

UTAH PRECONSTRUCTION AND CONSTRUCTION LIEN LAW

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The law governing liens for improvements to real property is found within the Utah Code of Laws, Title 38, Chapter 1a. The state statutes and court opinions establish a strict procedure to perfect and foreclose a lien. It is strongly recommended that a professional be routinely used to record and foreclose on construction liens.

Who is Entitled to a Lien?

The state statutes give lien rights to any person providing labor or performing services or furnishing or renting any materials or equipment used in the construction, alteration, improvement of any building or structure. This includes scheduling, estimating, staking, supervising, managing, materials testing, inspection, observation, and quality control or assurance involved in constructing, altering, or repairing an improvement.

Preconstruction services are defined as means to plan or design, or to assist in the planning or design of, an improvement or a proposed improvement including consulting, conducting a site investigation or assessment, programming, preconstruction cost or quantity estimating, preconstruction scheduling, performing a preconstruction construction feasibility review, procuring construction services, and preparing a study, report, rendering, model, boundary or topographic survey, plat, map, design, plan, drawing, specification, or contract document.

The lien claimant is the person who supplied material, equipment, or labor, did not get paid, and is now claiming a lien.

A lien may apply to preconstruction or construction services. The lien claimant should file a preconstruction service lien or construction service lien accordingly.

Property Subject to Lien: A lien may attach to the property where the building, structure, or improvement is located unless it is covered by the Residence Lien Restriction and Lien Recovery Fund

What is a Lien?

Contractors' and material suppliers' liens "cloud" the title to real property but can be an effective method (and sometimes the only method) for securing payment for labor or materials used in the improvement of real property. The lien stops the owner from selling the property with a clear title. The lien may be foreclosed in a lawsuit. The court can order that property be sold and the proceeds used to pay the contractor, subcontractor, laborer, or material supplier.



Act (§38-11-107). For the purposes of assigning property subject to lien, if the building, structure, or improvement occupies two or more lots or subdivisions of land, it is considered as one. Public property is not subject to lien law.

State Construction Registry Program

The State Construction Registry Program serves as a centralized repository for notices of commencement, preliminary notices, and notices of completion for any private and public construction project filings in Utah. The State Construction Registry can accept filings through internet submissions, mail, and fax. A database is maintained with the relevant information from these filings.

Notice of Retention

Within 20 days after commencing preconstruction services, a person performing these services must file a Notice of Retention in order to preserve lien rights.

Notice of Commencement

Within 15 days after a building permit is issued or within 15 days after work commences on the property, the original contractor or owner may file a Notice of Commencement with the State Construction Registry. If duplicate notices are filed by the original contractor and owner, the notices are combined.

Required Information: The Notice of Commencement must include the following information:

- ✓ Name and address of the project owner;
- ✓ Name and address of the original contractor;
- ✓ Name and address of the surety providing any payment bond for the project, or if none exists, a statement that a payment bond was not required for the work being performed;
- ✓ Name and address of the project; and
- ✓ Legal description of the property where the project is located.

Optional information in the Notice of Commencement may include:

- ✓ General description of the project
- ✓ Lot or parcel number, and any subdivision, development, or other project name

If the information in the Notice of Commencement is inaccurate or not filed in a timely manner, it will be deemed unenforceable.

Government Projects: No later than 15 days after commencement of physical construction work at a government project site, the original contractor, owner, or owner-builder shall file a notice of commencement.

Preliminary Notice

In order to preserve lien rights, any person providing construction services must file a preliminary notice with the State Construction Registry within 20 days after first providing labor, service, equipment, and material to a construction project.

Required Information: The preliminary notice must contain the following information:

- ✓ Building permit number for the project, or the number assigned to the project by the designated agent;
- ✓ Name, address, and telephone number of the potential lien claimant;
- ✓ Name and address of the person who contracted for labor, services, equipment, or materials
- ✓ Name of project owner
- ✓ Name of original contractor who contracted with the potential lien claimant; and
- ✓ Address of the construction project.

If the preliminary notice is not filed in a timely manner, it becomes valid five days after the late filing.

Government Projects: On government projects, all contractors except the person who has a contract with an owner or an owner-builder or a laborer compensated with wages shall file a preliminary notice with the State Construction Registry. The preliminary notice must be given

- ✓ within 20 days after first providing labor, service, equipment, and material to a construction project; or
- ✓ within 20 days after the filing of a Notice of Commencement.

Notice to Subcontractor

Within 14 days of a request from a subcontractor, the original contractor must provide a notice informing the subcontractor of all the preliminary notices received for the construction project.

Notice of Completion

Upon completion of a project, a Notice of Completion may be filed by

- ✓ an owner of a construction project;
- ✓ an original contractor;
- ✓ a lender that has provided financing for the construction project;
- ✓ a surety that has provided bonding for the construction project; or
- ✓ a title company issuing a title insurance policy on the construction project.

