

2011 Utah Legislative Update

By: Brian J. Babcock, Esq.

The 2011 Utah State Legislative Session was, to say the least, an eventful one. Brian Babcock from our firm spent a great deal of time working with various associations, attorneys, legislators, contractors, subcontractors, suppliers, etc. regarding proposed changes to the law which would impact the construction industry. During the process, Brian also acted as the Chairman of the Legislative Committee for the Associated General Contractors of Utah. As many of you are aware, there was much controversy over some of the proposed changes. Countless hours spent debating the pros and cons of numerous issues and trying to come up with something that all parties could live with. That is the legislative process which some have referred to as “watching sausage being made.” It is not necessarily a pretty sight.

While many may continue to believe that the changes ultimately made by the legislature are not good for the construction industry, the resultant bills that were passed are far better than that which was originally proposed. Nevertheless, the legislature made some significant changes to the Utah Mechanic’s Lien laws. There were two principal bills dealing with these changes: HB 260 “Mechanic’s Lien Revisions” and HB 115 “Mechanics’ Liens Amendments”. The following is a brief summary of the changes. As always, the “devil is in the details” as to how these changes will be implemented and the resultant impacts, for good or for bad.

HB 260 – Mechanic’s Lien Revisions

- Government projects, as it relates to notice requirements for bond claims, will continue as currently constituted. Filing by owner or general contractor of the Notice of Commencement for the project is unchanged. Thereafter subcontractors and suppliers are required to file Preliminary Notices in order to preserve bond claim rights.
- Changes to the mechanic’s lien law from this bill apply to all private projects which commence on or after August 1, 2011. Current law stays in effect until July 31, 2011.
- Eliminates the requirement for the filing of a Notice of Commencement with the State Construction Registry (“SCR”) on private projects.
- Requires all persons or entities (including general contractors) to file a Preliminary Notice in order to preserve lien rights on private projects. Preliminary Notices are still required to be filed within 20 days of commencement of the claimant’s work.
- Adds additional information required to be included in Preliminary Notice (tax identification number(s) for each parcel where work is to be performed and the name of the county where the property is located).
- Requires the construction lender to file with the SCR a Notice of Construction Loan “promptly” after and “in conjunction with” the recording of the trust deed with the loan closing.
- Requires the construction lender to file with the SCR a Notice of Construction Loan Default within five days of the recording of a notice of default with county recorder.
- Requires all filings with the SCR to contain tax identification number(s) for the property.

- Establishes that the First Preliminary Notice filed with the SCR is deemed to be the first work for priority purposes and the relation back doctrine. First work will no longer be determined by actual work done on the property.
- Provides for the persons or entities who have filed a Preliminary Notice with the SCR prior to the recording of the trust deed to withdraw their respective Preliminary Notices at the request of the construction lender in order for the construction lender to be placed in first position for priority purposes.
- If a party has withdrawn its Preliminary Notice at the request of the construction lender, the party must re-file its Preliminary Notice within 20 days of the bank's recordation of the trust deed to preserve its lien rights.
- Requires that the standardized building permit also include the tax identification number for each parcel of property for the project as well as the county within which the project is located.
- Requires the governmental entity issuing the building permit to transmit the building permit information to the SCR for filing for informational purposes only.

HB 115 – Mechanics' Lien Amendments

- Provides for a new lien for “preconstruction services.” Preconstruction services include “plan or design” services provided before construction of the improvement commences. Compensation must be separate and apart from construction services compensation.
- Preconstruction services are deemed completed when the construction commences (likely when the first preliminary notice is filed with the SCR).
- Requires all persons or entities to file a Notice of Retention (“retention” referring to one being retained to perform work and not to be confused with monetary retainage) in order to preserve preconstruction lien rights.
- Notice of Retention is required to be filed within 20 days of commencement of the claimant's work.
- Information required in Notice of Retention: contact information of service provider; description of services being provided; identifying information of person/entity who hired service provider; identifying information of property owner including county and tax identification number.
- Provisions to challenge the validity of a Notice of Retention.
- Priority for all preconstruction service liens relate back in time to the filing of the Notice of Retention. Exception: a preconstruction services lien is subordinate to a loan to the extent preconstruction services are provided after the recording of the loan.
- Required to file preconstruction lien within 90 days after completing the services.
- Required to file lawsuit to foreclose preconstruction lien within 180 days of recordation of the preconstruction lien.

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