

Mechanics' Liens for Minnesota Land Surveyors

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A. INTRODUCTION.

A mechanic's lien is an interest in real estate created by statute. In Minnesota, the controlling statute is Minnesota Statutes Chapter 514 (particularly §514.01 - .17). The development of the mechanic's lien statute dates back to the territorial laws of 1849, which were codified when Minnesota became a state in 1858.

It is designed to protect the rights of those who contribute to improvements to real property. By following the statutory requirements the land surveyor, as well as other contractors, may obtain a mechanic's lien against any real estate interest for which they contribute labor and materials to improvements. If necessary, they may seek to foreclose the lien. The mechanics' lien law is a powerful tool for land surveyors seeking payment for their services provided that relate to real estate improvements.

The advantages of using the mechanic's lien law include:

- Provides the surveyor with a security interest in the improved real estate allowing him collect on the debt before other creditors that have recorded their interest subsequent to the start of work on the improved property. Consequently, the mechanics' lien can allow the land surveyor to secure payment by foreclosure of the lien and sale to of property.
- Trying to secure payment by means a debt collector or conciliation court (if fee owed is less than \$7500) can be costly in company time and attorneys fees. The mechanic's lien statute, however, provides the court with discretion to award legal costs including fees. In some cases, the court will award attorney fees that are *greater* than the lien itself. The reasoning being is that the Court has deemed it good public policy for smaller contractors, such a land surveyors, to pursue their lien rights without fear of the legal process being cost prohibitive.
- The existence of a mechanic's lien on property amounts to a significant thorn in the owner's side, offering the surveyor substantial leverage in securing payment of outstanding sums for work done or material supplied. Title companies, lenders, and potential buyers of the property will demand that the lien be removed. Often, lenders will not make loan advances to the owner until the lien is removed. Further, if the surveyor forecloses on its lien, the resulting judgment can direct the foreclosure sale of the property for which improvements were made or material provided. Again, this represents significant leverage over a debtor who is thereby encouraged to make payment to extinguish the lien.
- The mechanic's lien law allows a surveyor who subcontracts to a developer as prime contractor a direct cause of action against the owner, even though he has not directly contracted work with the owner. In the absence of the Mechanic's lien statute, the surveyor would only be able sue on the breach of the contract, which will only provide a judgment against the prime contractor, unsecured by any real estate, which may be difficult or impossible to collect. The mechanic's lien provides a crucial remedy to this problem.

It is important to state that the mechanic's lien statute is *strictly construed as to whether a lien*

attaches, but is liberally construed after the lien has been created. Dolder v Griffin, 323 N.W.2d 773 (Minn. 1982). The mechanic's lien statute is strictly construed as to the time limitations for when a lien is established or terminated. *Guillaume & Associates, Inc. v. Don-John Co.*, 336 N.W.2d 362 (Minn. 1983).

B. HISTORY OF MECHANICS' LIENS AND LAND SURVEYORS

Prior to 1974, surveyors and engineers were not entitled to mechanics' liens in Minnesota. See *Dunham Assoc., Inc. v. Group Investments, Inc.*, 223 N.W.2d 376 (Minn.1974); *Anderson v. Breezy Point Estates*, 168 N.W.2d 693 (Minn.1969). The legislature in 1974 included the services of engineers and surveyors in the amendment to Minn.Stat. § 514.01 which provides:

Whoever performs engineering or land surveying services with respect to real estate, or contributes to the improvement of real estate by performing labor, or furnishing skill, material or machinery for any of the purposes hereinafter stated, ... shall have a lien upon the improvement, and upon the land on which it is situated. (emphasis added).

In addition, the following amendment was made to Minn.Stat. § 514.05:

All such liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof. As against a bona fide purchaser, mortgagee, or encumbrancer without notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground, but a person having a contract for the furnishing of labor, skill, material, or machinery for the improvement, may file for record with the register of deeds of the county within which the premises are situated, or, if claimed under section 514.04, with the secretary of state, a brief statement of the nature of such contract, which statement shall be notice of his lien. *Engineering or land surveying services with respect to real estate shall not constitute the actual and visible beginning of the improvement on the ground referred to in this section, except when such engineering or land surveying services include a visible staking of the premises. (emphasis added)*

