

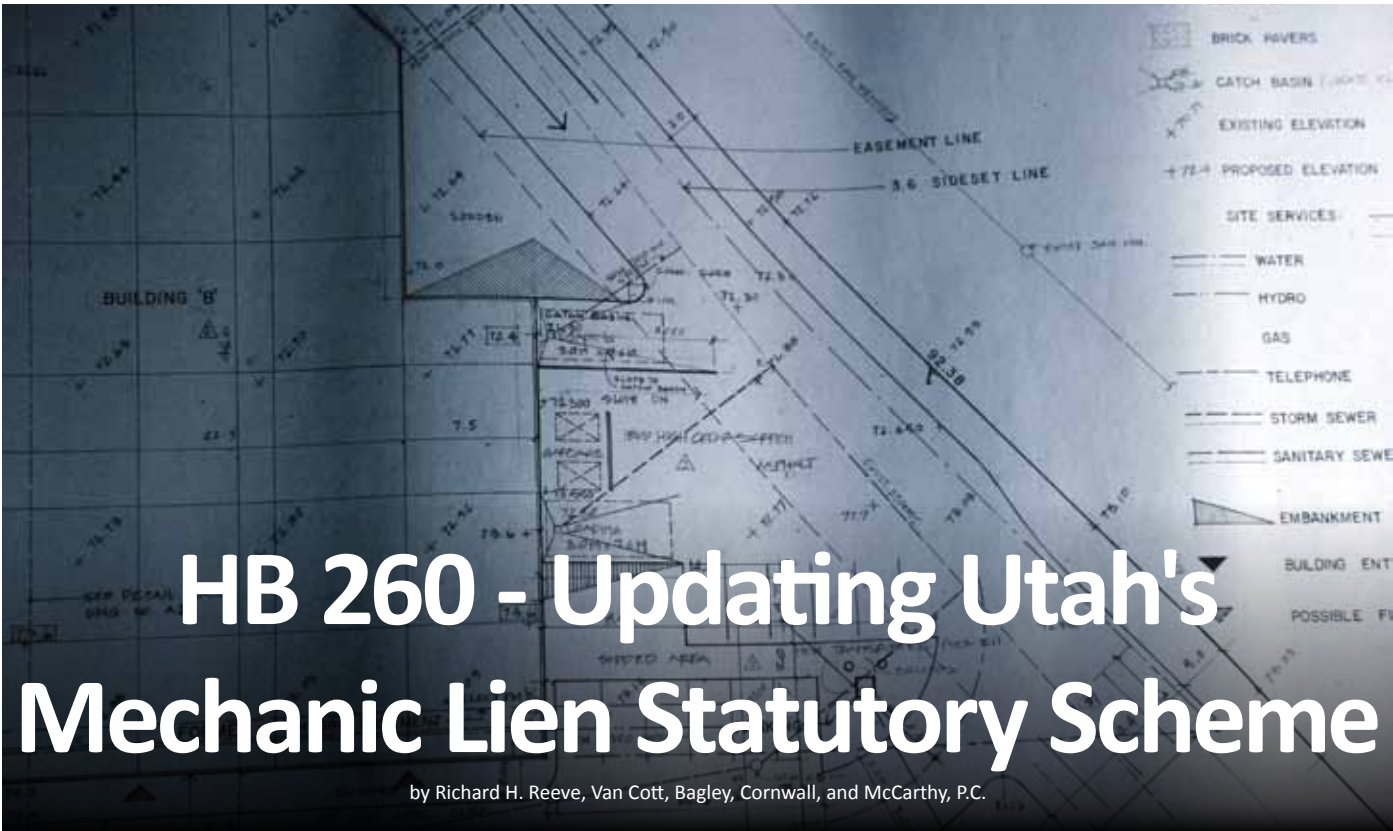
ABC Update

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from a Local Perspective





HB 260 - Updating Utah's Mechanic Lien Statutory Scheme

by Richard H. Reeve, Van Cott, Bagley, Cornwall, and McCarthy, P.C.

