

REPORT AND LEGISLATIVE RECOMMENDATIONS  
OF THE  
MECHANICS' LIEN LAW STUDY COMMISSION,  
STATE OF NEW JERSEY

Report to the Governor of the State of New Jersey  
September 1982

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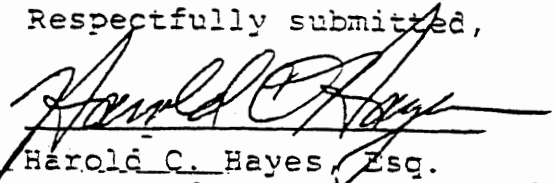
Governor of the State of New Jersey:

The Mechanics' Lien Law Study Commission,  
created by Governor Brendan E. Byrne on January 14,  
1981, in fulfillment of its charge submits its  
final report and recommendations following  
completion of its study of New Jersey's mechanics'  
lien law and public works mechanics' lien and  
bond laws.

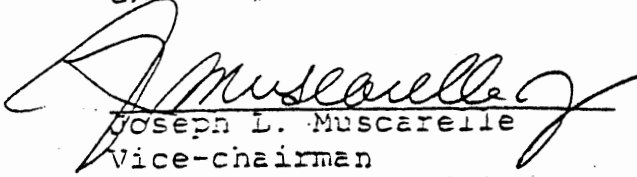
Respectfully submitted,



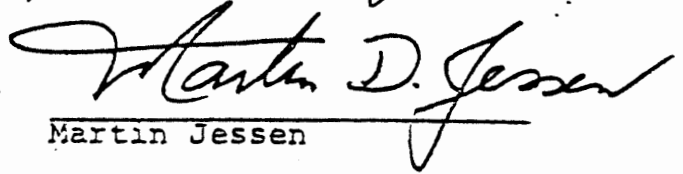
Angelo A. Mastrangelo, Esq.  
Chairman



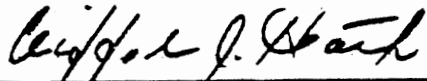
Harold C. Hayes, Esq.



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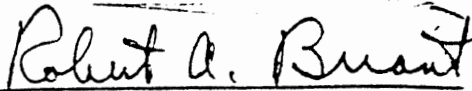


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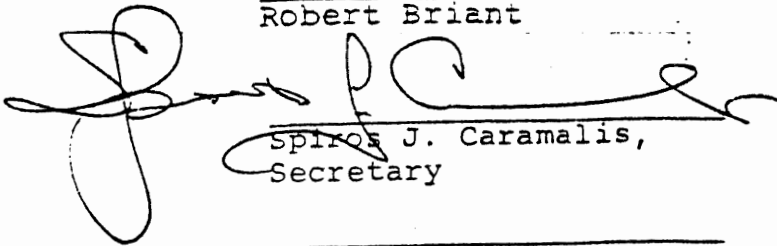
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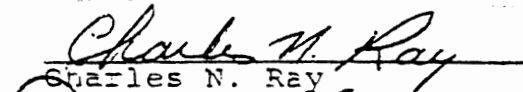


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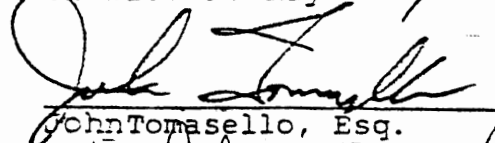


Spiros J. Caramalis,  
Secretary



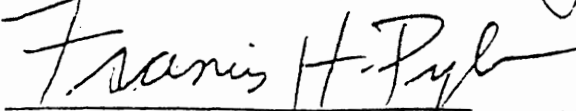
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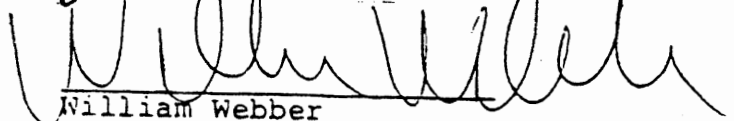


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## FOREWORD

The Mechanics' Lien Law Study Commission was created by Governor Brendan T. Byrne on January 14, 1981 at the urgings of the Building Contractors Association of New Jersey and other industry groups.

The January 14, 1981 announcement of the Commission's formation, after noting the "concern and frustration" of members of the construction industry in New Jersey with existing statutory procedures and remedies, went on to direct the Commission to undertake a "thorough and complete review of New Jersey statutes which were enacted for the protection of those individuals who perform labor or supply material in the construction or alteration of buildings within the State of New Jersey pursuant to N.J.S.A. 2A:44-64 et seq." The Commission was further charged with developing recommendations that "will satisfy all elements of industry and labor and the financial community" while fostering the "continued development of construction projects within the State..."

Commission membership was comprised of representatives of different segments of the construction industry -- including labor, building contractors, subcontractors, suppliers, and members of

the financial community and the title insurance industry -- together with legislative staff members and representatives from the State Division of Building and Construction and the Office of the Governor. In addition to the voting members of the Commission designated by the Governor, the Commission had at its disposal the services of Commission member's attorneys -- most notably, Robert S. Peckar and Barry J. Donohue -- who unstintingly gave of their time and considerable expertise during the course of the Commission's lengthy deliberations. From time-to-time, persons with special expertise and spokesmen for different interest groups without direct representation on the Commission were invited to participate in the Commission's deliberations. Finally, as draft legislation was developed, copies were circulated to various industry groups, with or without representation on the Commission, for review and comments.

Because of the scope and complexity of the subject matter, and the diversity of interests and viewpoints of different segments of the construction industry and within the Commission, the Commission was unable to adhere to its original six month deadline. In July 1981, the Commission requested and received an extension of time for reporting back to the Governor.

On January 19, 1982, the Commission delivered the draft legislation contained in the Appendices of this report to the Governor. The letter of transmittal accompanying the two drafts indicated that while the members had unanimously agreed to the Commission's final recommendations, additional time was required for completion of the Commission's report.

At the very first meeting of the Commission, widespread dissatisfaction was expressed by the members with the existing mechanics' lien filing procedures and the statutory remedies available for both private and public construction work. It was agreed that a major substantive revision of the existing laws on private and public construction was needed to more fairly balance the competing equitable interests of all of the parties to a construction contract, thereby better serving the interests of the entire construction industry and the consumer public.

In view of the far-reaching nature of the Commission's proposals, some explanation of the nature and basis of the Commission's recommendations was deemed necessary. Accordingly, Chapter I details the nature and objectives of the Commission's recommendations. Chapter II identifies some of the problems inherent in

existing law that influenced the Commission's decision to revise the present laws. Chapter III contains an exposition of the key provisions of the legislative drafts, with a view to providing both an explanation of the Commission's objectives and insight into the diverse interests and complex issues with which the Commission wrestled in the course of its extended deliberations. The appendices to the report contain (1) the draft legislation submitted by the Commission to the Governor on January 19, 1982, (2) the conflicting views of the principal protagonists on the waiver of lien rights issue; and (3) any personal comments submitted by individual Commission members on this report.

I am happy to say that the Commission's draft legislation and report were adopted without dissent. The one issue over which there was a sharp and irreconcilable difference of opinion was the question of whether the waiver of lien rights should be protected or prohibited by law. In order not to detract from the unanimity of the Commission's position on all other questions, and because it was felt that this was an issue that would ultimately have to be argued or reargued before the standing legislative committees that will consider the legislation, the representatives of

the two opposing camps were asked to present their positions in writing for inclusion, in unedited form, in the Appendices to the report. The positions of the New Jersey Subcontractors Association and the Building Contractors Association (the general contractors association) are set forth in Appendix C.

The report also does not deal with the issue of construction union fringe benefits. It was the unanimous view of the Commission that this issue was better dealt with in Assembly Bill 2225 (1980). The Commission expressed unanimous support for, and urged adoption of Assembly Bill 2225, which has been reintroduced as Assembly Bill 511 in the 1982 session of the General Assembly.

In closing, I wish to take the opportunity to thank Commission members and staff for the countless hours they gave to the work of the Commission\*, to industry representatives, both Commission members and participating nonmembers, for most forcefully arguing their respective cases before the Commission and giving

\*Special thanks to Mrs. Peggy Henry with the Office of Legislative Services who handled most of the Committee's secretarial chores.

Commission members the benefit of their professional insights; and above all to the industry representatives on the Commission who, after presenting the viewpoints of their groups, were willing and able to subordinate narrow self-interests to what the Commission believes to be in the best interests of the entire construction industry in New Jersey, including the financial community, title insurance industry, and property owners and developers.

The Commission does not pretend that its proposals fully accommodate all of the concerns and interests raised by various industry groups. What is unassailable, however, is that every effort was made to afford a fair hearing to all segments of the industry and that, wherever possible, the Commission has incorporated into the legislative drafts those suggestions not inconsistent with conceptual principles deemed by Commission members to be in the best interests of the entire construction industry.

Angelo A. Mastrangelo  
Chairman

## CHAPTER I

OverviewSCOPE OF COMMISSION'S CHARGE

Pursuant to Governor Brendan T. Byrne's order of January 14, 1981, the Mechanics' Lien Law Study Commission was created to study the statutory procedures and remedies available, in both private and public construction, under the State's mechanics' lien laws, and to develop recommendations that "will satisfy all elements of industry and labor and the financial community" consistent with the fostering of the "continued development of construction projects within the State of New Jersey."

OBJECTIVES OF COMMISSION'S LEGISLATIVE RECOMMENDATIONS

It was the unanimous opinion of the Commission that encouragement of the investment, and safeguarding of the respective interests of land, labor and capital in real estate development will enhance the business climate, and increase job and business opportunities and public revenues in the State of New Jersey. To this end, the statutory scheme recommended by the Commission seeks:

1. to achieve a more equitable balancing of the respective interests of land, labor and capital;
2. to continue to provide an extraordinary remedy

to those who supply work and materials (e.g., contractors, subcontractors, suppliers, workmen) in the improvement of real property, which remedies are in addition to and not intended to detract from the rights and remedies otherwise available to these and other parties pursuant to contract and common law.

