

**REPORT OF THE  
JOINT SUBCOMMITTEE STUDYING**

# **Mechanics' Lien Laws**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



## **HOUSE DOCUMENT NO. 4**

**COMMONWEALTH OF VIRGINIA  
RICHMOND  
1993**

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**Report of the  
Joint Subcommittee Studying  
Mechanics' Lien Laws  
To  
The Governor and the  
General Assembly of Virginia  
Richmond, Virginia  
1992**

TO: The Honorable L. Douglas Wilder, Governor,  
and  
the General Assembly of Virginia

**I. AUTHORITY FOR STUDY**

Stressing the importance of mechanics' lien laws (see Chapter 1 of Title 43, Code of Virginia) to the economy of Virginia and the fact that such laws have not been studied since 1979, House Joint Resolution No. 418 (1991), patroned by Delegate Glenn R. Croshaw, directed this study subcommittee to determine any necessary revision and amendment of all such laws (Appendix A).

Of primary concern was the question of whether subcontractors, suppliers and materialmen should continue to receive lien priority under Virginia's mechanics' lien laws to the extent their labor or materials add to the value of a building or structure. Therefore, in addition to legislators, citizen members representing general contractors, subcontractors, suppliers and materialmen, title insurance companies and construction lenders were appointed to the subcommittee.

**II. BACKGROUND AND LEGISLATIVE HISTORY**

**General Background**

Virginia's mechanics' lien statutes date back to the mid-nineteenth century. They were designed to give laborers and materialmen who enhance the value of a building or structure a lien on such properties to the extent that value is added. The underlying intent of these laws at their inception was to assure those parties payment for their work and supplies in order to encourage building in the Commonwealth, which was largely wilderness at that time.

The current lien priority given laborers and suppliers has been an integral part of our statute since 1919. However, this priority over the deed of trust lien of a construction lender comes to fruition when and only if properly perfected and is easily lost if not enforced within the time and in the manner prescribed by statute.

Some time ago, title insurance companies in Virginia requested and received permission from the Bureau of Insurance to write title insurance with affirmative mechanics' lien coverage for both lenders and owners. Title insurance companies are not required to provide such coverage, may be selective as to the clients on whose behalf they provide this coverage, and are given broad latitude to charge whatever rate they feel appropriate.

### Legislative History

The Virginia Advisory Legislative Council twice studied mechanics' lien laws during the 1960s. The Council's first report in 1967 recommended, among other changes, a limited form of "direct" lien to subcontractors, laborers and suppliers. Such liens at that time were derivative and limited to the amount owed by the property owner to the general contractor.

The second report in 1969 focused on strengthening those laws pertaining to registration of contractors. No changes were recommended in the mechanics' lien statutes as the Council wanted to test the effectiveness of the changes enacted in 1968 before making recommendations concerning them.

In 1979, a joint legislative subcommittee again reviewed the Commonwealth's mechanics' lien laws. During this study the Virginia Land Title Association voiced complaints regarding the inchoate nature of mechanics' liens which were branded "secret" liens. They argued that, because the lienor, i.e., a subcontractor, had up to 90 days after all work on the property had stopped to perfect his lien, financial institutions making construction loans and title insurance companies insuring against the existence of mechanics' liens in connection with such loans could not be assured that the construction loan deed of trust had first priority until 90 days after the completion of all construction.

Although the subcommittee refused to recommend changes in the relative priority given mechanics' liens, it did propose amending the way the 90 day period is calculated (i.e., the lien must be filed not later than 90 days after the last day of the month in which the claimant last performed labor or furnished material, or 90 days from the structure's completion or the termination of work thereon, whichever is sooner). The subcommittee also recommended the creation of a 150-day reachback provision which limited such liens to labor and material furnished within 150 days prior to the last day labor was performed or material furnished.

### III. DELIBERATIONS AND CONSIDERATIONS

As with prior studies of Virginia's mechanics' lien laws, the issues under consideration were clearly delineated and defined.

Of basic concern was the plight of the innocent homebuyer who purchases a home from an owner-developer who has not paid subcontractors and materialmen who participated in the building of the home. In such a case, if the owner-developer absconds or is judgment-proof, the homebuyer

is responsible for not only paying for his home, but also for satisfying all outstanding mechanics' liens. The usual defense that payment by an owner to the general contractor extinguishes the rights of subcontractors and suppliers does not apply since the owner-developer is the owner and the subcontractors and materialmen are the general contractors who have not been paid by the owner.