In 1986, the Minnesota Court of Appeals interpreted this amendment to mean that visible staking or grading of property could constitute the first visible improvement, and the priority of all mechanics liens could therefore attach with the performance of surveying or engineering services. *R.B. Thompson, Jr. Lumber Company v. Windsor Development Corporation*, 383 N.W.2d 362, 366-67 (Minn.App.1986). This case conflicted with long held rulings that the actual or visible improvement must be an improvement on the ground. See *Reuben E. Johnson Co. v. Phelps*, 156 N.W.2d 247, 251 (Minn.1968); *Erickson v. Ireland*, 158 N.W. 918, 920 (Minn. 1916). In the *R.B. Thompson* case, the court expressed concern regarding the ability of all lien claimants to tack onto the priority of engineers and surveyors, stating:

“By holding that housing contractors and other lien claimants may tack their liens back to any visible work done on a site, even if done *years* before the actual erection of the building, these cases inject great uncertainty into the bar and the industry.” *R.B. Thompson*, 383 N.W.2d at 367.

The court's concern in these cases was not with the priority of the lien of the surveyor, but with the ability of all other lien claimants who provided work or material to tack on to the surveyor's priority.

As a result *R.B.Thompson* the state legislature in 1987 again amended Minn.Stat. § 514.05 by adding the words *actual or record* before the word notice and the word *only* in the second sentence of Subd. 1 and by deleting the last sentence of Subd. 1 and adding a new Subd. 2.

Since 1987 Minn. Stat. §514.05 reads as follows:

Subd 1. **Generally.** All liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof. As against a bona fide purchaser, mortgagee, or encumbrancer without *actual or record* notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground, but a person having a contract for the furnishing of labor, skill, material, or machinery for the improvement, may file for record with the county recorder of the county within which the premises are situated, or, if claimed under section 514.04, with the secretary of state, a brief statement of the nature of the contract, which statement shall be notice of that person's lien *only*.

Subd. 2. **Exception.** Visible staking, engineering, land surveying, and soil testing services do not constitute the actual and visible beginning of the improvement on the ground referred to in this section. This subdivision does not affect the validity of the liens of a person or the notice provision provided in this chapter and affects only the determination of when the actual and visible beginning of the improvement on the ground, as the term is used in subdivision 1, has commenced. (emphasis added).

The statute now essentially creates a split in lien priority between surveyors and all other lien claimants. Surveyors can establish a lien upon the property simply by performing survey related services in connection with the property. Persons other than surveyors have a lien on the land once they have complied with Minn. Stat. §514.01 where they “contribute to the improvement of real estate by performing labor, or furnishing skill, material, or machinery for any of the purposes hereinafter stated”. *Kirkwold Const. Co. v. M.G.A. Const., Inc.* 513 N.W.2d 241 (Minn.1994). The split in priority restricts the non-survey service providers from tacking onto the priority date of the surveyor which could occur long before there are any visible improvements on the ground. (*Id.*).

It is important to note that the bona fide purchaser or mortgagee (i.e.lender) must have actual or record knowledge of the surveyor's work before the mechanic's lien attaches, and when the surveyor's mechanics' lien attaches it is superior to the bona fide purchaser or mortgagee's interests up to the time of the actual and visible improvement on the ground. (*Id.* at 245).

C. PROPERTY SUBJECT TO MECHANICS' LIENS

1. Public Property.

Public property held for and devoted to a public use is exempt from mechanic's lien laws. *Jordan v. Board of Education*, 39 N.W. 801 (Minn. 1888); *Burlington Mfg. Co. v. Board of Courthouse and City*

Hall Commissioners, 69 N.W. 1091 (Minn. 1897); *GME Consultants, Inc. v. Oak Grove Development, Inc.*, 515 N.W.2d 74 (Minn. App. 1994).

Real property held by a municipality for the purpose of economic development is not exempt from the mechanic's lien laws when it was to be devoted exclusively to private purposes. *Comstock & Davis, Inc. v. City of Eden Prairie*, 557 N.W.2d 213 (Minn. App. 1997). The public use exception applies only to "quintessentially public facilities" such as city halls, courthouses, schools, and jails. (*Id.* at 215).

2. Private Property

Generally, mechanic's liens can attach to any type of private interest in real property that may be sold or transferred

a. Homestead Property.

