

First Supplement to Memorandum 2008-9

Mechanics Lien Law: Discussion of Issues

This supplement analyzes one additional issue presented by the California State Council of Laborers Legislative Department and Construction Laborers Trust Funds for Southern California (hereafter, "Laborers Group") relating to the proposed law.

"Fund" and "Funds"

Civil Code Section 3264 limits claims against a "fund for payment of construction costs" to claims authorized by stop payment notice provisions, or made pursuant to a direct contract.

Proposed Public Contract Code Section 44110 continues the language of Section 3264 virtually verbatim, with regard to a public work:

44110. The rights of all persons furnishing work pursuant to a public works contract, with respect to any fund for payment of construction costs, are governed exclusively by this chapter, and no person may assert any legal or equitable right with respect to such fund, other than a right created by direct written contract between such person and the person holding the fund, except pursuant to the provisions of this chapter.

The term "fund" is not defined by the existing mechanics lien statute or the proposed law.

Laborers Group has previously advocated eliminating proposed Section 44110, arguing that Section 3264 was not intended to apply to a public work. See CLRC Memorandum 2007-45, pp. 12-14; Second Supplement to CLRC Memorandum 2007-45, pp. 1-3; Meeting Minutes (October 2007), pp. 2-3. The Commission did not make that change.

Laborers Group now raises another concern about proposed Section 44110. See Exhibit to CLRC Memorandum 2008-9, pp. 20-22.

The proposed law would add a new definition of the term "*funds*":

41050. "Funds" means warrant, check, money, or bonds (if bonds are to be issued in payment of the public works contract).

Comment. Section 41050 is a new definition. It is included for drafting convenience. It generalizes provisions of former Civil Code Sections 3186, 3187, and 3196.

Laborers Group asserts that this definition, if applied to the term “fund” as used in proposed Section 44110, would expand the scope of the provision in Section 44110 beyond the existing scope of Section 3264. The group argues that Section 3264, if applicable to public entities at all, was intended only to protect construction funds *in the possession of the public entity*. Laborers Group argues that this new definition of “funds,” if incorporated into Section 44110, would result in claims also being barred against checks, warrants or bonds that have *already been paid out* by the public entity as payment for construction costs.

Analysis

Various dictionary sources indicate that the term “fund” is generally understood to refer to a specific sum of money set aside for a special purpose (e.g., trust fund, retirement fund, mutual fund, etc.).

The term “funds” *may* simply indicate the plural of the term “fund” (e.g., her money was invested in several mutual funds). However, the term may also be used as a synonym for money in general, regardless of form (e.g., I’m low on funds). In this form, despite its spelling, the term is effectively a singular term, similar to “trousers” or “scissors.”

The definition of the term “funds” in proposed Section 41050 makes clear the term as used in the proposed law is intended to have this latter meaning.

It was added to the proposed law for drafting convenience, replacing various references throughout existing law to different forms of money.

By contrast, it is clear from context that the term “fund” as used in proposed Section 44110 is intended to mean the *source* from which construction costs are paid, rather than referring to the form any such payment may take.

The staff believes that, in the context in which the terms “fund” and “funds” appear in the proposed law, their usage is not likely to cause confusion. However, the meaning of the term “fund” as used in proposed Section 44110 could be further reinforced in the Comment.

The staff recommends **the following revision to the Comment to Section 44110:**

Comment. Section 44110 restates former Civil Code Section 3264 to the extent it applied to a public works contract. See Section

42010 (application of part). For a comparable provision applicable to a private work, see Civ. Code § 8500.

There may be specific statutory provisions that authorize payment by a public entity from a fund designated for a public work, notwithstanding the provisions of Section 44110. See, e.g., Code Civ. Proc. § 708.760 (satisfaction of judgment against direct contractor on public work), Labor Code § 1727 (public entity to withhold amounts needed to satisfy prevailing wage violations from funds due direct contractor on public work). This section is not intended to change existing law with respect to such provisions.

The term "fund" has a meaning distinct from the term "funds" as defined in Section 41050. "Fund" refers to the source for payment of construction costs, not the form of payment itself.

See also Sections 41050 ("funds"), 41090 ("person"), 41160 ("work").

Respectfully submitted,

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