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IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

64178-6

J. E. DUNN NORTHWEST, INC.,
a Washington corporation,

Appellant,

v.

BELLTOWN DEVELOPMENT PARTNERS, LLC,
a Washington limited liability company,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE GREGORY P. CANOVA

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal involves a novel construction of Washington's mechanics' lien statute and its definition in RCW 60.04.011(2) of "contract price":

"Contract price" means the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor.

Appellant J. E. Dunn Northwest, Inc. ("**J. E. Dunn**"), contracted to build a condominium project for respondent Belltown Development Partners, LLC ("**Belltown**"). (CP 328-29) The contract's guaranteed maximum price ("**GMP**") was subject to increase for changes that added work scope (CP 347, 1079) and the parties executed change orders increasing the GMP to \$39.5 million (CP 452, II. 12-13)¹. J. E. Dunn also asserted that it had been required to perform other changes for which it was owed several million dollars more, which entitlement Belltown disputed (CP 447).

J. E. Dunn filed a \$6.7 million lien (later reduced to \$5 million), seeking recovery for both the unpaid contract balance (the

¹ Numbers will generally be rounded to the nearest hundred thousand or ten thousand.

initial \$34 million [CP 489, ll. 8-9] GMP as increased by executed change orders, less payment received) **and** several million dollars in disputed amounts for claimed changes and delays increasing J. E. Dunn's costs to complete the project and extending its time of performance. (CP 456-57) It sued herein to foreclose that lien. Belltown subsequently moved for summary judgment to reduce J. E. Dunn's lien by the amount representing disputed claims. Belltown argued:

Under the specific and express language of the [mechanics' lien statute], a contractor can only lien for the **contract price**, which is defined as the "amount agreed upon" by the parties to the contract. For amounts in excess of the contract price the contractor is afforded no security against the property, and must file suit for breach of contract – like any other unsecured plaintiff in Washington pursuing its breach of contract claims.

(CP 447)

The trial court agreed and entered summary judgment reducing J. E. Dunn's lien to \$2.6 million. (CP 1095-96) It thus ruled that, when a fixed price, lump sum contractor asserts that the owner has failed to pay for the reasonable value of requested, performed, and un-priced changes for which the owner denies that payment is due, the contractor has no lien rights with respect to those claims.

This ruling is both startling and unprecedented. It produces an absurd result that denies the contractor any lien remedy in precisely the most common case of lien claims, *i.e.*, where the owner and contractor dispute whether the contractor has performed changed work for which payment is due. Thus, the primary purpose of the lien statute, which is to provide the contractor with “*security*” (RCW 60.04.900) in the real property for the value of its improvement thereto which is unpaid, is defeated.

But the strained—indeed, nonsensical—consequences produced by the court’s construction became yet more pronounced following J. E. Dunn’s unsuccessful reconsideration motion (CP 931, *et seq.*). Confronted with its cited/quoted cases that sustained liens that contained **both** types of claim items (*i.e.*, for unpaid items as to which the parties had reached price agreement **and** for claims for changed/extra work that were disputed and un-priced), Belltown retreated from its original motion position.

It allowed that, yes, the contractor could have a lien for such disputed claims, but not until it proved them at trial, when it could move to amend its lien to include those amounts as well. (CP1031-33) Thus, the second fundamental purpose of the lien statute (*i.e.*, of providing record notice of lien claims to parties interested in the

real estate by not later than 90 days following work completion), is also defeated. Under Belltown's "revised" argument, potential purchasers and others interested in the property will first learn of a claimed—and adjudicated—lien entitlement only after-the-fact, more than likely several years following project completion.

The court's construction of the mechanics' lien statute is wholly untenable and cannot be sustained.

II. ASSIGNMENT OF ERROR

Error No. 1: The trial court erred in entering its June 23, 2009 "ORDER GRANTING PLAINTIFF BELLTOWN DEVELOPMENT PARTNERS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO REDUCE LIEN" (CP 1095-97, the "**SJ Order**") and its August 18, 2009 "ORDER DENYING J. E. DUNN'S MOTION TO RECONSIDER ORDER GRANTING MOTION TO REDUCE LIEN" (CP 1092-93).

Issues pertaining to Error No. 1 are:

Issue No. 1: Does the mechanics' lien statute—and RCW 60.04.011(2)'s definition of "contract price"—deny a contractor a lien for the "customary and reasonable charge" of work "furnished at the instance of the owner" (RCW 60.04.021) as to which the parties have not reached agreement on price?

Issue No. 2: Is the contractor allowed a lien for such recovery *only at time of trial*, by means of a motion to amend its lien in accordance with proven entitlement to payment for

work as to which the parties had not reached price agreement?

III. STATEMENT OF THE CASE

A. THE CONSOLIDATED ACTIONS

Belltown executed a \$34 million dollar GMP contract with general/prime contractor J. E. Dunn to build a Seattle condominium project ("**Mosler Lofts**"). (CP 4-5). Project completion produced Belltown's June 2008 suit against J. E. Dunn in King County Superior Court (the first action, # 08-2-20669-6 SEA). (CP 1-9). Belltown also sued a related company, J. E. Dunn Construction Group, Inc. ("**J. E. Dunn Construction**"), which acted as J. E. Dunn's guarantor to Belltown. (CP 3-9).

Belltown alleged that J. E. Dunn had breached by failing to properly and timely perform, and by failing to remove liens filed by its subcontractors. (CP 3-9). It also sought recovery against guarantor J. E. Dunn Construction.

A little over three months later, a J. E. Dunn subcontractor ("**Keenan Hopkins**") commenced a second action in King County (# 08-2-34051-SEA) seeking to foreclose its lien. (CP 9-69). It sued J. E. Dunn and scores of defendants (including other subcontractors who had filed liens) claiming interests in the Mosler Loft property. J. E. Dunn answered while cross-claiming against Belltown for breach of the parties' contract, seeking \$6 million-plus

in damages (including amounts owed by it to its subcontractors [CP 456, ll. 12-19]) and lien foreclosure. (CP 82, ¶ 3.4, 84-85).

The earlier lawsuit filed by Belltown against J. E. Dunn was consolidated with the later-filed lien foreclosure action. (CP 241-248).

B. BELLTOWN'S SUMMARY JUDGMENT MOTION AND ORDER

Belltown subsequently brought its "MOTION FOR PARTIAL SUMMARY JUDGMENT TO REDUCE LIEN." (CP 446) The motion's "STATEMENT OF ISSUES" listed one issue:

Whether Dunn's lien against Mosler Lofts is excessive because RCW 60.04.021 only allows contractors to lien for the "contract price", which is defined as the "amount agreed upon" and Dunn's lien is many millions of dollars more than the [adjusted GMP] contract price of \$39,516,375.73 and includes items not agreed upon.

(CP 457, emphasis added.)

Belltown argued that the 1991/92 amendments to RCW Chapter 60.04 "made clear that a contractor can only lien for the contract price, and not all claims stemming from the contract." (CP 459, ll. 19-21).

