might be given on a lien that might later be determined invalid. See proposed Sections 7412, 7414, 7460, Bus. & Prof. Code § 7031.

In addition, at least in certain circumstances, wouldn't a "first in time" rule be a more fair way to apportion money obtained? Under the proportional approach suggested by Mr. Sackman, an owner whose property had been tied up by a lien for years would get exactly the same relief as an owner who had only been burdened by a lien (of the same amount) for days.

**The staff solicits comment from practitioners on this issue.** In the absence of a clear consensus as to how this issue is currently resolved in the courts, **the staff believes the draft statute should continue to leave this issue to an exercise of judicial discretion.**

*Section 7476 (Liability of contractor for lien enforcement)*

**§ 7476. Liability of contractor for lien enforcement**

7476. In an action to enforce a lien for labor, service, equipment, or material provided to a contractor:

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

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

Mr. Abdulaziz offers two comments as to this section. Exhibit p. 18. First, he contends the section should only apply to liens for labor, service, equipment or material provided to a contractor for which the owner has paid.

GGLT essentially echoes this suggestion, urging that the section should only apply to lien claims for which the direct contractor has already been paid. Exhibit p. 151.

Section 7476 continues existing law. Civ. Code § 3153. As Section 3153 allows an owner to deduct the amount of an adverse judgment “from any amount *then or thereafter due from [the owner] to the original contractor,*” it appears Mr. Abdulaziz and GGLT are advocating a change in existing law.

It could be reasonably argued it is unfair to require a direct contractor to defend an owner in a lien enforcement action, when the owner’s failure to pay the direct contractor is the cause of the lien claim. On the other hand, the lien could be invalid, and requiring the owner to pay the direct contractor the amount of the lien anyway in order to obtain a defense would also seem unfair. Moreover, a contractor who has already received payment corresponding to the amount of the claim would seem to have substantially less incentive to defend against the lien.

Finally, a direct contractor forced to defend an owner before receiving payment will ultimately not be left without a remedy, as the contractor would retain both contract and lien rights against the owner.

The staff recommends that the balance that has been struck by the Legislature on this issue remain intact, and that **this aspect of the section remain as drafted.**

Mr. Abdulaziz also urges that, in lieu of the withholding referenced in subdivision (a), a contractor should be permitted to obtain a release bond issued by an admitted surety.

The staff is unsure how a release bond would work in conjunction with this section. Proposed Section 7428 of the draft statute already allows a contractor to obtain a release bond that would *pay the lien claim*. Thus, Mr. Abdulaziz appears to be suggesting that a contractor should instead be able to obtain a release bond as a substitute for the contractor’s obligation under this section to *defend a foreclosure action*. **The staff seeks input on this suggestion from practitioners, but until such time does not recommend implementation of this suggestion.**

Mr. Brown suggests that this section provide that an owner is entitled to attorney fees, as is provided in many contracts. Exhibit p. 40.

Memorandum 2006-44 contains a section analyzing comments relating to the general availability (or nonavailability) of attorney fees in mechanics lien actions. Mr. Brown's suggestion relating to this section could be revisited by the Commission when that section of Memorandum 2006-44 is presented and discussed.

However, the staff notes that (in the absence of a contractual right) a lien claimant in an action to enforce a lien is not entitled to attorney fees. *Wilson's Heating & Air Conditioning v. Wells Fargo Bank*, 202 Cal. App. 3d 1326, 1330, 249 Cal. Rptr. 553 (1988). Absent a general overhaul relating to the awarding of attorney fees in conjunction with mechanics lien remedies, **the staff does not recommend adding a provision to this section that would allow an owner a non-reciprocal remedy.**

GGLT also takes issue with three other aspects of this section. Exhibit p. 151.

It first questions the leadline of the section, urging that in contrast with existing Civil Code Section 3153, the proposed section's leadline makes no reference to a contractor's obligation to indemnify an owner from lien claims.

