

**REPORT OF THE JOINT SUBCOMMITTEE OF THE COURTS
OF JUSTICE COMMITTEES OF THE SENATE AND HOUSE
OF DELEGATES STUDYING VIRGINIA'S MECHANIC'S
LIEN LAWS UNDER HOUSE JOINT RESOLUTION NO. 229**

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA



HOUSE DOCUMENT NO. 32

**COMMONWEALTH OF VIRGINIA
Richmond
1980**

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Delegate John D. Gray
Delegate Clinton Miller
Senator William F. Parkerson, Jr.
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**Report of the Joint Subcommittee of the Senate and
House of Delegates Studying Virginia's Mechanic's
Lien Laws Under House Joint Resolution No. 229
To
The Governor and the General Assembly of Virginia
Richmond, Virginia
January, 1980**

To: Honorable John N. Dalton, Governor of Virginia
and
The General Assembly of Virginia

I. Introduction

A Joint Subcommittee of the Courts of Justice Committees of the Senate and House of Delegates, having been authorized to conduct a study of Virginia's mechanic's lien laws under House Joint Resolution No. 229, submits the following report as the product of its deliberations. The text of House Joint Resolution No. 229, agreed to by the Senate and House of Delegates in the 1979 Session of the General Assembly, follows:

HOUSE JOINT RESOLUTION NO. 229

Requesting the Committees for Courts of Justice of the House of Delegates and the Senate to make a joint study of existing mechanic's lien laws.

WHEREAS, there has been a consistent legislative policy to enact laws affording protection to persons performing labor or furnishing materials by allowing such persons to perfect liens on improvements erected, and,

WHEREAS, changes in the methods and practices of the construction and building industry have occurred since the enactment of existing laws pertaining to the perfection of liens by persons performing labor or furnishing materials; and

WHEREAS, laws affording protection to persons performing labor or furnishing materials should be considered for revision and amendment; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the House of Delegates' Courts of Justice Committee and the Senate Courts of Justice Committee are hereby requested to study the existing mechanic's lien laws and their effect on the present methods and practices of the building and construction industry.

The study shall be conducted by a joint subcommittee, which shall be composed as follows: four members of the Committee for Courts of Justice of the House of Delegates, to be appointed by the Chairman thereof; and three members of the Committee for Courts of Justice of the Senate, to be appointed by the Chairman thereof. In addition, there shall be appointed five advisory members of the Subcommittee, who shall have no vote, two of whom shall be appointed by the Chairman of the Committee for Courts of Justice of the House of Delegates from the population of the Commonwealth at large with one such appointee being a person representative of lending institutions actively engaged in the financing of building and other construction, the other such appointee being a person representative of land title insurers actively engaged in insuring land titles for the building and construction industry and three of whom shall be appointed by the Chairman of the Committee for Courts of Justice of the Senate from the population of the Commonwealth at large with one such appointee being a person representative of general contractors actively engaged in the building and construction industry, with one such appointee being a person representative of subcontractors actively engaged in the building and construction industry, and with one such appointee being a person representative of material suppliers actively engaged in the building and construction industry.

Citizen members of the subcommittee shall be reimbursed for their actual expenses incurred in the performance of the work of the subcommittee.

The subcommittee shall meet to begin its work no later than May one, nineteen hundred seventy-nine and shall render its findings and recommendations to the Governor and General Assembly no later than October one, nineteen hundred seventy-nine.

II. Present Virginia Law

Giving a lien, as a matter or right, on real property to one who has performed labor or furnished materials in the construction and improvement of buildings and homes is one of the oldest concepts in American law. The underlying theory was to assure such mechanics and materialmen payment for their work and supplies in order to encourage the erection of building in a nation which was then largely wilderness. Although the country is now extensively covered with cities, towns and unincorporated communities, and is rapidly becoming more so covered, it remains a part of public policy to charge real property with the burden of ultimately assuring the payment due mechanics and materialmen for their contribution toward the improvement thereof.

Analogizing Virginia's mechanic's lien to the vendor's lien at common law, the Supreme Court of Virginia has held that § 43-3 of the Code of Virginia, authorizing a lien upon a building or structure and the land therewith necessary for use and enjoyment of the premises for labor performed and material furnished in construction, is intended to give those who have enhanced the value of a building the security of a lien on it to the extent they have added value. United Masonry, Inc. v. Jefferson Mews, Inc. , 218 Va. 360, 237 S.E.2d 171 (1977).

