

**Senator Scott D. Sandall** proposes the following substitute bill:

**PRECONSTRUCTION AND CONSTRUCTION LIENS**

**AMENDMENTS**

2022 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Scott D. Sandall**

House Sponsor: \_\_\_\_\_

**LONG TITLE**

**General Description:**

This bill modifies provisions related to preconstruction and construction liens.

**Highlighted Provisions:**

This bill:

- ▶ modifies definitions related to preconstruction and constructions liens, including definitions of the terms "owner" and "project property"; and
- ▶ makes technical changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**38-1a-102**, as last amended by Laws of Utah 2019, Chapter 250

**38-1a-506**, as renumbered and amended by Laws of Utah 2012, Chapter 278

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



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

27 **38-1a-102. Definitions.**

28 As used in this chapter:

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

31 (2) "Anticipated improvement" means [~~the~~] an improvement:

32 (a) for which preconstruction service is performed; and

33 (b) that is anticipated to follow the performing of preconstruction service.

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

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

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

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

43 (a) time and expense, lump sum, stipulated sum, percentage of cost, cost plus fixed or  
44 percentage fee, or commission; or

45 (b) a combination of the bases listed in Subsection (6)(a).

46 (7) "Construction lender" means a person who makes a construction loan.

47 (8) "Construction lien" means a lien under this chapter for construction work.

48 (9) "Construction loan" does not include a consumer loan secured by the equity in [~~the~~]  
49 a consumer's home.

50 (10) "Construction project" means an improvement that is constructed pursuant to an  
51 original contract.

52 (11) "Construction work":

53 (a) means labor, service, material, or equipment provided for the purpose and during  
54 the process of constructing, altering, or repairing an improvement; and

55 (b) includes scheduling, estimating, staking, supervising, managing, materials testing,  
56 inspection, observation, and quality control or assurance involved in constructing, altering, or

57 repairing an improvement.

58 (12) "Contestable notice" means a notice of preconstruction service under Section  
59 38-1a-401, a preliminary notice under Section 38-1a-501, or a notice of completion under  
60 Section 38-1a-506.

61 (13) "Contesting person" means an owner, original contractor, subcontractor, or other  
62 interested person.

63 (14) "Designated agent" means the third party the division contracts with as provided  
64 in Section 38-1a-202 to create and maintain the registry.

65 (15) "Division" means the Division of Occupational and Professional Licensing created  
66 in Section 58-1-103.

67 (16) "Entry number" means the reference number that:

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

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

71 (17) "Final completion" means:

72 (a) the date of issuance of a permanent certificate of occupancy by the local  
73 government entity having jurisdiction over ~~the~~ a construction project, if a permanent  
74 certificate of occupancy is required;

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

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

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

87 (18) "Final lien waiver" means a form that complies with Subsection 38-1a-802(4)(c).

88 (19) "First preliminary notice filing" means a preliminary notice that:

89 (a) is the earliest preliminary notice filed on ~~[the]~~ a construction project for which the  
90 preliminary notice is filed;

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

93 (c) is not ~~[cancelled]~~ canceled under Section 38-1a-307.

94 (20) "Government project-identifying information" has the same meaning as defined in  
95 Section 38-1b-102.

96 (21) "Improvement" means:

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

99 (b) a repair, modification, or alteration of a building, infrastructure, utility, or object  
100 referred to in Subsection (21)(a).

101 (22) "Interested person" means a person that may be affected by a construction project.

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

104 (24) "Original contract":

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

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

108 (25) "Original contractor" means a person, including an owner-builder, that contracts  
109 with an owner to provide preconstruction service or construction work.

110 (26) "Owner" means ~~[the person that owns the project property]~~ a person that has an  
111 interest in a project property.

112 (27) "Owner-builder" means an owner, including an owner who is also an original  
113 contractor, who:

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

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

117 (28) "Preconstruction lien" means a lien under this chapter for a preconstruction  
118 service.

119 (29) "Preconstruction service":

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

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

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

125 (b) includes consulting, conducting a site investigation or assessment, programming,  
126 preconstruction cost or quantity estimating, preconstruction scheduling, performing a  
127 preconstruction construction feasibility review, procuring construction services, and preparing a  
128 a study, report, rendering, model, boundary or topographic survey, plat, map, design, plan,  
129 drawing, specification, or contract document.

130 (30) "Private project" means a construction project that is not a government project.

131 (31) "Project property" means the real property interest on or for which preconstruction  
132 service or construction work is or will be provided.

133 (32) "Registry" means the State Construction Registry under Part 2, State Construction  
134 Registry.

135 (33) "Required notice" means:

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

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

138 (c) a notice of commencement;

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

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

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

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

143 (34) "Subcontractor" means a person that contracts to provide preconstruction service  
144 or construction work to:

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

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

147 (35) "Substantial work" does not include repair work or warranty work.

148 (36) "Supervisory subcontractor" means a person that:

149 (a) is a subcontractor under contract to provide preconstruction service or construction

150 work; and

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

154 Section 2. Section **38-1a-506** is amended to read:

155 **38-1a-506. Notice of intent to obtain final completion.**

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

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

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

163 (c) the original contractor or owner has not obtained a payment bond in accordance  
164 with Section **14-2-1**.

165 (2) The notice of intent described in Subsection (1) shall be filed at least 45 days before  
166 the day on which the owner or original contractor of a commercial nonresidential construction  
167 project files or could have filed a notice of completion under Section **38-1a-507**.

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

171 (a) that includes:

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

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

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

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

179 (4) (a) A person described in Subsection (3) may demand a statement of adequate  
180 assurance from the owner, contractor, or subcontractor with whom the person has privity of

181 contract no later than 10 days after the day on which the person files a balance statement in  
182 accordance with Subsection (3) from an owner, contractor, or subcontractor who is in privity of  
183 contract with the person.

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

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

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

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

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

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

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

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

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

211 (i) cash;

- 212 (ii) a bond;
- 213 (iii) an irrevocable letter of credit;
- 214 (iv) property;
- 215 (v) financing; or
- 216 (vi) another form of security approved by the court.
- 217 (6) (a) A person is subject to the civil penalty described in Subsection (6)(b), if the
- 218 person files a balance statement described in Subsection (3) that misrepresents the amount due
- 219 under the contract with the intent to:
  - 220 (i) charge an owner, contractor, or subcontractor more than the actual amount due; or
  - 221 (ii) procure any other unfair advantage or benefit on the person's behalf.
- 222 (b) The civil penalty described in Subsection (6)(a) is the greater of:
  - 223 (i) twice the amount by which the balance statement filed under Subsection (3) exceeds
  - 224 the amount actually remaining due under the contract for completion of construction; and
  - 225 (ii) the actual damages incurred by the owner, contractor, or subcontractor.
- 226 (7) A court shall award reasonable attorney fees to a prevailing party for an action
- 227 brought under this section.
- 228 (8) Failure to comply with the requirements established in this section does not affect
- 229 any other requirement or right under this chapter.
- 230 (9) A person who has not filed a preliminary notice as required under Section
- 231 [38-1a-501](#) is not entitled to a right or a remedy provided in this section.
- 232 (10) This section does not create a cause of action against a person with whom the
- 233 demanding party is not in privity of contract.