

1 **PRECONSTRUCTION AND CONSTRUCTION LIENS**

2 **AMENDMENTS**

3 2020 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Marc K. Roberts**

6 Senate Sponsor: _____

7

LONG TITLE

8 **General Description:**

9 This bill amends provisions of Preconstruction and Construction Liens.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ defines terms;
- 13 ▶ amends provisions related to the relation back and priority of liens;
- 14 ▶ removes the requirement that an owner file a notice of intent to obtain final
- 15 completion;
- 16 ▶ amends provisions regarding a notice of intent to finance and enacts provisions
- 17 regarding a notice of intent to finance construction;
- 18 ▶ enacts provisions related to a notice of progress and a notice of final lien;
- 19 ▶ amends provisions regarding a failure to provide notice; and
- 20 ▶ makes technical and conforming changes.

21 **Money Appropriated in this Bill:**

22 None

23 **Other Special Clauses:**

24 None

25 **Utah Code Sections Affected:**

26 AMENDS:



- 28 **38-1a-102**, as last amended by Laws of Utah 2019, Chapter 250
- 29 **38-1a-503**, as last amended by Laws of Utah 2014, Chapter 293
- 30 **38-1a-506**, as renumbered and amended by Laws of Utah 2012, Chapter 278
- 31 **38-1a-603**, as enacted by Laws of Utah 2019, Chapter 250
- 32 **38-1a-604**, as enacted by Laws of Utah 2019, Chapter 250
- 33 **38-1a-805**, as enacted by Laws of Utah 2015, Chapter 303

34 ENACTS:

- 35 **38-1a-605**, Utah Code Annotated 1953
- 36 **38-1a-606**, Utah Code Annotated 1953



38 *Be it enacted by the Legislature of the state of Utah:*

39 Section 1. Section **38-1a-102** is amended to read:

40 **38-1a-102. Definitions.**

41 As used in this chapter:

42 (1) "Alternate means" means a method of filing a legible and complete notice or other
43 document with the registry other than electronically, as established by the division by rule.

44 (2) "Anticipated improvement" means the improvement:

- 45 (a) for which preconstruction service is performed; and
- 46 (b) that is anticipated to follow the performing of preconstruction service.

47 (3) "Applicable county recorder" means the office of the recorder of each county in
48 which any part of the property on which a claimant claims or intends to claim a preconstruction
49 or construction lien is located.

50 (4) "Bona fide loan" means a loan to an owner or owner-builder by a lender in which
51 the owner or owner-builder has no financial or beneficial interest greater than 5% of the voting
52 shares or other ownership interest.

53 (5) "Claimant" means a person entitled to claim a preconstruction or construction lien.

54 (6) "Compensation" means the payment of money for a service rendered or an expense
55 incurred, whether based on:

- 56 (a) time and expense, lump sum, stipulated sum, percentage of cost, cost plus fixed or
57 percentage fee, or commission; or
- 58 (b) a combination of the bases listed in Subsection (6)(a).

- 59 (7) "Construction lender" means a person who makes a construction loan.
- 60 (8) "Construction lien" means a lien under this chapter for construction work.
- 61 (9) "Construction loan" does not include a consumer loan secured by the equity in the
62 consumer's home.
- 63 (10) "Construction modification" means a modification or amendment to a mortgage or
64 trust deed that secures a construction loan that:
- 65 (a) (i) extends the maturity date of the construction loan;
66 (ii) revises the interest rate of the construction loan;
67 (iii) advances additional funds to the construction loan;
68 (iv) increases a reserve amount of the construction loan;
69 (v) adds or removes collateral of the construction loan;
70 (vi) adds or removes borrowers of the construction loan; or
71 (vii) is similar to a modification or amendment described in Subsections (10)(a)(i)
72 through (vi) and changes the terms of the construction loan; and
- 73 (b) is a modification or amendment to secure funds for the purpose of preconstruction
74 services or construction work.
- 75 [~~(10)~~] (11) "Construction project" means an improvement that is constructed pursuant
76 to an original contract.
- 77 [~~(11)~~] (12) "Construction work":
- 78 (a) means labor, service, material, or equipment provided for the purpose and during
79 the process of constructing, altering, or repairing an improvement; and
- 80 (b) includes scheduling, estimating, staking, supervising, managing, materials testing,
81 inspection, observation, and quality control or assurance involved in constructing, altering, or
82 repairing an improvement.
- 83 [~~(12)~~] (13) "Contestable notice" means a notice of preconstruction service under
84 Section 38-1a-401, a preliminary notice under Section 38-1a-501, or a notice of completion
85 under Section 38-1a-506.
- 86 [~~(13)~~] (14) "Contesting person" means an owner, original contractor, subcontractor, or
87 other interested person.
- 88 [~~(14)~~] (15) "Designated agent" means the third party the division contracts with as
89 provided in Section 38-1a-202 to create and maintain the registry.