Notwithstanding the strictly legal question of statutory construction raised by its motion, Belltown also seemed to argue

that undisputed facts established by its supporting declarations² dictated a ruling that J. E. Dunn had waived and forfeited any right to recover for disputed claim items based on its alleged failure to comply with GMP contract claim and notice requirements. (CP 460, I. 21-464).

J. E. Dunn's opposition papers did two things. First, it argued for a contrary interpretation of RCW Chapter 60.04 and 60.04.011(2)'s definition of "contract price." (CP 604-10). J. E. Dunn argued that the lienable "contract price" included **both** amounts agreed upon as to price **and** contractor claims disputed by the owner which interpretation was supported by case law. (CP 604).

Second, J. E. Dunn argued that fact issues (raised by its opposing declaration of Eric Marsh [CP 624-916]) precluded summary judgment as to whether its disputed claims were barred by alleged non-compliance with contract notice and claim requirements. (CP 599, II. 11-604, I. 18).

Belltown's motion sought only a reduction *in J. E. Dunn's lien*. This notwithstanding, J. E. Dunn's subcontractor Keenan Hopkins, which had instituted the lien foreclosure action, filed an opposition to Belltown's motion because its interpretation of the lien

² Declarations of Mark Schuster (CP 328-445), Philip Wang (CP 477-547), Harlan Falkin (CP 548-554) and Colm Nelson (CP 555-583) were filed in support of Belltown's motion.

statute “would establish an adverse precedent with regard to the lien claim of [Keenan Hopkins].” (CP 585, ll. 5-7). Keenan Hopkins’ counsel, Kerry C. Lawrence, has authored extensive CLE materials since the mid-1990s on Washington’s mechanics’ lien statute and was a principal drafter of the 1991 and 1992 revisions to RCW 60.04. (CP 586, ll. 12-26; 589, l. 21—591; 604, ll. 12-15 and note 1).

Mr. Lawrence’s opposition on Keenan Hopkins’ behalf extensively analyzed the circumstances and effect of the 1991-92 amendments to RCW Chapter 60.04 and evidences its author’s stupefaction at the interpretation urged by Belltown’s motion which directly contradicted the language and intent of the statute in the drafting of which Mr. Lawrence had himself participated. (CP 584-591).

At summary judgment oral argument, J. E. Dunn summarized its version of the facts as set out in Eric Marsh’s declaration (CP 624-916). (RT 16, l. 9—19, l. 24). Key elements were:

- When Belltown and J. E. Dunn contracted, Belltown lacked complete design drawings. Nevertheless, construction started with an agreement that, when all drawings were available, the parties would negotiate an appropriate change order adjusting the GMP. (RT 16, l. 21-17, l.4).

- When the drawings were completed, J. E. Dunn submitted a cost proposal which Belltown rejected as too expensive. (RT 17, ll. 5-15). This led to stalemated discussions that never completely resolved in agreement over two and one half years of construction. (RT 17, ll. 10-25).
- During these negotiations, Belltown said: “We’re not going to do any change orders during this period of time while we’re negotiating the final adjusted contract amount.” (RT 18, ll. 1-7). Its position was: “Let’s wait until the end of the project. Let’s get the price [for the final drawings] finalized, and we’ll just wait until the end of the project [to price other changes increasing the GMP].” (RT 18, ll. 1-5).
- Meanwhile, the contract required J. E. Dunn to continue with performance (see General Condition [“GC”] 4.3.3 “Continuing Performance,” CP 380 [Bates # BDP 00.385]), notwithstanding Belltown’s refusing to issue change orders to cover the cost of much of the changed work that J. E. Dunn performed at Belltown’s request in order to complete the project. (RT 16, ll. 5-20; 17, ll. 16-25).
- At project-end, Belltown’s position was “We’re not going to issue a change order [for disputed claims].” (RT 18, ll. 5-16).

Belltown’s counsel responded as follows:

Now, I’d like to address a couple of issues raised by Mr. Wandler, First, I’ll just say I disagree with some of

the facts presented, but the critical issue is what leverage does a contractor have when a change order is reviewed? His options are obvious, and actually Dunn implemented these options at the end of the project. You can stop work.

Dunn is a multibillion-dollar company. I'm sure it's not bullied around by a local developer. If Dunn was concerned that it was being pressured by Belltown, it could have walked off the project.

...

Now, I would like to use the example presented to you by Mr. Wandler. If you look, there is only one way you can adjust the GMP on this (indicating), and that's if you get a change order.

Fair enough, Dunn still has claims, but we're not arguing that those claims are dismissed. We're just saying that the contract price is not adjusted. Since the contract price is not adjusted and those amounts are disputed, Dunn can't lien for those.

It would be unfair and unjust to allow a contractor, when it has agreed to do something for a fixed price, to then allow it to lien for disputed amounts that are not agreed upon in its lien.

(RT 21, l.12—22, l. 17, emphasis added.)

The court declined to hear argument from Keenan Hopkins' counsel Kerry Lawrence (RT 23, l. 24—24, l. 2) and granted the partial summary judgment. Drafting its own order, it adopted Belltown's statutory construction, ruling that the "provisions of RCW 60.04.011(2) are clear on their face and should be applied in a manner consistent with [Belltown's] position." (CP 1097, ll. 13-15).

C. J. E. DUNN'S RECONSIDERATION MOTION AND BELLTOWN'S CHANGED ARGUMENT

J. E. Dunn filed a reconsideration motion. (CP 931-94). It made several arguments (see following § IV), the first of which was that "Prior Cases Allow a Lien Recovery of the Contract Price Plus Proven Extras." (CP 932-934). Its motion relied upon several Washington appellate cases (considered *infra*) that **expressly** allowed such recovery.

J. E. Dunn also noted that RCW 60.04.091 provided that lien claims "may be amended as pleadings may be by order of court" and that numerous cases allowed such amendment at trial, as to disputed and now proven claims. (CP 938, I. 6—939). It concluded:

But, no more—if the Order and Belltown's argument is correct. Now, you can file a lien for the agreed contract price, but, as far as amending that claim to correspond with adjudicated entitlement for extras, "the train has left the station."

The right to lien amendment effectively becomes a dead letter under the Order.

(CP 939, II. 12-16).

Belltown's opposition beat a strategic retreat. Its original summary judgment papers unequivocally asserted that, for disputed claims exceeding a fixed price lump sum (including a GMP), there were no lien rights ever. As its motion's conclusion stated:

Under the express and unambiguous language of the Mechanic's Lien Statute, Dunn is not entitled to a security interest in Mosler Lofts beyond the GMP. Dunn may still assert claims for breach of contract for all underlying claims. But like most breach of contract actions in Washington, Dunn's claims for amounts above the contract price are unsecured under Washington law.

(CP 465, emphasis added.)

Confronted with J. E. Dunn's reconsideration motion's contrary authority, Belltown shifted ground. It conceded that the lien could be amended to include disputed amounts above the GMP, but such amendment *could only be sought and granted at trial, following proof of entitlement*. (CP 1029, ll. 11-17; 1031, l. 8—1033, l. 10; 1034, l. 16-1035, l. 19).