The threshold question faced by the subcommittee was the alignment of risk in this context. Virginia's alignment is such that subcontractors and materialmen, so long as they comply with strict statutory perfection guidelines, are protected from loss by being given lien priority. However, the subcommittee noted that much of this protection is illusory in that title insurance companies often do not promptly or completely pay liens they have insured against.

Most subcommittee members felt that Virginia's mechanics' lien laws, both as to lien priorities and statutory time periods, have worked well. They supported the concept that when a business puts its labor, industry and effort into property owned by someone else, that business should be protected. Changing these laws, it was concluded, would only hurt those who enhance property values and shift the risks from title insurance companies to subcontractors and materialmen.

Supporters of title insurance companies, banks, and savings and loan institutions argued that the construction loan is the first step in a building project which creates and fuels the project, and lenders' inability to effectively protect themselves from losses due to subsequent filing of mechanics' liens restricts available credit. Given the growth of multistate banking and the fact that most other states do not allow "secret" liens, they warned that lenders would prefer to provide credit for projects located in other states. Further, in the secondary mortgage market, affirmative lien coverage is unavailable and the loan is therefore not marketable to the normal national conduits. When lien priority was originally granted, this secondary market did not exist, nor was it the driving economic force in the 1970s that it is today.

A majority of subcommittee members believed that the present mechanics' lien system has worked very well, but acknowledged that the system is undergoing stress as a result of the lengthy and severe downturn in the economy. Many of the current problems, they argued, derive primarily from lax business standards by title insurance companies, which, all members agreed, are now taking greater care in writing contracts.

The majority concluded that subcontractors and materialmen expend money, time, and effort and furnish materials, all of which directly increase the value of the property involved. Thus, credit is extended (analogous to that extended by the lender) for which the subcontractor should have a lien to secure his outlay. On the other hand, title insurance companies add nothing to the property's value and are able to protect themselves with premium increases and leverage. By underwriting the entire cost of a project, title companies have an enormous amount of bargaining power which enables them to obtain balance sheets, financial information, indemnity bonds and additional security pledges as a matter of course. Also, the majority pointed

out that lien waivers are available to cut off lien threats. Subcontractors have no such means of protection and the argument that they operate "voluntarily" is significantly modified by the realities of the marketplace.

All sides agreed that the real culprit behind Virginia's recent difficulties with mechanics' liens is not the subcontractor or the homeowner, but the unscrupulous contractor or builder who is paid but fails to pay his subcontractors. While abuses by contractors and builders occasionally occur, a problem does not exist as to the homebuilder who stays in business (his assets can be levied upon) or who pays his subcontractors (which the overwhelming majority do). Also, no problem exists with respect to mechanics' liens in the commercial arena, but rather only in the residential market. Although homeowners can already protect themselves with existing market practices, all subcommittee members agreed that a notification provision with respect to the availability of affirmative title insurance coverage should be provided.

Even though Virginia's mechanics' lien laws are not perfect, the majority concluded that these laws give subcontractors the only realistic protection available, and that their absence would seriously constrict the construction industry.

With one dissenting vote, the subcommittee concluded that the Commonwealth's long-existing lien priority should remain undisturbed; however, lienholders should be encouraged to prosecute under § 43-13.1 of the Code when forged or unauthorized lien waivers are received. Currently, prosecution rarely takes place. Although fund diversion is currently criminal under § 43-13, subcommittee members urged expansion of this law to cover owner-developers. Additionally, they concluded that developers who own the property being developed should be licensed.

#### IV. LEGISLATIVE RECOMMENDATIONS

The joint study subcommittee submitted the following legislative recommendations to the 1992 Session of the General Assembly:

1. To make it a crime punishable as larceny for an owner-developer, i.e., a person who owns and develops residential real estate for resale, to intentionally divert funds paid to him for the purpose of paying persons who have performed labor or furnished materials for construction (Appendix B).
2. To require owner-developers to be licensed by the Board of Contractors as Class A contractors (Appendix C).
3. To make contracts for the purchase of residential real property voidable at the buyer's option if, after July 1, 1992, the contract does not include bold-faced notice to the purchaser that mechanics' liens for previously performed work or materials furnished can be filed even after closing (Appendix D).