The staff recommends that the leadline of the section be changed to:

**§ 7476. ~~Liability of contractor for~~ Defense of lien enforcement action by contractor**

Second, GGLT argues that a reference in subdivision (a) departs from existing law. It notes that the subdivision allows an owner during the pendency of the action to withhold from the direct contractor "the amount claimed in the action," whereas Civil Code Section 3153 allows for withholding only of "the amount of money for which the claim of lien is recorded."

GGLT notes that the amount claimed in the undefined "action" could exceed the amount of the lien, in a matter in which other causes of action were joined with the lien enforcement action.

The staff believes this contention to be a valid point. To address the ambiguity, the staff recommends that **subdivision (a) of Section 7476 be modified as follows:**

(a) The contractor shall defend the action at the contractor's own expense. During the pendency of the action the owner may withhold from the direct contractor the amount ~~claimed in the action~~ of the lien claim.

Finally, GGLT urges that the application of the section should be limited to lien claims made by claimants other than a direct contractor. The staff believes this concern is addressed by the introductory language of the section, which provides:

7476. In an action to enforce a lien for labor, service, equipment, or material provided **to a contractor**:

....

Since a direct contractor provides labor, service, equipment, or material only to an owner, this section is already inapplicable to a lien claim made by a direct contractor.

However, in order to provide further clarification, the staff recommends that **a line be added to the Comment to this section, reading:**

This section does not apply to an action to enforce a lien brought by a direct contractor.

### **Petition for release order**

Under current law, when an action is not timely commenced to enforce a recorded mechanics lien, an owner of the property may petition a court for release of the lien. Civil Code Section 3154. The only ground currently allowed for seeking release of a lien by this petition is the failure of the claimant to timely commence the enforcement action, and current law provides little procedural detail for the filing or hearing of this petition.

The draft statute proposes to add several new grounds on which an owner can petition for a release of a lien. The draft statute also provides a procedural framework for the hearing on the petition.

#### *Section 7480 (Petition for release order)*

##### **§ 7480. Petition for release order**

7480. (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 7460.

(2) The claim of lien is invalid under Section 7424.

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

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

(5) The claimant was not licensed to provide the labor, service, 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 claim of lien that is the subject of the release order. **However, another action or claim for relief may not be joined with a petition under this article.**

(c) Notwithstanding Section 7054, 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.

Mr. Melino believes the sections relating to the lien release procedure do not make sufficiently clear that the petition is addressed only to a specific claim of lien, rather than the inchoate lien right itself. Exhibit p. 129.

The staff agrees this is an important distinction. The staff believes that the text of Section 7480, the section that introduces and provides the grounds for the petition, makes sufficient reference to a “claim of lien.” However, in order to provide additional clarification, the staff recommends that **the Comment to the section be augmented to read as follows:**

**Comment.** Subdivision (a)(1) of Section 7480 continues former Section 3154(a) without substantive change. Subdivisions (a)(2)-(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 7424 (forfeiture of lien for false claim).

Subdivision (b) continues former Section 3154(h) without substantive change, and codifies the holding in *Solit v. Tokai Bank, Ltd. New York Branch*, 68 Cal. App. 4th 1435, 81 Cal. Rptr. 2d 243 (1999). A petition under this section addresses the validity of a specific recorded claim of lien. The petition has no effect on a claimant’s underlying lien right.

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 7028 (“owner” defined).

See also Sections 7002 (“claimant” defined), 7016 (“labor, service, equipment, or material” defined), 7024 (“lien” defined).

GGLT believes the draft statute's expansion of the grounds on which an owner can petition to release a lien "are welcome and will be effective." Exhibit p. 152.

Mr. Abdulaziz urges that the grounds listed in subparagraphs (a)(2), (3), and (4) of the section are too broad for a summary proceeding, and would likely require a jury determination. Exhibit p. 18.

Subparagraph (a)(2) allows for release of a lien claim that contains specified erroneous information, included with intent to slander title or defraud. The first qualification might be appropriate for a summary proceeding, but the staff agrees that proof of a claimant's intent could involve the presentation of substantial evidence not typically adjudicated in a summary proceeding. Moreover, such intent is determinative — Section 7424 provides that erroneous information included in a lien *without* such intent does not invalidate a lien.