The Utah State Legislature has once again passed revisions to Utah's mechanic's lien statutory scheme. This year the lien statute (Utah Code §38-1-1 et seq.) has been substantially revised by House Bill 260. The changes made by HB 260, if not altered in June's special legislative session, are set to take effect on August 1, 2011. Because of the significant changes and their impact on the validity and enforcement of mechanic's liens claims, anyone who deals with or seeks to be paid by mechanic's liens would do well to understand the changes.

From this attorney's point of view, there are three significant changes to Utah's lien statute. The purpose of this article is to provide a general overview of these changes. The specifics of the changes described below, as well as other changes made to the mechanic's lien statute should be reviewed and applied on a case by case basis by competent legal counsel.

First, HB 260 gives construction loans a virtual super priority over mechanic's liens. In the current version of the lien statute, mechanic's liens by any lien claimant could potentially have priority over the project's construction loan if visible lienable work was performed by

any contractor on the project prior to the recordation of the Trust Deed securing the construction loan. Under HB 260, construction loans are given priority over all mechanic's liens regardless of when the construction loan is recorded. See §38-1-5(3)¹. In addition, mechanic's liens now relate back, for purposes of priority, to the date of the earliest preliminary notice filed with the Utah State Construction Registry ("SCR"), rather than the date of the first visible work performed by the first lien claimant. See §38-1-5.

Second, county tax identification numbers are to become the standard "project identifier" for all SCR filings. Under the current law, projects are typically identified by the owner's name, the contractor's name, the lot or address of the construction project, or some combination of the above. The county tax identification number is not currently required. Under HB 260, the tax identification number is a required identifier, along with other basic project information, on all documents filed with the SCR. See §38-1-27(3)(c). Owners, contractors, suppliers, and all potential lien claimants should implement a process that allows them to identify and record the tax identification number for each project on which they provide labor, services or materials.

¹All references to the Utah Code refer to sections of the code as they will be modified by HB 260, unless otherwise noted.

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Third, HB 260 creates a division among the SCR filing requirements for private projects and government projects. Every potential lien claimant should ask themselves whether the project is a government project or a private project as they prepare to furnish labor or materials and as they prepare to make filings with the SCR. HB 260 defines government projects as projects built for or by the state, any state division or agency, any city, county, town, school district, special district, etc. See §38-1-27(1)(i). A private project is a construction project that is not a government project. See §38-1-27(1)(l). The specific SCR filing requirements for each type of project are listed below.

Notice of Commencement:

- *For private projects:* there is no required notice of commencement for private projects. See §38-1-31.5(8)(a). Instead, the local government entity issuing a building permit is required to input the building permit into the SCR. See §38-1-31(1)(a). For projects that do not require a building permit, a notice of commencement may presumably be filed with the SCR by the owner, original contractor, or owner-builder. The applicant for whom the building permit is issued is responsible to verify the accuracy and existence of the building permit. See §38-1-31(1)(a).

- *For government projects:* the original contractor, owner, or owner-builder must file a notice of commencement with the SCR no later than 15 days after the commencement of construction work at the project site. See §38-1-31.5(1). If no notice of commencement is filed, then lien claimants need not file preliminary notices

with the SCR. See §38-1-31.5(7). A notice of completion is also not required if a notice of commencement is not filed. See §38-1-31.5(7).

Preliminary Notice:

- *For private projects:* all parties that are entitled to a lien under Utah Code Ann. 38-1-3, must file a preliminary notice with the SCR within 20 days of first



furnishing labor, supplies, or services in connection with the construction project. See §38-1-32(2)(a)(i). Failure to file a preliminary notice results in a waiver of subsequent lien rights. See §38-1-32(1)(d)(i). There is no provision for the late filing of a preliminary notice.

There are two significant changes to the preliminary notice requirements for a private project. Under the prior law, only subcontractors were required to file preliminary notices. Now all parties that are entitled to lien must file a preliminary notice, including those parties who have a contract with the owner or owner-builder.