4. To require the settlement agent to provide the purchaser of residential real estate with written notice of the availability, nature and cost of title insurance. The buyer's acceptance or rejection of coverage must also be in writing. Failure to provide the notice, however, does not give rise to a cause of action (Appendix E).
5. To require an owner-developer of a residential real estate project to provide the purchaser with an affidavit prior to the sale, indicating (i) all persons providing materials or labor for the project who have been paid in full or (ii) the names, addresses and amounts due or claimed to be due to such persons. Willful failure to provide the statement or providing a materially false statement is punishable as a Class 5 felony. (This is the same penalty as prescribed for presenting a forged lien waiver under § 43-13.1) (Appendix F).

\*

Respectfully submitted,

Glenn R. Croshaw, Chairman

Joseph V. Gartlan, Jr., Vice Chairman

J. Samuel Glasscock

W. Roscoe Reynolds

Virgil H. Goode, Jr.

Paul D. Rinaldi

Daniel Jarrett

M. Ronald Helms

Frank T. McCormick

Randolph W. McElroy

\* NOTE: Following the conclusion of this study, negotiations continuing between the parties concerned resulted in the passage of House Bill 972 which statutorily creates "mechanics lien agents" to act as the real property owner's agent for receipt of notice of anyone entitled to claim a mechanics' lien against a one-or-two-family dwelling unit wherein the building permit for such unit contains the name, address, etc., of the mechanic's lien agent. The owner appoints an agent who can be an attorney, a title company or a financial institution. The notice by the potential lienor to the mechanics' lien agent must contain the name, address, etc. of the claimant, a description of the property and a statement that he seeks payment



for work performed or materials furnished. He must provide notice to the agent within 30 days of the issuance of the building permit or within 30 days of the first day that he performs labor or furnishes material in order to perfect the lien unless no building permit was issued at the time the work or material was provided. (See Appendix G).

V. APPENDIX

A - House Joint Resolution No. 418

B - Legislative Recommendation No. 1

C - Legislative Recommendation No. 2

D - Legislative Recommendation No. 3

E - Legislative Recommendation No. 4

F - Legislative Recommendation No. 5

G - House Bill No. 972

H - Letter from Frank T. McCormick, Lawyers Title Insurance Corporation,  
August 24, 1992

APPENDIX A  
**GENERAL ASSEMBLY OF VIRGINIA--1991 SESSION**  
HOUSE JOINT RESOLUTION NO. 418

*Establishing a joint subcommittee to study the existing mechanics' lien laws.*

Agreed to by the House of Delegates, February 4, 1991  
Agreed to by the Senate, February 21, 1991

WHEREAS, because the mechanics' lien laws are important to the economy of Virginia and the mechanics' lien laws have not been studied since 1979, such laws should be considered for revision and amendment; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study the mechanics' lien laws in the Commonwealth. The joint subcommittee shall consist of ten members to be appointed as follows: three members from the House of Delegates and three citizen members to be appointed by the Speaker of the House, and two members from the Senate and two citizen members to be appointed by the Senate Committee on Privileges and Elections. The citizen members shall include one representative from each of the following: general contractors, subcontractors, suppliers and materialmen, title insurance companies offering mechanics' lien coverage in the Commonwealth, and construction lenders offering construction loans in the Commonwealth.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1992 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

The indirect costs of this study are estimated to be \$11,483; the direct costs of this study shall not exceed \$7,200.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of this study.

LD1192180

2

3 A BILL to amend and reenact § 43-13 of the Code of Virginia, relating  
4 to diversion of funds to any persons performing labor or  
5 furnishing materials; penalty.