(Section 7424 also continues existing law providing that the inclusion of specified erroneous information in a lien claim with intent to slander title or defraud *does* invalidate a lien. However, existing law does not provide that this ground for invalidating a lien may be litigated in a summary release procedure.)

The staff recommends that **subparagraph (a)(2) be deleted from Section 7480.**

Subparagraph (a)(3) allows for release of a lien claim that has been paid in full. This subparagraph is primarily intended to address the situation in which after recording a lien claim a claimant is paid in full, but the claimant thereafter neglects or refuses to record a release of the claim. The owner presumably will have some documentation from the claimant indicating the claim has been "paid in full," and the owner would then present that documentation in support of the petition for release.

However, the language of the subparagraph does raise some questions. Does the subparagraph require the owner to establish that the *claimant* was paid in full? Or, in the case of a claimant other than a direct contractor, would the language of the subparagraph allow an owner to prevail by simply showing payment of the amount stated in the claim, to the direct contractor?

To avoid any possibility of the latter construction, the staff recommends that **subparagraph (a)(3) be modified to read:**

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

Subparagraph (a)(4) allows for release of a lien claim when *none* of the labor, service, equipment, or material stated in the claim has been provided. This subparagraph is primarily intended to address the situation in which the claimant has recorded a lien on the wrong property, or some other circumstance exists establishing that the claimant did no work on the property at all.

The staff believes that this subparagraph would be reasonably construed to allow an owner to prevail only in very specific circumstances. The staff recommends **that the subparagraph be retained as drafted.**

Mr. Abdulaziz also urges that subparagraph (a)(6) should be modified to exclude a determination made in small claims court as a ground for granting the petition. Exhibit p. 18.

The Commission has been informed that claimants often make use of small claims court in an attempt to recover the amount of a disputed lien claim from an owner. However, even when the court in such an action rules that the claimant is entitled to take nothing, most small claims courts, based on perceived jurisdictional limitations, are unwilling to release the lien claim.

Section 7480 was in part intended to solve this problem, allowing an owner who had prevailed in small claims court to use that judgment as a ground for releasing the lien.

**The staff therefore does not recommend excepting a small claims court judgment from the application of this section.**

The Building Owners and Managers Association (BOMA) urges that Section 7480 should be modified so as to expressly authorize a petition for the *reduction* of a lien. BOMA indicates that the most common lien problem a property owner faces is not a wholly invalid lien, but rather an overstated lien. It suggests that under current case law an owner may be permitted to use a release petition to reduce a lien, citing *Basic Modular Facilities, Inc. v. Ehsanipour*, 70 Cal. App. 4th 1480 (1999). However, BOMA indicates that some trial courts nevertheless struggle with the apparent “all or nothing” language of existing law, which is continued in Section 7480.

Civil Code Section 3154 speaks only of an owner’s right to petition for “release” of a lien, and the staff has found no case expressly indicating that the term “release” includes a reduction of a lien. (A recorded lien was ultimately ordered reduced in *Basic Modular Facilities*, but Section 3154 is never mentioned in the opinion, and the procedural history of the case is unclear.)

The staff believes that litigation over the proper amount of a recorded lien claim would be problematic in a summary adjudication. In addition, seeking such a determination would be largely inconsistent with the objective of the lien release procedure, which is to allow an owner an expedited opportunity to completely *clear* a lien.

**The staff does not recommend that Section 7480 be modified to allow a petition to reduce a lien.**

GGLT suggests that the last sentence of subdivision (b), prohibiting the joining of any other action with the petition, should be modified. Exhibit p. 153. It points out that if a claimant had commenced an enforcement action before the owner filed a petition under this section, prohibiting joinder of the two actions could result in inconsistent judgments.

However, rather than suggesting that the section allow joinder in this situation, GGLT instead suggests that Section 7480 bar the commencement of a petition procedure, if the claimant has already commenced an enforcement action.