Also under the prior law, lien claimants were given an opportunity to file a preliminary notice late, albeit with a five day penalty on the amounts they could claim. Under HB 260 the late filing provision for preliminary notices for private projects has been eliminated.

- *For government projects:* all potential lien claimants that do not have a contract directly with the owner of the construction project (i.e., a subcontractor), must file a preliminary notice with the SCR within 20 days of first furnishing labor, supplies or services in connection with the construction project. See §38-1-32.5(1). Preliminary notices can be filed late; however, lien claimants can only claim amounts incurred 5 days after the late preliminary notice is filed with the SCR. See §38-1-32.5(4) and (5).

Notice of Intent to File a Notice of Completion:

- *For private projects:* If the project is (i) a commercial project, (ii) that extends for more than 120 days, (iii) costs more than \$500,000.00, and (iv) is not secured by a payment bond, then a Notice of Intent to File a Notice of Completion must be filed with the SCR 45 days before a Notice of Completion is filed with the SCR. See §38-1-40(1)-(2) (current version). The filing of a "Notice of Intent to File" allows subcontractors and suppliers to file an Amended Preliminary Notice and a Demand for A Statement of Adequate Assurance. See §38-1-40 (current version). An Amended Preliminary Notice must be filed within 20 days of the Notice of Intent to File. See §38-1-40(2) (current version). A Demand for A Statement of Adequate Assurance must be filed within 10 days after the filing of an Amended Preliminary Notice. See §38-1-40(4) (current version).

- *For government projects:* same requirements as those for private projects.

Notice of Completion:

- *For private projects:* A notice of completion can be filed by any person with an interest in the project including the owner, a contractor, a title insurer, a holder of surety bond. See §38-1-33(1)(a). The notice of completion must be filed upon "final completion" of the construction project. See §38-1-7(1)(a) (current version). Final completion is the date of the issuance of a certificate of occupancy if one is required; if not, then the date of the final inspection, if one is required; if not, then the date on which the last substantial work was furnished by the lien claimant. See §38-1-7(1)(a) (current version). As before, notices of completion are very important because they shorten the owner's exposure to mechanic's liens from 180 days to 90 days. See §38-1-7 (current version). Notices of completion are also important in that all preliminary notices for contractors furnishing work at the end of the project must be filed within 10 days of the filing of the Notice of Completion with the SCR.

- *For government projects:* same requirements as those for private projects.

In conclusion, under HB 260 the importance of timely and accurate SCR filings, specifically preliminary notices and notices of completion, have markedly increased. Failure to understand and incorporate these changes could have profound impacts on both a lien claimant's ability to assert and enforce a mechanic's lien and an owner's exposure to mechanic's lien claims. All developers, owner-builders, contractors, subcontractors, suppliers, and design professionals that work on construction projects should understand these changes and implement internal programs to insure that accurate and timely SCR filings occur in connection with each active construction project. □

This article is designed to provide general information only. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel. The author is an attorney with the law firm of Van Cott, Bagley, Cornwall & McCarthy, P.C. and member of the firm's Construction Practice Group. Mr. Reeve can be reached at 801.532.3333



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The attorneys in Van Cott's Construction Law Group provide a wide range of legal services to owners, developers, general contractors, subcontractors, architects, engineers, construction managers, suppliers, utilities, lenders, and

insurance and bonding companies throughout the construction industry and design professions. Members of the Construction Practice Group provide legal assistance in all areas of construction law including: Construction Contracts, Construction Lending Agreements, Construction Claims and Disputes, Mechanic Liens and Bond Claims, Arbitration/Mediation/Litigation, Risk/Safety Management and Government Contracts and Disputes.

Van Cott's Construction Law Group assists clients in the successful completion of projects and developments, and to resolve disputes in an efficient, cost-effective and timely manner. We have extensive experience in mediation, arbitration, and litigation, and practice before state and federal courts, as well as various government boards and agencies.

The Van Cott Construction Practice Group is chaired by John A. Snow.