

1 **PRECONSTRUCTION AND CONSTRUCTION LIENS**

2 **AMENDMENTS**

3 2013 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Scott K. Jenkins**

6 House Sponsor: Brad R. Wilson

8 **LONG TITLE**

9 **General Description:**

10 This bill amends Title 38, Chapter 1a, Preconstruction and Construction Liens.

11 **Highlighted Provisions:**

12 This bill:

13 ▶ changes the name of a notice of retention described in Section 38-1a-401 to a notice
14 of preconstruction service;

15 ▶ provides that all preconstruction liens on a project property are on equal footing;
16 and

17 ▶ makes technical changes.

18 **Money Appropriated in this Bill:**

19 None

20 **Other Special Clauses:**

21 None

22 **Utah Code Sections Affected:**

23 AMENDS:

24 **38-1a-102**, as renumbered and amended by Laws of Utah 2012, Chapter 278

25 **38-1a-204**, as enacted by Laws of Utah 2012, Chapter 278

26 **38-1a-306**, as enacted by Laws of Utah 2012, Chapter 278

27 **38-1a-401**, as renumbered and amended by Laws of Utah 2012, Chapter 278

28 **38-1a-402**, as renumbered and amended by Laws of Utah 2012, Chapter 278

29 **38-1a-403**, as renumbered and amended by Laws of Utah 2012, Chapter 278

30 ENACTS:

31 **38-1a-405**, Utah Code Annotated 1953

32

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

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

35 **38-1a-102. Definitions.**

36 As used in this chapter:

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

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

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

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

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

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

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

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

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

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

54 (7) "Construction lien" means a lien under this chapter for construction work.

55 (8) "Construction loan" does not include a consumer loan secured by the equity in the
56 consumer's home.

57 (9) "Construction project" means construction work provided under an original

58 contract.

59 (10) "Construction work":

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

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

65 (11) "Contestable notice" means a notice of [~~retention~~] preconstruction service under
66 Section 38-1a-401, a preliminary notice under Section 38-1a-501, or a notice of completion
67 under Section 38-1a-506.

68 (12) "Contesting person" means an owner, original contractor, subcontractor, or other
69 interested person.

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

72 (14) "Division" means the Division of Occupational and Professional Licensing created
73 in Section 58-1-103.

74 (15) "Entry number" means the reference number that:

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

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

78 (16) "Final completion" means:

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

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

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

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

94 (17) "First preliminary notice filing" means the filing of a preliminary notice that is:

95 (a) the earliest preliminary notice filed on a construction project;

96 (b) filed on or after August 1, 2011;

97 (c) not filed on a project that, according to the law in effect before August 1, 2011,
98 commenced before August 1, 2011;

99 (d) not canceled under Section 38-1a-307; and

100 (e) not withdrawn under Subsection 38-1a-501(5).

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

103 (19) "Improvement" means:

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

106 (b) a repair, modification, or alteration of a building, infrastructure, utility, or object
107 referred to in Subsection (19)(a).

108 (20) "Interested person" means a person [~~who~~] that may be affected by a construction
109 project.

110 (21) "Notice of commencement" means a notice required under Section 38-1b-201 for
111 a government project, as defined in Section 38-1b-102.

112 (22) "Original contract":

113 (a) means a contract between an owner and an original contractor for preconstruction

114 service or construction work; and

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

116 (23) "Original contractor" means a person [~~who~~] that contracts with an owner, other
117 than an owner-builder, to provide preconstruction service or construction work.

118 (24) "Owner" means the person [~~who~~] that owns the project property.

119 (25) "Owner-builder" means an owner who:

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

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

123 (26) "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 (27) "Preconstruction lien" means a lien under this chapter for a preconstruction
135 service.

136 (28) "Prelender claimant" means a person whose construction lien is made subject to a
137 construction lender's mortgage or trust deed, as provided in Section 38-1a-503, by the person's
138 acceptance of payment in full and the person's withdrawal of the person's preliminary notice.

139 (29) "Private project" means a construction project that is not a government project.

140 (30) "Project property" means the real property on or for which preconstruction service
141 or construction work is or will be provided.

142 (31) "Refiled preliminary notice" means a preliminary notice that a preponder claimant
143 files with the registry on a construction project after withdrawing a preliminary notice that the
144 claimant previously filed for the same project.

145 (32) "Registry" means the State Construction Registry under Part 2, State Construction
146 Registry.

147 (33) "Required notice" means:

148 (a) a notice of [~~retention~~] preconstruction service under Section 38-1a-401;

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

150 (c) a notice of commencement;

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

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

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

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

155 (34) "Subcontractor" means a person [~~who~~] that contracts to provide preconstruction
156 service or construction work to:

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

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

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

160 (36) "Supervisory subcontractor" means a person [~~who~~] that:

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

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

166 Section 2. Section **38-1a-204** is amended to read:

167 **38-1a-204. Notification of filings with the registry.**

168 (1) The designated agent shall provide notification of the filing of a required notice
169 relating to an anticipated improvement or construction project to:

170 (a) the person filing the required notice, unless the person indicates to the division or
171 designated agent that the person does not want to receive notification; and

172 (b) each person [~~who~~] that requests notification of the filing of a required notice for
173 that anticipated improvement or construction project.