GGLT has pointed out a scenario that the staff agrees needs to be addressed. However, the staff does not concur in GGLT's proposed solution. If a filed commencement action barred an owner from using the release procedure, a claimant (who could always beat the owner to the courthouse) could permanently deprive an owner of what might be a speedy and efficient release of the lien, and then use delaying tactics in the enforcement action as settlement leverage.

The staff does believe that prohibiting joinder of two pending and related actions, one brought by an owner to release a lien and the second by a claimant to foreclose, would waste judicial resources. However, the staff does not see a significant inconsistent judgment problem.

If a court adjudicating a summary release petition were to grant the petition, the draft statute provides that the claim of lien is equivalent to cancellation of the claim of lien and its removal from the record. Proposed Section 7492. In this event, there would be no lien claim left to foreclose in any pending or subsequent lien foreclosure action. Alternatively, a denial of a summary release petition would have no effect on a lien enforcement action at all.

The staff believes that, rather than barring an owner from using the summary release procedure, this issue can be adequately addressed by the court, provided joinder of the two actions is not barred.

The staff therefore recommends that **subdivision (b) of Section 7480 be modified as follows:**

(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 claim of lien that is the subject of the release order. However, other than a pending action to enforce the claim of lien that is the subject of the release order, another action or claim for relief may not be joined with a petition under this article.

Paul Crane, an attorney with Kehr Schiff & Crane in Los Angeles, points out that while an owner of property needs this procedure to clear title, contractors on a project typically have a contractual obligation to provide lien free performance by their employees and vendors. Exhibit p. 47. Mr. Crane suggests it would make sense to therefore also allow contractors to make direct use of this expedited lien release procedure, to clear liens recorded by claimants working for the contractor.

Mr. Crane notes that under existing law, in order to clear such liens either (1) the owner has to assume the litigation responsibility and then pass the cost along to the contractor, or (2) the contractor has to obtain some type of authority to prosecute the petition on the owner's behalf. Mr. Crane urges that the first arrangement can be inefficient because litigation costs have to be passed down, and the second often does not work because of "major or minor disputes between the owner and the contractor."

As a proposed substantive improvement, Mr. Crane suggests that this section be expanded to allow a petition to be prosecuted by the contractor having primary responsibility for the entire project, as well as the contractor for whom the lien claimant provided work.

As an alternative, Mr. Crane suggests that standing to prosecute the petition could simply be granted to *any* person on a project who is obligated to provide lien free performance.

The staff believes Mr. Crane's idea is a good one in theory. However, the problem the staff perceives with granting direct standing to any individual other than the owner to prosecute an action under this section relates to an adverse ruling denying the petition.

Unless a person prosecuting the petition has the authority of the owner to do so, resolution of whether a denied petition could be refiled would necessarily be

unfair to someone. Either the owner (who was not involved in the first action) would nevertheless be precluded from using the procedure to challenge a lien directly affecting the owner's property, or the claimant would be forced to have to defend twice against the same petition.

The staff believes that proposed Section 7060, which allows an owner to give a direct contractor (or any other person) the authority to act as the owner's agent, is a sufficient solution to the problem Mr. Crane raises. The staff therefore recommends that **the section not be extended to grant standing to any individual other than an owner.**

Michael Brown, a representative with the Contractors State License Board, requests that this section provide that any ground on which a petition is allowed may also serve as the basis for administrative discipline of the lien claimant. Exhibit p. 46. He urges that language be added to the section expressly indicating that, in addition to seeking the remedy provided by the section, an owner may also file a complaint with the Contractors State License Board.

The staff takes no position on whether or not each of the grounds in Section 7480 should properly serve as the basis for administrative discipline of the claimant. However, the staff does not believe that arguably additional grounds for discipline should be incorporated in this section, or in the draft statute. The staff suggests that the subject of contractor discipline can involve issues substantially different than the validity of a recorded lien, and the former subject needs its own section, or series of sections, in another statute. As just one example of a disconnect between the two subjects, a claim of lien can be recorded by a laborer or another individual who is not subject to licensing requirements.