The mechanic's lien is the creation of statute. It attaches by operation of law when a contract has been entered into and work is done, or materials furnished, which add to the value of property. It is not the contract for erecting or repairing the building which creates the lien. It is the use of the materials furnished or labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the materialmen and laborers their liens under the statute. The property to which the mechanic's lien attaches is held as security for the debt.

The lien attaches and dates from the time the first work is done or the first materials are furnished under the contract giving rise to it. The duration of the lien is for six months from the time the memorandum of lien was recorded or for sixty days from the time the building, structure or railroad was completed or the work thereon otherwise terminated, whichever occurs last. (The memorandum of lien must be filed within ninety days from the time the work was done, the materials were furnished, the structure, or building was completed or the work was otherwise terminated.)

III. Legislative History

The Virginia Advisory Legislative Council has twice studied the mechanic's lien laws in Virginia and twice issued a report of its findings. The first report, issued in 1967, recommended a limited form of "direct" lien to subcontractors, laborers and suppliers. (The law at the time was an indirect or derivative lien, which limited the subcontractor's lien to what the owner owed the general contractor when the subcontractor gives notice to the owner of his claim.) Another recommendation of the 1967 report enabled an owner to limit his liability to the amount of his contract by requiring a 50% payment bond, from the general contractor, conditioned upon the payment to all persons supplying labor and/or materials of the amounts due them. The final recommendation of the earlier study is that a full, first lien priority would be granted to a construction lender to the extent of 75% of the loan, assuming no prior liens have been filed or notice given to the lender of such.

The 1969 report sought to "broaden and strengthen" the laws dealing with registration of contractors and subcontractors. No changes were recommended in the "new" mechanic's lien statutes, since the Council wanted to test the effectiveness of the new laws before making recommendations concerning them.

IV. Proceedings of the Joint Subcommittee

The Joint Subcommittee conducting the present study was composed of Delegates A. L. Philpott of Bassett, C. Richard Cranwell of Vinton, John D. Gray of Hampton and Clinton Miller of

Woodstock, who were appointed by the Chairman of the Committee for Courts of Justice of the House of Delegates, and Senators William F. Parkerson, Jr., Frederick T. Gray and Frederick C. Boucher, who were appointed by the Chairman of the Senate Courts of Justice Committee. Max W. Foore, Vice President of First Mortgage Corporation of Richmond; Herbert N. Morgan, President of Real Title Company, Inc. of Arlington; R. E. Lee, Jr., of R. E. Lee and Son, Inc. (general contractors) of Charlottesville; Robert W. Ligon, of Kane Plumbing Co., Inc. (subcontractor) of Richmond; and M. Ronald Helms, of Roper Brothers Lumber Company (material suppliers) of Petersburg, served as advisory members of the subcommittee.

The subcommittee held public hearings in Richmond throughout the summer and fall of 1979 to hear and evaluate the various proposals made by the interest groups participating in the study.

The major problem raised with reference to the inchoate nature of the lien was made by the Virginia Land Title Association. In noting the general rule of real property law that, when lienors perfect their lien at different times, the claim of the one who perfects first will be preferred, the Association pointed out that present Virginia law makes an exception to this rule in the case of mechanic's and materialmen's liens. As has been discussed earlier in this report, the lien of the mechanic or materialman does not come into being until the labor is performed or the materials are furnished and the mechanic or materialman need not record his lien until ninety days after all work on the property has stopped. Nevertheless, when a mechanic's or materialman's lien has been recorded, it takes precedence over all claims on the property previously recorded, including the construction loan mortgage which funded the construction.

This, according to the title insurers, creates the problem with financial institutions not being able to assure themselves a first lien on the property, in addition to the substantial risk of loss for the new home buyer.

In addition to echoing the comments of title insurers concerning what was referred to throughout the hearings as the "secret lien," representatives of the Virginia Banker's Association and the Virginia Mortgage Bankers Association pointed out specific problems with the final survey on a particular job extending the ninety-day filing period for memoranda of liens.

Materials and suppliers groups, as well as subcontractors were generally opposed to change in the present law as it relates to the inchoate nature of the lien and filing times for memoranda. They did note, however, the long period of time it takes under present law to get a mechanic's lien case heard and decided. A problem was also raised by these groups concerning the difficulty for a subcontractor or supplier to file and perfect a mechanic's lien when a condominium project is involved. Under existing case law, joint or blanket liens are permitted on two or more parcels of real estate but release of a single parcel from the lien may void the lien if the interest of third parties in the parcels would be detrimentally affected by the release. See, United Masonry, Inc. v. Jefferson Mews, Inc., *supra* .

