

## Project investments require protection

In this economy, it's important to understand the rules for construction lien claims and foreclosures



### CONSTRUCTIVE ADVICE

Jim Zehren

**Editor's note:** This is the second part of a two-part series. The first part appeared in the Aug. 21 edition of the Daily Journal of Commerce.

One of the impacts of this recession on the design and construction

industry is that payment issues are arising on development projects of all types and sizes. As a result, knowledge of construction lien law is more important than ever for claimants and those defending against claims. The second part of this column will address the basics of Oregon construction lien law involved in filing a claim of lien and foreclosure of a lien.

### Part II: Filing and foreclosing a lien

**Lien filing deadline.** A claim of lien generally must be filed within 75 days after the cessation of the claimant's performance or within 75 days after substantial completion of the project, whichever occurs first. Although filing a notice of completion is one way of establishing the date of substantial completion, it is only evidence of completion and thus is not commonly used. The 75-day filing deadline cannot be extended by agreement of the parties. A claim of lien filed prior to the commencement of the 75-day period likely is premature and invalid.

**"Abandonment" to establish lien filing deadline.** The 75-day deadline for filing a claim of lien also can be established by abandonment. It occurs 75 days after cessation of construction or when the owner or a mortgagee posts and files a notice of abandonment. An incomplete project can also be deemed not abandoned, when the owner or a mortgagee posts and files a notice of nonabandonment within 74 days after the cessation of construction. Such notices can be renewed every 150 days, indefinitely.

**Lien foreclosure deadline.** A lien foreclosure suit must be filed within 120 days after the filing of the claim of lien. This deadline can be extended by agreement for up to two years after the claim of lien was recorded, but only if the parties had a pre-lien agreement providing for extended payment and the agreement is referenced in the claim of lien.

**Forums for lien filing and foreclosure.** A claim of lien must be filed with the county recorder of the county in which the project is located. A lien foreclosure suit must be filed with the circuit court of the county in which the claim of lien was recorded.

**Lien release bonds and deposits.** Any interested person may at any time remove a lien from the property through a lien release bond or deposit of 150 percent of the lien amount. A

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notice of the bond or deposit must be given to the lien claimant, and an affidavit must be recorded to complete this process. Once a lien is removed, the lien foreclosure occurs in the normal course except that the lien attaches to the bond instead of the property.

**Demand for release of lien.** Any interested person may at any time demand that a lien be released. If the lien claimant fails to release and foreclose the lien, the party making the demand can recover the greater of \$500 or the amount incurred in providing a lien release bond and in making the demand plus attorneys' fees. If the lien claimant forecloses its lien, then the prevailing party in the suit can recover (in addition to other amounts) the greater of \$500 or the amount incurred in providing the lien release bond and in making or responding to the demand plus attorneys' fees.

**Two notices following filing of claim of lien.** A lien claimant must give two notices to the owner and mortgagees. First, a notice of filing of claim of lien must be given, along with a copy of the claim of lien, within 20 days after the filing of the claim of lien. Second, a notice of intent to foreclose lien must be given, such that the notice is received 10 days or more prior to the filing of the foreclosure suit.

**Claimant required to provide information upon owner's demand.** Within five days after receiving a demand from the owner that received a notice of intent to foreclose lien, the claimant must provide a list of the materials provided to the project and the claim therefore or a statement of the contractual basis for the owner's obligation to pay.

**Recovery of attorneys' fees and costs.** Once a lien foreclosure suit is filed, the prevailing party in the suit can recover its attorneys' fees, title report costs, recording fees and other costs and disbursements incurred in asserting the lien or defending against it. However, the lien claimant cannot recover such fees, costs or disbursements, even if it prevails at trial, unless it has timely complied with four statutory obligations: providing information upon demand of a mortgagee that received a notice of right to a lien, sending a notice of filing of claim of lien, sending a notice of intent to foreclose lien, and providing information upon demand of the owner. Nor can either the claimant or a party defending

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against a lien recover attorneys' fees, costs and disbursements upon prevailing on lien priority issues only; to obtain such a recovery, a party must prevail on issues related to the validity and foreclosure of the lien.

**Recovery of interest.** A lien can include interest on the amount owed if interest is owed under the governing contract or applicable law and if a claim for interest is stated on the claim of lien.

### **Priority of Oregon construction liens**

The most unusual feature of Oregon's construction lien law is that, in certain circumstances, a lien can have priority over a mortgage or trust deed recorded prior to commencement of construction of the project. This involves several factors.

This outcome does not occur if the work of the claimant is an alternation or repair, and the pre-recorded mortgage was not to finance that work.

This outcome applies only as to the improvement and not the land. As such, a lien can have priority over a pre-recorded mortgage in the improvement but not have priority over the same pre-recorded mortgage in the land. Whether practical or not, Oregon's lien statutes provide for the improvement to be sold separately

from the land at the foreclosure and for the purchaser to "remove the improvement" from the land.

No lien claimant providing materials (whether a material supplier or a subcontractor or prime contractor providing materials itself or through a lower-tier party) can have priority over a pre-recorded mortgage as to the amount claimed for materials unless the claimant gave a notice of right to a lien to the mortgagee.

If a subcontractor or prime contractor providing materials fails to give a notice of right to a lien, it nonetheless can obtain priority over a pre-recorded mortgage as to the non-materials portion of its lien if the claim of lien segregates the amount claimed for materials.

By maintaining a basic knowledge of Oregon construction lien law, and by timely consulting with competent legal counsel when payment issues arise, those asserting lien claims and those defending against them can better protect their interests in this difficult economy.

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