3. to protect the interests of a property owner who has fulfilled his contractual obligations to his contractor or contractors in good faith;

4. to assure that the statutory rights created by the proposed legislation are readily available to statutory beneficiaries, without having to resort to daily legal advice in confronting a complicated, unclear and confusing statute, upon which a mistaken impression could easily cause an unwitting loss of statutory rights or improper impairment of another's rights ;

5. to protect the prudent and honest contractor from interruption of his cash flow and the deprivation of his rightful construction monies where he faithfully fulfills his contractual obligation to his subcontractors and suppliers;

6. to protect the prudent and honest contractor where the indebtedness sought to be secured is too remote from that contractor's ability to assure avoidance of the creditor's plight;

7. to better reflect and be more responsive to the current business setting of New Jersey, rather than making the construction industry a captive of outdated law;

8. to recognize and clearly designate the priority of mortgagees as to construction advances made in the course of a project so as to encourage the flow of construction monies into the growth of New Jersey businesses and development of real property;

9. to remove the uncertainty, lack of clarity and ambiguity of the current New Jersey practices and replace them with procedures and rights which are clearly defined, clearly understandable to the public and the industry, and clearly limited to specified amounts so as to cause the least interruption to construction activities and cash flow;

10. to permit the continued reliance of certain industries upon their lien rights, in order to afford credit to those who otherwise could not obtain it;

11. to assure the property owner that any improper imposition of lien claims upon his or her property would result in the owner's complete financial restoration from such an event, including attorney's fees, damages, and the forfeiture of the claimant's lien rights;

12. to make a clear and unequivocal statement to the industry that exaggerated, untimely and statutorily

barred lien claims, which interfere with the free flow of construction monies and the legal rights of the parties to a construction project, will no longer be tolerated.

## CHAPTER II

EXISTING CONSTRUCTION LIEN AND BOND LAW RIGHTS  
AND REMEDIES: PRIVATE AND PUBLIC CONSTRUCTIONA. Critique Of Current Mechanics' Lien LawCOMPLICATED AND TECHNICAL

Under existing State law, there are a number of procedural steps which must be taken by a lien claimant in order to perfect a lien on real estate. These procedural steps are intricate and complex, both as to the forms of notices and documents required for filing, and as to the time sequence in which documents must be filed. The failure of the form to contain a specific piece of information or the late filing or incorrect filing of a form prevents the lien claimant from perfecting his lien. In practice, most of the litigation under the existing statute deals with procedural challenges and with technical forms of documents rather than with the merits and substance of a given claim. This type of homage to form rather than

substance is a type of evil in the law that the 1947 constitutional revision attempted to rectify in New Jersey. The current "mechanics' lien law" is one of the last vestiges of a body of State law which, instead of fostering adjudication on the substance and merits of a dispute, continues to encourage the disallowance of legitimate claims merely for failure to adhere to complicated technical legal forms and filing requirements.

#### DUAL SYSTEM OF LIENS

Under current law, there are two separate and distinct methods for attempting to perfect a mechanics' lien. The first method requires a contractor or supplier to file a notice with the county clerk's office prior to doing any work or providing materials. This notice is called a "mechanics' notice of intention." Thereafter, a mechanics' lien claim is required to be filed with the county clerk's office, and a law suit commenced and prosecuted to judgment. In instances where the owner and general contractor have filed the general contract for the construction work, subcontractors and material suppliers must file a document called a "stop notice" with the county clerk's

office. The effect of this document is to put the owner on notice that the general contractor is not paying the subcontractors or suppliers and that the owner should withhold payment to the general contractor until he has been assured that the necessary payments have been made. In order to enforce a stop notice, a law suit again must be commenced and brought to judgment.

The problem with this dual system is that in many cases suppliers or subcontractors, unaware that the owner and general contractor have filed a contract, often file the wrong form. The claim is thereby unwittingly defeated, irrespective of the merits of the claim, solely because of a technical misfiling. Consequently, in order to be sure of what form to file, a subcontractor or supplier must do a title search on the property. This is an impractical and burdensome requirement. In addition, the general contractor is often a corporation wholly owned or controlled by the owner of the property. Where a general contract is filed under such circumstances, a court may later void the contract as not being an arms length agreement, thereby also invalidating any stop notices filed pursuant to the contract. Moreover, in the foregoing example, the subcontractor or supplier, believing the contract to be validly filed, would not have filed a mechanics' notice of intention, which is a

precondition for the filing of a lien claim. The mechanics' subcontractor or supplier is thus deprived of the very rights and lien remedies that existing law was intended to secure. The present dual system is thus unduly complicated and sufficiently burdensome as to invite abuse.

#### VAGUE AND UNCERTAIN

There exists a great deal of uncertainty as to the true effect of the filing of a mechanics' notice of intention or stop notice under the present law. Because of the uncertainty, both title insurers and lending institutions have taken a very conservative position in interpreting the law. Although the mechanics' notice of intention is not a lien on the property until such time as it is perfected by the entry of a final judgment, it is generally agreed that the intent of the law is to make the lien effective as of the date of the filing of the mechanics' notice of intention. Consequently, title insurers and lending institutions take the position that the filing of the mechanics' notice of intention is tantamount to a lien on the property, and, therefore, require its discharge prior to either insuring or advancing further construction funds. Thus, even in situations where there is no dispute or default in

payment, a subcontractor or supplier can, without due process or other legal proceedings, halt a construction project simply by filing a notice of intention. Even where the general contract is filed and the notice of intention is, presumably, without effect, title insurers and lending institutions nevertheless have taken the position that they cannot with impunity ignore a notice of intention out of concern that the filed contract may be set aside by the court upon a finding that too close a link existed between the owner and the general contractor. Because of such conservative statutory interpretations, an owner is often deprived of the statutory protections afforded by the filing of his general contract, and is instead constrained to deal with the mechanics' lien law as if no contract had been filed. In circumstances where stop notices are filed, the law is equally unclear. In the absence of a definitive court ruling on this matter, title insurers and lenders take the conservative position that the stop notice creates a lien on the property and refuse to insure advance funds on construction loans if a stop notice has been filed. Again, this affords any subcontractor or material supplier on a construction project the power to halt the construction project by

mere assertion of a claim, whatever its propriety, and the filing of a document with the county clerk.

Confusion over what form has to be filed and the potential for filing abuses thus create an unfavorable atmosphere for construction projects in New Jersey from the standpoint of both lenders and developers.

#### PREFILING REQUIREMENTS

The most objectionable provision of the current law is the prefiling requirement for perfecting a mechanics' notice of intention prior to the commencement of work or the supplying of material in order to protect the right to exercise, at a later date, lien rights against the improved property and to perfect the same. The prior notice requirement often interferes with the legitimate claims of subcontractors and suppliers who, in good faith and on the basis of sound business judgment, are, for unforeseeable reasons, unable or unwilling to pay for such services or materials. Not having filed a prior notice of intention, the subcontractor or supplier at this point finds himself without any mechanics' lien remedies. This type of situation only serves to unjustly enrich the owner of the property, while leaving the honest subcontractor or supplier without remedy to

the property. It also creates a situation where an unscrupulous subcontractor or supplier is in a position to extort payments from general contractors and owners by the mere filing of a single piece of paper with the county clerk (i.e., the mechanics' notice of intention, or a stop notice), thus effectively cutting off all future construction funding until such time as the contractor and/or owner are willing to "settle" with the subcontractor or materialman. The requirement that the lien process be started before there is any dispute or default in payment is clearly not conducive to the encouragement of construction lending in New Jersey.

B. Critique of Current Public Construction Bond Law and  
Municipal Mechanics' Lien Law

UNFAIRNESS TO THE DESIGNATED BENEFICIARIES

The primary purpose of the public bond law is to assure those who supply work and materials on a public improvement project that the public agency has secured, by payment bond obtained from the prime contractor, proper future payment for the work or materials to be provided. The bond assures payment of proper demands made by those designated beneficiaries. Current law requires the contractor to post a payment and

performance bond on any work constructed at the expense of the State or any county, municipality or school district. But NJSA 2A:44-145 provides that "no action shall be brought against any of the sureties on the bond required ... until the expiration of eighty (80) days after the acceptance of the building, work or improvement by the duly authorized board or officer". Cases interpreting this language have held that the "acceptance" by the public owner must be final, complete and unconditional before the 80-day period begins to run.

On smaller projects, this limitation may have little or no affect on the rights of potential claimants under the bond. When a project is completed and accepted within six months to one year, a potential claimant will either have been paid or know within that time that he must sue on the bond. On a major construction project, such as a sewage treatment plant, a municipal complex and the like, which may take two or three years to construct, "final acceptance" may not take place for an additional one or two years after substantial completion, during which time the owner and the contractor resolve claims and "punch list" items of work. During all of this time, the potential claimant

effectively has no remedy since "final acceptance" never took place.

The practical effect of such requirements is to create such a delay in the available remedy as to render the remedy useless in some situations and frustratingly remote in other situations. Moreover, the Commission recognized that disputes, between the public owner and the prime contractor, over that elusive date of "acceptance," further impairs the rights of designated beneficiaries under the terms of the payment bond.

#### UNFAIRNESS TO THE PRIME CONTRACTORS

Under the terms of the existing bond statute, prime contractors on public projects are required to provide a bond which secures payment to a virtually unlimited chain of subcontractors, suppliers and materialmen, the payment of whom is frequently beyond the practical control or monitoring of the contractor. To further complicate matters, inasmuch as a surety bond is not a policy of insurance but rather a guarantee by a surety for which the surety looks to the prime contractor as an indemnitor for complete reimbursement, the current law often renders the proprietor of the prime contractor a personal guarantor of the obligations of remote parties

to yet more remote parties. Most proprietors have to pledge their personal assets in order to obtain sufficient bonding capacity to bid State and other governmental work in New Jersey. The effect upon the proprietor's personal assets appears wholly unfair and unwarranted. Furthermore, as recognized by this State's courts, prime contractors who act prudently and who make all the payments required of them under their respective subcontracts and purchase agreements can and have been held exposed to double jeopardy, in the form of reimbursement to their surety, where a subcontractor or supplier has failed to pay his respective subcontractor or supplier.