90 ~~[(15)]~~ (16) "Division" means the Division of Occupational and Professional Licensing
91 created in Section [58-1-103](#).

92 ~~[(16)]~~ (17) "Entry number" means the reference number that:

93 (a) the designated agent assigns to each notice or other document filed with the
94 registry; and

95 (b) is unique for each notice or other document.

96 ~~[(17)]~~ (18) "Final completion" means:

97 (a) the date of issuance of a permanent certificate of occupancy by the local
98 government entity having jurisdiction over the construction project, if a permanent certificate
99 of occupancy is required;

100 (b) the date of the final inspection of the construction work by the local government
101 entity having jurisdiction over the construction project, if an inspection is required under a
102 state-adopted building code applicable to the construction work, but no certificate of occupancy
103 is required;

104 (c) unless the owner is holding payment to ensure completion of construction work, the
105 date on which there remains no substantial work to be completed to finish the construction
106 work under the original contract, if a certificate of occupancy is not required and a final
107 inspection is not required under an applicable state-adopted building code; or

108 (d) the last date on which substantial work was performed under the original contract,
109 if, because the original contract is terminated before completion of the construction work
110 defined by the original contract, the local government entity having jurisdiction over the
111 construction project does not issue a certificate of occupancy or perform a final inspection.

112 ~~[(18)]~~ (19) "Final lien waiver" means a form that complies with Subsection
113 [38-1a-802\(4\)\(c\)](#).

114 ~~[(19)]~~ (20) "First preliminary notice filing" means a preliminary notice that:

115 (a) is the earliest preliminary notice filed on the construction project for which the
116 preliminary notice is filed;

117 (b) is filed on a construction project that, at the time the preliminary notice is filed, has
118 not reached final completion; and

119 (c) is not cancelled under Section [38-1a-307](#).

120 ~~[(20)]~~ (21) "Government project-identifying information" has the same meaning as

121 defined in Section 38-1b-102.

122 [~~(21)~~] (22) "Improvement" means:

123 (a) a building, infrastructure, utility, or other human-made structure or object
124 constructed on or for and affixed to real property; or

125 (b) a repair, modification, or alteration of a building, infrastructure, utility, or object
126 referred to in Subsection [~~(21)~~] (22)(a).

127 [~~(22)~~] (23) "Interested person" means a person that may be affected by a construction
128 project.

129 [~~(23)~~] (24) "Notice of commencement" means a notice required under Section
130 38-1b-201 for a government project, as defined in Section 38-1b-102.

131 [~~(24)~~] (25) "Original contract":

132 (a) means a contract between an owner and an original contractor for preconstruction
133 service or construction work; and

134 (b) does not include a contract between an owner-builder and another person.

135 [~~(25)~~] (26) "Original contractor" means a person, including an owner-builder, that
136 contracts with an owner to provide preconstruction service or construction work.

137 [~~(26)~~] (27) "Owner" means the person that owns the project property.

138 [~~(27)~~] (28) "Owner-builder" means an owner, including an owner who is also an
139 original contractor, who:

140 (a) contracts with one or more other persons for preconstruction service or construction
141 work for an improvement on the owner's real property; and

142 (b) obtains a building permit for the improvement.

143 [~~(28)~~] (29) "Preconstruction lien" means a lien under this chapter for a preconstruction
144 service.

