

## Massachusetts Enacts Design Professional Lien Law

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For years, one of the great ironies burdening the noted cluster of nationally and internationally renowned architects and engineers headquartered in Massachusetts, has been that for projects in their home state, they have been the stepchildren of the development and construction industry with respect to legal protections to secure payment for their professional services. However, this is about to change. On January 5, 2011, Governor Deval Patrick signed into law important legislation giving design professionals the right to assert liens against real estate to secure payment for professional services rendered. The new law mirrors long-held rights of construction contractors, subcontractors, and material suppliers to use mechanics' liens to secure payment for their labor, materials, and services provided on construction projects. Now, design professionals that comply with the statutory requirements will have increased leverage resulting from the ultimate right to force the sale of the owner's real estate in order to satisfy debts owed for their professional services. With the passage of this legislation, Massachusetts joins a growing majority of states across the country in recognizing such rights for design professionals.

This *Client Update* summarizes the key provisions of the new law and outlines practical steps that design professionals, and others involved in real estate development

projects, will need to take in order to be prepared for the law's implementation and to take advantage of its provisions.

### Summary of the Designer Lien Law

*Liens by Prime-Tier Design Professionals.* The new law applies to architects, professional engineers, landscape architects, land surveyors and licensed site professionals, and will become effective on July 1, 2011. Design professionals that hold a written contract for professional services with an owner of "any interest in real property" or with any person "acting for, on behalf of, or with the consent of such owner" will have a lien in the amount of the sums due, or to become due, to the design professional under the contract as of the date of filing of a "notice of contract" at the registry of deeds in the county where the land lies.

In order to assert a lien, professional services must be performed in connection with the "proposed or actual" erection, alteration, repair or removal of a building, structure or other improvement. The statute is explicit that the professional services need not be rendered in connection with a project that is actually constructed. Design professionals providing services (e.g. programming or preliminary design services) on a "proposed" project that never comes to fruition may also assert a lien, as long as their client has a "lienable interest" in real property. Also, a lien may be initiated through the filing of a notice of contract, whether or not the professional services have been commenced or completed; thereby, allowing design professionals to file a notice of contract at the outset of the project to establish their lien status prior to subsequently filed mortgages and liens of construction contractors.

The notice of contract permitted by the statute may be recorded at any time after execution of the contract, but may not be recorded later than the earlier of: (i) 60 days after the filing of a notice of substantial completion under G.L. c. 254, section 2A; or (ii) 90 days after professional services under

the contract where last performed. These deadlines must be strictly adhered to because exceeding them will result in a design professional's lien being void and unenforceable.

*Liens by Subconsultants.* Subconsultants performing services under a direct contract with a prime tier consultant may also assert a lien, provided that their engagement has been "approved in writing" by, or on behalf of, the owner of the real property. Like prime-tier consultants, subconsultants may file a notice of contract at any time after execution of their subcontract, provided that such notices of contract are not filed later than: (i) 60 days after the filing of a notice of substantial completion under G.L. c. 254, section 2A; or (ii) 90 days after professional services under the prime contract where last performed.

A subconsultant's lien differs from that of a prime consultant in a couple of important respects. First, a subconsultant must give "actual notice" of the filing of a notice of contract to the owner of the real estate that is the subject of the lien. Second, a lien by a subconsultant may not exceed the amounts due or to become due to the prime consultant under its prime contract with the owner as of the date of such actual notice given to the owner. Accordingly, subconsultants that delay filing a notice of contract in hopes that they will soon be paid, may impair their ability to obtain a lien for the full amount that may be due them if, during this intervening period, the prime consultant has been paid additional contract balances by the owner. Subconsultants in this position will need to think tactically and balance their interest in preserving their maximum lien rights against the negative implication sometimes associated with filing a notice of contract early in the course of a project.

It is important to note that, unlike mechanics' lien law provisions that allow third-tier subcontractors and suppliers to assert liens, design professionals that do not have a

direct contract with a prime-tier consultant—that are, in other words, third-tier consultants (or lower)—have no lien rights under the new law.