#### THE PUBLIC IMPROVEMENT LIEN

Coincident with the discussion of the surety bond, the Commission concluded that the Municipal Mechanics' Lien Law" (N.J.S.A. 2A:144-125 et seq.) serves no useful function where the contractor is required by statute to provide a payment bond. Indeed, instances of payments held up upon the filing of 9 municipal improvement lien, to the detriment of all those supplying work and labor to a project, underscores the negative aspect of such a procedure when in fact the public agency has, at some

substantial expense, secured the labor and supplies of subcontractors and materialmen through the requirement of a payment bond.

## CHAPTER III

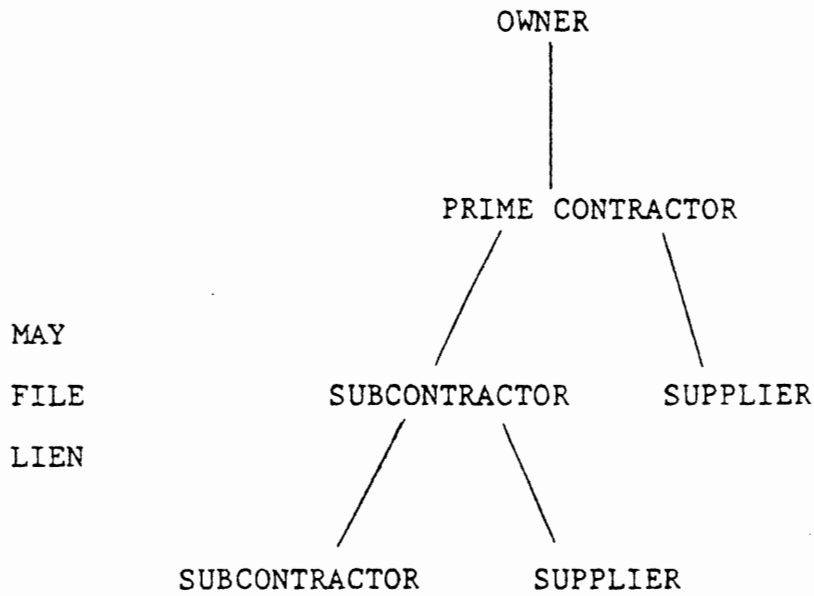
COMMENTARY ON COMMISSION'S LEGISLATIVE  
RECOMMENDATIONS

The purpose of this chapter is to identify and provide brief explanations of the intent of, and rationale for, the Commission's principal draft recommendations.

A. Comments on Proposed New Jersey Construction Lien LawSECTION 1

The definition of "contract" is intended to limit the applicability of this act to transactions which are memorialized by a writing in some form signed by the parties. Parties engaged in a transaction under oral agreements will have no right to file a lien. The requirement of a "writing" will reduce the factual proof problems in litigated matters and provide a sound basis for third parties to evaluate the merits of the lien claim. In consideration of the commercial practices of material suppliers, the Commission concluded that delivery tickets constitute a writing.

The terms "subcontractor" and "supplier" are defined so as to limit the number of parties who will be eligible to file a lien claim to the "third tier" suppliers and subcontractors, as illustrated by the following chart.



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Lower tier subcontractors and suppliers may not file liens.

SECTION 2

The Commission has no comment on this section as it is self-explanatory.

SECTION 3

The amount of the lien is limited to the value of the improvements to the real property and attaches only to the interest in the property of the party contracting for the improvements. For example, if a lessee contracts to have a building constructed or renovated, the lien of the contractor attaches only to the leasehold estate and not to the fee title. In order for the lien to attach to the fee title, the fee owner must authorize the improvement in writing. The intent is to prohibit liens against an interest in property without the expressed authorization of the party owning such interest.

SECTION 4

This section speaks to a lien for both materials and equipment. As to the former, the lien covers not only materials incorporated in the real property, but also materials used in the construction or operation of machinery or equipment that is used to improve the real

property but not incorporated therein. This is a change, in that under the current statute only material that is permanently affixed to the real property can be the subject of a lien.

This section also recognizes the increasing use of rental equipment in construction projects. The contractual rental value of leased equipment is covered by the new statute, whereas there is no such protection under existing law.

#### SECTIONS 5 AND 6

The Commission has no comment on these sections as they are self-explanatory.

#### SECTION 7

There are several elements to this section which received the particular attention of the Commission.

They are as follows:

a. The Commission included language requiring that the lien claim be signed and acknowledged by the claimant or, in the case of a partnership or corporation, a partner or duly authorized officer thereof. Agents may not be appointed to execute the lien claim. This

language was selected in response to the common practice of lien document filing by service companies which would file any document for any amount against any property in the name of the purported claimant, without any investigation or understanding of whether or not the document was being filed legally or otherwise. The signature and acknowledgement by the claimant which now appears on the proposed form (see section 9 of the bill) not only provides for the signature on the lien claim to be acknowledged, but that the individual, partner or officer must sign a representation and verification that is also acknowledged, in which that individual signifies his understanding of the potential liability arising out of the filing of an improper lien claim. It was the Commission's view that the lien claim has the most serious ramifications to the property owner as well as to all other parties to the construction project, and therefore the filing of the claim should receive the personal attention of a responsible person who thereby assumes, for the partnership or corporation, whatever consequences may flow from the filing of the lien.

b. The present statute provides for the filing of a lien claim within 120 days following the last date

that work, services, material or equipment was provided for which payment is claimed. The proposed act provides for a 90 day filing window. The Commission selected the 90 day period so as to provide uniformity and consistency with the New Jersey Public Construction Bonding Act proposed by the Commission.

c. The Commission included a specific provision which states that a lien filed after 90 days shall not be enforceable. This provision was selected by the Commission to clearly communicate the statutory mandate intended, to wit: that absolute adherence to the 90 days is required and that no excuse by way of equity, argument or otherwise would have the ability of extending this statutorily limited period.

d. The Commission felt that there should be a time prior to which no lien can be claimed against real property, and that the time should be realistically connected to the stage of construction. In that regard, the Commission selected the date of issuance of the construction permit or the visible commencement of the improvement, whichever is earlier, to signify the first date upon which the lien may attach or be enforceable.

e. In order to afford the court a basis upon which to determine in challenge cases when the "last date of work" should be fixed for the purposes of measuring this absolute 90 day statutory period, the Commission included the language appearing in the last paragraph of section 7, which essentially intends to communicate that a potential lienor cannot utilize post-completion visits as a basis for reviving expired lien filing rights. For example, if a painting contractor completed the full painting of a building on March 1, 1982, but was called back in July 1982 to patch some areas which had either been disturbed subsequent to the completion of the work or to patch areas where the paint had not been applied precisely as specified, the March 1, 1982 date would be the date for the commencement of the lien rights and not the July date.

#### SECTION 8

This section is self-explanatory. However, by way of clarification, the Commission intended that the mailing of the lien claim within three business days to the last known business address or place of residence of the owner and contractor, and subcontractor, if any, against whom the claim is asserted, would be sufficient

for the purposes of service. However, the mailing must be made by certified mail, return receipt requested.

#### SECTION 9

The Commission determined that there should be one form of lien, and only one form, which could be utilized uniformly throughout the State. While the form is largely self-explanatory, the following comments are offered by way of clarification:

Paragraph 1 of the form requires that the claimant identify himself, the date of the lien, the identity of the owner against whose property the lien is claimed, the total amount of the lien and the identity of the contracting party with whom that lienor has a contract. The contracting party would be the general contractor, a subcontractor, owner's agent or any otherwise nominal party with whom the contract exists. Additionally, the lienor is required to specify the work, services, materials or equipment upon which the lien is claimed. The Commission does not anticipate the need for long detailed lists consuming several pages.

By way of example, a masonry contractor providing all of the masonry services and materials on a large project could satisfy the requirements of Section 1 by indicating as follows:

1. All masonry work as set forth in Section A of the specifications prepared by John Doe, Architect, dated \_\_\_\_\_, and as shown on the plans and specifications of said Architect, dated \_\_\_\_\_, drawings 1 through 15.

2. The distinction between Paragraphs 1 and 2 is as follows. Paragraph 1 indicates all of the work undertaken by contract by the lienor. Paragraph 2 is different in that it requires the lienor to indicate what materials actually were installed. Therefore, to borrow from the above example, the lienor would indicate in paragraph 2 that all masonry materials and 50% of the work set forth in response to paragraph 1 have been provided.

3. Paragraph 3 requires that the lienor set forth, on a schedule annexed to the lien, a "particular" description of the real property against which the lien is claimed. A lot and block number or a metes and bounds description would suffice. The only concern that a lienor should have with respect to this paragraph is that he adequately describe the property so as to assure

that no other party obtains a lien or other claim against the property prior to his by virtue of an inadequate property description, and also that the description be in a manner compatible with the records of the county clerk in the county in which the lien is filed.

4. Paragraph 4 requires identification of the written documents which constitute the contract between the parties, the date of same, and the names of the respective parties.

5. Paragraph 5 requires indication of the last date upon which work or services were performed, or material and equipment furnished. This date is critical with respect to the time period within which the lien may be filed. A lien which indicates a last date earlier than 90 days prior to the filing of the lien shall be void on its face.

#### Notice to Owner of Real Property

The proposed new lien format includes a specific "plain language" notice to the owner of the real property in which the owner is advised in blunt terms that his property may be sold to satisfy the amount asserted by the claim, under the following circumstances:

a. if the owner or his contractor does not pay the claimant and obtain a discharge;

b. if a judgment is entered upon the lien by a court after trial at which that owner may challenge the lien and, of course, if the owner fails to satisfy the judgment; or

c. if the lien is not discharged by the filing of a surety bond as provided in section 20 of the bill.

The purpose of this notice is to be certain that an owner recognizes the seriousness of the lien but also understands his right to challenge the claim asserted by the lienor if he believes that such a challenge is appropriate.

#### Notice to Subcontractor or Contractor

The proposed lien form also includes a notice to a subcontractor or contractor whose contract monies would be adversely affected by the filing of this lien in view of the owner's option to satisfy the lien and obtain a discharge based upon same. This provision is intended merely as a notice so that the subcontractor or contractor, against whom the lien is asserted, will have the opportunity to take steps to avoid interference with

overall cash flow to the project -- a matter of great concern to the Commission.