174 (2) (a) A person may request the designated agent to provide the person notification of
175 the filing of a required notice for any anticipated improvement or construction project.

176 (b) A person requesting notification under Subsection (2)(a) is responsible:

177 (i) to provide an email address, mailing address, or telefax number to which
178 notification may be sent; and

179 (ii) for the accuracy of the email address, mailing address, or telefax number.

180 (c) A person is considered to have requested notification under Subsection (2)(a) if the
181 person files, with respect to the same anticipated improvement or construction project that
182 relates to the required notice that is the subject of the notification:

183 (i) a notice of [~~retention~~] preconstruction service;

184 (ii) a notice of commencement;

185 (iii) a preliminary notice;

186 (iv) a notice of construction loan; or

187 (v) a notice of completion.

188 (3) The designated agent fulfills the notification requirement under Subsection (1) by
189 sending the notification to the email address, mailing address, or telefax number that the person
190 provides to the designated agent, whether or not the person actually receives the notification.

191 Section 3. Section **38-1a-306** is amended to read:

192 **38-1a-306. Substantial compliance.**

193 (1) Substantial compliance with the requirements of this chapter is sufficient to claim,
194 as applicable, a preconstruction lien or a construction lien.

195 (2) Subsection (1) may not be construed to excuse compliance with or affect the
196 requirement to file:

197 (a) a notice of [~~retention~~] preconstruction service as provided in Section 38-1a-401 in

198 order to claim a preconstruction lien; or

199 (b) a preliminary notice as provided in Section 38-1a-501 in order to claim a
200 construction lien.

201 Section 4. Section **38-1a-401** is amended to read:

202 **38-1a-401. Notice of preconstruction service.**

203 (1) (a) A person [~~who~~] that desires to claim a preconstruction lien on real property shall
204 file a notice of [~~retention~~] preconstruction service with the registry no later than 20 days after
205 the person commences providing preconstruction service for the anticipated improvement on
206 the real property.

207 (b) A person [~~who~~] that fails to file a timely notice of [~~retention~~] preconstruction
208 service as required in this section may not claim a valid preconstruction lien.

209 (c) A timely filed notice of [~~retention~~] preconstruction service is effective as to each
210 preconstruction service that the person filing the notice provides for the anticipated
211 improvement under a single original contract, including preconstruction service that the person
212 provides to more than one supervising subcontractor under that original contract.

213 (d) A notice of [~~retention~~] preconstruction service filed for preconstruction service
214 provided or to be provided under an original contract for an anticipated improvement on real
215 property is not valid for preconstruction service provided or to be provided under a separate
216 original contract for an anticipated improvement on the same real property.

217 (e) A notice of [~~retention~~] preconstruction service that is timely filed with the database
218 with respect to an anticipated improvement is considered to have been filed at the same time as
219 the earliest timely filed notice of [~~retention~~] preconstruction service for that anticipated
220 improvement.

221 (f) A notice of [~~retention~~] preconstruction service shall include:

222 (i) the name, address, telephone number, and email address of the person providing the
223 preconstruction service;

224 (ii) the name, address, telephone number, and email address of the person [~~who~~] that
225 employed the person providing the preconstruction service;

226 (iii) a general description of the preconstruction service the person provided or will
227 provide;

228 (iv) the name of the record or reputed owner;

229 (v) the name of the county in which the property on which the anticipated improvement
230 will occur is located;

231 (vi) (A) the tax parcel identification number of each parcel included in that property; or

232 (B) the entry number of a previously filed notice of ~~[retention]~~ preconstruction service
233 that includes the tax parcel identification number of each parcel included in that property; and

234 (vii) a statement that the person filing the notice intends to claim a preconstruction lien
235 if the person is not paid for the preconstruction service the person provides.

236 (g) (i) A claimant who is an original contractor or a supervisory subcontractor may
237 include in a notice of ~~[retention]~~ preconstruction service the name, address, and telephone
238 number of each subcontractor who is under contract with the claimant to provide
239 preconstruction service that the claimant is under contract to provide.

240 (ii) The inclusion of a subcontractor in a notice of ~~[retention]~~ preconstruction service
241 filed by another claimant is not a substitute for the subcontractor's own submission of a notice
242 of ~~[retention]~~ preconstruction service.

243 (2) The burden is on the person filing the notice of ~~[retention]~~ preconstruction service
244 to prove that the person has substantially complied with the requirements of this section.

245 (3) (a) Subject to Subsection (3)(b), a person required by this section to file a notice of
246 ~~[retention]~~ preconstruction service is required to give only one notice for each anticipated
247 improvement.

248 (b) A person ~~[who]~~ that provides preconstruction service under more than one original
249 contract for the same anticipated improvement and desires to claim a preconstruction lien for
250 preconstruction service provided under each original contract shall file a separate notice of
251 ~~[retention]~~ preconstruction service for preconstruction service provided under each original
252 contract.