Homestead property is not exempt from the mechanic's lien laws. (Minn. Const. Art. 1 §12; Minn.Stat. §510.01). This is an important distinction between the mechanic's lien and judgment lien obtained from a judgment in conciliation court or other civil action, where the judgment lien is limited to nonexempt property which includes the homestead.

b. Area Limitation. Minn. Stat. §514.03, Subd. 3 provides:

The lien shall extend to all interest and title of the owner in and to the premises improved, not exceeding 80 acres, except in the case of homesteaded agricultural land as used in section 273.13, 8 subdivision 23, where the lien shall be limited to 40 acres."

Where the real property upon which a mechanic's lien is claimed exceeds the statutory limit, the claimant must select land within a parcel not exceeding the statutory limit. *Tuttle v. Howe*, 14 Minn. 145, (Minn. 1869); *Gale v. Hopkins*, 206 N.W. 164 (Minn. 1925), but the inclusion in a mechanic's lien statement of more real estate than the statutory limit allows does not, in the absence of bad faith, destroy the mechanic's lien. *Aaby v. Better Builders, Inc.*, 37 N.W.2d 234 (Minn. 1949).

c. Multiple parcels of land under same ownership. See Minn. Stat. §514.09.

The statute provides that when the surveyor has one general contract with the owner for work covering several parcels he/she can elect to 1) apply one lien demand between the several adjoining parcels, or 2) assert a lien on the individual parcels proportionate to the owner's entire liability under the general survey contract. If the parcels surveyed are noncontiguous, separate lien statements must be filed. *S. H. Bowman Lumber Co. v. Piersol*, 180 N.W. 106 (Minn. 1920). The determination of whether the parcels are adjoining is made as of the date the surveyor entered into the general contract with the owner. See *LaValle v. Bayless*, 257 N.W.2d 283, 285 (Minn.1977).

The Minnesota Court of Appeals has upheld a combined mechanic's lien statement that was recorded against multiple lots separated by commonly owned intervening lots. *Automated Bldg. Components, Inc. v. New Horizon Homes, Inc.* 514 N.W.2d 826 (Minn.App., 1994). In this case two blocks of lots in a multifamily townhouse development were "adjoining lots" and, thus, could be subject to combined mechanics' lien statement, even though one city street and three commonly owned lots were interspersed in the blocks. (*Id.*). The land was platted to accommodate one planned unit development and there were no unrelated lots dividing the land. (*Id.*). This scenario is most applicable to the surveyor hired solely for

construction surveying services on a planned unit development or common interest community.

D. WHEN THE LIEN ATTACHES TO THE PROPERTY AND PRIORITY

A mechanic's lien may attach to any interest in real property which may be sold or otherwise transferred. *Dunham Associates, Inc. v. Group Investments, Inc.*, 223 N.W.2d 376 (Minn. 1974). The lien attaches when the first item of survey related work is performed in connection with the property. (Minn. Stat. §514.05). Since timing is critical for establishing priority of their security interest in the property as well as right of foreclosure, the surveyor should document the exact day work began on the property.

Establishing the date that the surveyor commenced work for the project is critical in instances where the combined encumbrances on a piece of property exceed its total value. The potential of multiple competing interests in a mechanic's lien foreclosure action may result when other contractors, subcontractors, and material suppliers proceed against one another to try to collect the value of their labor or material when the equity in the property is insufficient to satisfy all claims.

1. Knowledge of another person's unrecorded interest.

Actual knowledge by a lien claimant of another party's unrecorded interest, or of a lien claimant's work before the first visible improvement, can change the rules of priority. As surveyors, we are all familiar with the concept of junior vs. senior rights when analyzing sequential conveyances. The rule of priority for lienholders on a given parcel of land is no different.

Under the Minnesota Recording Act, a bona fide purchaser who records first obtains rights to the property which are superior to a prior purchaser who failed to record. *See* Minn. Stat. §507.34; *Mavco, Inc. v. Eggink* 739 N.W.2d 148 (Minn. 2007) (a mortgagee, which executed mortgage before contractor's action to foreclose mechanics' lien, but recorded mortgage more than two months after contractor filed notice of lis pendens, was not a bona fide purchaser, and thus contractor's mechanics' lien took priority over mortgagee's mortgage); but the Recording Act does not protect a purchaser who has actual or constructive notice of outstanding rights in another, since the purchaser is then not a bona fide purchaser. *Chaney v. Minneapolis Community Development Agency*, 641 N.W.2d 328 (Minn.App.2002).