**The staff does not recommend incorporating language in Section 7480 relating to contractor discipline.**

*Section 7482 (Demand prerequisite to petition)*

**§ 7482. Demand prerequisite to petition**

7482. An owner of property may not petition the court for a release order under this article unless at least 10 days before filing the petition the owner gives the claimant notice demanding that the claimant execute and record a release of the claim of lien.

The staff recommends that **this section be augmented as follows, in order to facilitate possible resolution of the petition before filing:**

**§ 7482. Demand prerequisite to petition**

7482. An owner of property may not petition the court for a release order under this article unless at least 10 days before filing the petition the owner gives the claimant notice demanding that the claimant execute and record a release of the claim of lien. The notice shall state the grounds for the demand.

*Section 7486 (Time of hearing)*

**§ 7486. Time of hearing**

7486. (a) On the filing of a petition for a release order, the clerk shall set a hearing date. The date shall be not more than 30 days after the filing of the petition. The court may continue the hearing beyond the 30-day period on a showing of good cause, but in any event the court shall rule and make any necessary orders on the petition not later than 75 days after the filing of the petition.

(b) The petitioner shall serve a copy of the petition and notice of hearing on the claimant at least 10 days before the hearing. Service shall be made in the same manner as service of summons, or by mail addressed to the claimant.

(c) Notwithstanding Section 7114, when service is made by mail, service is complete on the fifth day following deposit of the petition and notice in the mail.

Mr. Brown believes the 10 days allotted to a claimant defending in this procedure is far too short. Exhibit p. 41. He points to a provision governing the public works summary proceeding relating to the validity of a stop payment notice (Civ. Code § 3199), in which a claimant is given between 10 and 20 days to respond to an affidavit, and believes even that amount of time to be insufficient.

Mr. Brown suggests that courts are often inclined to deny summary petitions even when perceived to have some merit, based on a perception that the respondent has not had sufficient time to obtain and present evidence in opposition. He urges that both sides should be given a fair and full hearing, suggesting that the petitioner should be give more time to file the petition, but that service of the petition should then be required immediately upon filing.

Mr. Brown also notes that, while the section provides the court discretion to continue the date set for hearing, it does not appear to afford the court discretion to extend the time for a response to the petition to be filed.

BOMA also takes issue with the 10 day notice requirement, as well as the provision allowing a court 75 days to rule on the petition. Exhibit p. 108. BOMA notes that many of the new grounds on which a petition may be based may involve detailed factual inquiries, necessitating much more than 10 days for any

respondent to prepare. Further, BOMA urges, given that a title insurer could not possibly insure around a recorded lien where the challenge to the lien was based on anything other than the expiration of the time for filing an enforcement action, 75 days is too long to wait for a decision. BOMA suggests service of the petition consistent with the provisions of Code of Civil Procedure Section 1005, and a mandated decision by the court within 10 court days of hearing.

GGLT also believes the 85 days required before an owner can obtain a release under this “expedited” procedure (owner must demand release 10 days before filing under Section 7482, and court has 75 days from filing to issue a ruling under this section) may be too long for many owners. Exhibit p. 152. It point out that unless the claimant commences an enforcement action (or gets an extension of credit from the owner), the recorded lien would be invalidated in five more days anyway (proposed Section 7460).

GGLT suggests shortening the notice period to five days, and the decision period to 60 days.

The staff agrees that the various time limits the draft statute currently establishes for this procedure may need adjusting. The primary reason the Commission proposed new grounds for the release petition was to save an owner from having to wait 90 days before being able to obtain an order releasing a clearly invalid lien. However, requiring an owner to potentially wait 85 days for this result would, at least in most cases, make the new additional grounds irrelevant.

The owner will almost certainly not even know about the recorded lien until at least several days after it is recorded. If that time is added to the 85 days, by the time the court issues its order — as pointed out by GGLT — the 90 day time limit for commencing an enforcement action will in most cases have expired anyway.

