

## CONSTRUCTION LIEN ROADMAP

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Are you wondering how the Construction Lien Act works and how you can use it to get paid? The simple explanation which follows is an effort to examine the Michigan Construction Lien Act and summarize it in a manner which makes sense from an orderly business standpoint. The Michigan Construction Lien Act basically provides that people and companies who provide improvements to real property, which is land, through the providing of labor, material or services, may have a lien against the property to secure payment for those improvements as long as they follow the simple rules. If, after having recorded the lien, these parties are not paid, they have an avenue to collect the amounts owed in court through what is called a lien foreclosure action. Ultimately, that action could result in a forced sale of the property. However, in order to get to that point, lien claimants need to follow the rules very carefully.

The first document you need to know about is called a *Notice of Commencement*. A sample copy of a Notice of Commencement is attached as **Exhibit 1**. This is a document which is typically prepared either by an owner of real property, a lessee of real property, or the lender for either the owner or the lessee. A Notice of Commencement is recorded in the Register of Deeds much as a deed to your house or your mortgage is recorded. This Notice of Commencement contains a legal description of the property which is going to be improved. The legal description will be needed in order to prepare the rest of the construction lien documents. In addition, the Notice of Commencement is supposed to list either the owner or the owner's "designee" as well as the contractor on the project. This information will become important.

If you need to get a copy of the Notice of Commencement, it should either be posted on the job site or you may write a letter, certified mail, return receipt requested, asking the owner for a copy of the Notice of Commencement. The Notice of Commencement is supposed to be recorded before any actual physical improvement to the property. Sometimes, owners will get ahead of themselves and will have work done in advance of the recording of the Notice of Commencement. If that happens, then the owner runs the risk that lien claimants will jump ahead of the bank priority.

On the backside of the Notice of Commencement there is supposed to be a form called a *Notice of Furnishing*. A sample copy of a Notice of Furnishing is attached as **Exhibit 2**. The Notice of Furnishing is designed to be used by those people or entities who provide labor, material and services on a construction project, but who do not have a direct contract with the owner. The purpose of this form is to let the owner know, in a formal way, that these parties with whom it has no contract are actually providing the labor and materials, and it gives the owner an opportunity to request lien waivers from those entities at the time of payment.

It is very important for potential lien claimants to prepare and send the Notice of Furnishing. The Notice of Furnishing is required to be sent within 20 days of first providing labor, material or services. In addition, as indicated above, on the Notice of Commencement, the owner is required to list the name of the owner or the owner's designee, as well as the general contractor. A copy of the Notice of Furnishing needs to be sent to the owner or the owner's

designee, and the contractor. In abundance of caution, there is no harm in sending the form to the owner, the contractor, and the designee, if one exists. In order to properly send and serve this Notice of Furnishing, you need to prepare a Proof of Service. A copy of a sample Proof of Service is attached as **Exhibit 3**. In addition, you should send the Notice of Furnishing to the owner, contractor and designee via certified mail, return receipt requested, so that you can later prove that the Notice of Furnishing was actually provided.

After you begin working on the project, you certainly will want to be paid. As part of the payment process, the owner or contractor may request that you prepare and sign a *Sworn Statement*. A sample copy of a Sworn Statement is attached as **Exhibit 4**. The Sworn Statement is going to require that you list all of the subcontractors and suppliers with whom you are dealing on the project. You will have to swear as to their contract amounts, as well as how much they have been paid to date. Sworn statements will only need to be prepared and sent if the owner requests them from a general contractor or the general contractor requests them from a subcontractor.

Then, as part of the payment process, you will also be required to provide lien waivers. A lien waiver simply operates to discharge lien rights to the extent of payment. There are two types of lien waivers, partial lien waivers and final lien waivers. Partial lien waivers are used during the course of the project, and final lien waivers are used at the end of the project. In addition, partial lien waivers come in two forms, conditional partial lien waivers and unconditional partial lien waivers. When you are submitting a payment application and have not been paid, you will need to submit a conditional partial lien waiver. That means that you have not waived your lien rights until you actually receive the money. A sample conditional partial lien waiver is attached as **Exhibit 5**. When you are paid, the conditional partial lien waiver turns into an unconditional partial lien waiver. However, if you exchange payment for a lien waiver, you will need to use an unconditional partial lien waiver. A sample of that form is attached as **Exhibit 6**. Likewise, on final completion of the project, you will be required to submit a full conditional lien waiver in the event that you have not yet been paid, a copy of which is attached as **Exhibit 7**, or, in the event that you are paid in exchange for the lien waiver, you may utilize a full unconditional lien waiver, a copy of which is attached as **Exhibit 8**.