The court denied reconsideration. (CP 1092-93) Its order gave no indication whether it accepted Belltown's modified reconsideration argument that disputed claims could be properly liened, but only by amendment made at trial based on proven entitlement.

D. J. E. DUNN'S LIS PENDENS AND THE COURT'S CR 54(b) FINAL JUDGMENT

J. E. Dunn filed a lis pendens, giving record notice that it intended to seek appellate reversal, with retroactive effect, of the order reducing its lien. (CP 995-1027). J. E. Dunn also filed a motion asking the court to enter final judgment, pursuant to CR 54(b), upon its order reducing J. E. Dunn's lien to the extent it

included disputed claims. The court entered such an order, making required CR 54(b) findings. (CP 1099-1104).

IV. ARGUMENT AND AUTHORITY

J. E. Dunn develops its argument for reversal in the seven following sections. § IV.A identifies pertinent principles of statutory construction. § IV.B summarizes J. E. Dunn's statutory construction argument, focusing on three key provisions of RCW Chapter 60.04 sanctioning a lien for the "full" amount claimed, including "disputed" amounts that are not "clearly excessive." § IV.C highlights the "absurd, unlikely or strained consequences"³ of the trial court's contrary construction. § IV.D reviews numerous other statutory provisions that harmoniously provide for (1) a right to lien for *disputed* claims and (2) *prior* record notice thereof to third parties. § IV.E canvasses decades of precedent conflicting with the trial court's construction. § IV.F develops that the 1991/92 amendments *ratified*, rather than negated, long-established mechanics' lien precedent that the SJ Order erroneously rejects. Concluding § IV.G develops that Belltown's reconsideration/fallback position (that disputed claims are lienable only by trial amendment) produces an absurd result and is untenable.

³ *Whatcom County v. Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

A. PERTINENT PRINCIPLES OF STATUTORY CONSTRUCTION

In *Whatcom County v. Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996), in the context of ambiguous statutory language, our Supreme Court summarized pertinent principles of statutory construction:

If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. The purpose of an enactment should prevail over express but inept wording. The court must give effect to legislative intent determined within the context of the entire statute. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. (Internal citations and quotations omitted, emphasis added.)

In *Premera v. Kreidler*, 133 Wash.App. 23, 131 P.3d 930 (2006), the court discussed the canons of statutory construction at pages 36-37:

If a statute's meaning is plain on its face, we must give effect to that meaning. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wash.2d 226, 242, 88 P.3d 375 (2004). But to determine a statute's plain meaning, we may examine legislative purposes or policies appearing on the face of the statute as well as closely related statutes. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wash.2d 637, 647, 62 P.3d 462 (2003); *Dept of Ecology v. Campbell & Gwinn*, 146 Wash.2d 1, 10-12, 43 P.3d 4 (2002).

.....

We give effect to all of the language used in a statute, and statutory provisions must be considered in relation to each other and harmonized to ensure proper construction. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 560, 14 P.3d 133 (2000). We will “avoid readings of statutes that result in unlikely, absurd, or strained consequences.” *Glaubach v. Regence Blueshield*, 149 Wash.2d 827, 833, 74 P.3d 115 (2003). An interpretation that is consistent with the spirit or purpose of the enactment is favored over a literal reading that results in unlikely or strained consequences. *State v. Day*, 96 Wash.2d 646, 648, 638 P.2d 546 (1981).

(Emphasis added.)

B. ARGUMENT SUMMARY: RCW CHAPTER 60.04 ALLOWS CONTRACTORS TO LIEN “FOR THE FULL AMOUNT DUE UNDER THEIR CONTRACT,”⁴ INCLUDING AMOUNTS AS TO WHICH THE OWNER “DISPUTES CORRECTNESS OR VALIDITY.”⁵

RCW 60.04.021, “Lien authorized,” pertinently states that “any person furnishing labor ...for the improvement of real property shall have a lien upon the improvement for the contract price of labor.” The summary judgment issue before the court below was thus: does that “contract price” include **only** labor expended improving the property for the *price of which* (by an executed contract, change order, or otherwise) the parties have agreed?

⁴ RCW 60.04.031(3)(a) (emphasis added).

⁵ RCW 60.04.161 (emphasis added).

That is, does the right to lien exclude claims for changes/extras un-priced by the parties as to which the owner disputes entitlement and/or recovery amount?

Perhaps the clearest negative answer to these two statements of the same issue is found in the interaction of three statutes: RCW 60.04.031, 60.04.161, and 60.04.081.

1. **RCW 60.04.031(3)(a) Recognizes a Lien “for the Full [Contract] Amount Due.”⁶**

RCW 60.04.031, “Notices-Exceptions,” defines the required pre-performance written notice that certain parties must give to owners and prime contractors as a pre-condition to their acquiring lien rights. RCW 60.04.031(3)(a) excuses persons who provide professional services, materials or equipment who contract directly with owners of a single family residence or garage, from the duty of giving such notice.

In establishing that exception, the section characterizes the nature of the “contract price” lien created by the above-quoted RCW 60.04.021. Specifically, it provides:

[Such persons contracting directly with the owner] shall have a lien for the full amount due under their contract, as provided for in RCW 60.04.021.

⁶ (Emphasis added.)

agreement. Rather, it must show that the amount claimed is “frivolous and made without reasonable cause, or clearly excessive.” Only in those circumstances does the statute allow the court to order release of a disputed lien claim.

In short, if the parties have not reached agreement on price as to an item of changed or extra work which the lien claimant asserts that it performed at the owner’s request, the contractor may properly file a lien for “the full amount” that it claims is “due under its contract,” including amounts “the correctness or validity of” which the owner “disputes,” unless the owner can prove those amounts to be “frivolous” or “clearly excessive.” See RCW 60.04.0031(3)(a), 60.04.161, and 60.04.081.

Numerous other sections of RCW Chapter 60.04 harmoniously dictate the same construction, as is developed in following § IV.D. Although this brief’s argument could perhaps safely stop here, what may be an excess of caution prompts a more exhaustive review.

C. THE TRIAL COURT’S INTERPRETATION PRODUCES “ABSURD, UNLIKELY OR STRAINED CONSEQUENCES.”⁷

Following sections (§§ IV.D-G) examine in detail the conflicts between the trial court’s interpretation and controlling statutory provisions and precedent. Preliminarily, however, we emphasize the “big picture” which is that, if upheld, the SJ Order’s interpretation will wreak havoc for both contractors and courts trying to uphold the mechanics’ lien statute’s promise to provide security in improved realty to unpaid contractors and materialmen. There are at least three obvious levels of such absurd consequences.

1. “Real World” and Judicial Practical and Administrative Absurdities

An excellent place to start is by noting the issues raised by Belltown’s modified argument on reconsideration which the trial court left undecided. That is, is it correct, as Belltown then contended, that disputed claims are lienable, *but only by amendment made at trial supported by proven entitlement?*

Either answer produces absurdities. If the answer is “yes,” the second essential purpose of a recorded lien—which is to give **prior notice** to interested third parties so that they can protect themselves in their dealings as concerns the property—is defeated. For example, it will do no good for a bank, which has lent money to

⁷ *Whatcom County*, 128 Wn.2d at 546.

an owner based on public records showing a much smaller claimed lien, to learn only later (after a trial amendment and proven entitlement) that the lien is actually for a much greater amount when disputed items are included.