145 [~~(29)~~] (30) "Preconstruction service":

146 (a) means to plan or design, or to assist in the planning or design of, an improvement or
147 a proposed improvement:

148 (i) before construction of the improvement commences; and

149 (ii) for compensation separate from any compensation paid or to be paid for
150 construction work for the improvement; and

151 (b) includes consulting, conducting a site investigation or assessment, programming,

152 preconstruction cost or quantity estimating, preconstruction scheduling, performing a
153 preconstruction construction feasibility review, procuring construction services, and preparing
154 a study, report, rendering, model, boundary or topographic survey, plat, map, design, plan,
155 drawing, specification, or contract document.

156 ~~[(30)]~~ (31) "Private project" means a construction project that is not a government
157 project.

158 (32) "Progress waiver" means a form that complies with Subsection 38-1a-802(4)(b).

159 ~~[(31)]~~ (33) "Project property" means the real property on or for which preconstruction
160 service or construction work is or will be provided.

161 ~~[(32)]~~ (34) "Registry" means the State Construction Registry under Part 2, State
162 Construction Registry.

163 ~~[(33)]~~ (35) "Required notice" means:

164 (a) a notice of preconstruction service under Section 38-1a-401;

165 (b) a preliminary notice under Section 38-1a-501 or Section 38-1b-202;

166 (c) a notice of commencement;

167 (d) a notice of construction loan under Section 38-1a-601;

168 (e) a notice under Section 38-1a-602 concerning a construction loan default;

169 (f) a notice of intent to obtain final completion under Section 38-1a-506; or

170 (g) a notice of completion under Section 38-1a-507.

171 ~~[(34)]~~ (36) "Subcontractor" means a person that contracts to provide preconstruction
172 service or construction work to:

173 (a) a person other than the owner; or

174 (b) the owner, if the owner is an owner-builder.

175 ~~[(35)]~~ (37) "Substantial work" does not include repair work or warranty work.

176 ~~[(36)]~~ (38) "Supervisory subcontractor" means a person that:

177 (a) is a subcontractor under contract to provide preconstruction service or construction
178 work; and

179 (b) contracts with one or more other subcontractors for the other subcontractor or
180 subcontractors to provide preconstruction service or construction work that the person is under
181 contract to provide.

182 Section 2. Section 38-1a-503 is amended to read:

183 **38-1a-503. Relation back and priority of liens.**

184 (1) A construction lien relates back to, and takes effect as of, the time of the first
185 preliminary notice filing.

186 (2) (a) Subject to Subsection (2)(b), a construction lien has priority over:

187 (i) any lien, mortgage, or other encumbrance that attaches after the first preliminary
188 notice filing; and

189 (ii) any lien, mortgage, or other encumbrance of which the claimant had no notice and
190 which was unrecorded at the time of the first preliminary notice filing.

191 (b) A recorded mortgage or trust deed that secures a construction loan or a recorded
192 construction modification attaches immediately before the first preliminary notice filing for the
193 construction project if each claimant that has a preliminary notice on file on the construction
194 project before the mortgage [~~or~~], trust deed, or construction modification was recorded receives
195 full payment for all construction work the claimant performed before the mortgage [~~or~~], trust
196 deed, or construction modification was recorded, regardless of whether the claimant receives
197 full payment before or after the day on which the mortgage [~~or~~], trust deed, or construction
198 modification is recorded.

199 Section 3. Section **38-1a-506** is amended to read:

200 **38-1a-506. Notice of intent to obtain final completion.**

201 (1) An owner, as defined in Section [14-2-1](#), of a nonresidential construction project
202 that is registered with the registry, or an original contractor of a commercial nonresidential
203 construction project that is registered with the registry under Section [38-1a-501](#), [~~shall~~] may
204 file with the registry a notice of intent to obtain final completion as provided in this section if:

205 (a) the completion of performance time under the original contract for construction
206 work is greater than 120 days;

207 (b) the total original construction contract price exceeds \$500,000; and

208 (c) the original contractor or owner has not obtained a payment bond in accordance
209 with Section [14-2-1](#).