Another problem raised by subcontractors and suppliers relates to the financial mechanism utilized by certain vendors of real estate. In order to create lot sales, some vendors are selling real estate to a builder under a contract to purchase, with closing under the contract being held when the builder has completed the improvements on the property and is ready to close with the ultimate purchaser. The question arises as to whether the owner of the real estate should have his interest in the land subjected to liens when he knows that the improvements are being erected upon his property. If the builder defaults under the contract of purchase after improvements have been placed upon the property, the seller of the property should not be allowed to enjoy a windfall by defaulting the contract, retaining possession of the improvements and not paying those persons who provided the labor and material for the improvements.

V. Recommendations

After thoroughly considering each proposal offered by the various interested groups, a majority of the subcommittee agreed on language pertaining to the problem created by the "secret lien," as referred to previously, releases on condominiums, and the problems relating to contract purchasers discussed above. The amendments agreed upon are attached to this report as Appendices I, and II, and III.

Respectfully submitted,

A. L. Philpott
C. Richard Cranwell
John D. Gray
Clinton Miller
William F. Parkerson, Jr.
Frederick T. Gray
Frederick C. Boucher

ADVISORY MEMBERS

Max W. Foore
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**Separate Statement of Senators William F. Parkerson, Jr.,
Frederick T. Gray and Frederick C. Boucher**

While we agree with the majority of the report and the legislation proposed, we do not agree with the portion of Appendix I to this Report which limits the labor or material covered by the memorandum of lien to that performed or furnished one hundred fifty days prior to the last day on which the work was performed or material furnished. We feel this limit is too restrictive on the contractors, subcontractors and material suppliers that the mechanic's lien law was designed to protect.

Separate Statement of Max W. Foore

From the construction lending point of view, the proposed amendment to § 43-3 of the Code permitting potential off-site liens to attach to on-site condominium units may create unknown risks and title problems especially where the lender is making advances against the real estate security. I believe that a solution other than burdening on-site units with potential off-site liens is needed.

Concurring Statement of M. Ronald Helms

Although I support Appendix I of the report as written, I do have some reservations about the new wording in lines 9 and 10. It appears to me, after careful study, that this wording is not compatible with what is actually happening in the world today. Most material suppliers bill their customers on a month-to-month basis, not on a day-to-day basis, and discounts are generally afforded to customers who pay their bills within 10 days after the close of the monthly billing period. As a result, a large percentage of our customers tend to group their purchases within the first few days for each month, thereby enabling them to have as much as forty days in their discount period. Since the lending institutions normally disburse their funds based on the percentage of work in place, not monthly, it appears that we may be required to file a lien for materials furnished to the customer prior to the time the lending institutions advance the funds to pay for that material. I don't believe anyone has a problem in agreeing that this is not only unrealistic, but unfair to all concerned. I believe this situation can be corrected by changing the wording that now exists on lines 9 and 10 as follows: "within 90 days from the last day of the month in which he last performs labor and furnishes material". This language would be much more consistent with what is actually happening in the construction industry today.

Dissenting Statement of R. E. Lee, Jr.

I am opposed to any change in the present law which would shorten the time for any contractor to perfect his lien for work done or material furnished. If a time is set for the filing of the memorandum of lien from the time work is completed, however, this time should be no less than one hundred twenty days, and preferably more.

I also feel the 150-day limitation on work covered by the lien is too restrictive. This time period will force memoranda of liens being filed on matters which are in conflict at the end of that period, but which would normally be resolved by the end of a typical job. It frequently occurs that change orders from owners are not processed within the one hundred fifty day period.

APPENDIX I

§ 43-4. Perfection of lien by general contractor; recordation and notice.—A general contractor, in order to perfect the lien given § 43-3, shall file at any time after the work is done and the material furnished by him and before the expiration of ninety days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated within ninety days from the date he last performs labor or furnishes material, in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is, or in the clerk's office of the Circuit Court of the city of Richmond, Division I, if such building, structure or railroad, or any part thereof, is within the corporate limits of the city lying north of James river and including the islands in such river, or in the clerk's office of the Circuit Court, Division II, of the city of Richmond, if the building, structure or railroad, or any part thereof, is within the corporate limits of the city lying south of James river, a memorandum showing the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant, or his agent, including a statement declaring his intention to claim the benefit of the lien, and giving a brief description of the property on which he claims a lien. It shall be the duty of the clerk in whose office such memorandum shall be filed as hereinbefore provided to record and index the same as provided in § 43-4.1, in the name as well of the claimant of the lien as of the owner of the property, and from the time of such recording and indexing all persons shall be deemed to have notice thereof. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien. *No memorandum filed pursuant to this chapter shall include sums due for labor or materials furnished more than one hundred fifty days prior to the last day on which labor was performed or material furnished to the job. Any memorandum may include sums withheld as retainages with respect to labor performed or materials furnished at any time before such memorandum is filed, but not to exceed ten per cent of the total contract price.*