6

7 Be it enacted by the General Assembly of Virginia:

8 1. That § 43-13 of the Code of Virginia is amended and reenacted as  
9 follows:

10 § 43-13. Funds paid to general contractor, subcontractor,  
11 owner-developer, etc., must be used to pay persons performing labor or  
12 furnishing material.--Any contractor ~~ex-~~ subcontractor or  
13 owner-developer or any officer, director or employee of such  
14 contractor ~~ex-~~ subcontractor or owner-developer who shall, with  
15 intent to defraud, retain or use the funds, or any part thereof, paid  
16 by the owner or his agent, the contractor or lender to such contractor  
17 or owner-developer or by the owner or his agent, the contractor or  
18 lender to a subcontractor under any contract for the construction,  
19 removal, repair or improvement of any building or structure  
20 permanently annexed to the freehold, for any other purpose than to pay  
21 persons performing labor upon or furnishing material for such  
22 construction, repair, removal or improvement, shall be guilty of  
23 larceny in appropriating such funds for any other use while any amount  
24 for which the contractor ~~ex-~~ subcontractor or owner-developer may be  
25 liable or become liable under his contract for such labor or materials  
26 remains unpaid, and may be prosecuted upon complaint of any person or



2

3 A BILL to amend and reenact §§ 54.1-1100, 54.1-1103, 54.1-1106, and  
4 54.1-1111 of the Code of Virginia, relating to regulation of  
5 contractors; licensure of owner-developers.

6

7 Be it enacted by the General Assembly of Virginia:

8 1. That §§ 54.1-1100, 54.1-1103, 54.1-1106, and 54.1-1111 of the Code  
9 of Virginia are amended and reenacted as follows:

10 § 54.1-1100. Definitions.--As used in this chapter, unless the  
11 context requires a different meaning:

12 "Board" means the Board for Contractors.

13 "Class A contractors" perform or manage construction, removal,  
14 repair, or improvements when (i) the total value referred to in a  
15 single contract or project is \$40,000 or more, or (ii) the total value  
16 of all such construction, removal, repair, or improvements undertaken  
17 by such person within any twelve-month period is \$300,000 or more.

18 "Class B contractors" perform or manage construction, removal,  
19 repair, or improvements when (i) the total value referred to in a  
20 single contract or project is less than \$40,000, and more than \$1,500,  
21 or (ii) when the work is for the purpose of constructing a water well  
22 to reach groundwater as defined in § 62.1-44.85 (8) regardless of  
23 contract or project amount.

24 "Contractor" means any person, firm, association, or corporation  
25 that for a fixed price, commission, fee, or percentage undertakes to  
26 bid upon, or accepts, or offers to accept, orders or contracts for

1 performing, managing, or superintending in whole or in part, the  
2 construction, removal, repair or improvement of any building or  
3 structure permanently annexed to real property owned, controlled, or  
4 leased by another person or any other improvements to such real  
5 property.

6 "Department" means the Department of Commerce.

7 "Designated employee" means the contractor's full-time employee  
8 who is at least eighteen years of age and who has successfully  
9 completed the oral or written examination required by the Board on  
10 behalf of the contractor.

11 "Director" means the Director of the Department of Commerce.

12 "Owner-developer" means any person who performs or supervises the  
13 construction, removal, repair or improvements of any building or  
14 structure permanently annexed to real property owned, controlled or  
15 leased by him or any other improvements to such property when either  
16 (i) the total value of all such improvements to or upon any single  
17 parcel of land is \$40,000 or more or (ii) the total value of all such  
18 improvements to or upon all real property undertaken by him within any  
19 twelve-month period is \$300,000 or more, but shall not include a  
20 person who performs or supervises the construction, removal, repair or  
21 improvement of not more than one building upon his own real property  
22 and for his own use during any twenty-four-month period.

23 "Person" means any individual, firm, corporation, association,  
24 partnership, joint venture, or other legal entity.

25 "Value" means fair market value. When improvements are performed  
26 or supervised by a contractor, the contract price shall be prima facie  
27 evidence of value.

28 § 54.1-1103. Necessity for license.--No person shall engage in,

1 or offer to engage in, contracting work or operate as an  
2 owner-developer in this Commonwealth unless he has been licensed under  
3 the provisions of this chapter. Except as provided in § 54.1-1117, the  
4 issuance of such license shall not entitle the holder to engage in any  
5 activity for which a special license is required by law.