210 (2) [~~The~~] If filed, the notice of intent described in Subsection (1) shall be filed at least
211 45 days before the day on which the owner or original contractor of a commercial
212 nonresidential construction project files or could have filed a notice of completion under
213 Section [38-1a-507](#).

214 (3) A person who provides construction work to an owner or original contractor who
215 files a notice of intent in accordance with Subsection (1) shall file an amendment to the
216 person's preliminary notice previously filed by the person as required in Section 38-1a-501:

217 (a) that includes:

218 (i) a good faith estimate of the total amount remaining due to complete the contract,
219 purchase order, or agreement relating to the person's approved construction work;

220 (ii) the identification of each original contractor or subcontractor with whom the
221 person has a contract or contracts for providing construction work; and

222 (iii) a separate statement of all known amounts or categories of work in dispute; and

223 (b) no later than 20 days after the day on which the owner or contractor files a notice of
224 intent.

225 (4) (a) A person described in Subsection (3) may demand a statement of adequate
226 assurance from the owner, contractor, or subcontractor with whom the person has privity of
227 contract no later than 10 days after the day on which the person files a balance statement in
228 accordance with Subsection (3) from an owner, contractor, or subcontractor who is in privity of
229 contract with the person.

230 (b) A demand for adequate assurance as described in Subsection (4)(a) may include a
231 request for a statement from the owner, contractor, or subcontractor that the owner, contractor,
232 or subcontractor has sufficient funds dedicated and available to pay for all sums due to the
233 person filing for the adequate assurances or that will become due in order to complete a
234 construction project.

235 (c) A person who demands adequate assurance under Subsection (4)(a) shall deliver
236 copies of the demand to the owner and contractor:

237 (i) by hand delivery with a responsible party's acknowledgment of receipt;

238 (ii) by certified mail with a return receipt; or

239 (iii) as provided under Rule 4, Utah Rules of Civil Procedure.

240 (5) (a) A person described in Subsection (3) may bring a legal action against a party
241 with whom the person is in privity of contract, including a request for injunctive or declaratory
242 relief, to determine the adequacy of the funds of the owner, contractor, or subcontractor with
243 whom the demanding person contracted if, after the person demands adequate assurance in
244 accordance with the requirements of this section:

245 (i) the owner, contractor, or subcontractor fails to provide adequate assurance that the
246 owner, contractor, or subcontractor has sufficient available funds, or access to financing or
247 other sufficient available funds, to pay for the completion of the demanding person's approved
248 work on the construction project; or

249 (ii) the parties disagree, in good faith, as to whether there are adequate funds, or access
250 to financing or other sufficient available funds, to pay for the completion of the demanding
251 person's approved work on the construction project.

252 (b) If a court finds that an owner, contractor, or subcontractor has failed to provide
253 adequate assurance in accordance with Subsection (4)(a), the court may require the owner,
254 contractor, or subcontractor to post adequate security with the court sufficient to assure timely
255 payment of the remaining contract balance for the approved work of the person seeking
256 adequate assurance, including:

- 257 (i) cash;
- 258 (ii) a bond;
- 259 (iii) an irrevocable letter of credit;
- 260 (iv) property;
- 261 (v) financing; or
- 262 (vi) another form of security approved by the court.

263 (6) (a) A person is subject to the civil penalty described in Subsection (6)(b), if the
264 person files a balance statement described in Subsection (3) that misrepresents the amount due
265 under the contract with the intent to:

- 266 (i) charge an owner, contractor, or subcontractor more than the actual amount due; or
- 267 (ii) procure any other unfair advantage or benefit on the person's behalf.

268 (b) The civil penalty described in Subsection (6)(a) is the greater of:

- 269 (i) twice the amount by which the balance statement filed under Subsection (3) exceeds
270 the amount actually remaining due under the contract for completion of construction; and
- 271 (ii) the actual damages incurred by the owner, contractor, or subcontractor.

272 (7) A court shall award reasonable attorney fees to a prevailing party for an action
273 brought under this section.

274 (8) Failure to comply with the requirements established in this section does not affect
275 any other requirement or right under this chapter.