If the answer is “no,” *i.e.*, a lien may not permissibly be amended at trial on the basis of proven entitlement as to disputed claims, or if amendment is allowed but without retroactive effect (to the date of original lien filing), that answer defeats the *primary purpose* of the mechanics’ lien statute, *i.e.*, of providing **security** in the realty to the contractor for the reasonable value of the improvement resulting from its efforts.

Another absurdity occurs even if the answer is twice “yes,” *i.e.*, that the contractor (1) may properly amend at trial based on proven entitlement as to disputed claims and (2) may do so with retroactive effect. The problem occurs if—as is entirely likely—the owner at work-completion **pays** the contractor for all work except claims for un-priced changes/extra work which the owner disputes. In that case, under the trial court’s construction, the contractor may not permissibly file a lien at all, within the required 90 days following the last day labor or materials are provided (see RCW 60.04.091), because it has already been paid for all work that is properly lienable.

This would produce the absurd situation that, at time of trial, the contractor would have no previously timely filed lien to amend,

and it would then be too late (likely by a year or more) to file a lien as to the long-since completed project.

In short, the trial court's interpretation makes mincemeat of any kind of sensible administration of RCW 60.04 by either contractors or courts.

2. The Effective Negation of a Quantum Meruit Remedy in Lien Foreclosure Actions

A second level of absurdity is that the SJ Order's construction for the first time ever creates an extra-statutory exception to a contractor's right of recovery under the lien foreclosure statute. This is because if Belltown and the SJ Order are correct, that when there is a contract a lien claimant cannot recover anything but agreed priced contract amounts, then a contract remedy going back 100 years—and recognized to this day in Washington courts—has just been effectively negated in lien foreclosure actions. That is, while the contractor could prove its entitlement to quantum meruit, any resulting judgment could not be enforced by a lien foreclosure.

Modern Builders Inc. of Tacoma v. Manke, 27 Wn. App. 86, 96, 615 P.2d 1332 (1980), is here instructive. The contractor there—as in untold number of other lien foreclosure actions—

sought an alternative (to a contract breach) quantum meruit recovery. The court stated at 27 Wn. App. 91:

We concede that the parties to a contract may possibly agree to changes from the original agreement which are so extensive that the contract must be abandoned as a matter of law. See *V. C. Edwards Contracting Co. v. Port of Tacoma*, 83 Wn.2d 7, 514 P.2d 1381 (1973).

Although the contractor had failed to provide “sufficient evidence” to obtain such a reasonable-value-of-performance quantum meruit recovery measure for the entire contract, the court did allow its mechanics’ lien judgment to include \$2,100 for a “proven” item of “extra work’ based on quantum meruit as well as the contract price.” *Id.* at 95. *Modern Builders* thus stands for the proposition that, in Washington, a lien recovery may include proven quantum meruit entitlement, either on a contract-wide or specific extra-work basis.

Other cases have similarly included quantum meruit entitlement in a mechanics’ lien foreclosure recovery. See, e.g., *Douglas Northwest, Inc. v. Bill O’Brien*, 64 Wn. App. 661, 683-85, 928 P.2d 565 (1992); *CKP, Inc v. GRS Const. Co.*, 63 Wn. App. 601, 615-17 [citing *Modern Builders*, supra], 821 P.2d 63 (1991). But no more under the SJ Order’s logic: if there is a contract price, that is the sole measure of and limit of the contractor’s recovery for lien-foreclosure purposes.

Thus, and ironically, the more extreme and dire is the contractor's plight (as when extensive changes would allow it to jettison the contract entirely and recover the full reasonable value of its performance), it will be denied that remedy in a lien foreclosure action. Also, partial recovery in quantum meruit for discrete claimed changes/extras/damages (as in *Douglas Northwest, supra*) would also be barred by the SJ Order's construction.

3. The SJ Order's Construction Creates a Hobson's Choice for a Contractor: Either Forego Lien Rights as to Disputed Claims, or Stop Work and Face Near-Certain Termination for Contract Default, Likely Forfeiting All Right to Payment.

We have saved the worst for last. The greatest absurdity is highlighted by Belltown counsel's oral argument assertion that J. E. Dunn's remedy, if it deemed that the owner was failing to properly issue change orders, **was to "stop work" and "walk off the project."** (RT 21, ll. 12-23). This advice is fantastic. It is a recipe for contractor suicide.

The reason is that the parties' contract—as is almost universally the case in major construction contracts—*requires* J. E. Dunn to continue work pending resolution of disputes over changes. Thus, GC §§ 4.3 "CLAIMS AND DISPUTES" (CP 379) and 4.4 "RESOLUTION OF CLAIMS AND DISPUTES" (CP 379-382 [Bates ## BDP 00384-87]) allows J. E. Dunn to claim for disputed changes under specified procedures "[p]ending resolution"

of which it must “proceed diligently with performance of the Contract” (GC § 4.3.3, CP 380 [Bates # BDP 000385]) for a failure of which it may be default terminated under Contract Article 13 “TERMINATION OR SUSPENSION” (CP 355 [Bates # BDP 00336] and GC §14.2 “TERMINATION BY THE OWNER FOR CAUSE” (CP 410 [Bates # BDP 00414]). The cited contract provisions are attached as **Appendix A**.

These provisions reflect a principle that has become fundamental to American construction law: pending resolution of disputes as to extras and changes, **the contractor must continue work while pursuing his contract claim remedies, upon penalty of default termination**. As stated in P. Bruner and P. O’Connor, Jr.’s 1 Bruner & O’Connor on Construction Law (West Group 2002, hereinafter “**Bruner & O’Connor**”) § 4:49 “Contractor’s duty to proceed with the changed work” at 619, 621:

A contractor ordered to do work, whether as a directed or constructive change within the general scope of the contract, typically is contractually obliged to proceed with performance of the ordered work pending resolution of any disputes over entitlement to or amount of an equitable adjustment. A contractor’s unexcused failure or refusal to proceed under such circumstances constitutes a material breach of contract warranting termination for default.

. . .

Because of the clear risks involved in being “second guessed” years later in litigation over

breach of the duty to proceed with the changed work, and in having to challenge and overturn a likely termination for default, contractors are usually well advised to proceed to perform the changed work and file appropriate claims and to not refuse to perform, except for the clearest and most substantial reasons.⁸

As similarly stated by R. Nash and S. Feldman in in 1 Government Contract Changes (Thomson West 2007) Chapter 6 “Contractor’s Duty to Proceed,” discussing federal contract “duty to proceed” clauses that have provided decades-old models for equivalent clauses such as those present in J. E. Dunn’s contract:

The duty to proceed is a fundamental obligation of a Government contractor.⁹

This duty substantially limits the contractor’s bargaining power during the performance of the contract and plays a significant role on the way the *Changes* clause is used during administration of the contract.¹⁰

The remedy of the Government in the event a contractor refuses to perform pending resolution of a dispute is drastic. The primary consequence is that the Contracting Officer may subject the contractor to a possible *termination* of the contract for default, and the Government has often seen fit to impose this sanction.¹¹

⁸ P. 176 (emphasis added, notes omitted).

