

# THE NOBLE ARCHITECT, THE HEARTLESS LANDOWNER AND AN AMBIGUITY IN OREGON'S CONSTRUCTION LIEN STATUTE

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## I. INTRODUCTION

Imagine the following conversation between an architect and her attorney:

Architect: I finished preparing the plans last week for the big job I was working on, but the owner abandoned the project for financial reasons. The owner is several months behind in its payments to me and I want you to file a construction lien to be sure I get paid.

Attorney: Do you know whether any other contractors have not been paid on the job or whether any liens have already been filed?

Architect: Everyone else who worked on the job has been paid and there are no liens, or other encumbrances, against the property of any kind, so we will not have to worry about priority disputes with any other creditors.

Attorney: Excellent. One last question: what exactly was the status of construction when the owner told you it was abandoning the job?

Architect: Well, we had finished preparing the architectural plans, and some surveying work may have been completed, but the owner abandoned the project before any excavation at the site began.

The essential question posed by the above scenario is whether architects are entitled to construction liens<sup>1</sup> based upon their prepara-

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1. Oregon's lien statute uses the term "construction lien." *See, e.g.*, OR. REV. STAT. § 87.001 (2003) (declaring that "ORS 87.001 to 87.060 . . . shall be known and may be cited as the Construction Lien Law"). Many other states, however, continue to use the term "mechanics' lien." *See, e.g.*, BRIAN A. BLUM, MECHANICS' AND CONSTRUCTION LIENS IN ALASKA, OREGON AND WASHINGTON § 1.3 (Issue 4 1994) (discussing the terminology different states

tion of plans even though visible construction<sup>2</sup> never begins.<sup>3</sup> For convenience, this Article uses the phrase “the lien” to refer to a construction lien granted to an architect even though visible construction does not commence at the site of the planned improvement.<sup>4</sup>

Architects obviously have a vested interest in being paid whether or not a building is constructed based upon their plans.<sup>5</sup> In many instances, architects may be able to sue the owner for breach of contract and recover without resorting to a construction lien. Often, however, construction liens are the only viable remedy when a landowner abandons a project.<sup>6</sup> Therefore, if architects are denied construction

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use to refer to “construction liens”). This Article uses the term “construction lien,” but the two terms are interchangeable. *See id.*

2. The above hypothetical conversation between an architect and her attorney suggests that a surveyor may have done some work on the property, which could result in some visible evidence that a construction project was imminent. Nevertheless, it is assumed throughout this Article that no *visible* work of any kind has been performed on the hypothetical property in question.

3. Although this Article is about construction liens for architects, similar arguments have been made regarding other classes of contractors. Anyone who performs work before visible construction commences, such as surveyors and engineers, may encounter the same issues. For useful discussion of some of the relevant case law regarding construction lien rights of other professionals, see Dag E. Ytreberg, Annotation, *Surveyor's Work as Giving Rise to Right to Mechanic's Lien*, 35 A.L.R.3d 1391 (1971); B. Finberg, Annotation, *Mechanic's Lien for Services in Connection with Subdividing Land*, 87 A.L.R.2d 1004 (1963); *see also* L.I. Reiser, Annotation, *Mechanic's Lien for Grading, Clearing, Filling, Landscaping, Excavating and the Like*, 39 A.L.R.2d 866 (1955).

4. To be more precise, “the lien” in this Article technically refers to a construction lien granted to an architect (prior to any visible construction) that the architect either has perfected, or is legally able to perfect, and ultimately may foreclose in accordance with the applicable statutes.

5. A related issue, somewhat unique to architects, is that an owner may fire a project's architect, but construction might ultimately commence using plans prepared by another architect. In such a situation, the original architect's plans may not have been “used” at all, but the owner may complete the project. For example, in *Park Lane Properties, Inc. v. Fisher*, 5 P.2d 577 (Colo. 1931), the first architect completed its plans for a hotel but the project was built with a subsequent architect's plans. *See infra* note **Error! Bookmark not defined.**

6. The usual scenario is that the owner of a construction project becomes insolvent and is effectively “judgment-proof,” making a judgment against the owner for breach of contract worthless. A construction lien, in contrast, may provide a remedy directly against the improvement and the underlying land. Once a lien is perfected in accordance with the statutory requirements, contractors may foreclose their liens and get paid (some or all of what they are owed) whether or not the owner of the project is solvent. Hence, construction liens, as noted above, are often not only a useful additional remedy but also may be a contractor's sole viable remedy.

One commentator expressed the matter as follows:

Mechanics liens are the most effective remedy contractors have to get payment for the work they have done. The legislature should encourage their use rather than force unpaid contractors to use common law claims in cumbersome jury trials that

liens when landowners abandon projects prior to visible commencement of construction, then the architects likely will never get paid for their work.