For instance, if you, as the surveyor on a project, have actual knowledge of an unrecorded mortgage before you begin your survey work, you may be junior in priority to the mortgagee, even though your work began before the mortgage was recorded. *See Comstock & Davis, Inc. v. G.D.S. & Associates*, 481 N.W.2d 82 (Minn. App.1992) (Actual notice requires conveying information of a signed enforceable mortgage); *Resolution Trust Corp. v. Ford Mall Assoc. Ltd. P'ship*, 30 F.3d 93, 95 (8th Cir.1994).

2. Single vs. Multiple Projects

When there is a **single project** with one prime contractor, all liens by the contractor and the subcontractors have equal priority. All the liens attach as of the date of the first visible work on the property, with the exception for the surveyor (as well as the engineer and architect) whose lien attaches when he/she begins survey related work on the property. Minn.Stat. §514.05 subd. 2; *Kirkwold Const. Co. v. M.G.A. Const., Inc.*, 513 N.W.2d 241, 245 (Minn.1994). Due to the surveyor's benefit of the split priority discussed earlier, a mortgagee with knowledge of non-visible work by the surveyor that occurred before the mortgage was executed will be junior to the surveyor's mechanic's lien if the mortgage was recorded before the first visible improvement, but after the surveyor began work on the property. (*Id.*).

When **multiple projects** with multiple phases and contractors occur on a given parcel of land the priority of the lien depends on the continuity and interrelation of the improvements. If the development is being constructed for the same general purpose and the phasing combined will form one single improvement (i.e. shopping mall, residential subdivision), priority will date back to the first visible improvement on the entire project. *See Poured Concrete Foundation, Inc. v. Andron, Inc.* 529 N.W.2d 506 (Minn.App.1995) (stating that an owner-contractor and excavator who have a unified plan, purpose, and contract that includes preparation for building home on lot, and when first visible sign of improvement to lot is excavation, lien claimants who contributed labor and materials to actual construction of home may relate their mechanics' liens back to date of original excavation, when first labor was furnished upon the premises).

E. PRE-LIEN NOTICE

The form that the land surveyor gives the landowner notice of surveyor's right to lien the property depends on whether the surveyor is the prime contractor or subcontractor and the size, number, and type of improvements on the property.

1. **Prime Contractor who will contract with subcontractors.** Minn. Stat. §514.011 subd 1 requires the following notice be included with the written contract with the owner in a minimum of 10-point bold type :

ANY PERSON OR COMPANY SUPPLYING LABOR OR MATERIALS FOR THIS IMPROVEMENT TO YOUR PROPERTY MAY FILE A LIEN AGAINST YOUR PROPERTY IF THAT PERSON OR COMPANY IS NOT PAID FOR THE CONTRIBUTIONS.

UNDER MINNESOTA LAW, YOU HAVE THE RIGHT TO PAY PERSONS WHO SUPPLIED LABOR OR MATERIALS FOR THIS IMPROVEMENT DIRECTLY AND DEDUCT THIS AMOUNT FROM OUR CONTRACT PRICE, OR WITHHOLD THE AMOUNTS DUE THEM FROM US UNTIL 120 DAYS AFTER COMPLETION OF THE IMPROVEMENT UNLESS WE GIVE YOU A LIEN WAIVER SIGNED BY PERSONS WHO SUPPLIED ANY LABOR OR MATERIAL FOR THE IMPROVEMENT AND WHO GAVE YOU TIMELY NOTICE.

If no written contract was entered into, the notice must be prepared separately and delivered personally or sent by certified mail to the owner or owner's agent within 10 days after the work is agreed upon. (*Id.*). Failure to comply bars assertion of the lien. (*Id.*). Thus, the surveyor must comply with these provisions when he/she acts as prime contractor and plans to subcontract for services such as aerial mapping, civil engineering, wetland delineation, and soil investigation among other services.

