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**BILL ANALYSIS**

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Senate Bill 465 (Substitute S-2)  
Sponsor: Senator Darwin L. Booher  
Committee: Banking and Financial Institutions

Date Completed: 5-1-18

### **CONTENT**

**The bill would amend the Construction Lien Act to establish procedures under which liens could be recorded by a design professional (a licensed or registered architect, professional engineer, or professional surveyor, or a legal entity authorized to practice any of those professions). The bill would do the following:**

- **Allow a design professional who entered into a written contract to provide professional services relating to the improvement of real property, to record a notice with the register of deeds at any time after the contract was executed.**
- **Allow a notice to be recorded regardless of whether the professional services or property improvement had been commenced or completed.**
- **Allow a person that furnished professional services under a written subcontract with a design professional who had recorded a notice, and whose engagement had been approved by a property owner, to record a notice for recording at any time after the subcontract was executed.**
- **Provide that if an actual physical improvement were made to the property after a notice was recorded, the notice would be effective only from the date of the first actual physical improvement.**
- **Require a register of deeds to endorse on the instrument the date of its recording and properly index the instrument, if a notice of professional services contract or subcontract were recorded.**
- **Specify that construction liens would have equal priority regardless of whether the lien arose at the time of first actual physical improvement or at the time a notice was recorded.**
- **Refer to when a "construction lien arises", instead of the "first actual physical improvement", in provisions that determine whether a construction lien has priority over other recorded interests.**

The bill also would repeal Section 301 of the Act, which specifies whether the Act or Public Act 179 of 1891 is the controlling law for a construction lien. Section 301 also permits a contractor, subcontractor, supplier, or laborer to request a written statement as to the date of a property owner's first contract with a contractor on a project.

#### **Contract for Professional Services; Notice**

The bill would allow a design professional who entered into a written contract with an owner, or with a person acting for, on behalf of, or with the consent of the owner, to provide professional services relating to the proposed or actual erection, alteration, repair or removal of a structure on or other improvement to real property, to record a notice with the register

of deeds of the county in which the property was located. The notice would have to be in substantially the form set forth in the bill for a Notice of Professional Services Contract.

(The bill would define "design professional" as an individual who is licensed or registered as an architect, professional engineer, or professional surveyor under Article 20 (Architects, Professional Engineers, and Land Surveyors) of the Occupational Code, or a corporation, partnership, limited liability company, or other legal entity that is authorized under Article 20 to engage in the practice of any of these professions. The bill specifies that the term "supplier" would not include a design professional or a person that has a subcontract with a design professional.

"Professional services" would mean services that are customarily and legally performed by or under the supervision or responsible control of design professionals in the course of their professional practice, including programming, planning, surveying, site investigation, analysis, assessment, design, preparation of drawings and specifications, and construction administration services.)

A design professional could record a notice of professional services contract at any time after a written contract was executed regardless of whether the professional services under the contract had been commenced or completed, and regardless of whether the erection, alteration, repair, or removal of the structure or the other improvement to which the professional services related had been, or was ever, commenced or completed. However, a design professional could not file a notice later than 90 days after he or she, or another person acting by, through, or under the design professional, last performed professional services.

A notice would be valid for one year after the date it was recorded. The design professional could record a subsequent notice with respect to a written contract. All of the above requirements, including the time limitation, would apply to a subsequent notice.

If an actual physical improvement were made to the property after a notice was recorded, the notice would be effective only from the date of the first actual physical improvement.

These provisions, or the recording of a notice, would not affect the requirements of the Act regarding the creation of a construction lien, including the requirements of Section 107, the steps necessary to claim a lien, or the manner of enforcing a lien. (Section 107 generally governs construction liens created when a contractor, subcontractor, supplier, or laborer provides an improvement to real property.)

#### Subcontract for Professional Services; Notice

The bill would allow a person that furnished professional services under a written subcontract with a design professional who had recorded a notice of professional services contract, and whose engagement had been approved in writing by or on behalf of the owner of the property, to record with the register of deeds for the county in which the property was located a notice of the subcontract in substantially the form set forth in the bill for a Notice of Professional Services Subcontract.

A person entitled to record a notice of contract could record the notice at any time after the execution of a written subcontract regardless of whether the professional services under the written subcontract had been commenced or completed, and regardless of whether the construction, alteration, repair, or removal of the structure or the other improvement to which the professional services related had been, or was ever, commenced or completed. However, the person could not record the notice later than 90 days after the last day a design professional who was entitled to record a notice, or any person claiming by, through, or under the design professional, performed professional services for the project.

