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Sunday, February 27, 2011, 3:01am

Lien On Me

## Mechanics Lien Protection Granted To Designers Architects, Engineers Eligible For Recourse If Projects Stall

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Recent changes to the commonwealth's mechanic's lien law now enable design professionals – architects, surveyors and the like – to record a lien on a property or project if they cannot secure payment, though they are still subordinate to their contractor peers in the pecking order.

Gov. Deval Patrick amended the law in January, extending the right to take legal action against a property owner. The latest changes are a continuation of sweeping revisions to local mechanic's lien statutes. Previous changes resulted in challenges to the widely held "pay when paid" principal that had governed the relationship between contractors and subcontractors since the early 1990s. Massachusetts is now one of 37 states to broaden their mechanic's lien statutes.



The latest amendment to Chapter 254 of the Massachusetts General Laws leaves designers at the end of the line for payment behind contractors and subcontractors if a judge orders a property liquidated so proceeds can be doled out to those companies owed money for services rendered.

In the pre-construction phase, designers and contractors must file a notice of contract before construction financing is received by developers, or their rights to place a lien in the event of non-payment are waived. A notice of contract is the first of a three-step process under state law allowing an unpaid party to force payment through a formal lawsuit.



"Historically, mechanic's liens were basically for labor and materials," said Thomas Guidi, an attorney and partner at Boston-based law firm Hemenway & Barnes and chair of the firm's real estate practice group. "It gave the chance for a lien so people would get paid for the labor or materials that they supplied for the construction project. This extends the lien to the period prior to construction because the design work mostly happens before. It's certainly helpful to those design professionals ... who sometimes don't get paid if a project doesn't go forward. The flip side is, it's potentially another lien on property that buyers, lenders and owners are going to have to pay attention to."

### Thinking Twice

That fair warning is not lost on Mark Barer, project manager for Boston-based developer Berkeley Investments. If he were to hire an architect he has worked with in the past, one he has a relationship with and trusts, Barer said he likely would not approach the job differently.

Not so for a new vendor.

"If it's a new vendor, I might think more seriously about the specific language in the contract to make sure I'm properly protected," Barer told Banker & Tradesman. "Architects are integral to the industry. I'm not sure on a day-to-day basis [changes to the law] will make a big difference in how we operate. But if there are ways that I can mitigate risk with certain language regarding liens, I would certainly look into that. We're treading new water here, so I think we'll clearly bring it up with our attorneys as we enter into new significant contracts."

The Massachusetts chapter of the American Institute of Architects championed the amendment, along with the American Council of Engineering Companies, which represented the engineering portion of design professionals. Until now, the only recourse these service providers had to recoup unpaid bills was through a lawsuit. Even then, if an architect was owed \$50,000, for example, and

the property owner decided to stop paying, the firm would need to spend substantial amounts of money in legal fees and representation – with no guarantee it would actually recover the \$50,000.

### Equal Footing

Clients stop payments for any number of reasons, said John Nunnari, executive director of the local AIA chapter. A property owner could decide that if a development project is not moving forward because of lack of funding, designers do not deserve to be paid – even though the designer already performed work. Or the client could feel the architect did not meet the design obligations.

Nunnari could not say accurately how often designers' pay is withheld. But of those individual practitioners he has spoken with in the local AIA chapter, he said there is not a single one that does not have a story where they "were left holding the bag and didn't get paid for services they rendered" and wished they had the lien protection.

Marc Margulies, principal for Boston's Margulies Perruzzi Architects, said although his firm has not been part of a lawsuit in its 23-year history, he is aware that before now, there was very little recourse for design professionals in the event of a payment issue with a client.

"Obviously because of the way the courts work, if you have a payment issue, it gets resolved considerably after the time when the issue first arises, so design professionals have had virtually no leverage if there was a problem," Margulies said. "It strikes me that it is useful to be able to be on a more equal footing with other people, like contractors, if there's a problem."