253 (4) A person filing a notice of ~~[retention]~~ preconstruction service by alternate means is

254 responsible for verifying and changing any incorrect information in the notice of [retention]
255 preconstruction service before the expiration of the period during which the notice is required
256 to be filed.

257 Section 5. Section **38-1a-402** is amended to read:

258 **38-1a-402. Notice of preconstruction lien -- Requirements.**

259 (1) Within 90 days after completing a preconstruction service for which a claimant is
260 not paid in full, a claimant who desires to claim a preconstruction lien shall submit for
261 recording with each applicable county recorder a notice of preconstruction lien.

262 (2) A claimant who fails to submit a notice of preconstruction lien as provided in
263 Subsection (1) may not claim a preconstruction lien.

264 (3) (a) A notice of preconstruction service lien shall include:

265 (i) the claimant's name, mailing address, and telephone number;

266 (ii) a statement that the claimant claims a preconstruction lien;

267 (iii) the date the claimant's notice of [retention] preconstruction service was filed;

268 (iv) the name of the person [who] that employed the claimant;

269 (v) a general description of the preconstruction service provided by the claimant;

270 (vi) the date that the claimant last provided preconstruction service;

271 (vii) the name, if known, of the reputed owner or, if not known, the name of the record
272 owner;

273 (viii) a description of the project property sufficient for identification;

274 (ix) the principal amount, excluding interest, costs, and attorney fees, claimed by the
275 claimant;

276 (x) the claimant's signature or the signature of the claimant's authorized agent;

277 (xi) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording
278 of Documents; and

279 (xii) if the lien is against an owner-occupied residence, as defined in Section
280 38-11-102, a statement meeting the requirements that the division has established by rule,
281 describing the steps the owner of the owner-occupied residence may take to require a claimant

282 to remove the lien as provided in Section 38-11-107.

283 (b) (i) A claimant who is an original contractor or a supervising subcontractor may
284 include in a notice of preconstruction lien the name, address, and telephone number of each
285 subcontractor who is under contract with the claimant to provide preconstruction service that
286 the claimant is under contract to provide.

287 (ii) The inclusion of a subcontractor in a notice of preconstruction lien filed by another
288 claimant is not a substitute for the subcontractor's own submission of a notice of
289 preconstruction lien.

290 (4) (a) A county recorder:

291 (i) shall record each notice of preconstruction lien in an index maintained for that
292 purpose; and

293 (ii) need not verify that a valid notice of [~~retention~~] preconstruction service is filed
294 with respect to the claimed preconstruction lien.

295 (b) All persons are considered to have notice of a notice of preconstruction lien from
296 the time it is recorded.

297 (5) (a) Within 30 days after a claimant's notice of preconstruction lien is recorded, the
298 claimant shall send by certified mail a copy of the notice to the reputed or record owner.

299 (b) If the record owner's address is not readily available to the claimant, the claimant
300 may mail a copy of the notice to the owner's last-known address as it appears on the last
301 completed assessment roll of the county in which the property is located.

302 (c) A claimant's failure to mail a copy of the notice as required in this Subsection (5)
303 precludes the claimant from being awarded costs and attorney fees against the reputed or record
304 owner in an action to enforce the lien.

305 (6) Nothing in this section may be construed to prohibit a claimant from recording a
306 notice of preconstruction lien before completing the preconstruction service the claimant
307 contracted to provide.

308 Section 6. Section **38-1a-403** is amended to read:

309 **38-1a-403. Effective time and priority of preconstruction lien -- Subordination to**

310 **bona fide loan.**

311 (1) Except as otherwise provided in this chapter, a preconstruction lien:

312 (a) relates back to and takes effect as of the time of filing of the earliest timely filed
313 notice of [~~retention~~] preconstruction service under Section 38-1a-401 for the anticipated
314 improvement for which the preconstruction lien is claimed; and

315 (b) has priority over:

316 (i) any lien, mortgage, or other encumbrance that attaches after the earliest timely filed
317 notice of [~~retention~~] preconstruction service is filed; and

318 (ii) any lien, mortgage, or other encumbrance of which the claimant had no notice and
319 that was unrecorded at the time the earliest timely filed notice of [~~retention~~] preconstruction
320 service is filed.

321 (2) A preconstruction lien is subordinate to an interest securing a bona fide loan if and
322 to the extent that the lien covers preconstruction service provided after the interest securing a
323 bona fide loan is recorded.

324 Section 7. Section **38-1a-405** is enacted to read:

325 **38-1a-405. Preconstruction liens on equal footing.**

326 (1) Each preconstruction lien on a project property is on equal footing with every other
327 preconstruction lien on the project property, regardless of:

328 (a) when the claimant submitted the claimant's notice of preconstruction service for
329 recording;

330 (b) when the claimant submitted the claimant's notice of preconstruction lien for
331 recording; or

332 (c) when the preconstruction service related to the lien occurs.

333 (2) Subsection (1) does not affect the priority of a construction lender's mortgage or
334 trust deed, as established under this chapter.