A notice would be valid for one year after the date it was recorded. The person furnishing professional services under a written contract with a design professional could record a subsequent notice with respect to the written contract. All of the requirements, including the time limitation, would apply to a subsequent notice.

If an actual physical improvement were made to the property after a notice was recorded, the notice would be effective only from the date of the first actual physical improvement.

These provisions, or the recording of a notice, would not affect the requirements of the Act regarding the creation of a construction lien, including the requirements of Section 107, the steps necessary to claim a lien, or the manner of enforcing a lien.

#### Notice of Commencement

Under the Act, before the commencement of any actual physical improvements to real property, an owner or lessee contracting for the improvements must record a notice of commencement in the office of the register of deeds for each county in which the real property to be improved is located.

Within 10 days after the date a subcontractor, supplier, or laborer mails a written request by certified mail, an owner, lessee, or designee must provide a copy of a notice of commencement to the subcontractor, supplier, or laborer.

An owner, lessee, or designee must post and keep posted a copy of a notice of commencement in a conspicuous place on the real property described in the notice during the course of the actual physical improvement to real property.

An owner, lessee, or designee also must provide a copy of a notice of commencement to a general contractor, if any.

The bill would refer in these provisions to improvement to real property, instead of actual physical improvements. The bill also would refer to an owner, lessee, or designee required to record a notice of commencement.

Additionally, under the bill, an owner, lessee, or designee would have to provide a copy of a notice of commencement to a subcontractor, supplier, or laborer regardless of whether the subcontractor, supplier, or laborer had requested one.

#### Constructive Notice

Under the Act, if a notice of commencement, claim of lien, certificate of discharge of lien, or certificate of a county clerk that no proceedings to enforce a statement or claim of construction lien have been commenced within the period provided by law, is recorded in the office of a register of deeds, the register must endorse on the instrument the date of its recording and must properly index the instrument.

The recording of a notice of commencement or a claim of lien operates as constructive notice to subsequent purchasers or encumbrancers in the same manner as the recording of a real estate mortgage.

Under the bill, both of these provisions also would apply to the recording of a notice of professional services contract and a notice of professional services subcontract. Additionally, the bill would refer to a construction lien instead of a statement or claim of lien.

## Priority

The Act states that, except as otherwise provided, as between parties entitled to claim construction liens under the Act, their claims of lien must be treated as having equal priority. Under the bill, the liens would have equal priority. The bill also specifies that this provision would apply, and the construction liens would have equal priority, regardless of whether the lien arose at the time of the first actual physical improvement or at the time a notice was recorded.

A construction lien under Act also has priority over all over all garnishments for the contract debt made after commencement of the first actual physical improvement, without regard to the date to recording of the claim of lien. Under the bill, a construction lien would have priority over all garnishments made after the lien arose, without regard to the date the claim of lien was recorded.

A construction lien arising under the Act has priority over all other interests, liens, or encumbrances that may attach to a building, structure, or improvement, or on the real property on which the building, structure, or improvement is erected, if the other interests, liens, or encumbrances are recorded subsequent to the first actual physical improvement. Under the bill, a construction lien would have priority over all other interests that were recorded after the construction lien arose.

A mortgage, lien, encumbrance, or other interest recorded before the first actual physical improvement to real property has priority over a construction lien arising under the Act. The priority of the mortgage exists as to all obligations secured by the mortgage except for the indebtedness arising out of advances made after the first actual physical improvement. An advance made pursuant to the mortgage, but after the first actual physical improvement has priority over a construction lien under certain circumstances. Under the bill, a mortgage, lien, encumbrance, or other interest recorded before the construction lien arose would have priority. An advance made pursuant to the mortgage after the construction lien arose would have priority under certain circumstances.

The bill specifies that, for purposes of determining priority, a construction lien would arise as follows:

- At the time of the first actual physical improvement, except as provided below.
- At the time a notice was recorded, if the lien were claimed by a person after the person had recorded a notice, but if an actual physical improvement were made after a notice was recorded, the notice would be effective only from the date of the first actual physical improvement.

MCL 570.1104 et al.

Legislative Analyst: Stephen Jackson

## **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government. The cost to record any additional instruments should be offset by the additional recording fees charged by a register of deeds.

Fiscal Analyst: Ryan Bergan

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.