Of course, a court is not required to wait 75 days to issue a decision, and could issue a ruling immediately. However, crowded dockets being what they are, a statutory entitlement to take 75 days to rule may cause these petitions to be granted lowest priority among all of a court’s active matters.

The staff also agrees with most of the commenters that 10 days notice of hearing is less than reasonable. The claimant may need to retain counsel, may have several outstanding liens to sort through to gather paperwork, and may be out of town when the notice arrives.

The staff recommends that **Section 7486 be modified as follows:**

**§ 7486. Time of hearing**

7486. (a) On the filing of a petition for a release order, the clerk shall set a hearing date. ~~The date shall be~~ The clerk shall set a date for hearing not more than 30 days after the filing of the petition, unless the petitioner waives this requirement. The court may continue the hearing ~~beyond the 30-day period~~ only on a showing of good cause, ~~but in any event the court shall rule and make any necessary orders on the petition not later than 75 days after the filing of the petition.~~

(b) The petitioner shall serve a copy of the petition and notice of hearing on the claimant at least ~~10~~ 20 days before the hearing. Service shall be made in the same manner as service of summons, or by mail addressed to the claimant.

(c) Notwithstanding Section 7114, when service is made by mail, service is complete on the fifth day following deposit of the petition and notice in the mail.

(d) The court shall rule and make any necessary orders on the petition not later than 10 days after the hearing of the petition.

*Section 7488 (Hearing and order)*

**§ 7488. Hearing and order**

7488. (a) At the hearing both (i) the petition and (ii) the issue of compliance with the service and date for hearing requirements of this article are deemed controverted by the claimant, and **the petitioner has the burden of proof on those matters.**

(b) If judgment is in favor of the petitioner, the court shall order the property released from the claim of lien.

(c) The prevailing party is entitled to a reasonable attorney's fee.

BOMA objects to the provision in Section 7488 placing the ultimate burden of proof of the validity of the lien on the owner, rather than the lien claimant. Exhibit p. 108. BOMA urges that often at the time a petition is filed an owner will not have access to all evidence (such as the contractor's records) necessary to fully establish grounds for the petition. BOMA urges it is more consistent with current law to require the owner to make only an initial showing calling the validity of the lien into question, and then place the ultimate burden to demonstrate the lien's validity on the recording contractor, citing a comparison to Code of Civil Procedure Section 405.32.

BOMA's suggestion has some merit. It is the lien claimant that would bear the burden of proof as to the validity of the lien in a lien enforcement action. Further, Code of Civil Procedure Section 405.32, governing a similar application to expunge a recorded lis pendens based on a real property claim, imposes on the

person recording the lis pendens the burden of establishing the “probable validity” of the underlying real property claim.

Implementation of BOMA’s suggestion *might* represent a change in existing law. Civil Code Section 3154, which governs the current statutory lien release procedure, does not expressly address the issue. The section only provides that “[t]he petition [to release a lien] shall be deemed controverted by the lien claimant.” Civil Code Section 3154(b)(5).

However, the staff reads this language as placing on the petitioning owner the initial burden of *production* of evidence, rather than the ultimate burden of proof of persuasion. See Evidence Code Section 550.

The staff therefore recommends that **Section 7488 be revised as follows:**

**§ 7488. Hearing and order**

7488. (a) At the hearing both (i) the petition and (ii) the issue of compliance with the service and date for hearing requirements of this article are deemed controverted by the claimant, ~~and the~~ . The petitioner has the initial burden of proof producing evidence on those matters. Thereafter, the petitioner has the burden of proof as to the issue of compliance with the service and date for hearing requirements of this article, and the claimant has the burden of proof as to the validity of the lien.

(b) If judgment is in favor of the petitioner, the court shall order the property released from the claim of lien.

(c) The prevailing party is entitled to a reasonable attorney’s fee.