#### Claimant's Representation and Verification

Finally, the claimant's representation and verification is referred to in the comments to section 7 above. More importantly, as section 16 of the bill describes the sanctions which would apply, discussion thereof is included in the comments to that section.

#### SECTION 10

Section 10 requires that, among other things, the lien claim state the exact amount being claimed. The Commission was very concerned that the lien remedy not be a vehicle for enormous claims without any basis, a practice that has become fashionable in the construction industry. The filing of exaggerated claims has, in the past, caused severe hardship on owners, general contractors, subcontractors and material suppliers, and, in some instances, has resulted in the unfair enrichment of the claimant. The exaggerated claims problem was considered by the Commission to be one of the principal flaws in the existing statutes.

By way of example, the Commission took note of situations where a contractor was owed \$10,000 but filed the lien for \$1,000,000 to get his point across. The Commission understood that the effect of such a filing of an exaggerated lien would go far beyond frightening the party who ostensibly owed the money in the first place. Rather, it would likely bring to a halt the financing of any private contractor, workman, material supplier or other party of interest to the project. The Commission therefore determined that overstated claims should not receive the benefit of lien law remedies. Only those claims for work actually performed, or materials actually provided, pursuant to a written contract and not paid for in accordance with the contract payment and price provisions, should be protected by the lien law. To that extent, section 10 provides for a limitation of the lien claim amount.

#### SECTION 11

Section 11 speaks to date and effect of attachment of the lien on the improved property. The most crucial part of the section is as follows:

"The total amount for which an owner may be liable for one or more lien claims filed pursuant to this act shall not be greater than the total amount of the price of the contract between the owner and the contractor pursuant to which the work, services, material or equipment is provided by the subcontractor or supplier, less the amount of any payments made by the owner pursuant to contract prior to receipt of a copy of the lien claim pursuant to Section 8 of this Act."

The foregoing language has two essential objectives. First, the lien shall not exceed the total contract price agreed to by the owner, less payments made before the filing of the lien claim. For example, if an owner contracts with a general contractor to build an office building for \$2 million, the maximum amount of the potential lien claims is limited to \$2 million (the lien fund) as to all material suppliers and subcontractors engaged by the general contractor. In this example, if the owner pays the general contractor \$1 million and thereafter lien claims are filed totaling \$1.2 million, the total amount recoverable by the lien claimants is limited to \$1 million and the claimants share proportionately in a \$1 million lien fund (see section 19). Similarly, when those claiming lien rights

have no greater right to lien than those in a direct contractual relationship with the owner. For example, where an owner contracts with an electrical contractor for \$500,000.00 in electrical improvements, the liens of the suppliers to the electrical contractor cannot exceed \$500,000. If the owner pays the electrical contractor the full contract price of \$500,000.00 and thereafter a supplier files a lien claim, the supplier cannot recover from the owner of the property because the lien fund has been exhausted.

A second and equally important objective is that an owner should not be required to pay twice for the improvements to his property. The only way in which an owner should be liable and have his property at risk should be the extent to which that owner has received a benefit for which he has not made payment. Therefore, the Commission determined that the fund, against which all liens against the improvement on that property could be asserted, would be limited to the amount of money contractually due from the owner to his contractor less any payments made up to the date filing of the lien claim. If the owner continues to make payments subsequent to the date of the filing of the lien claim,

then that owner does so at his own risk. The obverse side of this general proposition is that the rights of the contractor and supplier are protected up to the amount of the lien fund. The Commission recognized that there were still certain problems which could arise notwithstanding this important improvement over the present practice which places owners at substantial risk of duplicate payment in order to avoid losing title to their improved property. Nonetheless, the Commission believes that owners will be induced to invest in speculative and other private development in New Jersey if they know that every penny that they pay will never have to be paid again by virtue of any lien procedure.

#### SECTION 12

Section 12 merely provides for the filing of an amendment to the lien claim so that a party who continues to work after the filing of a lien to protect his rights as of a particular time will have the ability to increase the amount for which the lien is asserted based upon further work performed. However, this provision and the form of the amendment follows the lien

claim requirements and the lien claim form precisely so that the prohibitions against late filing, etc., are as applicable to the amendment as they are to the original lien. By way of note, a late filed amendment will not defeat a validly filed prior lien. Furthermore, the increased amount of the lien claim, if the same is the basis for the filing of the amendment, shall only be effective as of the date of the filing of the amendment and shall not relate back in time to the original lien as filed. It should also be noted that the amendment process may be used to reflect a partial payment against a previously filed lien.

### SECTION 13

The provisions of this section parallels the obligations and options of the owner that existed upon the filing of a stop notice under the original statute. That is, the owner shall either withhold the amount claimed or, upon being satisfied of the correctness of the claim, pay the claimant.

During its deliberations, the Commission considered language requiring that the owner, upon proper notice of

a lien claim, either escrow the amount of the lien claim from the unexpended contract monies or make payment directly to the claimant within a specified number of days. Upon further consideration, however, certain flaws could be seen in that approach.

For example, the owner may believe, upon the advice of his architect or for other reasons, the lien claimant is not entitled to the amount demanded. The lien claim could include items of defective or incomplete work, or materials that do not conform to contract requirements. It would be unfair under those circumstances, the Commission felt, to require the owner to make payment to the lien claimant.

Similarly, the escrowing of the lien claim amount could work to the prejudice of other potential lien claimants and the owner. Automatically removing the amount of the lien from the flow of funds could diminish the security available for other lien claimants, or it could threaten the timely completion of the overall work. The Commission therefore perceived an unfair burden being placed upon the owner, especially when the lien claim may later prove to be incorrect.

The current approach is designed to give the owner more flexibility. Under it, the owner may pay the claimant if he is satisfied with the correctness of the lien claim. Conversely, the owner is authorized to deduct the amount of the claim from any part of the unexpended contract monies. Further, the owner is on notice that any decision he makes to expend funds which have been liened is at his own peril. Should the lien claim later be reduced to judgment, the owner's property may be sold to satisfy that judgment.

This concept is patterned after the existing mechanics' lien law as it relates to the treatment of stop notices by the owner. It provides, in the view of the Commission, a fairer and more flexible treatment of the owner's obligations regarding lien claims.

#### SECTION 14

Section 14 requires each county clerk to provide a "Construction Lien Book", similar to the county clerk records required for notices of intention and stop notices under the original statute.

SECTION 15

The provisions of this section shorten the time within which the claimant must bring an action, upon demand by the owner, to establish his claim, but lengthen the time within which the action would otherwise be commenced pursuant to the original statute. The Commission felt the owner, whose title to the real property could be affected by the lien claim, should be permitted to require that the claimant promptly establish the validity of his claim. Accordingly, an owner may require a claimant to commence suit to establish his lien within 30 days following service of notice by the owner. The Commission further determined that a one year period, commencing with the date of the claimant's last work, affords ample opportunity for the commencement of the action, if the claim is not otherwise settled or secured by a bond. Additionally, the Commission wished to clarify the date upon which the "last work, services, material or equipment was provided" to the job by specifying that warranty work, services calls and the like were not to be considered in determining that date.

SECTION 16

This section is designed to remedy what certain members of the Commission felt were abuses that are sometimes encountered under the current statute. Although there is case law to the effect that a forfeiture of lien rights is the proper remedy in the case of a willfully overstated claim, the statute is silent on that subject. Some Commission members felt that forfeiture was not an adequate remedy when an overstated lien claim would impede or halt the cash flow for the overall project, thereby damaging not only the general contractor but other subcontractors as well. Accordingly, this section provides for the imposition of all court costs and reasonable legal fees, as well as for the recovery of any consequential damages suffered by an adversely affected party, in the case of an invalid lien claim. The Commission perceived "adversely affected parties" to include other subcontractors and suppliers whose progress payments were interrupted by virtue of the filing of an improper lien by one of the other contracting parties.

SECTIONS 17 through 22

The Commission has no comment on these sections as they are self-explanatory.

SECTIONS 23 and 24

These two sections eliminate all pre-filing notification requirements of existing law. The "stop notice" and the "mechanics notice of intention" provisions of existing law have been eliminated. The draft bill provides that a claimant may perfect a lien by filing within 90 days after his last day of work. Consequently, a purchaser, lessee or mortgagee acquiring an interest in the improved real property within this 90 day period would have no notice of potential liens that may legally be filed within such period. The act therefore provides that purchasers, lessees or mortgagees shall, in such instances, acquire an interest in the property free and clear of any unfiled mechanics liens, notwithstanding any other provision of the act permitting the filing of construction liens. A purchaser, lessee or mortgagee's interest is thus superior to any lien filed after the purchaser, lessee or mortgagee acquires an interest. The purpose of these sections is to eliminate any chilling effect the statute may otherwise have had on the free transferring, leasing and mortgaging of property, and to place the burden of the payment on the contracting owner instead of on the parties subsequently acquiring an interest without notice of the lien.

SECTION 25

The sanction provision of this section corresponds to that in the case of an invalid lien claim. While there may have been occasional abuses under the existing statute, the Commission recognized that the fraudulent deprivation of the rights provided by the proposed act could result in damages to the intended beneficiaries of the rights provided thereunder. That is, while the Commission was willing to impose sanctions upon those who would abuse the new law, it was also willing to impose sanctions upon those who would fraudulently deprive a potential claimant of the benefits of this act. In the latter case, the court would be empowered to assess damages against the responsible party.

The following are some examples of wrongful deprivation of rights which would lead to liability under this section: (1) owner contracts under incorrect name so that claimants are misled as to name in which real estate is held so as to cause them to record under an incorrect name, resulting in a failure to secure priority against a third party; (2) prime contractor furnishes incorrect owner name with same result; (3) owner or prime contractor furnishes incorrect

description of real estate with the intent of causing a mistake in recording by claimant; (4) misstatement by prime contractor as to amount of contract price or payment thereof which induces claimants not to record lien; (5) false or bad faith determination of damages from a prime contractor's breach which reduces the owner's lien liability; (6) the owner seeks to eliminate a tier of beneficiaries by contracting with an entity wholly owned by the owner which is created for the express purpose of depriving beneficiaries of the rights created by the construction lien law.