⁹ P. 158.

¹⁰ P. 159.

¹¹ P. 159.

In such circumstances, there seems to be no question that an outright refusal to proceed by the contractor will place it in default of the contract. This holding is consistent with the doctrine that such refusal is an anticipatory breach of the contract—a clear statement by the contractor that it will not perform (which statement may be relied on by the Government).¹²

Thus, a contractor's remedy here is for a *constructive* change followed by pursuit of its rights through the *disputes process*—not stoppage of work in an effort to obtain a different interpretation of the contract.¹³

Hence, no prudent contractor would stop work in any of these circumstances. It should always remember that the failure to follow the Government's clear direction can be grounds for a default termination.¹⁴

One gains the impression from reading these cases that the contractor greatly weakens its case when it stops work because it cannot resolve its difficulties through negotiation with the Contracting Officer. The contract scheme of working out specification difficulties through the changes process and resolving disputes regarding the amount of the equitable adjustment through the disputes process is too firmly embedded in the law of Government contracts to permit much variation in the decisions in this area. Hence, contractors must be aware that, in almost all cases, stopping work because they have yet to obtain an equitable adjustment will provide grounds for a default termination.¹⁵

Belltown's argument on summary judgment (i.e., that J.E.

Dunn could simply walk away from the project) demonstrates a

¹² P. 160 (notes omitted).

¹³ P. 162.

¹⁴ P. 163 (emphasis added).

¹⁵ P. 176 (emphasis added, note omitted).

complete lack of understanding of its own contract. Its (and the SJ Order's) construction creates this Hobson's choice for the contractor: it can either perform owner-directed work which it considers to be a change—as to the pricing of which the parties have not agreed thus meaning no change order is executed—**therefore giving up its lien rights for such work**, or it can refuse to do so and be terminated for default, **thereby risking its very existence because of the draconian potential legal consequences attendant upon such a refusal.**

In short, Belltown's and the trial court's construction produces multiple absurdities.

D. RCW CHAPTER 60.04 IS REplete WITH PROVISIONS HARMONIOUSLY GIVING (1) CONTRACTORS A RIGHT TO LIEN FOR DISPUTED CLAIMS AND (2) PRIOR RECORD NOTICE THEREOF TO THIRD PARTIES TO PROTECT THEIR INTERESTS.

J. E. Dunn submits that the three statutory provisions discussed in prior § IV.B, as construed by Washington courts, sufficiently establish the error of the trial court's construction of RCW Chapter 60.04. We note the following additional provisions which harmoniously support the contrary construction here argued for by J. E. Dunn.

- RCW 60.04.021 “authorize[es]” a “lien upon the improvement” for “any person furnishing labor” thereupon “at the instance of the owner.” RCW 60.04.011(4) defines “furnishing labor” as “the performance of any labor ... for the improvement of real property.”¹⁶ **But, under the trial court’s construction, “any” twice means “some” rather than “any.”** That is, “any person furnishing labor” excludes a fixed-price contractor who is unpaid only for disputed un-priced changes, and “any labor” does not include a contractor’s labor for changes for the price of which the parties have not agreed. J. E. Dunn’s construction, however, harmonizes these provisions with RCW 60.04.0111(2)’s “contract price” definition, and negates no parts thereof.

- RCW 60.04.031(4) sets out the form for a sometimes required pre-lien notice as to “COMMERCIAL AND/OR NEW RESIDENTIAL PROPERTY.” Its text includes the following:

In the event you or your contractor fail to pay us, we may file a lien against your property. A lien may be claimed for all professional services, materials, or equipment furnished after a date that is sixty days before this notice was given

...

¹⁶ (Emphasis added.)

We expect to be paid by the person who ordered our services, but if we are not paid, we have the right to enforce our lien by filing a construction lien against your property.¹⁷

Thus, the claimant has a lien for “all” services/materials/equipment “ordered” on the owner’s behalf as to which required notice is given to the owner. But, under the court’s construction, “all” services/materials/equipment provided by a fixed-price supplier does not mean “all.” Rather, it only means the portion as to which the parties have reached price agreement. Contrarily, J. E. Dunn’s construction harmonizes all provisions, negating none.

- RCW 60.04.091, “Recording-Time-Contents of Lien,” requires a lien claimant, as a condition of its right to foreclose a lien, to record in the public land records within 90 days of work-cessation, a “CLAIM OF LIEN” including the “PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED” and the name of the person “INDEBTED TO THE CLAIMANT.” Such “[f]iling requirements alert prospective acquirers of competing interests in the subject property.” 3 Bruner & O’Connor § 8:142, “Notice and filing requirements,” at p. 318.

¹⁷ (Emphasis added.)

Nowhere in this statute, or in RCW Chapter 60.04, is there any indication that the “principal amount” of “indebted[ness]” to be “claimed” *is less than the full amount claimed to be due*, which is the construction placed on it by the court and Belltown. Rather, there are at least a half dozen sections recognizing the contractor’s ability to lien for “the full amount due under [its] contract” (RCW 60.04.031(3)), or “the amount due” (RCW 60.04.071/.131), or for “any amount due or to become due” (RCW 60.04.151), or the “amount owing” or “claimed to be due in the notice” (RCW 60.04.221(4)-(5)),¹⁸ all of which either expressly or implicitly sanction a notice of lien for **all amounts claimed**, *including those for disputed and un-priced change claims*.

- Finally, note must be taken of RCW 60.04.900, “Liberal construction,” which provides:

RCW 19.27.095, 60.04.230, and 60.04.011 through 60.04.226 and 60.04.261 are to be liberally construed to provide security for all parties intended to be protected by their provisions.¹⁹

Every statutory section referenced in this brief thus far is included within those mandated to be “liberally construed to provide

¹⁸ (Emphasis added.)

¹⁹ (Emphasis added.)

security²⁰ for lien claimants. Yet, the trial court's construction would deny contractors lien "security" for precisely the most common type of liens—when the parties disagree as to the proper pricing of disputed (or even conceded) changes.

It is hard to conceive of a construction of RCW Chapter 60.04 that would more effectively gut its entire purpose by *denying security* to lien claimants.

E. THE COURT'S CONSTRUCTION CONFLICTS WITH DECADES OF PRECEDENT (BOTH PRE AND POST-1991/92 AMENDMENTS TO THE MECHANICS' LIEN STATUTE).

No reported case adopts the trial court's construction of RCW Chapter 60.04 and RCW 60.04.011(2). Rather, its construction directly conflicts with numerous opinions that allow precisely the type of recovery which the SJ Order would bar.

Belltown contends that the 1991/92 amendments to the mechanics' lien statute changed the result as to the issue raised by this appeal, and the following section addresses that statutory construction argument. Meanwhile, we canvass authority—both pre and post-1991/92—that sanctions results inconsistent with the trial court's construction.

