

Senator Daniel McCay proposes the following substitute bill:

PRECONSTRUCTION AND CONSTRUCTION LIENS

AMENDMENTS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Scott D. Sandall

House Sponsor: Steve Eliason

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";
- ▶ modifies and clarifies when preconstruction and construction liens attach to certain property interests; 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-301, as renumbered and amended by Laws of Utah 2012, Chapter 278



26 **38-1a-506**, as renumbered and amended by Laws of Utah 2012, Chapter 278

27

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

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

30 **38-1a-102. Definitions.**

31 As used in this chapter:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 (11) "Construction work":

56 (a) means labor, service, material, or equipment provided for the purpose and during

57 the process of constructing, altering, or repairing an improvement; and

58 (b) includes scheduling, estimating, staking, supervising, managing, materials testing,
59 inspection, observation, and quality control or assurance involved in constructing, altering, or
60 repairing an improvement.

61 (12) "Contestable notice" means a notice of preconstruction service under Section
62 38-1a-401, a preliminary notice under Section 38-1a-501, or a notice of completion under
63 Section 38-1a-506.

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

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

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

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

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

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

74 (17) "Final completion" means:

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

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

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

86 (d) the last date on which substantial work was performed under the original contract,
87 if, because the original contract is terminated before completion of the construction work

88 defined by the original contract, the local government entity having jurisdiction over ~~the~~ a
89 construction project does not issue a certificate of occupancy or perform a final inspection.

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

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

92 (a) is the earliest preliminary notice filed on ~~the~~ a construction project for which the
93 preliminary notice is filed;

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

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

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

99 (21) "Improvement" means:

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

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

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

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

107 (24) "Original contract":

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

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

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

113 (26) "Owner" means ~~the person that owns the project property~~ a person who
114 possesses an interest in a project property and contracts with an original contractor for
115 preconstruction service or construction work.

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

118 (a) contracts with one or more other persons for preconstruction service or construction

119 work for an improvement on the owner's real property; and

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

121 (28) "Preconstruction lien" means a lien under this chapter for a preconstruction
122 service.

123 (29) "Preconstruction service":

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

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

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

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

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

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

137 (32) "Registry" means the State Construction Registry under Part 2, State Construction
138 Registry.

139 (33) "Required notice" means:

140 (a) a notice of preconstruction service under Section [38-1a-401](#);

141 (b) a preliminary notice under Section [38-1a-501](#) or Section [38-1b-202](#);

142 (c) a notice of commencement;

143 (d) a notice of construction loan under Section [38-1a-601](#);

144 (e) a notice under Section [38-1a-602](#) concerning a construction loan default;

145 (f) a notice of intent to obtain final completion under Section [38-1a-506](#); or

146 (g) a notice of completion under Section [38-1a-507](#).

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

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

- 150 (b) the owner, if the owner is an owner-builder.
- 151 (35) "Substantial work" does not include repair work or warranty work.
- 152 (36) "Supervisory subcontractor" means a person that:
- 153 (a) is a subcontractor under contract to provide preconstruction service or construction
- 154 work; and
- 155 (b) contracts with one or more other subcontractors for the other subcontractor or
- 156 subcontractors to provide preconstruction service or construction work that the person is under
- 157 contract to provide.

158 Section 2. Section **38-1a-301** is amended to read:

159 **38-1a-301. Those entitled to lien -- What may be attached.**

160 (1) Except as provided in Section **38-11-107**, a person who provides preconstruction

161 service or construction work on or for a project property has a lien on the project property for

162 the reasonable value of the preconstruction service or construction work, respectively, as

163 provided in this chapter.

164 (2) A person may claim a preconstruction lien and a separate construction lien on the

165 same project property.

166 (3) (a) A construction lien may include an amount claimed for a preconstruction

167 service.

168 (b) A preconstruction lien may not include an amount claimed for construction work.

169 (4) (a) A preconstruction or construction lien attaches only to the interest that the

170 owner has in the project property that is the subject of the lien.

171 (b) If an owner possesses an interest in the project property that is less than fee simple,

172 a preconstruction or construction lien attaches only to the lesser interest of the owner and does

173 not attach to the fee simple interest.

174 (c) Notwithstanding Subsection (4)(b), a preconstruction or construction lien may

175 attach to the lesser interest of an owner who possesses an interest in the project property that is

176 less than fee simple and to the fee simple interest of the person who owns the fee simple

177 interest in the project property, if the person who provides preconstruction service or

178 construction work can demonstrate that the improvement underlying the preconstruction or

179 construction lien:

180 (i) was performed at the written instance of the person possessing the fee simple

181 interest in the project property; and

182 (ii) provides a substantial benefit to the person who owns the fee simple interest
183 beyond the time period of the lesser interest possessed by the owner.

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

185 **38-1a-506. Notice of intent to obtain final completion.**

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

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

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

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

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

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

201 (a) that includes:

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

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

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

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

209 (4) (a) A person described in Subsection (3) may demand a statement of adequate
210 assurance from the owner, original contractor, or subcontractor with whom the person has
211 privity of contract no later than 10 days after the day on which the person files a balance

212 statement in accordance with Subsection (3) from an owner, original contractor, or
213 subcontractor who is in privity of contract with the person.

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

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

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

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

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

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

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

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

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

241 (i) cash;

242 (ii) a bond;

243 (iii) an irrevocable letter of credit;

244 (iv) property;

245 (v) financing; or

246 (vi) another form of security approved by the court.

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

250 (i) charge an owner, original contractor, or subcontractor more than the actual amount
251 due; or

252 (ii) procure any other unfair advantage or benefit on the person's behalf.

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

254 (i) twice the amount by which the balance statement filed under Subsection (3) exceeds
255 the amount actually remaining due under the contract for completion of construction; and

256 (ii) the actual damages incurred by the owner, original contractor, or subcontractor.

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

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

261 (9) A person who has not filed a preliminary notice as required under Section
262 [38-1a-501](#) is not entitled to a right or a remedy provided in this section.

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