

Prior to 1987, surveyors were not entitled to file mechanic's liens for "professional services". Arizona Revised Statutes 33-981 was revised to include professional services.

The lien laws are very complex and this chapter will not attempt to interpret the Arizona liens laws. A.R.S. 33-981 thru 33-1006 (Article 6. Mechanic's and Materialmen's Liens) are included in this chapter for reference. It is important to note that there are provisions to file a lien even without a written contract.

Also, a warning with respect to filing liens. When a lien is filed, a cloud on the title for the property is created. This cloud could cost the landowner to suffer damages, such as a lost sale of the property or portion of the property. If the filing of the lien is done maliciously, then the landowner could sue and recover damages by reason of "slander of title". The elements of malice will not be discussed, but the following quotes from court cases will illustrate the concept of malice and slander of title.

"The dismissal of the slander of title claim was proper in light of the trial court's finding that a valid contract existed." *Globe Drilling Company v. Cramer*, 562 P.2d. 762.

"However, for Yosemite to recover, it was its burden to prove that the recording of the notice of the commencement of the action to foreclose was done maliciously, either expressed or implied." *Colorado Real Estate and Development, Inc. v. Sternberg*, 433 P.2d. 341.

"The contractor will be liable for wrongful assertion of title only if the owner can prove it was done maliciously. *Salt River Valley Water Users' Association v. Peoria Ginning Company*, 27 Ariz. 145, 231 P. 415 (1924). Not only must the owner prove the existence of malice, she must prove special damages in the form of loss of a present or a prospective advantage." *Deck v. Hammer*, 7 Ariz. App. 466, 440 P.2d. 1006.

Notice in *Deck v. Hammer*, the damages can be from a present or a prospective (future) advantage. This may include a loss of sale of the land, or portion thereof. The statutes must be strictly complied with and the lien holder must always operate in good faith.

And finally:

"A person cannot be charged with acting in bad faith when he refuses to relinquish a lien right to which he believes he is entitled under statute." *Adams Tree Service, Inc. v. TransAmerica Title Insurance Company*, 20 Ariz. App. 214, 511 P.2d. 658.

If the description of the land to be included in the lien is described in error, the lien should still be binding upon any portion of the land that the work was performed on, that is included within the misdescribed area. The following case indicates this:

"...[T]he inclusion of more land than that to which the lien may properly attach does not vitiate the lien upon so much of the land as is encompassed within the description and to which a lien may properly attach, at least if the description is not fraudulent or grossly misleading and innocent third parties are not affected." Adams Tree Service, Inc. v. TransAmerica Title Insurance Company, supra.

In conclusion, it is recommended that unless a person has experience with, and understands the Arizona lien laws, they should not attempt to interpret the statutes and file liens without assistance. There are firms that specialize in filing liens, and there are attorneys that also have experience in this area. If there is any doubt as to proper statutory proceeding, have a specialist assist. And always remember to deal with clients very professionally and in a courteous manner so as not to ever appear to have a "malicious" alternate motive.

It is also suggested that a condition of the contract include a statement that a lien may be filled in event that the client does not pay. This is helpful to prevent a slander of title suit.

The following pages are the Arizona statutes 33-981 thru 33-1006.

ARTICLE 6. MECHANICS' AND MATERIALMEN'S LIENS**Cross References**

Dams, reservoirs, and appurtenances, control, regulation, and abatement costs as lien, see § 45-1212.

§ 33-981. Lien for labor; professional services or materials used in construction, alteration or repair of structures; preliminary twenty day notice: exceptions

A. Except as provided in §§ 33-1002 and 33-1003, every person who labors or furnishes professional services, materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement whatever, shall have a lien on such building, structure or improvement for the work or labor done or professional services, materials, machinery, fixtures or tools furnished, whether the work was done or articles furnished at the instance of the owner of the building, structure or improvement, or his agent.

B. Every contractor, subcontractor, architect, builder or other person having charge or control of the construction, alteration or repair, either wholly or in part, of any building, structure or improvement is the agent of the owner for the purposes of this article, and the owner shall be liable for the reasonable value of labor or materials furnished to his agent.

C. A person who is required to be licensed as a contractor but who does not hold a valid license as such contractor issued pursuant to title 32, chapter 10¹ shall not have the lien rights provided for in this section.

D. A person required to give preliminary twenty day notice pursuant to § 33-992.01 is entitled to enforce the lien rights provided for in this section only if he has given such notice and has made proof of service pursuant to § 33-992.02.

E. A person who furnishes professional services but who does not hold a valid certificate of registration issued pursuant to title 32, chapter 1,² shall not have the lien rights provided for in this section.

F. A person who furnishes professional services is entitled to enforce the lien rights provided for in this section only if such person has a written agreement with the owner of the property or with an architect who has a written agreement with the owner of the property.

Amended by Laws 1979, Ch. 202, § 1; Laws 1987, Ch. 341, § 1.

