

Significant Changes in the Mechanics' Lien Law

by Scott J. Bradley

New legislation (H.3187) that should have a significant impact on the filing and resolution of mechanics' liens emerged from the legislative process on June 2, 2009.

Through the great efforts of your home builders association, the long sought after bill seeking to expand the protection afforded by the mechanics' lien statutes to landscapers and to make it more difficult for unlicensed contractors to file liens and encumber property is now law. As it is surely a rare case where all sides on an issue accept any proposed bill as drafted, the legislative grind has left some potentially hidden hazards contained within the language of the law. Below is a look at what the new law provides, as well as what issues may be just below the surface, only to come into clear view when subject to legal interpretation.

The initial change to the existing statute is the addition of section 29-5-26, under which providers of "landscape services" are now entitled to file and enforce mechanics' liens *without* the previous mandate that their work be directly related to the construction or repair of a building or structure. "Landscape services" is now broadly defined to include not only clearing, grading and site preparation, but also the installation of paving, walkways, swimming pools, decks, patios, irrigation systems, underground utilities and other features incidental and necessary to a landscape plan or site design. Note, however, that the services provided must exceed \$5000 and be subject to a written agreement. Services for a lesser amount do not qualify. It also appears that a written contract is a necessity if a contractor hopes to employ the lien statutes at a later date. Interestingly, no such written contract is required for other trades under the existing statute.

Newly added section 29-6-15 requires that prior to filing a mechanics' lien, a contractor must provide the Clerk of Court or Registrar of Deeds proof that he is licensed or registered if such licensing or registration is required by law. Proof is established by the contractor by including his contractor or registration number on the lien document. Left open is when the contractor must possess this license or registration in order to file. Although the common sense approach would be to accept that an unlicensed contractor could not obtain the necessary licensing *after* the start of the job, but *before* the filing of the lien, the language does not so specify. Given the traditionally strict interpretation of the statutory language by the courts, just such a scenario could be judicially accepted as compliance with the new law. The new section also does nothing to protect builders/owners from those trades that require no license or registration. Presumably, these trades may fall under the second provision of this section, which provides for fines and/or loss of license upon the filing of a frivolous lien. The term "frivolous lien", however, is left undefined. It will likely take many years of litigation before a working definition is reached. Only then will be determined whether this threat will serve an effective deterrent.

A significant beneficial change to the existing statute is the addition to section 29-5-120. The law now provides a mechanism for the court or the party subject to the lien to have it released if the lien holder fails to take the appropriate steps to enforce the lien. When the party subject to the lien is seeking removal, the



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language mandates that it must be facilitated through that party's attorney in an affidavit in a "form approved by the appropriate local office". Again, this terminology is undefined, but it is likely that a widely accepted form will quickly develop through trial and error. Regardless of the red tape required, this is a vast improvement over being at the mercy of the filing party when seeking to clear title.

The final significant change is to section 40-59-30. This amended section initially sets out licensing and/or registration mandates for a contractor prior to holding himself out as a "residential builder" or "residential specialty contractor". Criminal penalties are provided for a violation of the requirements. The section also provides that unless the contractor is in compliance with the licensing/registration requirement, that contractor cannot file a mechanics' lien (or bring suit to enforce the provisions of a contract for residential building or residential specialty contracting). Like section 29-6-15 discussed above, there is no specific requirement as to when the proper licensing/registration must be completed for the purpose of filing the lien.

As with essentially every new law, the true nature of its ultimate effectiveness will be molded by the courts interpretation of the law. The home builders association should be applauded in achieving the passage of H.3187. The industry is far better off in this arena than it was just a few months ago and benefits of the law will be tangible. As with any new law, however, some degree of negotiation and compromise was a necessity. Out of that necessity comes the opportunity for exploitation. Education in these areas will be your best weapon or defense should you find yourself or your business subject to or in need of a mechanics' lien.

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