*Liens by Design Professionals as Consultants to Construction Contractors.* Design professionals performing services under contract with a construction contractor or subcontractor may also assert a lien under G.L. c. 254, § 4 by filing a notice of contract any time after the execution of a contract with the contractor or subcontractor, but not later than the earlier of: (i) 60 days after filing or recording the notice of substantial completion under G.L. c. 254, section 2A; or (ii) 90 days after filing or recording of the notice of termination under G.L. c. 254, section 2B; or (iii) 90 days after the last day the contractor or subcontractor performed or furnished labor, materials, rental equipment, appliances, or tools to the project. A design professional in this position must also give actual notice of such filing to the owner, and if the design professional is a consultant to a second tier subcontractor, it must also serve a notice of identification on the construction contractor holding a contract with the owner of the real property that is the subject of the lien.

*Priority of Liens Against Mortgages.* Like traditional mechanics' liens of contractors and subcontractors, design professional liens will have priority over mortgages filed or recorded after the notice of contract except to the extent they later subordinate those rights to the mortgage in connection with periodic payments. Mortgages filed or recorded prior to a design professional's notice of contract will have full priority over such liens, even to the extent the lien seeks payment for services rendered before the recording of the mortgage. Liens for services rendered after the recording of the mortgage will prevail, except against any amounts "actually advanced or unconditionally committed" prior to the filing of the notice of contract.

These provisions have important practical applications. Under this scheme, design professionals are encouraged to file their notice of contract early, even if they are being timely paid for their services. Early

filing will give the design professional's lien priority over mortgages that may be recorded when the owner closes on the construction loan, typically at or around the completion of the designer's pre-construction services.

*Perfecting the Lien.* Enforcement of a lien established by filing of the notice of contract will require the filing of a statement of account at the appropriate registry of deeds specifying the amounts due or to become due, as well as the commencement of a lawsuit in superior court. The statement of account must be filed within 30 days after the last day that a notice of contract may be filed or recorded, and the superior court action must be commenced within 90 days thereafter. A certified copy of the complaint must also be recorded at the registry within 30 days of the filing of the complaint in superior court. Should the sale of real estate be required to satisfy liens against a property, disbursement of the sale proceeds to satisfy the liens of design professionals will be made only after payment in full of the claims of construction contractors and subcontractors who are lien creditors under G.L. c. 254.

*Effective Date.* Although the effective date of the new law is July 1, 2011, professional services performed prior to this deadline may be the subject of a lien, because any notice of contract filed on or after the effective date will be considered valid. Because a notice of contract may be filed after the performance of design service, nothing in the law prohibits recovery for services rendered prior to the effective date; however, no lien will be effective against (i.e., take priority over) any mortgage filed before the effective date.

## Implementation

New opportunities bring new challenges, and design professionals will need to be prepared to implement appropriate contract management practices when the law comes into effect. As owners, construction contractors, and lenders have become adept at managing the lien waiver process, design professionals will now be required to provide acknowledgements of payment in

exchange for payment for their services. Because construction lenders will not be required to continue funding projects where liens have been asserted by design professionals, both owners and lenders will need to pay close attention to requiring timely paperwork from design professionals. It will be incumbent on prime-tier and second-tier consultants to require their lower-tier consultants to provide appropriate acknowledgements of payment as a condition of receiving payment. Appropriate contract language will be required to implement these new requirements.

At the same time, design professionals that seek to assert liens must be prepared to make the required filings within the prescribed statutory periods so that their lien rights are not waived or diminished. As the large body of case law that has developed around the mechanics' lien statute has demonstrated, the onus is squarely on the party seeking to assert a lien to strictly follow all statutory requirements in order to preserve and enforce their lien rights.

At Burns & Levinson, we will be making more guidance available as the effective date of the new law approaches.

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*Note: This update is intended to call your attention to an important change in the law, but it does not attempt to summarize all relevant statutory and regulatory provisions or nuances affecting application of the new law to specific situations.*