¹ Section 32-1101 et seq.

² Section 32-101 et seq.

1987 Reviser's Note:

Pursuant to authority of § 41-1304.02, in the section heading "; professional services" was added after "labor", "exception;" was deleted and "; exceptions" was added after "notice".

§ 33-982. Claim of lien by assignee of contract or account for material furnished or labor performed

An assignee of a contract or account for material furnished or labor performed may verify, file, record and enforce the contract as if he had been the original owner or holder thereof.

§ 33-983. Lien for improvements to city lots, or other land

A. A person who furnishes professional services or material or labors upon a lot in an incorporated city or town, or any parcel of land not exceeding one hundred sixty acres in the aggregate, or fills in or otherwise improves the lot or such parcel of land, or a street, alley or proposed street or alley, within, in front of or adjoining the lot or parcel of land at the instance of the owner of the lot or parcel of land, shall have a lien on the lot or parcel of contiguous land not exceeding one hundred sixty acres in the aggregate, and the buildings, structures and improvements on the lot for professional services or material furnished and labor performed.

B. Every contractor, subcontractor, architect, builder, subdivider or other person having charge or control of the improvement or work on any such lot or parcel of land, either wholly or in part, is the agent of the owner for the purposes of this section, and the owner shall be liable for the reasonable value of professional services, labor or material furnished at the instance of such agent, upon a lot or parcel of land as prescribed in this section, or any street, alley or proposed street or alley, within, in front of or adjoining such lot or parcel of land.

Amended by Laws 1987, Ch. 341, § 2.

§ 33-984. Lien for labor or materials furnished mill, factory or hoisting works

Foundrymen, boilermakers, and other persons who labor or furnish materials for the construction, alteration, repair or operation of a mill, factory or hoisting works at the request of the owner shall have a lien thereon for the amount due. If the hoist, factory or mill is located on property not belonging to the owner of the hoist, factory or mill, the purchaser at the sale on foreclosure of the lien may remove them within sixty days after the sale, whether the hoist, factory or mill is a fixture or not. If the hoist, factory or mill is located on a mine, mining claim or mill site which is the property of the owner, the lien shall embrace the surface ground, not exceeding five acres, upon which the hoist, factory or mill is located.

§ 33-985. Lien for labor or materials furnished domestic vessel

Persons who furnish supplies or material or do repairs or perform labor for or on account of a domestic vessel owned wholly or in part in this state, shall have a lien on the vessel, her tackle, apparel, furniture and freight money for the amount due.

§ 33-986. Lien for labor in cutting wood, logs or ties

Persons who cut or cord wood, cut, saw or skid logs, cut, saw, hew or pile ties at the request of the owner thereof, shall have a lien thereon for the amount due for the labor performed.

§ 33-987. Lien for labor or materials furnished on waterways, highways, excavations or land

A person who labors or furnishes labor or materials in the construction, alteration or repair of any canal, water ditch, flume, aqueduct or reservoir, bridge, fence, road, highway, cellar, excavation or other structure or improvement, or in the clearing, ditching, bordering or leveling of land, and to whom wages or monies are due or owing therefor, shall have a lien upon such property for all amounts due and unpaid. Materials includes the use of mules, horses, machinery or equipment used in or about such projects.

§ 33-988. Lien for labor or materials furnished railroad

A person who labors or furnishes labor, teams, materials, machinery, fixtures or tools in the construction, repair or operation of a railroad, locomotive, car or other equipment, and to whom money or wages are due or owing therefor, and any person who furnishes provisions or supplies of any kind in the construction or repair of a railroad or to a contractor or subcontractor engaged in such construction or repair, for the housing, maintenance or subsistence of humans or animals employed or used in such construction or repair, and to whom any amount is due or owing therefor, shall have a lien upon the railroad and its equipment for the amounts unpaid.

As amended Laws 1973, Ch. 172, § 92.

§ 33-989. Lien for labor or material furnished mines and mining claims; priority

A. A person who labors or furnishes materials or merchandise of any kind, designed for or used in or upon a mine or mining claim, and to whom any amount is due for labor, material or merchandise, shall have a lien upon the mine or mining claim for the unpaid amounts.

B. The lien provided for in subsection A shall attach when the labor was performed or the material or merchandise furnished:

1. Under a contract between the person performing the labor or furnishing the material or merchandise and the owner of the mining claim, or his contractor.

2. Under a contract between the person performing the labor or furnishing the material or merchandise and the lessee of the mine or mining claim, or his contractor, where the lease from the owner to the lessee permits the lessee to develop or work the mine or mining claim.

3. Under a contract between persons performing the labor or furnishing the material or merchandise, and any person having an option to buy or contract to purchase the mine or mining claim from the owner thereof, where the option or contract permits the person to go upon the mine or mining claim, and to work or develop it.