Required Information: The contents of the Notice of Completion must include:

- ✓ Building permit number or number assigned to the project by the designated agent;
- ✓ Name, address, and telephone number of the person filing the notice of completion;

- ✓ Name of the original contractor
- ✓ Address of the project or a description of the location of the project;
- ✓ Date on which final completion is alleged to have occurred; and
- ✓ Method used to determine final completion.

Notification: Once the Notice of Completion is filed, electronic notification is sent out to those who filed notice of commencement for the project, filed preliminary notice for the project, and all interested persons who have requested notices concerning the project.

Conditional Waiver and Release

The claimant may complete a Conditional Waiver and Release form to release any liens prior to final payment for the labor and/or materials provided. The following form must be completed in its entirety for the Interim Waiver and Release to be valid.

UTAH CONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name: _____

Property Location: _____

Undersigned's Customer: _____

Invoice/Payment Application Number: _____

Payment Amount: _____

Payment Period: _____

To the extent provided below, this document becomes effective to release and the undersigned is considered to waive any notice of lien or right under Utah Code Ann., Title 38, Chapter 1a, Preconstruction and Construction Liens, or any bond right under Utah Code Ann., Title 14, Contractors' Bonds, or Section 63G-6-505 related to payment rights the undersigned has on the above described Property once:

- (1) the undersigned endorses a check in the above referenced Payment Amount payable to the undersigned; and
- (2) the check is paid by the depository institution on which it is drawn.

This waiver and release applies to a progress payment for the work, materials, equipment, or a combination of work, materials, and equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount.

This waiver and release does not apply to any retention withheld; any items, modifications, or changes pending approval; disputed items and claims; or items furnished or invoiced after the Payment Period.

The undersigned warrants that the undersigned either has already paid or will use the money the undersigned receives from this progress payment promptly to pay in full all the undersigned's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or combination of work, materials, and equipment that are the subject of this waiver and release.

Dated: _____

_____(Company Name)

By: _____

_____. Its: _____

Waiver and Release Upon Final Payment

The Waiver and Release Upon Final Payment must follow the Interim Waiver and Release after final payment is received. The following form serves as an Unconditional Waiver and Release.

UTAH WAIVER AND RELEASE UPON FINAL PAYMENT

Property Name: _____

Property Location: _____

Undersigned's Customer: _____

Invoice/Payment Application Number: _____

Payment Amount: _____

To the extent provided below, this document becomes effective to release and the undersigned is considered to waive any notice of lien or right under Utah Code Ann., Title 38, Chapter 1a, Preconstruction and Construction Liens, or any bond right under Utah Code Ann., Title 14, Contractors' Bonds, or Section **63G-6-505** related to payment rights the undersigned has on the above described Property once:

- (1) the undersigned endorses a check in the above referenced Payment Amount payable to the undersigned; and
- (2) the check is paid by the depository institution on which it is drawn.

This waiver and release applies to the final payment for the work, materials, equipment, or combination of work, materials, and equipment furnished by the undersigned to the Property or to the Undersigned's Customer.

The undersigned warrants that the undersigned either has already paid or will use the money the undersigned receives from the final payment promptly to pay in full all the undersigned's laborers, subcontractors, materialmen, and suppliers for all work, materials, equipment, or combination of work, materials, and equipment that are the subject of this waiver and release.

Dated: _____

_____(Company Name)

By: _____

Its: _____

Filing a Claim of Lien

Time Limitations: A preconstruction service lien must be filed 90 days after completion of the preconstruction service (See U.C.A. §§ 38-1a-402).

The notice to hold and claim a construction services lien must be filed within 180 days after the day of final completion of the original contract if no notice of completion is filed; or 90 days after the notice of completion is filed. (See U.C.A. §§ 38-1a-502).

A general contractor is required to furnish the owner of a project a payment bond to ensure all of the subcontractors are paid if the project is a commercial contract exceeding \$50,000. Ninety days after a person supplies labor, services, equipment, or material for the

commercial contract, that person can file a claim against the bond if they have not been paid in full.

This action must be commenced within 1 year of the last day on which the person supplied labor, services, equipment, or material. (See U.C.A. § 14-2-1).

*If there is no payment bond, the right of action is against the owner of the project and not against the bond; this does not affect the time limits.

Required Information: The notice of lien claim must contain the following information in order to be valid:

- ✓ Name of the property owner
- ✓ Name of the person by whom the lien claimant is employed or to whom the lien claimant furnished the equipment or material

- ✓ Time when the first and last labor was performed or materials or equipment was furnished
- ✓ Description of property
- ✓ Name, current address, and current phone number of lien claimant
- ✓ Amount of the lien claim
- ✓ Signature of lien claimant or the lien claimant's authorized agent.