It is not wrongful for a lien claimant to induce the owner to pay his claim even though the claimant is aware of other claimants who have not been paid, whether or not the other claimants have recorded a lien or notified the owner.

B. Summary of the main provisions of New Jersey Public Construction Bonding Act.

The proposed law repeals the provisions of the "municipal mechanics' lien law" and in its place substitutes a uniform, mandatory payment bond procedure

for all construction contracts entered into by the State, any of its political subdivisions, or any officer or agency thereof. The proposed law is a development of the concept set forth in N.J.S. 2A:44-143, and is patterned after the federal "Miller Act" (40 USCA § 270a et seq.), governing construction contracts awarded by the federal government.

The mandatory requirements apply to any construction contract in excess of \$20,000.00.

The prime contractor is required to provide:

(1) a performance bond of not less than 100% of the contract amount; and

(2) a payment bond of not less than 100% of the contract amount.

The payment bond shall be solely for the protection of first and second tier subcontractors, and to suppliers to the prime contractor and to the first tier subcontractor having provided work, material or equipment for prosecution of the construction work.

An eligible claimant having provided work, material or equipment may bring suit on the bond any time after 90 days following the date that he supplied the last of the work, material or equipment for which payment is claimed.

Any other eligible claimant -- that is, who does not have a contractual relationship with the contractor -- is authorized to bring suit on the payment bond after the aforesaid 90 days, only upon serving notice on the contractor prior to commencement of the action; notice shall also be given to the contracting body, but the giving of notice shall not be a condition for commencing or maintaining the action.

No action on a payment bond shall be commenced after one year following the date that the claimant supplied the last work, material or equipment for which payment is claimed and the action is brought, except by mutual consent of the parties, agreed to in writing prior to expiration of the one year period.

Service calls, warranty service or other work or services provided after completion of claimant's contract work shall not extend the time period within which a claim may be filed.

A surety furnishing a payment bond shall not be required to make payment on the payment bond for any sum that has been adjudged as owing to the claimant until such time as payment of the sum is due under the claimant's contract with the contractor, or, in the case

of a claim of a subcontractor to a subcontractor or a supplier to a subcontractor, payment is due under the subcontractor's contract, or the subcontractor's contract with the contractor, whichever is later.

The bill also provides statutory forms for both the performance bond and the payment bond.

APPENDICES



APPENDIX A

AN ACT concerning construction liens for improvements made to real property, revising and repealing various sections of the statutory law, and establishing a study commission to monitor the workings of the new law.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. This act shall be known and may be cited as the "Construction Lien Law Act."

2. As used in this act:

a. "Claimant" means a person having a right to file a lien claim on real property, as defined in R.S. 1:1-2, pursuant to the provisions of this act.

b. "Contract" means any agreement, or amendment thereto, in writing, evidencing the respective responsibilities of the contracting parties, which, in the case of a supplier, shall include a delivery or order slip signed by the owner or contractor, or an authorized agent thereof.

c. "Contract price" means the amount agreed to for the provision of work, services, material or equipment set forth in the contract.

d. "Contractor" means any person in direct contractual relation with the owner of real property for improvements thereto.

e. "County clerk" means the clerk or registrar of deeds and mortgages, as the case may be, of the county in which the real property to be improved is situated.

f. "Improvement" means any physical changes to real property, and includes the construction, reconstruction, alteration, repair, demolition or removal of any building or structure, any addition to such building or structure, or any construction or fixture necessary or appurtenant

to such building or structure for use in conjunction therewith.

"Improvement" includes excavation, digging, drilling, drainage, dredging, filling, irrigation, land clearance, grading or landscaping. "Improvement" shall not include the mining of minerals or removal of timber, gravel, soil, or sod where such is not integral to or necessitated by the need to improve real property.

g. "Lien" or "construction lien" means a lien on real property arising pursuant to the provisions of this act, including any amendment thereto.

h. "Lien fund" means the total amount stipulated in the contract, for the improvement to real property, entered into between the contractor and the owner of the property improved or to be improved.

i. "Owner" or "contracting owner" means any person with an estate or interest in real property who personally or through an authorized agent enters into a contract for improvement of the real property.

j. "Services" means professional services performed by a licensed architect, engineer or land surveyor in privity of contract with the owner of the land and utilized in connection with the improvement of real property.

k. "Subcontractor" means a subcontractor having a direct contractual relation with the contractor or a subcontractor having a direct contractual relation with a subcontractor to the contractor.

l. "Supplier" means any supplier of material or equipment, including rental equipment, to an owner, a contractor, or to a subcontractor to the contractor, which material or equipment is used in the improvement of real property.

1. "Work" means any activity, including labor, performed in connection with the improvement of real property.

3. Any contractor, subcontractor or supplier who provides work, services, material or equipment for use in the improvement of real property pursuant to a contract, shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in accordance with the contract. The lien shall attach to the interest of the contracting owner in the improved real property. If an improvement is contracted for by other than the owner of a fee simple interest in the improved real property, or has not been authorized in writing by said owner, the lien shall attach only to that person's interest in the real property.

Nothing in this act shall be construed to limit the right of any claimant from pursuing any other remedy provided by law.

4. a. A lien for material shall arise only where the material is delivered to, or used on the site to be improved for:

(1) incorporation in the improved real property, or consumption as normal waste in the construction operations; or

(2) use in the construction or operation of machinery or equipment utilized in the improvement of the real property but not incorporated therein.

b. A lien for equipment shall arise only for equipment utilized on the site for the improvement of real property, including equipment installed in the improved real property. The amount of the lien shall, in the

case of rental equipment, be limited to the rental value as prescribed in the rental contract.

5. Lien claims for the following improvements shall attach to real property only in the manner herein prescribed. In the case of an improvement:

a. involving a dock, wharf, pier, bulkhead, return, jetty, piling, groin, boardwalk or pipeline above, on or below lands under waters within the State's jurisdiction, the lien shall be on the improvements together with the contracting owner's interest in the lots of land in front of or upon which the improvements are constructed and any interest of the contracting owners of such land in the land or waters in front of such land;

b. involving removal of a building or structure or part of a building or structure from its situs and its relocation on other land, the lien shall be on the contracting owner's interest in the improved real property on which the building or structure has been relocated;

c. involving excavation, drainage, dredging, land-fill, irrigation work, construction of banks, making of channels, grading, filling, landscaping or the planting of any shrubs, trees or other nursery products, the lien shall be on the land to which such improvements are made, and shall not be upon the adjoining lands directly or indirectly benefited from such improvements.

6. No lien claim shall be filed or shall attach:

a. unless the total contract price of the improvements, for which the lien claim may be filed by the claimant, exceeds the jurisdictional limits established for the division of small claims of the

county district court pursuant to N.J.S.2A:6-43;

b. for materials that have been furnished or delivered subject to a security agreement pursuant to chapter 9 of Title 12A of the New Jersey Statutes (N.J.S. 12A:9-101 et seq.);

c. for improvements to real property contracted for and awarded by the State or any of its political subdivisions, or any agency or officer thereof.

7. A lien claim for the value of the contract price, or any portion thereof, for improvements made to real property shall be signed and acknowledged by the claimant or, in the case of a partnership or corporation, a partner or duly authorized officer thereof, and filed with the county clerk within 90 days following the date the last work, services, material or equipment was provided for which payment is claimed. No lien shall attach or be enforceable under the provisions of this act, unless the lien claim is filed within the 90 days, and a copy thereof given to the owner pursuant to section 8 of this act (C.           ), except that in no instance shall a lien attach prior to the date of issuance of a construction permit or the visible commencement of the improvement of the real property, whichever occurs first.

For purposes of this section, warranty or other service calls, or other work, materials or equipment provided after completion or termination of a claimant's contract shall not be used to determine the last day that work, services, material or equipment was provided.

8. Within 3 business days following the filing of a lien claim, the claimant shall, by personal service or certified mail, return receipt requested, serve or mail a copy of the lien claim as prescribed in section 9 of this act (C. \_\_\_\_\_) to the last known business address or place of residence of the owner and, if any, of the contractor and the subcontractor against whom the claim is asserted.

9. The form of the lien claim filing shall be as follows:

CONSTRUCTION LIEN CLAIM

TO THE REGISTRAR/CLERK, COUNTY OF \_\_\_\_\_:

In accordance with the terms and provisions of the Construction Lien Law Act (P.L. \_\_\_\_\_, c. \_\_\_\_\_; C. \_\_\_\_\_), notice is hereby given that:

1. (Name of claimant) of (Address of claimant) has on (Date) claimed a construction lien against the below stated real property of (Owner against whose property the lien is claimed), in the amount of (\$ \_\_\_\_\_), for the value of the work, services, material or equipment provided in accordance with a contract with (Name of other contracting party) for the following work, services, materials or equipment.

- a.
- b.
- c. (etc.)

2. The work, services, materials or equipment performed or supplied by claimant in connection with the improvement of the real property is:

- a.
- b.
- c. (etc.)

3. This construction lien is claimed against all that certain tract or parcel of land and premises lying and being in the \_\_\_\_\_ of \_\_\_\_\_, county of \_\_\_\_\_, State of New Jersey, and more particularly described in Schedule A annexed hereto, for the improvement of which property the aforementioned work, \_\_\_\_\_ services, materials or equipment was performed or supplied.

4. The work, services, material or equipment \_\_\_\_\_ was performed or delivered pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner or contractor, or an authorized agent thereof), dated \_\_\_\_\_, between (Claimant) and (name of other contracting party) of (address).

5. The last date upon which work, or services were performed, or material or equipment was furnished to the subject real estate is (Date).

NOTICE TO OWNER OF REAL PROPERTY:

Your real estate may be sold to satisfy the amount asserted by this claim, if:

- (a) you (or your contractor) do not pay claimant and obtain a discharge of lien from claimant;
- (b) a judgment is entered upon this lien by a court after a trial in which you (and/or your contractor) may challenge the lien asserted and you fail to satisfy that judgment by payment;
- (c) you (or your contractor) do not cause the lien to be discharged by the filing of a surety bond as provided for in N.J.S.A. (section 20 of this act).