C. The lien shall attach to the mine or mining claim in or on which the labor was performed or material or merchandise furnished, in preference to any prior lien or encumbrance or mortgage upon the mine or mining claim.

§ 33-990. Posting of "no lien" notice by owner not operating mine; violation; classification

A. The provisions of § 33-989 shall not apply and the owner of a mine or mining claim shall not be responsible for any debts when the mine or claim is worked under lease, bond or option from the owner thereof, when the owner conspicuously posts at the collar of all working shafts, tunnels and entrances to the mine and boarding houses, on or before the day the lessee or those working the claim under bond, lease or option begin operations, and records in the office of the county recorder of the county within which the mine or mining claim is located within thirty days from the date of the lease, bond or option, a notice that:

1. The mine or claim is not being operated by the owner.

2. The owner will not be liable for labor performed or materials or merchandise furnished in the operation or development of the mine or mining claim.

3. The mine or claim will not be subject to a lien therefor, referring to the contract, and particularly describing the mine or claim.

B. The lessee or person operating the mine shall keep the notices posted, and upon failure to do so is guilty of a class 2 misdemeanor.

Amended by Laws 1978, Ch. 201, § 585, eff. Oct. 1, 1978.

§ 33-991. Lands to which liens extend; rural lands; city lots; subdivision lots; mining claims

A. If the land upon which an improvement is made and labor or professional services have been performed lies outside of the limits of the recorded map or plat of a townsite, an incorporated city or town, or a subdivision, the lien shall extend to and include not to exceed ten acres of the land upon which the improvement is made and the labor has been performed.

B. If the land on which an improvement is made or labor or professional services have been performed lies within the limits of a recorded map or plat of a townsite, an incorporated city or town, or a subdivision, the lien shall extend to and include only the particular lot or lots upon which the improvement is made and the labor has been performed.

C. If the labor is performed or the improvements made upon a mining claim, the lien shall extend to the whole thereof and to the group of which the claim upon which the work was done is a part if the group is operated as one property.

Amended by Laws 1987, Ch. 341, § 3.

§ 33-992. Preference of liens over subsequent encumbrances; professional services liens

A. The liens provided for in this article, except as provided in subsection B or unless otherwise specifically provided, are preferred to all liens, mortgages or other encumbrances upon the property attaching subsequent to the time the labor was commenced or the materials commenced to be furnished. The liens provided for in this article except as provided in subsection B are also preferred to all liens, mortgages and other encumbrances of which the lienholder had no actual or constructive notice at the time he commenced labor or commenced to furnish materials.

B. A notice and claim of lien for professional services shall not be recorded nor shall a lien for professional services attach to the property until labor has commenced on the property or until materials have commenced to be furnished to the property so that it is apparent to any person inspecting the property that construction, alteration or repair of any building or other structure or improvement has commenced.

C. Liens for professional services shall attach not before but at the same time, and shall have the same priority, as other liens provided for in this article.

Amended by Laws 1987, Ch. 341, § 4.

1987 Reviser's Note:

Pursuant to authority of § 41-1304.02, in the section heading “; professional services liens”

was added after “encumbrances” and in subsection C a comma after “attach” was transposed to follow “priority”.

33-992.01. Preliminary twenty day notice; definitions; content; election; waiver; service; single service; contract

A. For the purposes of this section:

1. "Construction lender" means any mortgagee or beneficiary under a deed of trust lending funds with which the cost of the construction, alteration, repair or improvement is, wholly or in part, to be defrayed, or any assignee or successor in interest of either.

2. "Original contractor" means any contractor who has a direct contractual relationship with the owner.

3. "Owner" means the person, or his successor in interest, who causes a building, structure or improvement to be constructed, altered or repaired, whether the interest or estate of the person is in fee, as vendee under a contract to purchase, as lessee, or other interest or estate less than fee. Where such interest or estate is held by two or more persons as community property, joint tenants or tenants in common, any one or more of the persons may be deemed the owner.

4. "Preliminary twenty day notice" means a written notice from a claimant that is given prior to the recording of a mechanic's lien and which is required to be given pursuant to this section.

~~B. Except for a person under direct contract with the owner, or a contractor whose claim of lien arises out of labor or professional services under direct contract with the original contractor or one performing actual labor for wages, every person who furnishes labor, professional services, materials, machinery, fixtures or tools for which a lien otherwise may be claimed under this article shall, as a necessary prerequisite to the validity of any claim of lien, serve the owner or reputed owner, the original contractor or reputed contractor and the construction lender, if any, or reputed construction lender, if any, with a written preliminary twenty day notice as prescribed by this section.~~

C. The preliminary twenty day notice referred to in subsection B shall be given not later than twenty days after the claimant has first furnished labor, professional services, materials, machinery, fixtures or tools to the jobsite and shall contain the following information:

1. A general description of the labor, professional services, materials, machinery, fixtures or tools furnished or to be furnished and an estimate of the total price thereof.