276 (9) A person who has not filed a preliminary notice as required under Section
277 [38-1a-501](#) is not entitled to a right or a remedy provided in this section.

278 (10) This section does not create a cause of action against a person with whom the
279 demanding party is not in privity of contract.

280 Section 4. Section **38-1a-603** is amended to read:

281 **38-1a-603. Notice of intent to finance.**

282 (1) An owner may file with the registry a notice of intent to finance.

283 (2) A notice of intent to finance under Subsection (1) shall state:

284 (a) the anticipated date on which financing will occur;

285 (b) the anticipated lender's name, address, and telephone number;

286 (c) the name of the trustor on the trust deed securing the ~~[anticipated loan]~~ financing;

287 (d) the tax parcel identification number of each parcel included in the project property;

288 and

289 (e) the name of the county in which the project property is located.

290 (3) If an owner chooses to file a notice of intent to finance, the owner shall file the
291 notice of intent to finance no less than 14 days before the date on which the financing is
292 anticipated to occur.

293 (4) If the financing does not occur within 30 days after the anticipated date specified in
294 the notice of intent to finance, the notice of intent to finance shall automatically have no effect
295 and shall be removed from the registry.

296 Section 5. Section **38-1a-604** is amended to read:

297 **38-1a-604. Notice of final lien waiver.**

298 (1) After a notice of intent to finance is filed under Section [38-1a-603](#) or a notice of
299 intent to finance construction is filed under Section [38-1a-605](#) on a project property, each
300 subcontractor that has filed a preliminary notice pertaining to the project property may file with
301 the registry a final lien waiver.

302 (2) The final lien waiver described in Subsection (1):

303 (a) may be filed on the registry even if no notice of intent to finance was filed on the
304 registry[-]; and

305 (b) may state that no amount is owed.

306 Section 6. Section **38-1a-605** is enacted to read:

307 **38-1a-605. Notice of intent to finance construction.**

308 (1) An owner may file with the registry a notice of intent to finance construction.

309 (2) A notice of intent to finance construction under Subsection (1) shall state:

310 (a) the anticipated date on which construction financing will occur;

311 (b) the anticipated lender's name, address, and telephone number;

312 (c) the name of the trustor on the trust deed securing the construction financing;

313 (d) the tax parcel identification number of each parcel included in the project property;

314 and

315 (e) the name of the county in which the project property is located.

316 Section 7. Section **38-1a-606** is enacted to read:

317 **38-1a-606. Notice of progress waiver.**

318 (1) After a notice of intent to finance construction is filed under Section [38-1a-605](#) or a
319 notice of intent to finance is filed under Section [38-1a-603](#) on a project property, a
320 subcontractor that files a preliminary notice pertaining to the project property may file with the
321 registry a progress waiver, if the subcontractor:

322 (a) is owed money under the original contract; or

323 (b) anticipates performing additional services under the original contract.

324 (2) A progress waiver described in Subsection (1) may state that no amount is currently
325 owed.

326 Section 8. Section **38-1a-805** is amended to read:

327 **38-1a-805. Failure to file notice -- Petition to nullify preconstruction or**
328 **construction lien -- Expedited proceeding.**

329 (1) An owner of an interest in a project property that is subject to a recorded
330 preconstruction lien or a recorded construction lien may petition the district court in the county
331 in which the project property is located for summary relief to nullify the preconstruction lien or
332 the construction lien if:

333 (a) the owner claims that the preconstruction lien or the construction lien is invalid
334 because:

335 (i) the lien claimant did not timely file a notice of preconstruction service under
336 Section [38-1a-401](#); or

337 (ii) the lien claimant did not timely file a preliminary notice under Section [38-1a-501](#);

338 (b) the owner sent the lien claimant a written request to withdraw in accordance with
339 Subsection (2); and

340 (c) the lien claimant did not withdraw the preconstruction lien or the construction lien
341 within 10 business days after the day on which the owner sent the written request to withdraw.