The notice of lien claim must be notarized and properly recorded with the county where the property is located. If the lien is on an owner-occupied residence, the notice of lien claim must contain a statement describing the steps the owner must take to remove the lien as described in §38-1a-701(4).

Notification to Owner: After filing a notice of lien claim, the property owner must receive a copy of the claim of lien within 30 days after filing by registered or certified mail or delivery.

Time Limitation for Liens

In general, a lien claimant shall file an action to enforce the lien within 180 days of filing a written notice to hold and claim a lien under U.C.A. § 38-1a-701.

Priority

Liens against the same property are paid out in the following order:

- ✓ Subcontractors who are laborers or mechanics working by the day or piece that have not furnished materials
- ✓ All other subcontractors and all materialmen
- ✓ Original contractors

Preconstruction service liens relate back and take effect as of the time the Notice of Retention was filed. Construction service liens relate back and take effect as of the time the First Preliminary Notice was filed. Unless a previous agreement is made, a payment to a person claiming or included within a preconstruction service lien and a construction service lien shall be applied first to the preconstruction service lien until paid in full.

Mechanics' and materialmen's liens take priority over any lien, mortgage, or other encumbrances that attach after work commences or materials are delivered, as well as any other encumbrance of which the lien holder had no notice and which was unrecorded.

Monetary Awards

Monetary Redemption: After lien foreclosure and sale of the property, liens and mortgages are subject to the same right of monetary redemption. If the amount after the sale is not sufficient to cover the whole amount of the liens, payment is made in the order of priority as designated in the previous section. Once the amount becomes insufficient to pay a class of lienors, amounts are awarded on a pro rata basis.

Attorneys' Fees: Lienors are entitled to recover reasonable attorneys' fees for the preparation and recording of the notice of lien claim.

Bonding Around a Lien

Filing a Bond: If the owner of the property or any original contractor or subcontractor wants to contest the lien, a bond may be filed with the county recorder where the lien is filed.

The bond must be with an approved surety or cash deposit in the amount of:

- ✓ 150% of the amount claimed by the lien claimant, if the amount claimed is \$25,000 or more;
- ✓ 175% of the amount claimed by the lien claimant, if the amount claimed is at least \$15,000 but less than \$25,000; or
- ✓ 200% of the amount claimed by the lien claimant, if the amount claimed is less than \$15,000.

Notification of Bond Filing: If a bond or cash deposit is filed, the lien claimant must be notified within thirty days of filing.

Sufficiency of the Bond: The lien claimant may question the sufficiency of the bond or cash deposit within 90 days of notice. If the lien claimant does not question the sufficiency, the lien is released. If the bond is determined not to be sufficient, the lien is reinstated.

Abuse of Lien Rights

Wrongful lien claims are those claims that contain a greater demand than the sum due

- ✓ with the intention to cloud the title
- ✓ to obtain a greater monetary award than is due; or
- ✓ to gain any unjustified advantage or benefit.

Penalties: Any person who wrongfully files a claim of lien against any property is subject to penalties.

Those who file a wrongful claim may be found guilty of a Class B misdemeanor and have to pay twice the amount by which the wrongful lien exceeds the amount actually due plus damages, or the actual damages incurred by the property owner, whichever is greater.

Lien Recovery Fund

Residence Lien Restriction: In 1994, the Utah Legislature addressed a problem with liens against homeowners. General contractors would not pay their subcontractors and vendors even though the homeowner had paid the general contractor. As a result, the subcontractors and vendors would file mechanics' liens against the homeowner. This meant that the homeowner had to pay for the work twice. To address this problem the Residence Lien Restriction and Lien Recovery Fund Act was passed.

A person who is qualified to file a lien on an owner-occupied residence is barred from filing that lien if:

- ✓ the homeowner enters into a written contract with a licensed contractor, a contractor exempt from licensure, a factory built housing retailer, or a real estate developer for construction on or the purchase of a single family or duplex residence;
- ✓ the homeowner has paid the original contractor, factory built housing retailer, or real estate developer in full; and
- ✓ the homeowner occupies the residence within 180 days of the completion of construction.

Residence Lien Recovery Fund: In order to protect the subcontractor, Utah has established the Residence Lien Recovery Fund. This fund is an alternative payment source for contractors, laborers, or suppliers whose liens are voided because of the Residence Lien Restriction Act.

All contractors are required to join the fund. Any other person or company who provides qualified services (goods and services for residential construction) may join the fund through the Utah Department of Occupational and Professional Licensing: www.dopl.utah.gov/programs/rlrf/index.html.