2. The name and address of the person furnishing such labor, professional services, materials, machinery, fixtures or tools.

3. The name of the person who contracted for THE purchase of such labor, professional services, materials, machinery, fixtures or tools.

4. A legal description, subdivision plat, street address, location with respect to commonly known roads or other landmarks in the area or any other description of the jobsite sufficient for identification.

5. The following statement in bold-faced type:

"In accordance with Arizona Revised Statutes section 33-992.01, this is not a lien and this is not a reflection on the integrity of any contractor or subcontractor.

Notice to Property Owner

If bills are not paid in full for the labor, professional services, materials, machinery, fixtures or tools furnished or to be furnished, a mechanic's lien leading to the loss, through court foreclosure proceedings, of all or part of your property being improved may be placed against the property. You may wish to protect yourself against this consequence by either:

1. Requiring your contractor to furnish a release signed by the person or firm giving you this notice before you make payment to your contractor.

2. Using any other method or device which is appropriate under the circumstances."

D. If an invoice for such materials contains the information required by this section, a copy of the invoice transmitted in the manner prescribed by this section is sufficient notice.

E. If labor, professional services, materials, machinery, fixtures or tools are furnished to a jobsite by a person who elects not to give a preliminary twenty day notice as provided in subsection B, such person is not precluded from giving a preliminary twenty day notice not later than twenty days after furnishing other labor, professional services, materials, machinery, fixtures or tools to the same jobsite. Such person, however, is entitled to claim a lien only for such labor, PROFESSIONAL SERVICES, materials, machinery, fixtures or tools furnished within twenty days prior to the service of such notice and at any time thereafter.

F. Any agreement made or entered into by an owner whereby the owner agrees to waive the rights or privileges conferred upon him by this section is void.

G. The notice required by this section may be served by delivering the notice personally, by leaving it at the residence or place of business of the person to be served with some person of suitable age and discretion then residing or working therein or by first class, registered or certified mail, postage prepaid, addressed to the person to whom notice is to be given at his residence or business address. If service is made by first class, certified or registered mail, service is complete at the time of the deposit of such mail.

H. A person required by this section to give notice to the owner, to an original contractor and to the construction lender, if any, need give only one such notice to the owner, to the original contractor and to the construction lender, if any, with respect to all labor, professional services, materials, machinery, fixtures or tools he furnishes for the building, structure or improvement, unless the actual estimated total price for the labor, professional services, materials, machinery, fixtures or tools furnished or to be furnished exceeds by twenty per cent or more the total price in any prior original or subsequent preliminary notice or unless the labor, professional services, materials, machinery, fixtures or tools are furnished under contracts with more than one subcontractor, in which case notice requirements shall be met for all such additional labor, professional services, materials, machinery, fixtures or tools.

I. If a notice contains a general description required by subsection B of the labor, professional services, materials, machinery, fixtures or tools furnished up to the date of notice, it is not defective because after such date the person giving notice furnishes labor, professional services, materials, machinery, fixtures or tools that are not within the scope of such general description, or exceed by less than twenty per cent the estimated total price thereof.

J. WITHIN TEN DAYS AFTER RECEIPT OF A WRITTEN REQUEST FROM ANY PERSON OR HIS AGENT INTENDING TO FILE A PRELIMINARY TWENTY DAY NOTICE, WHICH REQUEST SHALL IDENTIFY THE PERSON, HIS ADDRESS, THE JOB SITE AND THE GENERAL NATURE OF THE PERSON'S LABOR, PROFESSIONAL SERVICES, MATERIALS, MACHINERY OR TOOLS TO WHICH THE PRELIMINARY TWENTY DAY NOTICE SHALL APPLY, THE OWNER SHALL FURNISH SUCH PERSON A WRITTEN STATEMENT OF:

1. THE LEGAL DESCRIPTION, SUBDIVISION PLAT, STREET ADDRESS, LOCATION WITH RESPECT TO COMMONLY KNOWN ROADS OR OTHER LANDMARKS IN THE AREA, OR ANY OTHER DESCRIPTION OF THE JOB SITE SUFFICIENT FOR IDENTIFICATION.