6 § 54.1-1106. Application for Class A license; fees; examination;  
7 issuance.--Any person desiring to be licensed as a Class A contractor  
8 shall file with the Department a written application on a form  
9 prescribed by the Board. The application shall be accompanied by a fee  
10 set by the Board pursuant to § 54.1-201. The application shall contain  
11 the name, place of employment, and business address of the proposed  
12 designated employee; information on the knowledge, skills, abilities,  
13 and financial position of the applicant; and an affidavit stating that  
14 the information on the application is correct. The Board shall  
15 determine whether the past performance record of the applicant,  
16 including his reputation for paying material bills and carrying out  
17 other contractual obligations, satisfies the purposes and intent of  
18 this chapter. The Board shall also determine whether the applicant has  
19 complied with the laws of the Commonwealth pertaining to the  
20 domestication of foreign corporations and all other laws affecting  
21 those engaged in the practice of contracting as set forth in this  
22 chapter. In addition, if the applicant is a sole proprietor, he shall  
23 furnish to the Board his name and address. If the applicant is a  
24 member of a partnership, he shall furnish to the Board the names and  
25 addresses of all of the general partners of the partnership. If the  
26 applicant is a member of an association, he shall furnish to the Board  
27 the names and addresses of all of the members of the association. If  
28 the applicant is a corporation, it shall furnish to the Board the



1 names and addresses of all officers of the corporation. The applicant  
2 shall thereafter keep the Board advised of any changes in the above  
3 information.

4 If the application is satisfactory to the Board, the proposed  
5 designated employee shall be required by Board regulations to take an  
6 oral or written examination to determine his general knowledge of  
7 contracting, including the statutory and regulatory requirements  
8 governing contractors in the Commonwealth. If the proposed designated  
9 employee successfully completes the examination and the applicant  
10 meets or exceeds the other entry criteria established by Board  
11 regulations, a Class A contractor license shall be issued. The license  
12 shall permit the applicant to engage in contracting only so long as  
13 the designated employee is in the full-time employment of the  
14 contractor. In the event the designated employee leaves the full-time  
15 employ of the licensed contractor, the contractor shall within ninety  
16 days of that departure provide to the Board the name of the new  
17 designated employee.

18 The Board may grant a Class A license in any of the following  
19 classifications: (i) building contractor, (ii) highway/heavy  
20 contractor, (iii) electrical contractor (iv) plumbing contractor, (v)  
21 HVAC contractor, and (vi) specialty contractor, and (vii)  
22 owner-developer.

23 § 54.1-1111. Prerequisites to obtaining building, etc.,  
24 permit.--Any person applying to the building inspector or any other  
25 authority of a county, city, or town in this Commonwealth, charged  
26 with the duty of issuing building or other permits for the  
27 construction of any building, highway, sewer, or structure, or any  
28 removal, grading or improvement shall furnish prior to the issuance

1 the permit, either (i) satisfactory proof to such inspector or  
2 authority that he is duly licensed under the terms of this chapter to  
3 carry out or superintend the same, or (ii) file a written statement,  
4 supported by an affidavit, that he is not subject to licensure as a  
5 contractor ~~ex-~~, subcontractor , or owner-developer pursuant to this  
6 chapter. The applicant shall also furnish satisfactory proof that the  
7 taxes or license required by any county, city, or town have been paid  
8 so as to be qualified to bid upon or contract for the work for which  
9 the permit has been applied.

10 It shall be unlawful for the building inspector or other  
11 authority to issue or allow the issuance of such permits unless the  
12 applicant has furnished his license number issued pursuant to this  
13 chapter or evidence of being exempt from the provisions of this  
14 chapter.

15 The building inspector, or other such authority, violating the  
16 terms of this section shall be guilty of a Class 3 misdemeanor.

17 #

LD1247180

2

3 A BILL to amend the Code of Virginia by adding a section numbered  
4 11-2.4, relating to contracts for sale of residential property;  
5 notice.

6

7 Be it enacted by the General Assembly of Virginia:

8 1. That the Code of Virginia is amended by adding a section numbered  
9 11-2.4 as follows:

10 § 11-2.4. Notice of possible filing of mechanics' lien  
11 required.--A. Every contract made on or after July 1, 1992, for the  
12 purchase of residential real property shall include the following  
13 provision:

14 NOTICE

15

16 Virginia law (§ 43-1 et seq.) permits persons who have performed  
17 labor or furnished materials for the construction, removal, repair or  
18 improvement of any building or structure to file a lien against the  
19 property. This lien may be filed at any time after the work is  
20 commenced or the material is furnished, but not later than the earlier  
21 of (i) 90 days from the last day of the month in which the lienor last  
22 performed work or furnished materials or (ii) 90 days from the time  
23 the construction, removal, repair or improvement is terminated.