2. **Prime Contractor who will not be using subcontractors.**

Minn. Stat. §514.011 subd 1 does not require the statutory pre-lien notice noted above when the prime contractor will not be using subcontractors. This is the more common situation for surveyors. Although no statutory pre-lien notice is required, I recommend that the surveyor have prepared a "*Notice of Contract Pursuant to Minn. Stat. §514.05*" (See attached **FORM 1**). Once the contract between the surveyor and the owner or the owner's agent is executed, the notice is then filed with the county recorder

or county registrar of titles if the property is Torrens. The purpose is to provide record notice to the world that the surveyor is performing work on the land consistent with Minn. Stat. §514.05. This is particularly useful for the surveyor since the surveyor's work is typically not a visible improvement giving rise to actual notice of the lien. In addition, I would advise mailing a copy of the notice to the owner or owner's agent in the situation where the surveyor is not directly contracting with the owner. This type of pre-lien notice serves to establish the surveyor's priority ahead of subsequent recorded interests of bona fide purchasers, mortgagees, and other mechanic's lien claimants.

Absent recording and mailing the *Notice of Contract Pursuant to Minn. Stat. §514.05*, every effort must be made by the surveyor to provide actual notice to the owner that he/she has commenced survey related work on the property.

3. **Surveyor as subcontractor.** Minn. Stat. §514.011 subd 1 provides that all subcontractors are required to give pre-lien notice to the owner in order preserve their lien rights. The following notice must be in the following form, in capital letters if typewritten or in a minimum of 10-point bold type print:

THIS NOTICE IS TO ADVISE YOU OF YOUR RIGHTS UNDER MINNESOTA LAW IN CONNECTION WITH THE IMPROVEMENT TO YOUR PROPERTY.

ANY PERSON OR COMPANY SUPPLYING LABOR OR MATERIALS FOR THIS IMPROVEMENT MAY FILE A LIEN AGAINST YOUR PROPERTY IF THAT PERSON OR COMPANY IS NOT PAID FOR THE CONTRIBUTIONS.

WE (NAME AND ADDRESS OF SUBCONTRACTOR) HAVE BEEN HIRED BY YOUR CONTRACTOR (NAME OF YOUR CONTRACTOR) TO PROVIDE (TYPE OF SERVICE) OR (MATERIAL) FOR THIS IMPROVEMENT. TO THE BEST OF OUR KNOWLEDGE, WE ESTIMATE OUR CHARGES WILL BE (VALUE OF SERVICE OR MATERIAL).

IF WE ARE NOT PAID BY YOUR CONTRACTOR, WE CAN FILE A CLAIM AGAINST YOUR PROPERTY FOR THE PRICE OF OUR SERVICES.

YOU HAVE THE RIGHT TO PAY US DIRECTLY AND DEDUCT THIS AMOUNT FROM THE CONTRACT PRICE, OR WITHHOLD THE AMOUNT DUE US FROM YOUR CONTRACTOR UNTIL 120 DAYS AFTER COMPLETION OF THE IMPROVEMENT UNLESS YOUR CONTRACTOR GIVES YOU A LIEN WAIVER SIGNED BY ME (US).

WE MAY NOT FILE A LIEN IF YOU PAID YOUR CONTRACTOR IN FULL BEFORE RECEIVING THIS NOTICE.

The notice must be delivered personally or sent certified mail to the owner or owner's agent not later than 45 days after the surveyor has first provided labor for the property. It is wise to provide the pre-lien notice as early as possible as the owner is liable only for the amount of money remaining on the contract for services at the time owner received the notice (Minn. Stat. §514.011 subd 2(a)).

a. Who's the Owner? Minn. Stat. §514.011 subd. 5 provides:

For the purposes of this section, "owner" means the owner of any legal or equitable interest in real property whose interest in the property (1) is known to one who contributes to the

improvement of the real property, or (2) has been recorded or filed for record if registered land, and who enters into a contract for the improvement of the real property.

Absolute ownership is not required. *Minnesota Wood Specialties, Inc. v. Mattson*, 274 N.W.2d 116, 119 (Minn.1978); *Cox v. First Nat'l Bank of Aitkin*, 415 N.W.2d 385, 388 (Minn. App. 1987). Anyone with any interest in the property that may be sold to satisfy the lien can be an owner, but they must have an ownership interest at the time the contracting parties enter into a contract for surveying services. *See Carey Lombard Lumber Co. v. Bierbauer*, 79 N.W. 541, 542 (1899).

In large development projects, the subcontracting surveyor can have difficulty discovering and actual owner. The statute provides for this difficulty by requiring that the prime contractor provide the owner's name and address to the subcontractors within 10 days of a request for information (Minn. Stat. §514.011 subd. 3). Failure of the prime contractor to provide the information makes them liable for actual damages sustained or expenses incurred by the subcontractors, plus reasonable attorney fees and costs. (*Id.*)(*See also Cox v. First National Bank of Aitkin*, 415 N.W.2d 385 (Minn. App. 1987); *Steffl v. Roediger* 406 N.W.2d 535 (Minn. App. 1987)).