2. THE NAME AND ADDRESS OF THE OWNER OR REPUTED OWNER.

3. THE NAME AND ADDRESS OF THE ORIGINAL CONTRACTOR OR REPUTED CONTRACTOR.

4. THE NAME AND ADDRESS OF THE CONSTRUCTION LENDER, IF ANY, OR REPUTED CONSTRUCTION LENDER.

FAILURE OF THE OWNER TO FURNISH THE INFORMATION REQUIRED BY THIS SUBSECTION DOES NOT EXCUSE ANY CLAIMANT FROM TIMELY SERVING A PRELIMINARY TWENTY DAY NOTICE, BUT IT DOES STOP THE OWNER FROM RAISING AS A DEFENSE ANY INACCURACY OF SUCH INFORMATION IN A PRELIMINARY TWENTY DAY NOTICE, PROVIDED THE CLAIMANT'S NOTICE OF LIEN OTHERWISE COMPLIES WITH THE PROVISIONS OF THIS CHAPTER. IF THE INFORMATION IS RECEIVED BY THE CLAIMANT AFTER THE CLAIMANT HAS SERVED A PRELIMINARY TWENTY-DAY NOTICE AND THE INFORMATION CONTAINED IN THE TWENTY-DAY NOTICE IS INACCURATE, THE CLAIMANT SHALL, WITHIN THIRTY DAYS OF THE RECEIPT OF THIS INFORMATION, SERVE AN AMENDED NOTICE IN THE MANNER PROVIDED IN THIS SECTION. SUCH AMENDED NOTICE SHALL BE CONSIDERED AS HAVING BEEN SERVED AT THE SAME TIME AS THE ORIGINAL NOTICE, EXCEPT THAT THE AMENDED PRELIMINARY NOTICE SHALL BE EFFECTIVE ONLY AS TO WORK PERFORMED, MATERIALS SUPPLIED OR PROFESSIONAL SERVICES RENDERED TWENTY DAYS PRIOR TO THE DATE OF THE AMENDED PRELIMINARY NOTICE OR THE DATE THE ORIGINAL PRELIMINARY NOTICE WAS SERVED ON THE OWNER, WHICHEVER OCCURS FIRST.

§ 33-992.02. Proof of service of preliminary twenty day notice; receipt; affidavit

Proof that the preliminary twenty day notice required by § 33-992.01 was served in accordance with § 33-992.01, subsection G shall be made as follows:

1. If served by personally delivering the notice to the person to be notified, by leaving it at his residence or place of business with some person of suitable age and discretion then residing or working therein or by mail, by an acknowledgment of receipt of the notice in a form substantially as follows:

Signature of sender

Acknowledgment of Receipt of Preliminary
Twenty Day Notice

This acknowledges receipt on (insert date) of a copy of the preliminary twenty day notice at (insert address).

Date: _____
(Date this acknowledgment is executed)

Signature of person acknowledging receipt, with title if acknowledgment is made on behalf of another person"

2. If a person to whom the notice is served pursuant to § 33-992.01, subsection G fails to complete the acknowledgment or fails to complete and return the acknowledgment within thirty days from the date of mailing, proof of service may be made by affidavit of the person making such service, showing the time, place and manner of service and facts showing that such service was made in accordance with § 33-992.01. Such affidavit shall show the name and address of the person to whom a copy of the preliminary twenty day notice was delivered, or mailed, and, if appropriate, the title or capacity in which he was served. If service was made by first class, certified or registered mail, the certificate of mailing, the receipt of certification or registration shall be attached to the affidavit.

Added by Laws 1979, Ch. 202, § 2.

33-993. Procedure to perfect lien; notice and claim of lien; service; recording; definitions

A. In order to impress and secure the lien provided for in this article, every original contractor, within ninety days after the completion of a building, structure or improvement, or any alteration or repair of such building, structure or improvement, or if a notice of completion has been recorded, within forty-five days after recordation of such notice, and every other person claiming the benefits of this article, within sixty days after the completion of a building, structure or improvement, or any alteration or repair of such building, structure or improvement, or if a notice of completion has been recorded, within thirty-five days after recordation of such notice, shall make duplicate copies of a notice and claim of lien and record one copy with the county recorder of the county in which the property or some part of the property is located, and within a reasonable time thereafter serve the remaining copy upon the owner of the building, structure or improvement, if he can be found within the county. The notice and claim of lien shall be made under oath by the claimant or someone with knowledge of the facts and shall contain:

1. The legal description of the lands and improvements to be charged with a lien.

2. The name of the owner or reputed owner of the property concerned, if known, and the name of the person by whom the lienor was employed or to whom he furnished materials.

3. A statement of the terms, time given and conditions of the contract, if it is oral, or a copy of the contract, if written.

4. A statement of the lienor's demand, after deducting just credits and offsets.

5. A statement of the date of completion of the building, structure or improvement, or any alteration or repair of such building, structure or improvement.

6. A statement of the date that the labor, materials, machinery, fixtures or tools were first furnished to the jobsite.

7. A statement of the date the preliminary twenty day notice required by section 33-992.01 was served. A copy of such preliminary twenty day notice and the proof of service required by section 33-992.02 shall be attached.

B. For the purposes of subsection A of this section, "completion" means the earliest of the following events:

1. Actual completion of the work.

2. FOR THE PURPOSES OF RESIDENTIAL CONTRACTING AS DEFINED BY SECTION 32-1102, occupation or use of the building, structure or improvement by the owner or his agent.

3. Written acceptance by the owner or his agent of the building, structure or improvement.

4. Final inspection and written acceptance by the governmental body which issued the building permit for the building, structure or improvement.