24 AN EFFECTIVE LIEN FOR WORK PERFORMED PRIOR TO THE DATE OF THIS  
25 CONTRACT MAY BE FILED AFTER SETTLEMENT. LEGAL COUNSEL SHOULD BE  
26 CONSULTED.

LD1247180

1            B. A contract which does not include the notice required by this  
2 section shall be voidable by the purchaser.

3

#

LD1196180

2

3 A BILL to amend the Code of Virginia by adding in Chapter 46 of Title  
4 38.2 a section numbered 38.2-4615.1, relating to notification of  
5 buyers of the availability of owner's title insurance.

6

7 Be it enacted by the General Assembly of Virginia:

8 1. That the Code of Virginia is amended by adding in Chapter 46 of  
9 Title 38.2 a section numbered 33.2-4615.1 as follows:

10 § 38.2-4615.1. Notification to buyers of the availability of  
11 owner's title insurance.--In connection with any transaction involving  
12 a purchase or sale of an interest in residential real property in this  
13 Commonwealth, the settlement agent as defined in § 6.1-2.10, before  
14 the disbursement of any funds, shall obtain from the purchaser a  
15 statement in writing that he has been advised by the settlement agent  
16 or by any other person as stated in the writing of the availability of  
17 title insurance coverage, including affirmative mechanics' lien  
18 coverage, and of the general nature, scope and cost of such coverage,  
19 and that the purchaser does or does not desire such coverage.

20 The failure of a settlement agent to provide the information  
21 requested by this section shall not of itself be deemed to create a  
22 cause of action that would not otherwise exist.

23

#

LD1197180

2

3 A BILL to amend the Code of Virginia by adding a section numbered  
4 43-13.2, relating to mechanics' liens; affidavit of payment prior  
5 to sale.

6

7 Be it enacted by the General Assembly of Virginia:

8 1. That the Code of Virginia is amended by adding a section numbered  
9 43-13.2 as follows:

10 § 43-13.2. When affidavit of payment required of owner prior to  
11 sale.--A person who is both the owner of residential real property and  
12 a developer, contractor or subcontractor furnishing labor or material  
13 to or for the property shall, at the time of sale of such property,  
14 provide the purchaser with an affidavit stating either (i) that all  
15 persons performing labor or furnishing materials in connection with  
16 the residence have been paid or (ii) the name, address and amount  
17 payable or claimed to be payable to any person performing labor or  
18 furnishing materials. Willful failure to provide such statement or  
19 willful material misrepresentation with respect to such statement  
20 shall be punishable as provided in § 18.2-172.

21

#

**1992 SESSION**

## VIRGINIA ACTS OF ASSEMBLY - CHAPTER 787

*An Act to amend and reenact §§ 43-1, 43-3 and 43-4 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 36-98.01, 43-4.01 and 43-13.2, relating to mechanics' liens; affidavit of payment prior to sale; building permits.*

[H 972]

Approved APR 6 1992

Be it enacted by the General Assembly of Virginia:

1. That §§ 43-1, 43-3 and 43-4 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 36-98.01, 43-4.01 and 43-13.2 as follows:

*§ 36-98.01. Mechanics' lien agent included on building permit for residential property at request of applicant.—In addition to any information required by the Uniform Statewide Building Code, a building permit issued for any one- or two-family residential dwelling unit shall at the time of issuance contain, at the request of the applicant, the name, mailing address, and telephone number of the mechanics' lien agent as defined in § 43-1. If the designation of a mechanics' lien agent is not so requested by the applicant, the building permit shall at the time of issuance state that none has been designated with the words "None Designated."*