4. Exceptions to the Pre-Lien Notice

The statute allows for several exceptions to the pre-lien notice. The most significant exceptions include:

- a. **Multiple dwelling.** Minn. Stat. §514.011 subd. 4b. provides that no pre-lien notice is required for an improvement consisting of *more than 4 family units* and the improvement is wholly residential in character.
- b. **Non-agricultural and non-residential property.** Minn. Stat. §514.011 subd. 4c provides that no pre-lien notice is required for improvements that are *non-agricultural and wholly or partially nonresidential* if the work:
 - i. is to provide or add more than 5,000 total usable square feet of floor space; or
 - ii. is an improvement where the existing property contains more than 5,000 total usable square feet of floor space; or
 - iii. is an improvement which contains more than 5,000 square feet and does not involve the construction of a new building or an addition to or the improvement of an existing building. In this instance the "improvement" includes clearing, landscaping, and surfacing, among other activities.

In calculating the usable square footage of an improvement the area of floor space, measure the gross area less the width of the walls. A home office intended for operating a business constitutes a non-residential use. *C. Kowalski, Inc. v. Davis*, 47 N.W.2d 872 (Minn. App. 1991); *Bendiske Concrete & Masonry, Inc. v. Barthel Construction, Inc.*, 515 N.W.2d 95 (Minn. App. 1994). Conversely, a person performing business related tasks in a home office does not establish a partially non-residential use of property if the tasks are merely incidental to the residential use of the home. The use of an identifiable portion of the property must be non-residential. *Emison v. J. Paul Sterns Co.*, 488 N.W.2d 336 (Minn. App. 1992).

5. Disclaimers by Owners. Minn. Stat. §514.06 provides:

“...When improvements are made by one person upon the land of another, all persons interested therein otherwise than as bona fide prior encumbrancers or lienors shall be deemed to have authorized such improvements, insofar as to subject their interests to liens therefor. Any person who has not authorized the same may protect his interest from such liens by serving upon the person doing work or otherwise contributing to such improvement within five days after knowledge thereof, written notice that the improvement is not being made at his instance, or by posting like notice, and keeping the same posted, in a conspicuous place on the premises....”

An owner who has not authorized the improvement of the owner’s property may protect the owner’s interest from mechanic’s liens by giving written notice that the improvements are not being made at the owner’s request. The owner must serve written notice upon the persons who contributed to the improvements or post written notice on the owner’s property within five days after the owner’s knowledge of an improvement to the owner’s property.

A lien claimant must prove that the owner had actual knowledge of an improvement. If the claimant shows that the owner had actual knowledge, the owner must prove that the owner gave notice to the claimant pursuant to Minn. Stat. §514.06. *Anderson v. Harrison*, 160 N.W.2d 560 (Minn.1968). An owner’s obligation to disclaim his responsibility under Minn. Stat. §514.06 arises from the owner’s knowledge of an improvement not from the owner’s knowledge of a specific lien claimant’s work or materials. *Berks v. Oberpriller*, 448 N.W.2d 883 (Minn. App. 1989).

Where the owner gives notice to the persons who are contributing to the improvements pursuant to Minn. Stat. §514.06, a mechanic’s lien shall not attach to the owner’s interest. *Bond Elec. Co. v. Mill City Plastics*, 102 N.W.2d 281 (Minn. 1960).

The surveyor is protected here, because, even though an improvement is not visible on the real property, an owner must disclaim responsibility for the improvement where the owner has actual or constructive knowledge of the work performed. *See Korsunsky Krank Erickson Architects, Inc. v. Walsh*, 370 N.W.2d 29 (Minn. 1985) (Architects were entitled to mechanics' lien against landowners' interest in property where their services constituted constructive contribution to improvement of that property and landowners consented to that improvement without disclaiming, even though no visible work was done on property and even though landowners were not party to contract between developer and architects).

