

# Breaking Ground

THE MAGAZINE OF THE MASTER BUILDERS' ASSOCIATION OF WESTERN PENNSYLVANIA

MARCH/APRIL 2010

## Legal Perspective

By Ericson P. Kimbel, Esq.

### Significant Changes to Mechanics Lien Law Are Pending

You may know someone who has experienced a scenario like the following. A western Pennsylvania subcontractor contracts with an Ohio general contractor to perform work on a project located in Youngstown, OH. Although the subcontractor completed its work in a timely and workmanlike manner, the general contractor is holding retainage and additional contract monies. The subcontractor files a mechanics' lien in Ohio only to be met with objections for failure to file a notice of furnishing. The Ohio court strikes the lien, noting in its order that the subcontractor failed to preserve its lien rights by filing a notice of furnishing and, thus, the subcontractor forfeited its right to lien the project. The subcontractor, of course, was unfamiliar with Ohio mechanics lien law and was unaware of the need for such a filing.

The simple solution to this business problem would be avoidance: don't work in Ohio. However, a bill to add a similar notice procedure is currently pending in the Pennsylvania House.

On December 4, 2009, House Bill 1960 was introduced by Representative Mike Turzai (R-Allegheny). The bill provides an additional notice procedure for owners and subcontractors designed to patch perceived holes in the 2007 amendment to the lien laws; but which can forfeit a subcontractor's right to file a mechanics' lien under certain circumstances. The bill also reduces the time for filing a lien from

the current six months to four months from completion of work. At present, the bill is in labor committee in the House.

Pennsylvania House Bill 1960 proposes to change the mechanics' lien procedure in Pennsylvania and seeks to shorten the time for filing a lien from six to four months. The bill intends to add a notice of commencement and notice of furnishing requirement to the existing lien law. By adding the notice procedure, the bill provides owners and lenders with knowledge of all possible subcontractor lien claimants on the project. Thus, an owner can be certain upon final payment to the general contractor that there are no unknown lien claimants who may assert a lien after final payment to the general contractor.

The notice procedure operates in a two-step process to preserve subcontractors' lien rights. Initially, the owner may – but is not required to – file a notice of commencement with the prothonotary of the county where the project is located. After a proper notice of commencement has been filed, subcontractors must then file a notice of furnishing to preserve their lien rights. If a notice of commencement has been filed and a subcontractor does not file a notice of furnishing, the subcontractor's lien rights are lost. Several other states use similar notice requirements for mechanics' liens. For instance, a similar procedure applies to all projects in Ohio, while in New Jersey the notices of furnishing and commencement apply only to municipal projects.

Rep. Turzai explained, "My legislation allows the owner of a property to know exactly who provided services for a project. This will protect owners from

‘hidden liens’ and ensure that a contractor pays all subcontractors on a project before they receive final payment. My legislation does not diminish the current lien rights of subcontractors”

## Notice of Commencement

The Bill requires a notice of commencement to be filed within 30 days of execution of the general contract. In the notice, the owner must identify itself, along with an address for service of notices and claims, identify the general contractor and identify the real property of the project with specificity. The notice is filed with the Prothonotary and docketed with contractor as plaintiff and owner as defendant. The owner must serve the general contractor with a copy of the filed notice within seven days of filing. If a subcontractor requests the notice of commencement from the general contractor, it must be provided within seven days of written request.

## Notice of Furnishing

Under the current Pennsylvania lien law definitions, “subcontractor” includes first and second tier subcontractors and material suppliers. This definition would not be changed by HB 1960 and each claimant included within this definition must provide a notice of furnishing to preserve their lien rights if a notice of commencement has been properly filed. A general contractor is not required to file a notice of furnishing to preserve its lien rights.

The bill requires that a notice of furnishing be served – it is not required to be filed with the court – upon the owner within 30 days after the notice of commencement was filed, or within 30 days after first “performing work or services or first providing materials or equipment in connection with the improvement of the real property”, whichever is later. This time limit will become crucial if the bill becomes law.

## Decreased Time Limit for Filing

Although the notice of commencement and notice of furnishing does not affect a general contractor’s lien procedure, HB 1960 decreases the time within which to file all mechanics’ liens. The bill proposes that all liens be perfected within four months instead of the current six months. There has been no change to the preliminary notice requirements for subcontractors, which requires that notice of

intent to lien be provided by the subcontractor to the owner at least 30 days prior to filing the claim. Under HB 1960 a subcontractor will need to provide preliminary notice of its intent to lien within three months of completion of work, while a contractor will have four months to file its lien.

## Impacts on the Industry

Under HB 1960, owners will be provided more protection through knowledge of all possible lien claimants on the project. At the end of a project, owners will now know for certain who may have rights to file a lien against a project. The corollary to this knowledge is that owners should require general contractors to fully pay each possible lien claimant before making final payment to the general contractor to avoid any liens on the project.

As to general contractors, the bill does not add any procedural steps for general contractors to preserve their lien rights, but does decrease the time for filing liens. It is anticipated that general contractors will more closely track subcontractor payments to avoid a situation where an owner is holding payment because of possible liens by first and second tier subcontractors.

As noted above, the new procedure should provide owners with the knowledge to mandate that all subcontractors be paid before final payment is made to the general contractor. Although the Bill does provide this additional protection to subcontractors, it also requires that subcontractors file a notice of furnishing when the owner has filed a notice of commencement. This additional step may be missed by a subcontractor who is not current on the status of the lien law, and that subcontractor would lose its lien rights due to its failure to file a proper and timely notice of furnishing. Additionally, the time will be reduced for a subcontractor to file its lien claim.

*Eric Kimbel is an attorney practicing construction law in the Pittsburgh office of Cohen Seglias Pallas Greenhall & Furman.* 