²⁰ (Emphasis added.)

1. Cases Decided Under the Pre-1991/92 Mechanics' Lien Statute

Perhaps the most direct evidence of the court's erroneous construction is provided by *Modern Builders*, 27 Wn. App. 96:

Since plaintiff did not segregate and prove the great majority of its claimed extra costs for changes in the plans, plaintiff is entitled to a lien only for the contract price plus the proven \$2,100 in extra costs as offset by amounts paid by Puget Sound National Bank.²¹

Thus, Division II allowed precisely what the trial court would prohibit, *i.e.*, recovery of an unpaid contract balance **plus proven extras** as to which no price agreement has been reached. It specifically stated that, to the extent such extras were proved, plaintiff lien claimant could recover "for 'extra' work based on quantum meruit as well as the contract price" (*id.*, at 95, emphasis added).

Division I ruled consistently in *Douglas Northwest*, 64 Wn. App. 673, where the contractor's foreclosure recovery was affirmed for claimed lien amounts including:

(1) the unpaid contract balance, (2) compensation for additional work performed, (3) compensation for the increased costs attributable to misrepresentation of the soils on the site, and (4) compensation for

²¹ (Emphasis added.)

standby equipment, extended home office overhead, extended field operation costs, and labor and equipment in efficiency.²²

The court specifically rejected the defendant's argument that the contractor was barred from recovering \$40,000 for extras in quantum meruit. 64 Wn. App. 683-90. Thus, and again, lien recovery was affirmed for an unpaid contract balance **plus** extras as to which no pricing agreement was reached.

A third such case is *CKP, Inc., supra*. The court there affirmed a foreclosure recovery for "the lien amounts for the basic contract, which was for a fixed sum," on which interest for liquidated amounts was allowed. 63 Wn. App. 614. Additionally, it allowed lien recovery for both extras reduced to signed change orders and those that were not (excluding only interest on those thus unliquidated amounts):

The extra work in the second category [as to which no pricing agreement was reached], however, was not reduced to written contract modifications executed by both parties, but rather was proven by testimony, job diaries, and other such documents. It therefore falls into the category described by *Modern Builders, Inc. v Manke, supra*, that is, extra work arising outside of and independent of the contract for which CKP may

²² (Emphasis added.)

recover costs plus a reasonable profit in quantum meruit.²³

The *CKP* court further specifically held that lien foreclosure attorneys' fees were recoverable for extras, holding that "[f]ees incurred in proving extras over a contract price may be allowed."²⁴

2. Cases Decided Post-1991/92 Amendments

Later cases also sustain filed liens including disputed amounts. In *Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 155 P.3d 952 (2007), *affirmed by* 166 Wn.2d 429, 210 P.3d 308 (2009), the contractor filed a lien based on not only a "\$441,716 base bid," but also arising from disputes related to "a number of changes ... affecting the cost of [the contractor's] work." 137 Wn. App. 878. Its lien claim was upheld (as against the interest of its contractee in the physical improvements attached to public property).²⁵

The notion that a filed lien may not properly include *disputed* amounts was similarly rejected in *S. D. Deacon Corp. v. Gaston Bros.*, 150 Wn. App. 87, 207 P.2d 468 (2009). A contractor and subcontractor signed a \$63,000 subcontract containing an

²³ 63 Wn. App. 617, citing *Modern Builders*, 27 Wn. App. at 97.

²⁴ *Id.* at 621.

²⁵ *See*, 137 Wn. App. 880-881.

integration clause. There was also an agreed \$991.78 change order. The dispute arose because the subcontractor alleged that the true contract amount (based on its submitted bids) was \$112,000, for which greater amount (minus payments received) it had filed a lien.

The prime contractor obtained a summary dismissal of the lien based on an argument that the \$63,000 contract's integration clause was preclusive. The Court of Appeals reversed, reinstating the lien, holding that "disputed" claim entitlement fact issues required a trial to resolve those disputes. It stated:

The summary procedure [to dismiss excessive liens] provided [under RCW 60.04.081(1)] is not to be used as a substitute for trial where there is a legitimate dispute about the amount of work done and money paid.²⁶

...

The trial court's reasoning cannot be sustained. Most important, it was disputed whether the July 5 agreement was intended by the parties to cover all of Gaston's work on the fitness center.²⁷

In short, Belltown's fallback argument (in opposition to J. E. Dunn's reconsideration motion) has it exactly backwards: liens are properly filed for disputed amounts, and the resolution of those

²⁶ 150 Wn. App. 90, 93 (emphasis added).

²⁷ 150 Wn. App. 90, 93 (emphasis added).

disputes (unless a lien is “so devoid of merit that no possibility of sustaining [it] exists”)²⁸ occurs at trial, not in motions to strike or reduce liens based on alleged integrated—or GMP—contract defenses.

In this case, as in *S. D. Deacon*: “[T]here is no dispute that the parties had an agreement and that [the lien claimant] performed work. The only dispute concerns the amount owed.”²⁹ That “dispute,” properly framed by the filed lien claiming the disputed amount, should be resolved at trial. See also *Henifin Constr. v. Keystone Constr.*, 136 Wn. App. 268, 272, 145 P.3d 402 (2006) (lien was proper when the foreclosure “suit involves these change orders that were not approved by McDonalds”).³⁰

F. THE 1991/92 AMENDMENTS RATIFIED AND PROVIDED EXPRESS STATUTORY SANCTION FOR, RATHER THAN NEGATED, PRIOR CASE LAW ALLOWING LIEN-FILING/RECOVERY FOR DISPUTED CLAIMS.

Belltown’s argument that the 1991/92 amendments were somehow intended to reverse decades of judicial precedent (see prior § IV.D) sanctioning the filing of and recovery upon liens including disputed (and un-priced by the parties) claims, is

²⁸ 150 Wn. App. 96.

²⁹ 150 Wn. App. 95 (emphasis added).

³⁰ (Emphasis added.)

untenable and tortured. Rather, the 1991/92 modifications added express statutory justification for the then long-established precedent supporting liens for disputed and un-priced claims.

1. The Key Changes Wrought by the 1991/92 Amendments

We attach (as **Appendices B-C**) the current and pre-1991/92 versions of RCW 60.04. Generally, a comparison of the earlier with the later amended provisions shows an overall consistency, with various changes aimed primarily at streamlining and updating the mechanics' lien statute in light of more modern and complicated economic conditions. Basically, the 1991/92 modifications were housekeeping/modernizing/"broadening"³¹ in nature, and far removed from any attempt to dramatically (or at all) scale back the rights of lien claimants. To the contrary, the most significant single change pertinent to this appeal was the addition of RCW 60.04.900, which mandated that RCW 60.04 be "liberally construed to provide security for all parties intended to be protected by their provisions."³²

³¹ "The revisions included broadening the scope of the chapter to include professional changes as well as numerous other substantive and procedural changes." IV. WSBA Washington Real Property Deskbook (3rd ed. 1996), § 65.1 at 65-2.

³² (Emphasis added.)