Our question<sup>7</sup> is undecided in Oregon<sup>8</sup> and several other states.<sup>9</sup> Many states, however, have addressed our question, some by statute and others by case law, and they have reached varied conclusions.<sup>10</sup> Some states require visible evidence of the commencement of construction<sup>11</sup> before architects are granted liens for their work.<sup>12</sup> Other states grant architects liens even though visible construction never commences.<sup>13</sup> Still other states grant architects liens before visible commencement of construction, but only if there is no priority dispute with another creditor.<sup>14</sup> Regardless of the particular approach a state adopts, however, each state must consider the competing interests of architects, landowners, lenders, and other contractors.<sup>15</sup>

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will continue to clog overcrowded courts, without improving the outcome, encouraging settlement, or expediting payment for work done.

Roger W. Stone, *Mechanic's Liens in Iowa—Revisited*, 49 DRAKE L. REV. 1, 40 (2000).

7. This Article uses phrases such as “our question” or “our issue” to refer to the central question of this Article: whether architects are entitled to construction liens, in Oregon or elsewhere, even though visible construction does not commence at the site of the planned improvement.

8. See *infra* Part II.

9. In addition to Oregon, seventeen other states have no clear answer to our question. See *infra* Part III.D.

10. For a useful discussion of many of the cases dealing with our issue, see Kimberly C. Simmons, Annotation, *Architect's Services as Within Mechanics' Lien Statute*, 31 A.L.R.5th 664 (1995); see also Thomas Warner Smith, III, Note, *Mechanic's Lien Priority Rights for Design Professionals*, 46 WASH. & LEE L. REV. 1035 (1989) (arguing that, in order to balance the competing interests of design professionals and construction lenders, state legislatures should enact statutes allowing design professionals' liens to attach when they record a notice of commencement or a notice of intention to do work).

11. For an analysis of “commencement of construction” in the construction lien context, see J.R. Harvey, Annotation, *What Constitutes “Commencement of Building or Improvement” for Purposes of Determining Accrual of Mechanic's Lien*, 1 A.L.R.3d 822 (1965).

12. See *infra* Parts III.B.1, III.C.1 (discussing those states that deny architects the lien either by statute or by case law). To be precise, not all of the states discussed below in Parts III.B.1 and III.C.1 grant architects construction liens simply because construction commences. For instance, Pennsylvania also requires that architects supervise construction in order to obtain a lien. See *infra* notes **Error! Bookmark not defined.**-51. Nevertheless, all of the states discussed in Parts III.B.1 and III.C.1 require, at a minimum, that construction commence before architects are entitled to construction liens.

13. See *infra* Parts III.B.2, III.C.2.

14. For example, Utah grants architects the lien, but if there is a competing creditor (such as a lender), then an architect's lien does not attach until “visible to the eye” commencement of construction. See *infra* notes **Error! Bookmark not defined.**-43.

15. See, e.g., *Rogue Valley Mem'l Hosp. v. Salem Ins. Agency*, 510 P.2d 845, 851 (Or. 1973) (noting that legislatures enacting construction lien laws must consider the opposing in-

Part II of this Article analyzes our question under Oregon law and concludes that an Oregon court is equally likely to grant or deny architects the lien.<sup>16</sup> Part III analyzes how other states have addressed our question. This serves several related purposes. First, because our question is undecided in Oregon, investigating how other jurisdictions have dealt with our issue may help predict how an Oregon court would address the issue. Second, because a primary goal of this Article is to suggest improvements to Oregon's statute, it is useful to survey the choices, both good and bad, that other states have made. Finally, analyzing the law from other jurisdictions (whether or not such analysis is directly relevant to interpreting or improving Oregon's statute) may assist legislators and practitioners, in states other than Oregon, that are grappling with their construction lien statutes.

Part IV summarizes the arguments courts have employed to grant or to deny architects the lien. Part V presents some specific suggestions for Oregon's legislature if it wishes to clarify Oregon's construction lien statute to provide a clear answer to our question. Finally, Part VI concludes with a plea for clarification of the construction lien statutes in all states where the law concerning our issue is currently unclear.

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terests of the debtor, the lien holder, and purchasers at a foreclosure sale).

16. This Article does not discuss all the steps required to acquire, perfect, and foreclose a lien in Oregon, or in any other state. Oregon practitioners needing such guidance should consult the resources discussed below in Part II.C. This Article also assumes that our hypothetical architect seeking a construction lien has prepared competent plans in accordance with her contract with the owner. Furthermore, although this Article frequently discusses priority disputes between competing creditors, determining how best to resolve priority disputes between architects and other contractors, or between architects and lenders, is not a primary concern of this Article.

Finally, this Article assumes that the reader understands the basic purpose of construction lien statutes. Brian Blum aptly summarizes the key rationale of construction lien laws as follows:

Mechanics' lien statutes are motivated by the policy that building construction is likely to be encouraged by legislation that secures the debt due to a builder or supplier of materials for work or material furnished for the improvement of real property. Apart from the policy of stimulating construction activity by assisting builders and suppliers in the collection of their claims, the lien is also supported by a policy of fairness: When work or material is devoted to the improvement of property, the value of the property is likely to be enhanced, and the cost of that work or material is appropriately treated as a charge on the property.

BLUM, *supra* note 1, § 1.1 (footnotes omitted).