F. LIEN WAIVERS

Minn. Stat. §514.07 provides:

“The owner may withhold from the owner’s contractor as much of the contract price as may be necessary to meet the demands of all persons, other than the contractor, having a lien upon the premises for labor, skill, or material furnished for the improvement, and for which the contractor is liable. The owner may pay and discharge all these liens and deduct the cost of them from the contract price. No owner shall be required to pay the owner’s contractor until the expiration of 120 days from the completion of the improvement, except to the extent that the contractor furnished to the owner waivers of claims for mechanic’s liens signed by persons who furnished labor, skill or material for the improvement and who have given the notice required by section 514.011, subdivision 2 . . .”

The lien waiver is a representation that the surveyor has received payment and waives his/her right to file a lien for the work for which he has been paid. (See attached **FORM 2: Receipt and Waiver of Mechanic’s Lien Rights** (Minn. Uniform Conveyancing Blank 40.5.1)). As can be seen on the form, the

surveyor can 1) waive up to a certain amount of money or percentage of fee owed , 2) all labor and materials provided through a specific date, and 3) a waiver of all work provided on the project. Also note that the document is in a recordable form that serves for the benefit of the owner or lender that desires or requires the waiver. The surveyor has no obligation or need to record the waiver.

The owner or their agent cannot require the surveyor to waive his/her lien rights in advance of the start of work. *See* Minn. Stat. §337.10. Lien waivers must be supported by consideration (i.e. payment by owner) to be valid. *Sussel Co. v. First Fed. Sav. & Loan Ass'n of St. Paul*, 232 N.W.2d 88, 90 (Minn. 1975).

Normally, lien waivers only waive rights for fees and materials provided up to the date of the waiver. *Sussel Co. v. First Fed. Sav. & Loan Ass'n of St. Paul*, at 89. But be careful when agreeing to the extent of your waiver of lien rights. A lien waiver that “waives all rights acquired to date” does not waive rights acquired after the execution of the lien waiver. *Engler Bros. Construction Co. v. L’Allier*, 159 N.W.2d 183 (Minn. 1968). Do not be overinclusive of the extent of the survey services being waived. For example, a lien waiver that acknowledged full payment for “carpenter labor, dishwasher and disposal” and waived all rights to mechanic’s liens for work furnished before the execution of the lien waiver constituted a *complete waiver* of all of the work performed on the project and not a partial waiver limited to the specified items, as was intended. *Lundstrom Construction Co. v. Dygert*, 94 N.W.2d 527 (Minn. 1959).

G. MECHANIC’S LIEN STATEMENT

Minn. Stat. §514.08 describes the “mechanics” of the Mechanic’s Lien Statement. The most important provision of the statute is that **unless the statement is recorded or served on the owner, the owner’s authorized agent, or the person who entered into the contract within 120 days of the end of work on the property, the lien ceases to exist**. Thus, keep accurate records of the completion of work on a given project. Waiting too long will be fatal for the mechanics’ lien. See attached **FORM 3: Mechanic’s Lien Statement by Business Entity** (Minn. Uniform Conveyancing Blank 40.1.2) that complies with statutory requirements.

File the lien statement in recorder’s office or registrar of titles office if Torrens. If it is not filed in the appropriate office, the claimant is not entitled to a mechanic’s lien. *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983); *David-Thomas Cos., Inc. v. Voss*, 517 N.W.2d 341 (Minn. App.1994).

1. Extent of the Lien

The extent of the lien depends on whether the pre-lien notice was required. If **no pre-lien notice is required** (as is often the case for the surveyor), the lien amount is either the contract sum, or if no contract exists, the reasonable value of the work performed. (Minn. Stat. §514.03, subd. 1). This is a good incentive to have a written contract in place with the owner. You don’t want to have to litigate over the “reasonable” value of your work.

If a pre-lien notice was required, the extent of lien is the same as if no pre-lien notice required with the exception that the total lien cannot exceed the contract amount or reasonable value minus payments made to the prime contractor *prior to receiving the notice*, payments made to discharge lien claims, and payments made along with a valid lien waiver. (Minn. Stat. §514.03, subd. 2).

2. Inaccuracies in the lien statement

Generally, the statement requirements are construed liberally (except the 120 day requirement). (Minn. Stat. §514.74), but in no case can a lien exist for more than the amount claimed in the statement or an amount more than is justly due the lien claimant. (*Id.*).