5. Cessation of labor for a period of sixty consecutive days, except when such cessation of labor is due to a strike, shortage of materials or act of God.

C. For the purposes of this section, "notice of completion" means a written notice which the owner or his agent may elect to record at any time after completion of construction, as defined in subsection B of this section, of the building, structure or improvement, or any alteration or repair of such building, structure or improvement for the purpose of shortening the lien period, as provided in subsection A of this section. A notice of completion shall be signed and verified by the owner or his agent and shall contain the following information:

1. The name and address of the owner.
2. The nature of the interest or estate of the owner.
3. The legal description of the jobsite and the street address.

The validity of the notice is not affected by the fact that the street address recited is erroneous or that such street address is omitted.

4. The name of the original contractor, if any.

D. If there is more than one owner, any notice of completion signed by less than all such owners shall recite the name and address of all such owners. If the notice of completion is signed by a successor in interest, it shall recite the names and addresses of his transferor or transferors.

E. A notice of completion shall be recorded in the office of the county recorder of the county in which the property or some part of the property is located. The county recorder of the county in which the notice of completion is recorded shall index the notice of completion under the index classification in which mechanics' and materialmen's liens are recorded.

F. If a notice of completion has been recorded by the owner, the owner shall mail by certified or registered mail a copy of the notice of completion to the ~~general~~ ORIGINAL contractor and to all persons from whom the owner has previously received a preliminary twenty day notice. In the event the owner fails to mail a copy of the notice of completion to any person from whom the owner has received a preliminary twenty day notice, such person shall have ninety days in the case of the ~~general~~ ORIGINAL contractor, and sixty days in the case of any other person, to impress and secure the lien provided for in this article.

§ 33-994. Right of owner of property against which lien is claimed to withhold payment to original contractor; procedure

Upon service of the notice and claim of lien, the owner may retain, out of the amount due or to become due the original contractor, the value of the labor or material furnished as shown by the notice and claim of lien. The owner shall furnish the original contractor with a true copy of the notice and claim of lien and if the contractor does not, within ten days after receipt of the copy, give the owner written notice that he intends to dispute the claim, he shall be considered as assenting to the demand, which shall be paid by the owner when it becomes due.

33-995. Duty of contractor to defend action on claim of lien by person other than a contractor; rights of owner against contractor; other rights

A. When a lien is recorded or notice given by any person other than a contractor, the contractor shall defend, at his own expense, any action brought thereon.

B. During pendency of such action the owner may withhold the amount sued for, and if judgment is given upon the lien, he may deduct from any amount due or to become due from him to the contractor the amount of the judgment and costs.

C. If the owner has settled with the contractor in full, or if such an amount is not owing to the contractor, the owner may recover back from the contractor the amount so paid by him, and for which the contractor was the party originally liable.

D. ANY CONTRACTOR, SUBCONTRACTOR OR OTHER PERSON WHO IS OBLIGATED BY STATUTE, CONTRACT OR AGREEMENT TO DEFEND, REMOVE, COMPROMISE OR PAY ANY CLAIM OF LIEN OR ACTION AND WHO UNDERTAKES SUCH ACTIVITY HAS THE RIGHTS OF THE OWNER AND BENEFICIAL TITLE HOLDER AGAINST ALL PERSONS CONCERNING SUCH ACTIVITY, AS SPECIFIED IN SECTIONS 33-420 AND 33-994.

Approved by the Governor, May 19, 1989.

Filed in the Office of the Secretary of State, May 19, 1989.

§ 33-996. Joinder of persons claiming liens; claimant as party defendant; intervention

Lienors not contesting the claims of each other may join as plaintiffs, and when separate actions are commenced the court may consolidate them, and make all persons having claims filed parties to the action. Persons claiming liens who fail or refuse to become parties plaintiff shall be made parties defendant, and those not made a party, may, at any time before final hearing, intervene.

§ 33-997. Sale of property to satisfy lien

No sale of property to satisfy a lien granted under the provisions of this article shall be made except upon judgment of foreclosure and order of sale.

§ 33-998. Limitation of action to foreclose lien

A lien granted under the provisions of this article shall not continue for a longer period than six months after it is recorded, unless action is brought within such period to enforce the lien. If a lien claimant is made a party defendant to an action brought by another lien claimant, the filing within such period of six months of an answer or cross-claim asserting the lien shall be deemed the commencement of an action within the meaning of this section.

As amended Laws 1966, Ch. 63, § 22.

§ 33-999. Right of lienholder to have land and improvements sold together or separately; right of purchaser to possession

A. The person enforcing a lien granted under the provisions of this article may have the lot or land and improvements sold together, or he may have the improvements alone sold when it can be done without material injury to the property beyond the value of the improvements.