NOTICE TO SUBCONTRACTOR OR CONTRACTOR:

This lien has been filed with the county clerk and the owner of the real estate, the effect of which is to place the owner on notice that the real estate may be sold to satisfy this claim unless the owner pays the claimed sum to this claimant.

Signed \_\_\_\_\_

For \_\_\_\_\_

(Individual, Firm or Corporation)

(Date)

ADD ACKNOWLEDGMENT

ADD SCHEDULE A

CLAIMANT'S REPRESENTATION AND VERIFICATION

Claimant represents and verifies that:

1. The amount claimed herein is pursuant to claimant's contract with a contractor or subcontractor at the date of filing.
2. The work, services, material or equipment for which this lien claim is filed was exclusively performed or furnished in connection with the improvement of the real property which is the subject of this claim.
3. This claim has been filed not later than 90 days from the last date upon which work, services, materials or equipment was performed or furnished in connection with the improvement of the real property.

4. If any of the representations hereinabove are false, this construction lien claim will be void and claimant may be liable for damages to the owner or any other person injured as a consequence of the filing of this lien claim.

Name of Claimant \_\_\_\_\_

Signed \_\_\_\_\_

(Type or Print Name and Title)

Date:

Acknowledgment:

Signature of preparer:

10. The amount of a lien claim shall be limited to the contract price, or any portion thereof, for the work, services, material or equipment provided in accordance with the contract at the time of the filing of the lien, less the amount of salvage value of any recoverable material not incorporated in the improvement.

11. A lien shall, subject to the limitations of section 7 of this act (C.           ), attach as of the date of filing of the lien claim. The total amount for which an owner may be liable for one or more lien claims filed pursuant to this act, shall not be greater than the total amount of the price of the contract between the owner and contractor pursuant to which the work, services, material or equipment is provided by the subcontractor or supplier, less the amount of any payments made by the owner pursuant to contract prior to receipt of a copy of the lien claim pursuant to section 8 of this act (C.           ).

12. A lien claim may be amended by the filing of an amendment with the county clerk. The amended lien claim shall comply with all the conditions and requirements for the filing of a lien claim, including the notice requirements of section 8 of this act (C. \_\_\_\_\_), as well as the conditions and requirements of this section. All obligations of the owner with respect to any amount claimed in the amended lien claim in excess of the amount previously claimed shall attach as of the date of \_\_\_\_\_ filing of the amended lien claim.

The form of the amended lien claim filing shall be as follows:

AMENDMENT TO CONSTRUCTION LIEN CLAIM

TO THE REGISTRAR/CLERK, COUNTY OF \_\_\_\_\_:

On \_\_\_\_\_ (Date) \_\_\_\_\_, the undersigned claimant, \_\_\_\_\_ (Name of Claimant) of \_\_\_\_\_ (Address of Claimant) \_\_\_\_\_, filed a CONSTRUCTION LIEN CLAIM in the amount of \_\_\_\_\_ (\$ \_\_\_\_\_) DOLLARS for the value of the work, services, material or equipment provided in accordance with the contract between Claimant and \_\_\_\_\_ (Name) as of \_\_\_\_\_ (Date) \_\_\_\_\_.

The lien claim was claimed against all that certain tract or parcel of land and premises lying and being in the \_\_\_\_\_ of \_\_\_\_\_, County of \_\_\_\_\_, State of New Jersey, and more particularly described in Schedule A annexed hereto, for the improvement of which property the aforementioned work, services, material or equipment was performed or furnished.

Effective the date of the filing of this  
AMENDMENT TO CONSTRUCTION LIEN CLAIM, the value of  
the said lien is claimed to be in the total amount of \_\_\_\_\_  
\_\_\_\_\_ (\$ \_\_\_\_\_) DOLLARS,  
inclusive of all prior lien claims or amendments thereof.

The work, services, material or equipment performed  
or furnished upon which this Amendment is made are:

- (a)
- (b)
- (c)

The last date upon which work or services were  
performed or material or equipment was supplied to the  
subject real estate is \_\_\_\_\_ (Date) \_\_\_\_\_.

NOTICE TO OWNER OF REAL PROPERTY

(Same as for lien claim)

NOTICE TO SUBCONTRACTOR OR CONTRACTOR

(Same as for lien claim)

CLAIMANT'S REPRESENTATION AND VERIFICATION

(Same as for lien claim)

13. Upon receipt of notice of a lien claim, the owner shall be authorized to withhold and deduct the amount claimed from the unpaid part of any contract monies that are or thereafter may be due and payable to the contractor or subcontractor. If the lien claim is not paid or settled by the contractor or subcontractor, the owner may, on being satisfied of its correctness, pay the amount of the lien claim to the claimant.

14. Each county clerk shall provide a book designated as a "Construction Lien Book" in which he shall, enter any lien claim filed pursuant to section 7 (C.       ), and any amended lien claim filed pursuant to section 12 of this act. Lien claims shall be marginally notated as to any amendments thereto.

The clerk shall make a proper index of the same in the name of the owner of the real property, stating the name of the claimant and the date of filing of the lien claim.

15. A claimant filing a lien claim shall forfeit all rights to enforce the lien, if the claimant fails to bring an action to establish the lien claim:

a. within one year of the date that the last work, services, material or equipment was provided, for which the lien claim was filed; or

b. within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner requiring the claimant to commence an action to establish the lien claim.

For purposes of this section, warranty or other service calls, or other work, materials or equipment provided after completion or termination of a claimant's contract shall not be used to determine the last day that work, services, material or equipment was provided.

16. If a lien claim is without basis, the amount of the lien claim is wilfully and grossly overstated, or the lien claim is filed in a manner and at a time not in accordance with the provisions of this act, the claimant shall forfeit all claimed lien rights and rights to file subsequent lien claims to the extent of the face amount claimed in said lien claim, and shall be liable for all court costs, and reasonable legal expenses, including attorney's fees, incurred by the owner or the contractor. The court may, in addition, enter judgment against the claimant for damages to many of the parties adversely affected by the lien claim.

In the case of a lien claim forfeited pursuant to this section, nothing herein shall be construed to bar the filing of a subsequent lien claim for any work, services, equipment or material provided after the date of filing of the forfeited lien claim, provided that the amount of said subsequent lien claim shall not be within the face amount of the forfeited lien.

17. A claimant shall, within 10 days following commencement of an action to enforce a lien claim, provide the clerk of the county in which the action has been commenced, a certificate, attested to by the claimant or the claimant's attorney, specifying the caption of the action and that an action has been commenced on the lien claim, and identifying the court in, and date upon which the action has been commenced. Upon receipt of the certificate, the county clerk shall endorse on the lien claim that an action has been commenced on the lien claim, and specify the court in which the action has been brought. The filing of the attorney's certificate shall be a condition for maintaining the action.

18. A claimant shall join as party defendants the contractor against whom the lien claim is filed and any other person having an interest in the real property that would be adversely affected by the judgment.

Any party to an action to establish a lien shall be entitled to any defense available to any other party in contesting the amount for which any other lien claimant seeks to have his lien reduced to judgment.

19. If the total amount of the liens established by judgment exceeds the amount of the unexpended contract price, the unexpended amount shall be apportioned on a pro rata basis among the lien judgment holders.

The judgment shall execute against the lien fund and not against the improved real property, except where the owner has made payments subsequent to the filing of the lien in contravention of the provisions of section 9 of this act.

20. A lien claim may be discharged of record by the county clerk upon execution and filing with the county clerk of a surety bond in an amount equal to 110% of the amount of the lien claim. The surety bond shall be provided by a surety company authorized to transact business in the State. The bond shall be for the payment of any judgment and costs that may be recoverable under the lien claim.

21. A lien claim may be discharged of record by the county clerk:

a. pursuant to section 20 of this act;

b. upon receipt of a duly acknowledged certificate, discharging the lien claim, from the claimant having filed the lien claim, or his successor in interest, or his attorney; or

c. pursuant to an order of discharge by a court of appropriate jurisdiction.

22. A discharge of a lien claim shall be duly acknowledged or proved and recorded in a properly indexed book for that purpose. A notation of the nature, date and record of the discharge shall be endorsed upon the margin of the record of the original lien in the construction lien book. The notation shall also set forth the book and page where the discharge is recorded.

23. In the event of a conveyance of an interest in real property to which improvements have been made that are subject to the lien provisions of this act and the last work, services, material or equipment for the improvements was provided within 90 days of the date of conveyance, the conveying owner of the real property shall, to the extent of the provisions of this act, remain liable within the 90 day period for any lien claim filed in accordance therewith.

24. Any person acquiring an interest in real property subject to the provisions of this act, shall acquire the interest therein free and clear of any construction lien claim filed pursuant to the provisions of this act, if the interest acquired is recorded prior to the recording of the lien claim.

25. A person who fraudulently deprives a person entitled to the benefits of this act, shall be liable to that person for any damages resulting therefrom.

26. The Legislature finds it desirable to reconstitute a Construction Lien Law Study Commission to monitor and evaluate the workings of the "Construction Lien Law Act," (P.L. c. ; C. ) and the "New Jersey Public Construction Bonding Act," (P.L. c. ; C. ), and to report back to the Governor and the Legislature any changes or refinements that may be deemed necessary or desirable to safeguard the statutory rights and remedies available thereunder to property owners and the diverse segments of the construction industry. The Commission shall be constituted within 120 days of the enactment of this act. The Commission shall be comprised of 12 members, to be appointed in equal numbers by the Governor, the President of the Senate and the Speaker of the General Assembly. Commission vacancies shall be filled in the same manner as the original appointment. Commission members shall serve without compensation. The Commission shall organize itself and conduct its business in such manner as its members deem useful. The Commission is authorized to request information and assistance of any agency or officer of the State or any of its political instrumentalities. The Commission may, from time-to-time, submit reports and recommendations to the Governor and the Legislature. The provisions of this section shall expire 18 months after the effective date of this act.

27. The following sections of law are repealed:  
N.J.S. 2A:44-64 through 2A:44-124, inclusive.  
Section 1 of P.L. 1979, c. 301 (C.2A:44-124.1).

28. This act shall take effect 120 days after  
enactment and shall apply to any improvement for  
which a construction permit is issued on or after the  
effective date.