APPENDIX II

§ 43-3. Lien for work done and materials furnished; waiver of right to file or enforce lien.—(a) All persons performing labor or furnishing materials of the value of fifty dollars or more, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing materials of like value for the construction of any railroad, shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof, and upon such railroad and franchises for the work done and materials furnished. But when the claim is for repairs or improvements to existing structures only, no lien shall attach to the property repaired or improved unless such repairs or improvements were ordered or authorized by the owner, or his agent.

If the building or structure being constructed, removed or repaired is part of a condominium as defined in § 55-79.41(d) or under the Horizontal Property Act (formerly §§ 55-79.1 through 55-79.38), any person providing labor or furnishing material to one or more units within the condominium pursuant to a single contract may perfect a single lien encumbering the one or more units which are the subject of the contract and all persons providing labor or furnishing materials for the common elements may perfect a single lien encumbering all the condominium units. Whenever a lien has been or may be perfected encumbering two or more units, the proportionate amount of the indebtedness attributable to each unit shall be the ratio that the percentage liability for common expenses appertaining to that unit computed pursuant to § 55-79.83(c) bears to the total percentage liabilities for all units which are or may be encumbered by the lien. The lien claimant shall release from a perfected lien an encumbered unit upon request of the unit owner as provided in § 55-79.46(b) upon receipt of payment equal to that portion of the indebtedness evidenced by the lien attributable to such unit. In the event the lien is not yet perfected, the lien claimant shall upon request of any interested party execute lien releases for one or more units upon receipt of payment equal to that portion of the indebtedness attributable to that unit or units and shall be entitled to perfect a single lien against the unreleased unit or units for the remaining portion of the indebtedness.

(b) Any person providing labor or materials for the installation of streets, sanitary sewers or water lines for the purpose of providing access or service to the individual lots in a development or condominium unit as defined in § 55-79.41(d) or under the Horizontal Property Act (former §§ 55-79.1 through 55-79.38) shall have a lien on each individual lot in the development for that fractional part of the total cost of such labor or materials as is obtained by using “one” as the numerator and the number of lots as the denominator *and in the case of a condominium on each individual unit in an amount computed by reference to the liability of that unit for common expenses appertaining to that condominium pursuant to § 55-79.83(c)* ; provided, however, no such lien shall be valid as to any lot or condominium unit unless the person providing such labor or materials shall, prior to the sale of such lot or condominium unit , file with the clerk of the circuit court of the jurisdiction in which such land lies a document setting forth a full disclosure of the nature of the lien to be claimed, the amount claimed against each lot or condominium unit and a description of the development or condominium , and shall, thereafter, comply with all other applicable provisions of this chapter.

Nothing contained herein shall be construed to prevent the filing of a mechanic's lien under the provisions of paragraph (a) hereof. (c) Any right to file or enforce any mechanic's lien granted hereunder may be waived in whole or in part at any time by any person entitled to such lien.

APPENDIX III

§ 43-20. Extent of lien where owner has less than fee in land.—Subject to the provisions of § 43-3, if the person who shall cause a building or structure to be erected or repaired owns less than a fee simple estate in the land, then only his interest therein shall be subject to liens created under this chapter. *When the vendee under a contract for the sale of real estate causes a building or structure to be erected or repaired on the land which is the subject of the contract and the owner has knowledge of such erection or repairs, the interest of the owner in the land shall be subject to liens created under this chapter; and for the purpose of § 43-21, the interest of such an owner in the land, to the extent of the unpaid purchase price, shall be deemed to be a recorded purchase money deed of trust lien created at the time the contract of sale was fully executed. As used in this section, “a contract for the sale of real estate” shall not include a lease of real estate containing an option to purchase the leased real estate or an option to purchase real estate unless the option is enforceable against the optionee.*