**Comment.** Subdivision (a) of Section 7488 continues the last sentence of former Section 3154(b)(5) and the last two sentences of former Section 3154(e) without substantive change. Subdivision (b) continues a portion of former Section 3154(f); the remainder of the former provision is continued in Article 8 (commencing with Section 7490) (removal of claim of lien from record). Subdivision (c) continues former Section 3154(g) with the exception of the \$2,000 limitation.

See also Sections 7002 (“claimant” defined), 7024 (“lien” defined), Evidence Code Section 500 (burden of proof), Evidence Code Section 550 (burden of producing evidence).

*Section 7492 (Effect of court order)*

**§ 7492. Effect of court order**

7492. (a) A court order or judgment under Section 7490 is equivalent to cancellation of the claim of lien and its removal from the record.

(b) This section does not apply to a court order dismissing an action to enforce a lien that is expressly stated to be without prejudice.

Mr. Brown believes this section is confusing, as he does not understand how an order under this section could be “without prejudice.” Exhibit p. 42.

Section 7492 is a continuation of Civil Code Section 3148, which also makes reference to the dismissal of an enforcement action stated by the court to be “without prejudice.” The staff suggests there might be many circumstances in which a court might dismiss a filed action to enforce a lien, but allow the claimant to refile the action (assuming time still remained to statutorily allow such refiling). The most likely scenario might be some technical defect in the complaint, or a procedural defect in the filing.

The staff recommends that **this section be retained as drafted.**

#### *Effect of court order releasing lien*

The staff is concerned the draft statute may contain some ambiguity and possibly inconsistency relating to the effect of a court order releasing a lien, before the order is recorded at the county recorder’s office.

The relevant provisions in the draft statute are as follows:

#### **§ 7490. Court order**

7490. (a) A court order dismissing an action to enforce a lien or releasing property from a claim of lien, or a judgment that no lien exists, shall include all of the following information:

- (1) The date of recordation of the claim of lien.
- (2) The county in which the claim of lien is recorded.
- (3) The book and page or series number of the place in the official records where the claim of lien is recorded.
- (4) The legal description of the property.

(b) A court order under this section is a recordable instrument.  
**On recordation of a certified copy of the court order, the property described in the order is released from the claim of lien.**

#### **§ 7492. Effect of court order**

7492. (a) A court order or judgment under Section 7490 is **equivalent to cancellation of the claim of lien and its removal from the record.**

(b) This section does not apply to a court order dismissing an action to enforce a lien that is expressly stated to be without prejudice.

**§ 7494. Effect of expiration or recordation of court order**

7494. If a claim of lien expires and is unenforceable under Section 7460, or if a court order or judgment is recorded under Section 7490, 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.

These three provisions are at least arguably inconsistent. Section 7490(b) indicates that property is not released from a lien until recordation. However, Section 7492(a) provides that the order is “equivalent” to removal from the “record,” with no mention of recordation. Finally, Section 7494 seems to indicate that title is effectively cleared based simply on expiration of the time limit in 7460, with no mention of whether any court order is needed at all.

To clarify this issue, the staff recommends that **the draft statute be modified as follows:**

**§ 7490. Court order**

7490. ~~(a)~~ A court order dismissing an action to enforce a lien or releasing property from a claim of lien, or a judgment that no lien exists, shall include all of the following information:

- ~~(1)~~ (a) The date of recordation of the claim of lien.
- ~~(2)~~ (b) The county in which the claim of lien is recorded.
- ~~(3)~~ (c) The book and page or series number of the place in the official records where the claim of lien is recorded.
- ~~(4)~~ (d) The legal description of the property.

~~(b) A court order under this section is a recordable instrument. On recordation of a certified copy of the court order, the property described in the order is released from the claim of lien.~~

**§ 7492. Effect Recordation of court order**

~~7492. (a) A court order or judgment under Section 7490 is equivalent to cancellation of the claim of lien and its removal from the record.~~

~~(b) This section does not apply to a court order dismissing an action to enforce a lien that is expressly stated to be without prejudice. A court order or judgment under Section 7490 is an instrument recordable in the office of the county recorder.~~

(b) On recordation in the county recorder’s office of a certified copy of the court order or judgment, the property described in the order is released from the claim of lien.