APPENDIX B

AN ACT concerning payment and performance bonds on public construction projects and revising and repealing various sections of statutory law.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. This Act shall be known and may be cited as the "New Jersey Public Construction Bonding Act."

2. Definitions.

As used in this act:

a. "Claimant" means any person making a claim under a payment bond who is:

(1) a subcontractor to a prime contractor or a subcontractor; or

(2) a supplier providing materials or equipment to a prime contractor or to a subcontractor to the contractor,

b. "Contracting body" means the State or any political subdivision of the State, or agency or officer thereof, legally authorized to enter into contracts for the making of public improvements.

c. "Contract price" means the amount specified in a written agreement, or any amendments thereto in writing, for the provision of work, material or equipment.

d. "Contractor" means any person in direct contractual relation with the owner of real property for improvements thereto.

e. "Equipment" means any machinery or other apparatus, including rental equipment, utilized on the site to be improved, for the improvement of real property.

f. "Improvement" means any physical changes to real property, and includes the construction, reconstruction, alteration, repair, demolition or removal of any building or structure, any addition to such building or structure, or any construction or fixture necessary or appurtenant

to such building or structure for use in conjunction therewith.

"Improvement" includes excavation, digging, drilling, drainage, dredging, filling, irrigation, land clearance, grading or landscaping. "Improvement" shall not include the mining of minerals or removal of timber, gravel, soil, or sod where such is not integral to and necessitated by the need to improve real property.

g. "Material" means any goods utilized in the improvement of real property and incorporated into the improved real property, consumed as normal waste in construction operations, or used in the construction or operation of machinery or other equipment utilized in the improvement of real property, but not incorporated therein.

h. "Work" means any activity, including labor and services, performed in connection with the improvement of real property.

3. Performance and payment bonds: Amount, conditions; filing with contracting body.

As a condition of the award of a contract for the improvement of any building, structure, or other improvement to real property, the contracting body, in the case of a contract in an amount of \$20,000.00 or less, may require, and, in the case of a contract amount of more than \$20,000.00, shall require the contractor awarded the contract to furnish to the contracting body the following bonds.

a. A performance bond in an amount not less than 100% of the contract price, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. The bond shall be solely for the protection of the contracting body awarding the contract.

b. A payment bond in an amount not less than 100% of the contract price. The bond shall be solely for the protection of claimants supplying work, material or equipment to the contractor to whom the contract was awarded, or to any of his subcontractors, for use or consumption in the prosecution of the work provided for in the contract.

The bonds shall be executed by one or more surety companies authorized to do business in the State of New Jersey and shall be payable to the contracting body. The bonds shall be filed in the office of the contracting body awarding the contract.

4. Actions on payment bonds by claimants.

a. Any claimant who has supplied work, material or equipment in the prosecution of the work provided for in any contract for which a payment bond has been given pursuant to the provisions of section 3 of this act, who has not been paid the contract price, or any portion thereof, for work, material or equipment provided pursuant to contract, including any contract adjustments mutually agreed to in writing by the parties, may bring an action in his own name on the payment bond to recover the amount any time after 90 days following the date that he provided the last of the work, material or equipment for which payment is claimed, which action he may prosecute to final judgment and have execution on the judgment.

b. Any claimant who has no contractual relationship with the contractor, may bring an action on the payment bond in accordance with subsection a. of this section only upon the serving of notice to the contractor, by

certified mail, return receipt requested, addressed to the last known business address or place of residence of the contractor, prior to commencement of the action, but not later than 90 days following the date the last work, material, or equipment was provided for which payment is claimed. The notice shall state with substantial accuracy the amount claimed and the name of the person to whom the work, material or equipment was provided. Service of notice shall be a condition precedent to commencement of an action on the payment bond. Proof of mailing shall satisfy the requirement of timely service of notice.

c. Any claimant bringing an action pursuant to this section shall, at the time of commencement of the action, provide the contracting body with a notice of commencement in the same manner and form as that provided the contractor pursuant to subsection b. of this section. The provision of notice to the contracting body shall not be a condition for commencing or maintaining an action.

5. Actions on payment bonds: Venue; limitation of actions.

An action on a payment bond as provided herein shall be brought in a court of appropriate jurisdiction. No such action may be commenced after the expiration of one year following the date on which the claimant supplied the last work, material or equipment for the payment of which the action is brought; except that the time for commencing such action may be extended by mutual consent of the claimant, the contractor and surety, agreed to in writing prior to the expiration of the one-year period.

For the purposes of this section, service calls, warranty service or other work, material or equipment provided after completion of claimant's contract work shall not extend the time period within which a claim shall be filed.

6. Time for payment.

A surety furnishing a payment bond hereunder shall not be required, upon a claim or suit against it, to pay the sum adjudged owing the claimant until such time as payment of the sum is due the claimant in accordance with the terms of the claimant's contract with the contractor, or, in case of a claim by a subcontractor to a subcontractor or a supplier to a subcontractor, until the date upon which such payment is due the claimant from the subcontractor under the terms of their agreement, or the date on which payment is due from the contractor to the subcontractor against whom the claim is made, whichever date is later.

7. Certified copies of payment bonds, contracts to be furnished applicant by contracting body; fee; copies as prima facie evidence.

The contracting body shall furnish a certified copy of any payment bond and the contract for which such bond was given to any person who makes an application for such copy, upon payment of a fee in accordance with section 2 of P.L. 1963, c. 73 (C.47:1A-2).

A certified copy of any payment bond and of the contract for which such bond was given shall constitute prima facie evidence of the contents, execution and delivery of the original of such bond and contract.

8. The form of the surety bonds required hereunder shall be as follows:

- a. Performance Bond.
- b. Payment Bond.

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS that \_\_\_\_\_

\_\_\_\_\_ here insert name and address of the Contractor

as Principal, hereinafter called Principal, and \_\_\_\_\_

\_\_\_\_\_ here insert name and address of Surety

as Surety, hereinafter called Surety, are held and firmly bound unto \_\_\_\_\_

\_\_\_\_\_ here insert name and address of Obligee

as obligee, hereinafter called Obligee, in the amount of \_\_\_\_\_

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_)

for the payment of which Principal and Surety bind themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally by this instrument.

WHEREAS, Principal has by written agreement dated \_\_\_\_\_

\_\_\_\_\_, 19 \_\_, entered into a Contract with the Obligee for

\_\_\_\_\_ here describe the contract

\_\_\_\_\_ in accordance with plans and specifications prepared by \_\_\_\_\_

\_\_\_\_\_ which contract is made a part hereof by reference and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the Principal shall perform and fulfill all of the undertakings, terms and conditions of the Contract, then this obligation shall be void and of no effect, otherwise it shall remain in full force and effect.

The Surety hereby waives notice of any alteration of the Contract or extension of time for its performance which is made or granted by the Obligee.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the Obligee named herein.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 19 .

\_\_\_\_\_  
Contractor/Principal

\_\_\_\_\_  
Surety

PAYMENT BOND

KNOW ALL MEN BY THESE PRESENTS that we \_\_\_\_\_

\_\_\_\_\_ Here insert the name and address of legal title of the Contractor

as Principal, hereinafter called Principal, and \_\_\_\_\_

\_\_\_\_\_ as Surety, hereinafter called Surety, are held and firmly bond unto \_\_\_\_\_

\_\_\_\_\_ Here insert the name and address of the obligee

as Obligee, hereinafter called Obligee, for the use and benefit of Claimants as hereinbelow defined, in the amount of \_\_\_\_\_

\_\_\_\_\_ Dollars (\$ \_\_\_\_\_). Here insert a sum equal to the contract price

for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has by written agreement dated \_\_\_\_\_, 19 \_\_\_\_\_, entered into a Contract with Obligee for \_\_\_\_\_

\_\_\_\_\_ in accordance with drawings and specifications prepared by \_\_\_\_\_

\_\_\_\_\_ Here insert full name and title

\_\_\_\_\_ which Contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that, if the Principal shall promptly make payment pursuant to the contract to all Claimants as hereinafter defined, for all work, material and equipment used or reasonably required for use in the

performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1. A Claimant is defined as one having a direct contract with the Principal or with a subcontractor of the Principal for work, material, or equipment used in the performance of the contract.

2. The above named Principal and Surety hereby jointly and severally agree with the Obligee that every Claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work was done or performed, or material or equipment was furnished by such Claimant, may sue in its own name and prosecute the suit to final judgment for such sum or sums as may be justly due Claimant, and have execution thereon.

3. No suit or action shall be commenced hereunder by any Claimant,

(a) Unless Claimant, other than one having a direct Contract with the Principal, shall have given written notice to the Principal within ninety (90) days after the date on which Claimant did or performed the last of the work or furnished the last of the material or equipment for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material or equipment was furnished, or for whom the work was done or performed. Such notice shall be served by mailing the same by registered mail or certified mail, postage prepaid, in an envelop addressed to the Principal, at any place where an office is regularly maintained for the transaction of business.

(b) After the expiration of one (1) year following the date on which Claimant last performed work or labor, or supplied material or equipment on said contract.

(c) Other than in the Superior Court of New Jersey or the county district court, as may be appropriate.

4. The amount of this bond shall be reduced by and to the extent of any payment or payments made by the surety in good faith hereunder.

Signed and sealed this            day of            , 19    .

\_\_\_\_\_  
Contractor/Principal

\_\_\_\_\_  
Surety

8. N.J.S. 2A:44-125 through 2A:44-147, inclusive, are hereby repealed.

9. This act shall take effect 90 days after enactment and shall apply to any contracts entered into on or after that date.

THE "WAIVER OF LIEN" ISSUE

Statement By The  
New Jersey Subcontractors Association

Among all of the Commission members, the New Jersey Subcontractors Association ("NJSA") argued most strenuously that the new statutory format should include a provision invalidating the effect of "waiver of lien" clauses that are frequently found in construction contracts. Accordingly, NJSA proposed adoption of the following statutory language:

"Waivers of construction lien rights are against public policy, unlawful, and void except to the extent that they are given in exchange for full payment for the services or materials to which they relate."