In order to deprive the claimant of the claimant's mechanic's lien, there must be a showing of fraud, bad faith or intentional demand for an amount in excess of that due. *R.B. Thompson, Jr. Lumber Co. v. Windsor Development Corp.*, 383 N.W.2d 357 (Minn. App. 1986). Although a claimant demands in the lien statement more than was due, the claimant shall be entitled to a mechanic's lien where it was an honest mistake, inadvertence or careless bookkeeping. *Cox v. First National Bank of Aitkin*, 415 N.W.2d 385 (Minn. App. 1987).

A claimant is not entitled to a mechanic's lien where the claimant filed the mechanic's lien statement for the entire contract price although the claimant did not complete all the work contracted. *Lyons v. Jarnberg*, 150 N.W. 1083 (Minn. 1915).

H. SATISFACTION OF THE MECHANICS' LIEN

Minn. Stat. §514.12 subd 3. provides:

*No lien shall be enforced in any case unless the holder thereof shall assert the same, either by filing a complaint or answer with the court administrator, **within one year after the date of the last item of the claim as set forth in the recorded lien statement**; and, no person shall be bound by any judgment in such action unless made a party thereto within the year; and, as to a bona fide purchaser, mortgagee, or encumbrancer without notice, the absence from the record of a notice of lis pendens of an action after the expiration of the year in which the lien could be so asserted shall be conclusive evidence that the lien may no longer be enforced and, in the case of registered land, the registrar of titles shall refrain from carrying forward to new certificates of title the memorials of lien statements when no such notice of lis pendens has been registered within the period.* (emphasis added)

To enforce his/her lien rights, the lien claimant must **foreclose the claim within one year of his last contribution of labor and/or materials on the property**. For the most part, the process is conducted the same way as mortgage foreclosure. The surveyor, as lien claimant, will initiate the foreclosure proceedings as the plaintiff against the owner (s) and all other persons claiming an interest in the property for which the lien claimant has actual or constructive notice which includes other mechanics' lienholders, mortgagees, and judgment creditors. Service on the other defendants must be served within the one year period or the lien simply expires. It is important to note that other mechanics' lienholders are the only "persons", as identified in the statute, against whom a mechanic's lien may not be enforced after the one-year period for commencing a mechanics' lien foreclosure action has expired. *Mavco, Inc. v. Eggink* 739 N.W.2d 148 (Minn. 2007).

The surveyor as plaintiff should request recovery of principal amount of debt, plus interest, costs, and attorney fees. Interest accrues at the rate provided in your survey contract, or the legal rate if no contract is in place, from the time payment is due until 30 days after the last day of the lien claimant's contribution to the project. (Minn. Stat. 514.135). Thereafter interest accrues at the judgment rate, which is the average rate of interest for treasury bills for November of the previous year (currently 4%) (*Id.*)

A Notice of *lis pendens* is filed to protect the lien claim within one year of completion of work on the property. Absence of the notice is evidence to good faith purchasers, encumbrancers, and mortgagees that the lien is terminated. Minn. Stat. §514.12 subd 3.

1. Attorney Fees

A mechanic's lien foreclosure is one of the relatively rare situations where the law gives the court discretion to award attorney fees and costs to the successful party in the action. (Minn. Stat. §514.14). The amount of attorney fees actually awarded is entirely within the court's discretion. It is important to note that the attorney's fees and costs can in fact be greater than the amount of mechanics' lien. *See Hedlund Engineering Services, Inc. v. Hampton Arden Hills, L.L.P.* 2003 WL22436038, (Minn.App.2003) (Court awarded reasonable attorney fees and costs of \$16,427.13 for a mechanic's lien of \$16,113.61). The Court has stated that limiting fees would discourage small lienholders (such as surveyors, generally) from pursuing valid claims through the legal process. *Kirkwood Const. Co. v. M.G.A. Const., Inc.* 498 N.W.2d 465 (Minn.App.1993).

2. Satisfaction of mechanic's lien

Most owners and purchasers of the property, who are facing foreclosure of the mechanics' lien, will opt to settle and satisfy the lien.

Upon payment due, the surveyor as lien claimant must record a satisfaction of the lien. *See* Minn. Stat. §514.76, providing that the lien “*shall be satisfied of record, at the expense of the claimant upon payment or tender to the claimant of the amount actually due thereon.*” What generally happens is that the lien claimant simply provides the executed satisfaction of lien to the owner, who then records it. The statute requires the lien claimant to provide the satisfaction within ten days of the demand by the owner.*(Id.)*.

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