B. When the improvements are sold separately, the purchaser shall be placed in possession by the officer conducting the sale and the purchaser shall have the right to remove the improvements within a reasonable time from the date of purchase.

§ 33-1000. Priority among mechanic's and materialman's liens; prorating proceeds of foreclosure sale

A. The liens for work and labor done or professional services or material furnished, as provided for in this article, are on an equal footing without reference to the date of recording the notice and claim of lien, and without reference to the time of performing the work and labor or furnishing the professional services or material.

B. When a sale is ordered and the property sold, the proceeds of the sale, if not sufficient to discharge all liens against the property without reference to the date of recording the notice and claim of lien, shall be prorated over the respective liens.

Amended by Laws 1987, Ch. 341, § 6.

§ 33-1001. Priority of claims for current wages owed by owner of property under levy

A. When a levy is made under execution, attachment or other similar writ, except when the writ is issued in an action under this article, a miner, mechanic, salesman, servant or laborer who has a claim against the defendant for labor performed may give notice of his claim, sworn to and stating the amount thereof, to the creditor, defendant debtor and the officer executing the writ, at any time within three days before sale of the property levied upon. The officer shall file the claim with the clerk of the court issuing the writ, and unless the claim is disputed by the debtor or creditor before sale, the officer shall pay the claimant from the proceeds of the sale the amount claimant is entitled to receive for such services rendered within sixty days next preceding the levy of the writ, not exceeding two hundred dollars to each claimant. Upon failure of the officer to do so, he shall be liable to the claimant therefor.

B. The claim may be disputed by the debtor or creditor, or any lienholder, in writing, specifying the reasons for disputing it, verified and delivered to the officer before the sale, and shall be filed in the court issuing the writ. The officer shall pay all claims not disputed from the first money received. If the total amount of all claims presented exceeds the amount derived from the sale, the officer shall pay to the holders of the undisputed claims their pro rata share of the money and shall pay the pro rata amount of the disputed claims, together with an amount for costs as the court orders, into court. The court shall cite all parties interested to appear, and in a summary manner determine the validity of the disputed claims and direct the manner in which the officer shall distribute the proceeds of the sale.

§ 33-1002. Definitions; inapplicability of certain liens to owner-occupied dwelling; waiver void

A. In this section:

1. "Dwelling" means real property upon which there has been constructed or is to be constructed any building, structure or improvement which is designed for either single one-family or single two-family residential purposes or activities related thereto, including an apartment in a horizontal property regime or other condominium.

2. "Owner-occupant" means a natural person who:

(a) Prior to commencement of the construction, alteration, repair or improvement holds legal or equitable title to the dwelling by a deed or contract for the conveyance of real property recorded with the county recorder of the county in which the dwelling is located, and

(b) Resides or intends to reside in the dwelling at least thirty days during the twelve-month period immediately following completion of the construction, alteration, repair or improvement and does not intend to sell or lease the dwelling to others. Residence in the dwelling or intent to reside in the dwelling may be evidenced by the following or other physical acts:

- (i) The placing of his or her personal belongings and furniture in the dwelling, and
- (ii) Occupancy either by the person or members of his or her family.

A single act shall not establish a person as an owner-occupant if such person permits exclusive occupancy by other than members of his or her family for other than temporary purposes thereby negating his or her intent to reside in the dwelling primarily for use as his or her home.

B. No lien provided for in this article shall be allowed or recorded by the person claiming a lien against the dwelling of a person who became an owner-occupant prior to the construction, alteration, repair or improvement, except by a person having executed in writing a contract directly with the owner-occupant.

C. Any provision of an agreement made or entered into by an owner-occupant which waives the provisions of this section is void.

Amended by Laws 1976, Ch. 176, § 2; Laws 1979, Ch. 202, § 4.

§ 33-1003. Payment bond in lieu of lien right; bond purposes and conditions; recording

A. Every owner of land, including any person who has a legal or equitable interest therein, who enters a contract requiring any person to perform labor or professional services or to furnish materials, machinery, fixtures or tools in the construction, alteration or repair of any building, or other structure or improvement on such land, may avoid the lien provisions of § 33-981 pertaining to agents by requiring the person with whom he contracts to furnish a payment bond prior to or at the time of execution of such contract. Upon recordation of the payment bond together with a copy of such contract in the office of the county recorder, in the county in which the land is located, no lien shall thereafter be allowed or recorded by the person claiming a lien against the land on which the labor or professional services are performed or the materials, machinery, fixtures or tools furnished, as provided in this article, except by the person who contracts, in writing, directly with the owner.

B. A payment bond furnished pursuant to subsection A of this section shall be in a sum equal to the full amount of the contract between the owner and the person with whom the owner contracts, and shall be solely for the protection of claimants performing labor or professional services or furnishing materials, machinery, fixtures or tools to such person or his subcontractor in the prosecution of the work provided for in such contract. The bond shall be conditioned in accordance with the provisions of § 34-223, subsections A and B. The contract recorded with the bond shall contain a legal description of the land on which the work is being or is to be performed.