The giving of lien waivers by subcontractors and material suppliers has been a pervasive and troublesome part of construction industry practice in most states. It has involved misunderstandings, coercive practices against potential lien claimants, frequent conduct approaching fraud, and frequent litigation over the interpretation, reliability and validity of purported lien waiver documents. No solution seems fully satisfactory. The one chosen here, and adopted by New York in 1975, is the absolute voiding of any waiver of lien rights not given in exchange for actual payment.

It seems wrong to hold lien claimants, many of whom are distinctly vulnerable to economic coercion, to waivers they sign on the basis (most often) of assurances of payment, when their need for lien rights arises only if those very assurances are unfulfilled. Once it is understood by lenders, title interests, lawyers and the construction trades that lien waivers are useless under this Act, waivers will not be sought and sounder construction payout practices will be used.

A partial waiver of lien reflecting a partial payment on contract price of course continues valid under this Section.

The Building Contractors Association (general contractors) and the National Association of Industrial and Office Parks (developers), both voting members of the Commission, have contended that most lending institutions require blanket waivers of lien rights in order to insure that the construction mortgage has absolute priority over any other lien on the property.

In response to this objection, NJSA pointed out that new construction activity in New York, especially in the last few years, is proceeding at an unprecedented level. Since that state adopted a statutory prohibition of lien waivers in 1975, NJSA believes there is no substantive validity to this argument. Lending institutions frequently arrange for the subordination of liens at the time advances are made on a construction mortgage. In this manner, construction funds continue to flow while the rights of potential lien claimants are protected.

Additionally, the Building Contractors Association and the National Association of Industrial and Office Parks argued that general contractors and subcontractors should be free to bargain over the terms of a contract, without governmental interference. While this argument may on its face

have some philosophical appeal, NJSA has responded it ignores the realities of the construction industry. Since any given general contractor or developer may have a number of subcontractors available to perform a single task, the contractor is free to offer unfair subcontractual terms on a take it or leave it basis. NJSA believes this argument would have some validity if subcontractors and general contractors at all times were in equal bargaining positions. That however is simply not the case. Our courts have held time and again the mechanic's lien statute is designed to afford a remedy to subcontractors and material suppliers and also to encourage their participation in the construction trades. Those legislative policies can easily be thwarted, NJSA believes, by permitting general contractors and developers to effectively invalidate the protections afforded by this statute by the use of waiver of lien clauses.

This was the single issue upon which the Commission could not compromise. Accordingly, at the conclusion of the Commission's work, a vote was taken on the question. Of the twelve members who voted, seven favored inclusion of language barring contractual waivers of lien, while five members voted against the proposal.



# BUILDING CONTRACTORS ASSOCIATION OF NEW JERSEY



BUILDING CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, WASHINGTON, D.C.

Benedict Torcivia, *President*

John Ambrose, Jr., *Vice President*

Lawrence Simpson, *Secretary*

Rudolph Ricciardi, *Treasurer*

Edward A. Burke, P.E., *Managing Director*

August 16, 1982

Fox, Schackner, Mastrangelo  
& Clarcken, Esqs.  
810 Broad Street  
Newark, New Jersey 07102

ATTN: Angelo A. Mastrangelo, Esq.  
Chairman  
Mechanic's Lien Law Study Commission

RE: Building Contractors Association of  
New Jersey

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Dear Angelo:

The Building Contractors Association of New Jersey (BCA/NJ) has appreciated the opportunity to participate in the Mechanic's Lien Law Study Commission and has particularly found great satisfaction in the manner in which the representatives of the various interests within the construction community were able to achieve resolution of the many difficult issues which confronted them in the course of the Commission's work, and especially your handling of the chairmanship. However, as the Commission's report indicates, there was one area where the Commission was unable to achieve unanimity and upon which there was great division within the Commission. That issue involved the matter of the "waiver of lien."

There was never any dispute among Commission members that a party could waive his right to file a lien upon receipt of payment. The disagreement arose in connection with the issue of the waiver being agreed upon between the parties to a contract at the time the contract is signed.

The BCA/NJ feels strongly that all parties to a contract should decide how to conduct their own business. It should not

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be dictated by a government where there is no evidence of unfair advantage for one of the contracting parties. The representatives of the Subcontractors Association have indicated a contrary position and have expressed the belief that such advance waivers should be declared void and illegal as against public policy upon the apparent explanation that their members are compelled to sign these waivers in a setting which amounts to economic duress.

It is important to recognize that the remedies available under the Mechanic's Lien Law are in addition to and supplement any remedies that are available to contracting parties pursuant to the existing statutory and case law of the State of New Jersey. The waiver of a Mechanic's Lien right does nothing to limit the right of a contracting party to sue the other party upon a breach and to obtain redress in the courts upon that basis. The special remedy which is provided under the Mechanic's Lien Law presently and which would be provided in accordance with the Commission's draft affords to a subcontractor, materialmen and, indeed a general contractor the ability to place the owner of the property on notice that that property may be security for the payment of obligations due to that party. No other industry has obtained such a complicated and stringent statutory setting which has the benefit of eliminating much of the risk which otherwise exists in the business of construction. Obviously, the Commission believed that such a statutory remedy should continue to be available to the industry.

It was the intent of the Commission to create a law that was good for the industry and create an atmosphere in the State which will generate rather than subdue the interest of legitimate developers, investors, owners, general contractors and subcontractors. A little prudence and normal business caution will produce the same effect as the argued for statutory prohibition of the waiver of lien. General contractors, subcontractors and materialmen by their own admission give preferential prices to responsible general contractors and owners who they know pay their bills promptly - obviously since to do so saves financing costs for the supplier of labor and materials. With only "good" contractors being successful, there will be fewer disputes over non-payment for services rendered and owners from within and outside the State will get more economical projects constructed on properties in New Jersey. When you consider these objectives, the need for availability of a lien waiver becomes apparent.

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Aside from this general issue which is so broad in scope, even the logistical matter of payment speaks to the need for this device. One in this industry cannot ignore the added time and paper work to obtain waiver of liens from twenty to thirty contractors and suppliers each month for normal progress payments. Time and administrative costs add to project costs.

Prudent business practice and credit checks will eliminate much of the risk of non-payment. Also, owners and developers need not be concerned with the potential of validly filed liens creating a cloud upon the title and financial structuring of the projects which could for some contractors cause inconvenient and possibly insurmountable situations regarding construction progress payments if not for a waiver of lien permission at contract signing. With the availability of a lien waiver, which could only be obtained in writing and pursuant to a contract between the parties, a materialman, subcontractor or general contractor could assure the investor that his project will not be plagued with the legal, financial and other difficulties which could arise if liens could be validly filed. In other words, such a waiver could make the difference between going forward with a project and not going forward with a project in New Jersey. The BCA/NJ asks somewhat rhetorically why should a subcontractor and contractor, who have worked with one another for years, who have learned to trust one another and who have been successful by virtue of their prudent business judgment, be precluded from affording that property developer the security that he desires in order to generate the realization of his project. For the lien law to declare such a waiver void as against public policy would have the effect of taking away from those responsible contractors, who have worked with one another, the ability to conduct their business in a manner that they choose and perhaps place the project outside the State.

We must specifically reject the contention of the subcontractors that they are victimized by demands for lien waivers as a condition to obtaining contracts with "certain" contractors. One would presume that the "certain" contractors are those who have no intention of paying their bills. One must wonder, then, why would these subcontractors enter into a contract with a party who they do not expect to pay his bills. What of the owner and contractor who is victimized by the subcontractor who inflates a change order price to a ridiculous amount and with the refusal of the contractor owner to pay, threatens to or actually liens the project. This could also occur if the subcontractor is not being paid due to poor workmanship or inferior materials. By this action

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the subcontractor knows he will stop the construction lender from paying any additional monies on the project, preventing payment of other subcontractors, real estate taxes, overhead, interest payments, etc., and bring the owner or contractor to his financial knees.

The subcontractors also argue that even reliable contractors fall into bad payment habits on occasion and that they should have the ability to be protected from those bad payment habits. We ask rhetorically who forces those subcontractors to work when they are not being paid? In fact, it is the belief of the BCA/NJ that imprudent general contractors, subcontractors and suppliers cannot be protected from their own imprudence by this law and, indeed, they should not be protected from their imprudence from any other law. The business setting which is basic to our system of commerce affords the aggrieved party the opportunity to obtain relief in the courts. However, even that remedy is not a certain remedy, and it is rather inappropriate that the subcontracting community indicate that their problems with their own judgment should be protected by a statute. We must reject the subcontractors contention that with the present waiver of lien permission this situation discourages business expansion in the State. There is no concrete evidence to support this statement.

It is possible to set forth a multitude more of realistic business settings in which the waiver could have an important value to the contracting parties and should be available to them. This observation, of course, raises the basic philosophical issue which was discussed at some length during the Commission meetings. That philosophical discussion centered around our argument, in which several other members of the Commission joined, that the creation of the remedy should not dictate the contractual relations between parties. In an analogous situation, parties can file financing statements under the provisions of the Uniform Commercial Code, yet there is no requirement that they must. It is clear that by omission or contract under the UCC, the parties can agree to waive that security when they enter upon their contractual relations. In other words, it is excellent that there should be a remedy available. However, it should be left to the negotiation between the contracting parties if they will utilize that remedy or otherwise.

In closing, we feel that the proposed new statute affords all parties who supply labor and materials with more than adequate protection without the prohibition of the lien waiver. This provision, if included, could have serious deleterious effect on

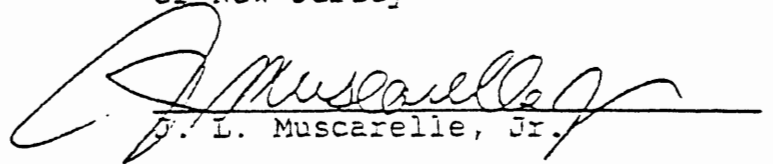
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business in the State. If the material and labor suppliers had no other remedy, it could be strongly argued to provide the remedy discussed. But this is not the case. We urge that any future law does not include this onerous and superfluous provision.

Very truly yours,

Building Contractors Association  
of New Jersey



J. L. Muscarelle, Jr.