*Department of Occupational and Professional Licensing
Lien Recovery Fund*

PO Box 146741

Salt Lake City, Utah 84114-6741

Phone: (801) 530-6104

Toll-free in Utah: (866) 275-3675

Fax: (801) 530-6511

Filing a Claim: Filing a claim with the fund is similar to filing a lien foreclosure action. The following steps must be taken:

- ✓ File a civil action against the nonpaying party and the homeowner. This must be done within 180 days from when the qualified beneficiary filed a lien, or 270 days from the completion of the original contract, whichever is earlier.
- ✓ Provide the homeowner with the required application for a Certificate of Compliance. This is available on the DOPL website.
- ✓ Obtain a judgment against the nonpaying party.
- ✓ Attempt to collect on the judgment. The claimant must issue a Motion and Order in Supplemental Proceedings and attempt to serve that Motion. If the motion is served, evidence must be provided showing that no assets were located.
- ✓ Complete and submit the claim application. This application can be found on the DOPL website.

Written Notice: Every contractor who enters into a written contract with a homeowner must provide the following notice:

PROTECTION AGAINST LIENS AND CIVIL ACTION. Notice is hereby provided in accordance with Section 38-11-108 of the Utah Code that under Utah law an "owner" may be protected against liens being maintained against an "owner-occupied residence" and from other civil action being maintained to recover monies owed for "qualified services" performed or provided by suppliers and subcontractors as a part of this contract, if and only if the following conditions are satisfied:

(1) the owner entered into a written contract an original contractor, a factory built housing retailer, or a real estate developer;

(2) the original contractor was properly licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act at the time the contract was executed; and

(3) the owner paid in full the original contractor, factory built housing retailer, or real estate developer or their successors or assigns in accordance with the written contract and any written or oral amendments to the contract.

(4) An owner who has satisfied all of these conditions may perfect his protection from liens by applying for a Certificate of Compliance with the Division of Occupational and Professional Licensing by calling (801) 530-6628 or toll free in Utah only (866) 275-3675 and requesting to speak to the Lien Recovery Fund. (*Utah Administrative Code R156-38a-108*).

This same language must also be included on the face of the Notice of Intent to Hold and Claim Lien.

Final Inspection...

What is a Lien? A lien can be a useful tool in securing payment for labor or materials for improvement on real property.

Who is Entitled to a Lien? The state statutes give lien rights to anyone performing services or furnishing or renting any materials or equipment used in the construction, alteration, improvement of any building or structure. This includes preconstruction services and construction services.

State Construction Registry Program: The State Construction Registry Program serves as a centralized repository for notices of commencement, preliminary notices, and notices of completion for private and public construction project filings in Utah.

Notice of Commencement: A notice of commencement must be filed by the original contractor or owner within 15 days after a building permit is issued or within 15 days after work commences on the property. For government projects, a notice of commencement must be filed within 20 days after first providing labor, service, equipment, and material to a construction project

Preliminary Notice: A preliminary notice on a private project should be filed within 20 days after first

providing labor, service, equipment, and material to a construction project. On government projects, the preliminary notice of lien rights should be filed within 20 days after supplying labor and/or materials or 20 days after the notice of commencement was filed.

Notice to Subcontractor: If requested the original contractor must provide a notice informing the subcontractor of all the preliminary notices received within 14 days of the subcontractor's request.

Notice of Completion: Upon completion of a project, a Notice of Completion may be filed by an owner, original contractor, lender that has provided financing for the construction project, surety that has provided bonding for the construction project, or title company issuing a title insurance policy on the construction project.

Conditional Waiver and Release: To release any liens prior to final payment, the lien claimant may complete a conditional waiver and release.

Waiver and Release Upon Final Payment: After final payment is received, an waiver and release upon final payment must be provided if an unconditional waiver and release was received prior to final payment.

Filing a Claim of Lien: A claim of lien must be filed within 90 days after the lienor last provided materials and/or labor for preconstruction services and within 180 days of final completion of the original contract for

construction services. The claim of lien must contain specific text by law.

Time Limitation for Liens: In general, a lien claimant shall file an action to enforce the lien within 180 days of filing a written notice to hold and claim a lien.

Priority: Payments on liens are paid in the following order: subcontractors who are laborers or mechanics working by the day or piece that have not furnished materials; all other subcontractors and all materialmen; and original contractors.

Monetary Awards: If the proceeds of a lien foreclosure sale are not sufficient enough to pay lienors, monetary awards are distributed on a pro rata basis.

Bonding Around a Lien: If a bond or cash deposit in the amount of 150 percent of the lien is filed and found sufficient, the lien is released.

Abuse of Lien Rights: Wrongful lien claims are subject to criminal and monetary penalties.

Residence Lien Restriction and Lien Recovery Fund: This act protects homeowners and subcontractors and suppliers from general contractors who do not properly distribute payments for services and materials on residential construction projects.