As below developed, a comparison of pertinent former and current RCW Chapter 60.04 provisions does two things: (1) it demonstrates an overall continuity of the mechanics' lien statute; and (2) it undercuts, rather than supports, the Belltown/SJ Order construction of RCW 60.04.011(2).

- RCW 60.04.010 “authorized” a lien for “[e]very person furnishing labor in the construction ... of any structure ... upon the same for the labor performed.” RCW 60.04.040 allowed a similar lien for “[a]ny person who, at the request of the owner ... fills in or otherwise improves [any real property]”. These are equivalent to the amended combined/streamlined RCW 60.04.021.

- RCW 60.04.020 required suppliers of materials/supplies/equipment to give notice to the owner (not later than 60 days after starting performance) to protect its lien right. RCW 60.04.031 is the equivalent current statute, which sets forth in greatly increased detail the substance of the required notice. A similar expansion of notice requirements is reflected in the new RCW 60.04.221 “Notice to lender—withholding of funds.”

- Prior RCW 60.04.050 and current RCW 60.04.061 are equivalent.

- RCW 60.04.060 required recording of lien notice within 90 days of work-cessation. The claim required a statement of “the amount for which the lien is claimed.” The amended equivalent is RCW 60.04.091 which requires a statement of “the principal amount for which the lien is claimed.”

- Former RCW 60.04.064, “Owner may record notice to lien claimants,” has no current equivalent.

- Former RCW 60.04.067 and current RCW 60.04.101, and former RCW 60.0.080 and current 60.04.121, and former RCW 60.04.090 and current 60.04.131, are equivalent.

- Former RCW 60.04.110, “Extent of Contractor’s right to recover—Settlements—Right of Owner,” pertinently stated that the “contractor shall be entitled to recover upon the [lien] claim filed by it only such amount as may be due him according to the terms of his contract.” The current statute, in its amended RCW 60.04.011(2), makes clear that the “amount due [contractor] according to the terms of his contract” (the former RCW 60.04.110 language) includes for lien purposes a “contract price” that encompasses **both** “the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and

reasonable charge therefor.” RCW 60.04.011(2) (emphasis added).

Thus, ironically, the 1991/92 amendments’ two most significant changes—as concerns this appeal—were: (1) to *add* the “contract price” language that both *ratified*, and provided express statutory support for, longstanding precedent that sanctioned the filing of, and recovery upon, liens claiming for both disputed and un-priced change claims, and for quantum meruit recoveries based upon reasonable value; and (2) to *add* current RCW 60.04.090 “Liberal Construction.” Both undercut, rather than support, the trial court’s construction.

2. Belltown’s Contrary Argument Fails.

Belltown’s pertinent contrary argument is made in its summary judgment motion (at CP 458, I. 11-460, I. 20). Belltown there notes that the initial 1991 version of RCW 60.04.031 contained a clerical/typographical error. Specifically, that section’s model form of notice to be provided, by those who did not contract directly with owners or common law agents of owners of existing residential property, pertinently stated:

Claims may only be made against that portion of the contract you have not yet paid to your prime contractor as of the time you received this notice.

Obviously, the drafters inadvertently left out the word “price” after contract. In 1992, as Belltown notes, they corrected the omission (and also specified a time for the referenced notice) as follows:

Claims may only be made against the portion of the contract ***price*** you have not yet paid to your prime contractor as of the time <you received> this notice was given to you or three days after this notice was mailed to you.

(CP 459, note omitted, all emphasis original.)

Based on this merely technical correction, Belltown argued that “the amendments ruled out any ambiguity and made clear that a contractor can only lien for the contract price, and not all claims stemming from the contract.” (CP 459, ll. 19-21) Well, it is true that the amendment reflects that the lien is only for the “contract price,” but for reasons developed above, contract price includes (in addition to agreed and priced contract amounts) amounts for disputed and un-priced changes.

Belltown’s argument is untenable, as is the SJ Order’s statutory construction adopting the same.

G. BELLTOWN'S RECONSIDERATION/FALLBACK POSITION (THAT DISPUTED/UNPRICED CLAIMS ARE LIENABLE ONLY BY TRIAL AMENDMENT) PRODUCES AN ABSURD RESULT AND IS WITHOUT STATUTORY OR PRECEDENTIAL SUPPORT.

Prior argument dictates a negative answer to Issue No. 1 related to J. E. Dunn's sole assignment of error, *i.e.*, a contractor is **not barred** from a lien recovery for disputed and un-priced lien claims. Issue No. 2 should also be answered negatively, *i.e.*, such claims are not lienable only by means of motions to amend made at trial following proven entitlement as to disputed and un-priced claims.

There are two reasons. First, there is not the slightest support for such a rule, as argued for by Belltown in its opposition to J. E. Dunn's reconsideration motion, in either the text of RCW Chapter 60.04 or in precedent. That lien amendments have been allowed at trial for many decades past in no way indicates that an **initially filed lien** may not claim for disputed and un-priced changes in the first instance. The authority developed in prior sections of this brief establishes that such liens are proper.

Second, to reiterate an earlier point, it is absurd to give notice of a lien claim only after it is proven because that defeats the very purpose of such notice, *i.e.*, of allowing third parties to protect

themselves with respect to their dealings concerning the lien property.

V. RAP 18.1 REQUEST FOR ATTORNEYS' FEES

RCW 60.04.181(3) provides that a prevailing party in a lien foreclosure action may recover "attorneys' fees ... incurred by the attorney in the superior court, court of appeals, ... as the court ... deems reasonable." It is perhaps also pertinent that RCW 60.04.081 "Frivolous claim—Procedure" makes provision in its subsection (3) for an interim award of reasonable attorneys' fees to a lien claimant who successfully defends against a motion to dismiss its lien as "frivolous."

If this appeal succeeds, J. E. Dunn will prevail as to the disputed statutory construction issue. Consequently, pursuant to RAP 18.1, J. E. Dunn asks the Court of Appeals in such a case (1) to award it and to fix the amount of reasonable attorneys' fees on appeal and (2) to direct the trial court, on remand, to award and fix J. E. Dunn's reasonable attorneys' fees below that were incurred in defending against the summary judgment motion and order that are the subject of this appeal.

VI. CONCLUSION

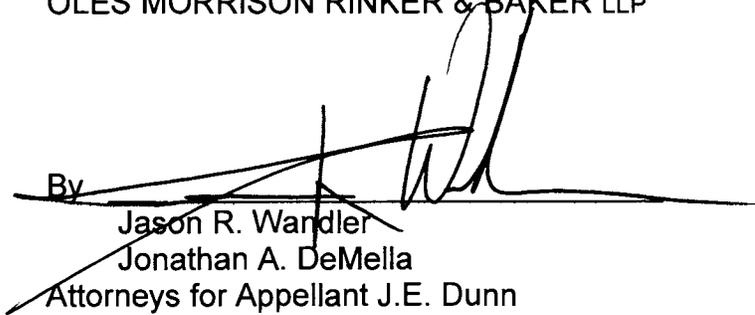
The trial court's construction of RCW Chapter 60.04, and of RCW 60.04.011(2)'s definition of "contract price," is error as a

matter of law. For that reason, the SJ Order should be reversed by an opinion directing the reinstatement of the stricken portion of J. E. Dunn's lien claiming for disputed and un-priced changes and extras. The Court should also award reasonable attorneys' fees to J. E. Dunn on appeal under RCW 60.04.181(3), and direct the trial court on remand to make an award to J. E. Dunn of reasonable attorneys' fees incurred by it in defending against Belltown's motion and reversed SJ Order.