In the event that you are not timely paid, you will need to record a lien. A lien is another notice which is recorded with the Register of Deeds in the county where the property is located, much the same way as a Notice of Commencement, and it gives notice to both the owner and the world that you claim certain money due against the owner's land for this particular work. However, to be effective, a lien absolutely must be recorded within 90 days of last providing labor, material or services. It may be prudent to set your own clock to record the construction liens after 75 days. If you do not timely record the lien, you lose your lien rights and there are no exceptions. In order to record a lien, you will need the lien document itself, a sample copy of which is attached as **Exhibit 9**, and you will need to attach a copy of your Notice of Furnishing together with a Proof of Service of the lien, a sample copy of which is attached as **Exhibit 10**. You will need the Proof of Service because you will need to provide a copy of the lien to the owner and/or the designee, as well as the contractor, within 15 days of your recording the lien. In addition, it is very important that you get the lien to the Register of Deeds within the 90 days of last providing labor, material or services. That means that if you are at 88 days after the last

day of providing labor, material or services, you should not mail the lien to the Register of Deeds, you should hand deliver it. In addition, if you are within two weeks of the 90 day expiration date, you likewise should not mail the lien documents to the Register of Deeds because when they are received by the Register of Deeds, they usually end up in the “in basket” and may not actually get recorded until after the 90 days. If that happens, you may be out of luck. When you hand deliver the lien to the Register of Deeds, obtain a date-stamped copy from them showing when the document was actually received by the Register of Deeds. If it later turns out that the Register of Deeds then does not record the lien until after the 90 days, you have satisfied your obligations and the lien will be timely.

Often times, the recording of a lien will prompt payment by the owner through the contractor. In the event that it does not, you will need to file an action in circuit court foreclosing the construction lien. This is similar to a mortgage foreclosure action. In order to do so, you will need to do a title search to figure out who has claims against the property, and you will need to commence the construction lien foreclosure action *within one year of recording the construction lien*. One common mistake is that a lien claimant will record the lien on December 1<sup>st</sup>, for example, and then will file a lawsuit to foreclose the lien on December 1<sup>st</sup> of the following year. Remember, that will mean the lien foreclosure action is late. There is no forgiveness in the one year filing timeline and if you fail to file the lien foreclosure action on a timely basis, you will lose all of your lien rights.

In addition, there is sometimes confusion regarding when the “last work” is for purposes of determining or calculating the 90 days. The 90 days must be from the performance of labor, material or services. This would include punch list work. It would not, however, include warranty work. In addition, it must include some material aspect of the construction project. Therefore, if you have a multimillion dollar contract and you go in just to replace a light switch cover, that is probably not sufficient. You will need to retain timecards and other documents to prove when your employees were out on the job in order to properly calculate that 90-day time frame.

In the event that the owner does not pay after the foreclosure proceedings have commenced, and if you prevail in your lawsuit, the judge will order a foreclosure sale similar to a foreclosure of a real estate mortgage. Also, while going through the construction lien foreclosure proceeding, the court has the discretion to award you attorney’s fees. This is not automatic, and you may not recover all of your fees. At least, however, you can make the argument.

At some point, you may get paid and will then have to discharge your construction lien. A sample Construction Lien Discharge is attached as **Exhibit 11**. That document will likewise need to be recorded with the Register of Deeds.

If you file a construction lien foreclosure action, you will need to record with the Register of Deeds something called a “Notice of Lis Pendens,” a sample copy of which is attached as **Exhibit 12**. This document is notice to the world that litigation has been commenced.

In addition, if you record a lien, an owner or contractor may have the opportunity to transfer that lien to a bond, called a construction lien transfer bond. There is no statutory form for the construction lien transfer bond; however, the bond has the effect of transferring the lien to the bond and removing the lien from the owner's real property. This is commonly referred to as "bonding off" a lien. Then, you will be proceeding against the bonding company as opposed to the owner.

The rules are somewhat different with respect to residential real property, so if you get involved with any parcel of property involving residential construction, please ask questions as to how the rules are different. In addition, remember that residential construction does not necessarily mean single family residences. It could include a very large development which was partially residential, partially commercial, and partially other uses. Consequently, you need to look closely at the use in order to determine which rules apply.

Please also understand that the rules are different when you are dealing with a public property. If the real estate is publicly owned, you are not entitled to record a construction lien. Instead, you will need to be making claims on payment bonds provided by the general contractor which require completely different rules.

If you have any questions, please contact us at Hilger Hammond, 49 Monroe Center NW, Suite 200, Grand Rapids, Michigan 49503; Ph (616) 458-3600 [www.hilgerhammond.com](http://www.hilgerhammond.com)