342 (2) A written request to withdraw described in Subsection (1) shall:

343 (a) be delivered by certified mail to the lien claimant at the lien claimant's address
344 provided in the recorded preconstruction lien or the recorded construction lien;

345 (b) state the owner's name, address, and telephone number;

346 (c) contain:

347 (i) (A) the name of the county in which the property that is subject to the
348 preconstruction lien or the construction lien is located; and

349 (B) the tax parcel identification number of each parcel that is subject to the
350 preconstruction lien or the construction lien; or

351 (ii) a legal description of the property that is subject to the preconstruction lien or the
352 construction lien;

353 (d) state that the lien claimant has failed to timely file:

354 (i) a notice of preconstruction service under Section 38-1a-401; or

355 (ii) a preliminary notice under Section 38-1a-501;

356 (e) request that the lien claimant withdraw the lien claimant's preconstruction lien or
357 construction lien within 10 business days after the day on which the written request to
358 withdraw is sent; and

359 (f) state that if the lien claimant does not withdraw the preconstruction lien or the
360 construction lien within 10 business days after the day on which the written request to
361 withdraw is sent, the owner may petition a court to nullify the lien in an expedited proceeding
362 under this section.

363 (3) A petition under Subsection (1) shall:

364 (a) state with specificity that:

365 (i) the lien claimant's preconstruction lien or the lien claimant's construction lien is
366 invalid because the lien claimant did not file a notice of preconstruction service or a
367 preliminary notice, as applicable;

368 (ii) the petitioner sent the lien claimant a written request to withdraw in accordance

369 with Subsection (2); and

370 (iii) the lien claimant did not withdraw the preconstruction lien or the construction lien
371 within 10 business days after the day on which the owner sent the written request to withdraw;

372 (b) be supported by a sworn affidavit of the petitioner; and

373 (c) be served on the lien claimant, in accordance with the Rules of Civil Procedure,
374 within three business days after the day on which the petitioner files the petition in the district
375 court.

376 (4) (a) If the court finds that a petition does not meet the requirements described in
377 Subsection (3), the court may dismiss the petition without a hearing.

378 (b) If the court finds that a petition meets the requirements described in Subsection (3),
379 the court shall schedule an expedited hearing to determine whether the preconstruction lien or
380 the construction lien is invalid because [~~the lien claimant failed to file a notice of~~
381 ~~preconstruction service or a preliminary notice;~~ the notice of preconstruction service or
382 preliminary notice is not filed within the time period described in Subsection 38-1a-401(1) or
383 38-1a-501(1)], as applicable.

384 (5) (a) If the court grants a hearing, within three business days after the day on which
385 the court schedules the hearing and at least seven business days before the day on which the
386 hearing is scheduled, the petitioner shall serve on the lien claimant, in accordance with the
387 Rules of Civil Procedure, a copy of the petition, notice of the hearing, and a copy of the court's
388 order granting the expedited hearing.

389 (b) The lien claimant may attend the hearing and contest the petition.

390 (6) An expedited proceeding under this section may only determine:

391 (a) whether the lien claimant filed a notice of preconstruction service or a preliminary
392 notice; and

393 (b) if the lien claimant failed to file a notice of preconstruction service or a preliminary
394 notice, whether the lien claimant's preconstruction lien or construction lien is valid.

395 (7) (a) If, following a hearing, the court determines that the preconstruction lien or the
396 construction lien is invalid, the court shall issue an order that:

397 (i) contains a legal description of the property;

398 (ii) declares the preconstruction lien or the construction lien void ab initio;

399 (iii) releases the property from the lien; and

- 400 (iv) awards costs and reasonable attorney fees to the petitioner.
- 401 (b) The petitioner may submit a copy of an order issued under Subsection (7)(a) to the
- 402 county recorder for recording.
- 403 (8) (a) If, following a hearing, the court determines that the preconstruction lien or the
- 404 construction lien is valid, the court shall:
- 405 (i) dismiss the petition; and
- 406 (ii) award costs and reasonable attorney fees to the lien claimant.
- 407 (b) The dismissal order shall contain a legal description of the property.
- 408 (c) The lien claimant may submit a copy of the dismissal order to the county recorder
- 409 for recording.
- 410 (9) If a petition under this section contains a claim for damages, the proceedings related
- 411 to the claim for damages may not be expedited under this section.