*§ 43-1. Definitions.—As used in this chapter, the term "general contractor" shall include contractors, laborers, mechanics, and persons furnishing materials, who contract directly with the owner and the term "subcontractor" shall include all such contractors, laborers, mechanics, and persons furnishing materials, who do not contract with the owner but with the general contractor. As used in this chapter, the term "owner" shall not be construed to mean any person holding bare legal title under an instrument to secure a debt or indemnify a surety. As used in this chapter, the term "mechanics' lien agent" means a person (i) designated in writing by the owner of real estate or a person authorized to act on behalf of the owner of such real estate and (ii) who consents in writing to act, as the owner's designee for purposes of receiving notice pursuant to § 43-4.01. Such person shall be an attorney at law licensed to practice in the Commonwealth, a title insurance company authorized to write title insurance in the Commonwealth or one of its subsidiaries or licensed title insurance agents, or a financial institution authorized to accept deposits and to hold itself out to the public as engaged in the banking or savings institution business in the Commonwealth or a service corporation, subsidiary or affiliate of such financial institution. Provided that nothing herein shall be construed to affect pending litigation.*

*§ 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 or limited common elements 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 or to which those limited common elements pertain, and for which payment has not been made. All persons providing labor or furnishing materials for the common elements pertaining to all the units may perfect a single lien encumbering all such 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 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 determined as herein provided. In the event the lien is not 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 such unit or units determined as herein provided but no such release shall preclude the lien claimant from perfecting 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 *site development improvements or for streets, stormwater facilities, sanitary sewers or water lines* for the purpose of providing access or service to the individual lots in a development or condominium units as defined in § 55-79.41 ~~(d)~~ or under the Horizontal Property Act (formerly §§ 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. "*Site development improvements*" means *improvements which are provided for the development, such as project site grading, rather than for an individual lot.*

Nothing contained herein shall be construed to prevent the filing of a mechanic's lien under the provisions of subsection (a) hereof.

(c) Any right to file or enforce any mechanic's lien granted hereunder may be waived whole or in part at any time by any person entitled to such lien.

§ 43-4. Perfection of lien by general contractor; recordation and notice.—A general contractor, or any other lien claimant under §§ 43-7 and 43-9, in order to perfect the lien given by § 43-3, *provided such lien has not been barred by § 43-4.01 C*, shall file a *memorandum of lien* at any time after the work is commenced or material furnished, but not later than ninety days from the last day of the month in which he last performs labor or furnishes material, ~~but~~ *and* in no event later than ninety days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated. *The memorandum shall be filed 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 located. The memorandum shall show 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 the memorandum shall be is 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 and 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 the memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien. The lien claimant may file any number of such memoranda but no memorandum filed pursuant to this chapter shall include sums due for labor or materials furnished more than 150 days prior to the last day on which labor as performed or material furnished to the job preceding the filing of such memorandum. Provided However, any memorandum may include sums withheld as retainages with respect to labor performed or materials furnished at any time before such memorandum it is filed, but not to exceed ten percent of the total contract price. The time limitations set forth herein shall apply to all labor performed or materials furnished on construction commenced on or after July 1, 1980. As to any labor performed or materials furnished or*



construction commenced prior to July 1, 1980 the lien claimant 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.

*§ 43-4.01. Posting of building permit; identification of mechanics' lien agent in building permit; notice to mechanics' lien agent; effect of notice.—A. The building permit for any one- or two-family residential dwelling unit issued pursuant to the Uniform Statewide Building Code shall be conspicuously and continuously posted on the property for which the permit is issued until all work is completed on the property. The permit shall be posted on the property before any labor is performed or any material furnished on the property for which the building permit is issued.*

*B. If, at the time of issuance, the building permit contains the name, mailing address, and telephone number of the mechanics' lien agent as defined in § 43-1, any person entitled to claim a lien under this title may notify the mechanics' lien agent that he seeks payment for labor performed or material furnished by registered or certified mail or by physical delivery. Such notice shall contain (i) the name, mailing address, and telephone number of the person sending such notice, (ii) the building permit number on the building permit, (iii) a description of the property as shown on the building permit, and (iv) a statement that the person filing such notice seeks payment for labor performed or material furnished. A return receipt or other receipt showing delivery of the notice to the addressee or written evidence that such notice was delivered by the postal service or other carrier to but not accepted by the addressee shall be prima facie evidence of receipt. An inaccuracy in the notice as to the description of the property shall not bar a person from claiming a lien under this title or filing a memorandum or otherwise perfecting or enforcing a lien as provided in subsection C if the property can otherwise be reasonably identified from the description.*

