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General Contractors Must Serve a Preliminary Notice

By: Trevor B. Potter, Cox, Castle & Nicholson LLP

Preliminary notices are a hot button issue for general contractors today, because if they fail to serve a preliminary notice on a construction lender, contractors lose their statutory mechanic's lien and stop notice rights.

The loss of these powerful rights and remedies robs general contractors of immense leverage in payment disputes with owners (and lenders) and relegates general contractors to pursuing unsecured breach of contract claims to recover unpaid amounts – claims that could languish for years without resolution. Without a mechanic's lien on the owner's property and the threat of foreclosing on that lien, the litigation posture of general contractors is substantially and unnecessarily weakened.

Some GCs Unaware Law Changed

In two recent litigation matters handled by Cox, Castle & Nicholson, the general contractor failed to serve a preliminary notice on the construction lender, rendering the majority of the contractor's litigation claims dead on arrival. Indeed, it appears that some general contractors are simply unaware that California law changed and that they now have to serve a preliminary notice on the construction lender in order to perfect their mechanic's lien and stop notice rights.

Civil Code section 8200(e) expressly states, “[a] claimant with a direct contractual relationship with an owner or reputed owner [e.g. a general contractor] is required to give preliminary notice only to the construction lender or reputed construction lender, if any” as a necessary prerequisite to the

validity of a subsequent mechanic's lien or stop payment notice claim to recover unpaid amounts for work performed. (Civ. Code 8200(a), (e)(2).)

What It Contains

A preliminary notice is typically a one-page document prepared by contractors that contains: (1) a general description of the work and its estimated price, (2) the name and address of the person furnishing the work, (3) the name of the person who contracted for the work, (4) a description of the jobsite, and (5) the identity of the owner and construction lender (if any). A preliminary notice from a general contractor puts the construction lender on notice that the contractor is performing work on a project and the approximate value of that work.

Prior to 2012, it was obvious that the law required subcontractors to serve preliminary notices on owners, general contractors and construction lenders in order to assert valid mechanic's lien and stop notice claims, and subcontractors became accustomed to doing so as a matter of course. As to general contractors, however, the preliminary notice requirement was unnecessarily ambiguous, because general contractors were expressly exempted from serving preliminary notices under Civil Code section 3097(a) but it was unclear if Civil Code section 3097(b) qualified that exemption. (See *Brewer Corporation v. Point Center Financial, Inc.* (2014) 223 Cal.App.4th 831.)

Notwithstanding this legal ambiguity, general contractors (and their lawyers) generally concluded that they did not need to serve construction lenders in order to assert valid mechanic's lien and stop notice claims. As a result, general contractors became

accustomed to not worrying about preliminary notices.



2012 Law Changed Things

However, the California Legislature passed a law that went into effect in 2012 that amended the preliminary notice statutes, in part, to remove any ambiguity regarding the applicability of the preliminary notice requirement to general contractors. The Legislature noted that section 3097(b) “contain[ed] an ambiguity relating to whether a general contractor must give preliminary notice to a construction lender on a private work.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 189 (2009–2010 Reg. Sess.), p. 4, as amended Dec. 15, 2009.)

The bill clarified “that a general contractor must give preliminary notice to a construction lender on a private work” (*Ibid.*) and California law now requires *any* contractor in a direct contractual relationship with an owner to provide a preliminary notice to the construction lender as a prerequisite to the validity of any mechanic's lien claim.

Preserving Rights and Remedies with a Preliminary Notice

General contractors that avoided the necessity of seeking to enforce mechanic's lien or stop notice claims since the amended California statutes went into effect in 2012, may be unaware that the law regarding preliminary notices changed. Given the construction boom since the Great Recession and the relative dearth of distressed projects, it appears that many general contractors may fit into this dangerous category.

The prior belief that general contractors do not need to concern

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Navigating The Opportunity Zone Program

By Julie Treppa, Farella Braun + Martel LLP

A new economic development tool created to stimulate investment in low-income communities known as “Opportunity Zones” has been attracting the attention of investors, developers and business owners alike.

The Opportunity Zone Program emerged as part of a bipartisan effort to induce private investors to infuse capital into low-income communities, which otherwise would rely upon grants or investments from non-profit organizations, federal, state or local governments, and community development organizations to stimulate growth.

The Opportunity Zone Program attracts private capital to Opportunity Zones by extending tax advantages to investors in “Qualified Opportunity Funds” which, in turn, invest in projects or businesses located in these

zones. The incentive is not limited to real estate investments. Rather, businesses that deploy capital and operate in Opportunity Zones can benefit from this incentive.

Moreover, unlike other tax incentive programs, the Opportunity Zones Program is available to any taxpayer with capital gains to defer, and there is no cap on the benefits that can be claimed under the program. As a result, the program is causing a stir in both the start-up and development community, driving up pricing on real estate sales and lease rates within these communities.

Unanswered Questions

Despite widespread interest in the Opportunity Zone Program, guidance from the Treasury Department on specific program requirements has trickled out.



Proposed regulations were issued in late October of 2018, but those regulations left many questions unanswered.

In December of 2018, President Trump signed an executive order establishing the White House Opportunity and Revitalization Council, which is

tasked with assessing ways to minimize regulatory and administrative costs of investing in Opportunity Zones. The executive order requires the council to submit a work plan within 90 days of the order, along with a list of best practices and recommended statutory, regulatory and policy changes, but the recent government shutdown will likely disrupt this time table.

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themselves with preliminary notices is now misplaced. Every general contractor should automatically serve a preliminary notice on the construction lender at the outset of each project in order to preserve the powerful rights and remedies that California law provides. ■

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