(c) This section does not apply to a court order dismissing an action to enforce a lien that is expressly stated to be without prejudice.

**§ 7494. Effect of ~~expiration or recordation of court order~~**

~~7494. If a claim of lien expires and is unenforceable under Section 7460, or if a court order or judgment is recorded under Section 7490 7492, 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.~~

**Under this formulation, a court order granting a petition to release a lien claim does not actually release the lien until the order is recorded in the county recorder's office.**

*Res Judicata Effect of Court Order*

The staff also believes it worthwhile to clarify the effect of a court order under this procedure on any *other* action, recording of lien claim, or lien right.

As presently written, the draft statute does not explicitly provide whether an order releasing a claim of lien bars the subsequent recording of an identical claim of lien by the claimant.

The Commission intends the newly created release procedure to address only the validity of a challenged lien *claim*, rather than the validity of the lien *right* underlying that claim. Such a formulation, distinguishing between a particular recorded lien claim and an inchoate lien right, would be consistent with judicial interpretation of other similar statutes in existing mechanics lien law. See *Solit v. Tokai Bank, Ltd. New York Branch*, 68 Cal. App. 4th 1435, 81 Cal. Rptr. 2d 243 (1999).

The staff recommends that **the sections in this Article be slightly reorganized, and one new section (identified as Section 7496) be added, as follows:**

**§ 7480. Petition for release order**

7480. ~~(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)~~ ~~(a)~~ The claimant has not commenced an action to enforce the lien within the time provided in Section 7460.

~~(2)~~ ~~The claim of lien is invalid under Section 7424.~~

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

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

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

~~(6) (e)~~ 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 claim of lien that is the subject of the release order. However, another action or claim for relief may not be joined with a petition under this article.~~

~~(c) Notwithstanding Section 7054, 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.~~

#### **§ 7495. Other actions or claims**

7495. This article does not bar any other cause of action or claim for relief, other than an action to enforce the claim of lien that is the subject of the release order. However, another action or claim for relief may not be joined with a petition under this article, other than a pending action to enforce the claim of lien that is the subject of the release order.

#### **§ 7496. Subsequent recording by claimant**

7496. An order releasing a lien under this article does not bar the subsequent recording of a claim of lien by the claimant, if that recording is otherwise allowed by law.

#### **§ 7497. Judicial arbitration**

7497. Notwithstanding Section 7054, 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.

A related issue not addressed by the draft statute is the effect a ruling *adverse* to an owner in a lien release proceeding would have in an action brought by a claimant to foreclose that same lien. Under normal circumstances, given the identity of parties, there is some likelihood an owner would be collaterally estopped from relitigating this adverse ruling.

The staff suggests that such collateral estoppel may be inconsistent with the objective of the summary lien release procedure. Many owners seeking to clear a lien perceived as clearly in error may attempt to use the summary procedure without incurring the expense of counsel. However, if the lien claimant opposing the petition (who might be represented by counsel) was able to raise a substantial

question as to the allegation in the petition, the “litigation” of the disputed issue might cause the owner to forfeit a crucial defense in the lien enforcement action that would likely soon follow.

On the other hand, there are equitable arguments that would support a collateral estoppel effect. First, there is the underlying rationale for the doctrine — denying collateral estoppel would require the claimant to litigate a disputed issue twice, and arguably allow the owner “two bites at the apple.” Moreover, it is the owner who is making the choice to use the summary lien release procedure, and without counsel. Nothing in the draft statute compels an owner to do so.

**The staff regards this as a close question, and ultimately makes no recommendation to the Commission as to resolution.** However, if the Commission wished to preclude this collateral estoppel effect, **the draft statute could do so by adding a new section, as follows:**

**§ 7498. Collateral estoppel effect of court ruling**

**7498. A ruling or order in a proceeding under this article denying a petition to release a lien is inadmissible and has no effect in a separate action to enforce the lien.**

Respectfully submitted,

Steve Cohen  
Staff Counsel