*C. Except as provided otherwise in this subsection, no person other than a person claiming a lien under § 43-3 (b) may claim a lien under this title or file a memorandum or otherwise perfect and enforce a lien under this title with respect to a one- or two-family residential dwelling unit if such person fails to notify any mechanics' lien agent identified on the building permit in accordance with subsection B above (i) within thirty days of the first date that he performs labor or furnishes material to or for the building or structure or (ii) within thirty days of the date such a permit is issued, if such labor or materials are first performed or furnished by such person prior to the issuance of a building permit. However, the failure to give any such notices within the appropriate thirty-day period as required by the previous sentence shall not bar a person from claiming a lien under this title or from filing a memorandum or otherwise perfecting and enforcing a lien under this title, provided that such lien is limited to labor performed or materials furnished on or after the date a notice is given by such person to the mechanics' lien agent in accordance with subsection B above. A person performing labor or furnishing materials with respect to a one- or two-family residential dwelling unit on which a building permit is not posted at the time he first performs his labor or first furnishes his material shall determine from appropriate authorities whether a permit of the type described in subsection B above has been issued and the date on which it is issued.*

*No person shall be required to comply with this subsection as to any memorandum of lien which is recorded prior to the issuance of a building permit nor shall any person be required to comply with this subsection when the building permit does not designate a mechanics' lien agent.*

*D. Unless otherwise agreed in writing, the only duties of the mechanics' lien agent shall be to receive notices delivered to him pursuant to subsection B and to provide any notice upon request to a settlement agent, as defined in § 6.1-2.10, involved in a transaction relating to the residential dwelling unit.*

*E. Mechanics' lien agents are authorized to enter into written agreements with third parties with regard to funds to be advanced to them for disbursement, and the transfer, disbursement, return and other handling of such funds shall be governed by the terms of such written agreements.*

*F. A mechanics' lien agent as defined in § 43-1 may charge a reasonable fee for services rendered in connection with administration of notice authorized herein and the disbursement of funds for payment of labor and materials for the construction or repair of improvements on real estate.*

*§ 43-13.2. When affidavit of payment required of owner prior to sale.—A person who is both the owner of a one- or two-family residential dwelling unit and either a developer of such property, a contractor in connection with the development or improvement of such*

*erty or a contractor or subcontractor furnishing labor or material in connection with development or improvement of such property shall, at the time of settlement on the sale of such property, provide the purchaser with an affidavit stating either (i) that all persons performing labor or furnishing materials in connection with the improvements on such property and with whom such owner is in privity of contract have been paid in full or (ii) the name, address and amount payable or claimed to be payable to any person so performing labor or furnishing materials and with whom such owner is in privity of contract. Willful failure to provide such statement or any willful material misrepresentation with respect to such a statement which causes a monetary loss to a financial institution, title company, contractor, subcontractor, supplier, owner, mechanics' lien agent or any other person or institution shall be punishable as a Class 5 felony.*

**2. That an emergency exists and the provisions of this act shall be effective on June 1, 1992.**

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President of the Senate

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Speaker of the House of Delegates

**Approved:**

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Governor



# Lawyers Title Insurance Corporation

5 2 5 1992

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August 24, 1992

Oscar R. Brinson, Esquire  
Senior Attorney  
Division of Legislative Services  
Commonwealth of Virginia  
910 Capitol Street  
Richmond, VA 23219

Re: Mechanics' Lien Laws Study

Dear Oscar:

I am receipt of your memorandum dated July 13, 1992. I believe it is generally accurate, but I would make two comments. On page three of the memorandum, in the fourth full paragraph, you infer that a majority of subcommittee members believed that many of the problems were caused by lax business standards imposed by title insurance companies. Certainly that view was put forth by the subs and suppliers in their argument, but I do not believe that the committee members themselves expressed that opinion.

On page four, in the first full paragraph, the memorandum recites that no problem exists with respect to mechanics' lien in the commercial arena. That really is not correct, and I believe that the comment made by the title industry was that although commercial transactions were less prone to mechanics' lien difficulties than residential transactions, that when a commercial problem did arise, it was apt to be a very high dollar amount. However, the consensus certainly is that there are fewer commercial lien problems than residential.

Should you have any questions, please let me know.

Yours very truly,

Frank T. McCormick  
Senior Vice President  
and Regional Manager

FTM/ead