C. The bond provided for in this section shall be executed by one or more surety companies authorized to do business in this state and shall be accompanied by a power of attorney disclosing the authority of the person executing the same on behalf of the surety.

D. The county recorder of the county in which the bond and contract are recorded shall index the bond and contract under the index classification in which mechanics' and materialmen's liens are recorded.

Amended by Laws 1976, Ch. 162, § 58; Laws 1982, Ch. 125, § 6; Laws 1987, Ch. 341, § 7.

§ 33-1004. Discharge of mechanic's liens; bond; limitations of actions; discharge of surety; judgment

A. After perfection of a lien pursuant to this article, an owner, including any person who has a legal or equitable interest in the land which is subject to the lien, a contractor, subcontractor, mortgagee or other lien creditor, may, either before or after the commencement of an action to foreclose such lien, cause to be recorded in the office of the county recorder, in the county in which the land is located, a surety bond in the form described in subsection B of this section, together with a power of attorney disclosing the authority of the person executing the same on behalf of the surety. Upon the recordation of such bond, the property shall be discharged of such lien whether or not a copy of the bond is served upon the claimant or he perfects his rights against the bond.

B. A surety bond to discharge a lien perfected under the provisions of this section shall be executed by the person seeking to discharge such lien, as principal, and by a surety company or companies duly authorized to do business in this state, such bond shall be for the sole protection of the claimant who perfected such lien. The bond shall be in an amount equal to one and one-half times the claim secured by the lien and shall be conditioned for the payment of the judgment which would have been rendered against the property for the enforcement of the lien. The legal description of the property and the docket and page of the lien sought to be discharged shall be set forth in the bond.

C. The principal on such bond shall, upon recordation thereof with the county recorder, cause a copy of the bond to be served within a reasonable time upon the lien claimant, and if a suit be then pending to foreclose the lien, claimant shall within ninety days after receipt thereof, cause proceedings to be instituted to add the surety and the principal as parties to the lien foreclosure suit.

D. The bond shall be discharged and the principal and sureties released upon any of the following:

1. The failure of the lien claimant to commence a suit within the time allowed pursuant to § 33-998.

2. Failure of the lien claimant to name the principal and sureties as parties to the action seeking foreclosure of the lien if a copy of the bond has been served upon claimant. If the bond is served upon the claimant within less than ninety days from the date claimant would be required to commence his action pursuant to § 33-998, then the claimant shall have ninety days from the date he receives a copy of such bond to add the principal and the sureties as parties to the lien foreclosure suit.

3. The dismissal of the foreclosure suit with prejudice as to the claimant or the entry of judgment in such suit against claimant.

E. In an action to foreclose a lien under this article, where a bond has been filed and served as provided herein, a judgment for the claimant on the bond shall be against the principal and his sureties for the reasonable value of the labor and material furnished and shall not be against the property.

F. In the event a copy of the bond is not served upon the claimant as provided in subsection C of this section, the claimant shall have six months after the discovery of such bond to commence an action thereon, except that no action may be commenced on such bond after two years from the date it was recorded as provided in this section.

G. The county recorder of the county in which the bond and contract are recorded shall index the bond and contract under the index classification in which mechanic's and materialmen's liens are recorded.

Added Laws 1973, Ch. 140, § 3.

§ 33-1005. Payments made in trust

Monies paid by or for an owner-occupant as defined in § 33-1002 to a contractor, as defined in § 32-1101, as payment for labor, professional services, materials, machinery, fixtures or tools for which a lien is not provided in this article shall be deemed for all purposes to be paid in trust and shall be held by the contractor for the benefit of the person or persons furnishing such labor, professional services, materials, machinery, fixtures or tools. Such monies shall neither be diverted nor used for any purpose other than to satisfy the claims of those for whom the trust is created and shall be paid when due to the person or persons entitled thereto. The provisions of this section shall not affect other remedies available at law or in equity.

Amended by Laws 1987, Ch. 341, § 8.

§ 33-1006. Release of mechanic's and materialman's liens

A. When any lien established by the provisions of this article has been satisfied, the lienholder shall, within twenty days after satisfaction, issue a release of the lien.

B. When any lien prohibited to be filed against the dwelling of an owner-occupant as defined in § 33-1002 has been recorded, the person claiming the lien shall, within twenty days of the written request of the owner-occupant, issue a release of the lien.

C. The release issued pursuant to this section shall be in document form as specified in § 11-480. Failure to grant such a release shall be subject to the penalties prescribed by § 33-712.

Amended by Laws 1979, Ch. 202, § 5.

§ 33-1007. Definition of professional services

In this article, unless the context otherwise requires, "professional services" means architectural practice, engineering practice or land surveying practice as defined in § 32-101.

Added by Laws 1987, Ch. 341, § 9.