DATED this 17TH day of FEBRUARY, 2010.

OLES MORRISON RINKER & BAKER LLP

By

A handwritten signature in black ink, appearing to be "Jason R. Wandler", is written over a horizontal line. The signature is stylized and somewhat cursive.

Jason R. Wandler

Jonathan A. DeMella

Attorneys for Appellant J.E. Dunn
Northwest, Inc.

| APPENDIX | TITLE | PAGES |
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| A | Contract Provisions re: Contractor's Duty to Proceed | A1-A6 |
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APPENDIX A

12.2.4 If the Owner's accountants report the Cost of the Work as substantiated by the Contractor's final accounting to be less than claimed by the Contractor, the Contractor shall be entitled to demand arbitration of the disputed amount without a further decision of the Architect. Such demand for arbitration shall be made by the Contractor within 10 days after the Contractor's receipt of a copy of the Architect's final Certificate for Payment; failure to demand arbitration within this 30-day period shall result in the substantiated amount reported by the Owner's accountants becoming binding on the Contractor. Pending a final resolution by arbitration, the Owner shall pay the Contractor the amount certified in the Architect's final Certificate for Payment.

12.2.5 If, subsequent to final payment and at the Owner's request, the Contractor incurs costs described in Article 7 and not excluded by Article 8 to correct defective or nonconforming Work, the Owner shall reimburse the Contractor such costs and the Contractor's Fee applicable thereto on the same basis as if such costs had been incurred prior to final payment, but not in excess of the Guaranteed Maximum Price. If the Contractor has participated in savings as provided in Paragraph 5.2, the amount of such savings shall be recalculated and appropriate credit given to the Owner in determining the net amount to be paid by the Owner to the Contractor.

ARTICLE 13 TERMINATION OR SUSPENSION

13.1 The Contract may be terminated by the Contractor, or by the Owner for convenience, as provided in Article 14 of AIA Document A201-1997. However, the amount to be paid to the Contractor under Subparagraph 14.1.3 of AIA Document A201-1997 shall not exceed the amount the Contractor would be entitled to receive under Paragraph 13.2 below.

13.2 The Contract may be terminated by the Owner for cause as provided in Article 14 of A201-1997. The amount, if any, to be paid to the Contractor under Subparagraph 14.2.4 of AIA Document A201-1997 shall not cause the Guaranteed Maximum Price to be exceeded, nor shall it exceed an amount calculated as follows:

13.2.1 Take the Cost of the Work incurred by the Contractor to the date of termination;

13.2.2 Add the Contractor's Fee computed upon the Cost of the Work to the date of termination at the rate stated in Subparagraph 5.1.2 or, if the Contractor's Fee is stated as a fixed sum in that Subparagraph, an amount that bears the same ratio to that fixed-sum Fee as the Cost of the Work at the time of termination bears to a reasonable estimate of the probable Cost of the Work upon its completion; and

13.2.3 Subtract the aggregate of previous payments made by the Owner.

13.3 To the extent that the Owner elects to take legal assignment of subcontracts and purchase orders (including rental agreements), the Contractor shall, as a condition of receiving the payments referred to in this Article 13, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contractor, as the Owner may require for the purpose of fully vesting in the Owner the rights and benefits of the Contractor under such subcontracts or purchase orders.

13.4 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201-1997; in such case, the Guaranteed Maximum Price and Contract Time shall be increased as provided in Subparagraph 14.3.2 of AIA Document A201-1997 except that the term "profit" shall be understood to mean the Contractor's Fee as described in Subparagraphs 5.1.2 and Paragraph 6.4 of this Agreement.

ARTICLE 14 MISCELLANEOUS PROVISIONS

the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or, unless otherwise specifically stated by the Architect, of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

4.2.8 The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

4.2.9 The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner, for the Owner's review and records, written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

4.2.10 If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

4.2.11 The Architect will interpret matters concerning the design of the Work and the requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made in writing within five (5) days after written request is made for them. Within three (3) days of receiving the Architect's interpretation, the Owner will decide the matters raised and advise the parties of its decision. Any further dispute will be subject to the Article 4 claims resolution process.

4.2.12 Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings..

4.2.13 The Owner may, by written notice to the Architect and Contractor, take on responsibility for all or a portion of the Architect's duties under this Section 4.2.

4.3 CLAIMS AND DISPUTES

4.3.1 Definition. A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

4.3.2 Time Limits on Claims. Claims by either party must be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be initiated by written notice to the Architect and the other party.

4.3.3 Continuing Contract Performance. Pending final resolution of a Claim except as otherwise agreed in writing or as provided in Subparagraph 9.7.1 and Article 14, the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4. No adjustment in the Contract Time or Contract Sum shall be permitted, however, in connection with a concealed or unknown condition that does not differ materially from those conditions disclosed or that reasonably should have been disclosed by the Contractor's (i) prior inspections and reviews under Sections 1.5.2 or 3.2.1 or (ii) preconstruction services for the Project.

4.3.5 Claims for Additional Cost. If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.6.

4.3.6 If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner; (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with this Paragraph 4.3.

4.3.7 Claims for Additional Time.

4.3.7.1 If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

4.3.7.2 If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by authoritative data substantiating that weather conditions were abnormal for the period of time, could not have been reasonably anticipated and had an unanticipated adverse effect on the scheduled construction. The parties recognize that there is a rainy season in the Pacific Northwest and that the construction schedule in this Agreement acknowledges such weather. "Abnormal" means proven to be unusual based on NOAA data for the past five years.

4.3.8 Injury or Damage to Person or Property. If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, or of others for whose acts such party is legally responsible, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after discovery. The notice shall provide sufficient detail to enable the other party to investigate the matter.

4.3.9 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are materially changed in a proposed Change Order or Construction Change Directive so that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

4.3.10 Claims for Consequential Damages. The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

- .1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and
- .2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article 14. Nothing contained in this Subparagraph 4.3.10 shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of the Contract Documents.

4.4 RESOLUTION OF CLAIMS AND DISPUTES

4.4.1 Decision of Architect. Claims, excluding those alleging an error or omission by the Architect and those arising under Paragraphs 10.3 through 10.5, shall be referred initially to the Architect for a recommendation. An initial recommendation on such Claims by the Architect shall be required as a condition precedent to mediation or litigation of all Claims between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no recommendation having been rendered by the Architect. The Architect will not make recommendations on disputes between the Contractor and persons or entities other than the Owner.

4.4.2 The Architect will review Claims and within ten days of the receipt of the Claim take one or more of the following actions: (1) request additional supporting data from the claimant or a response with supporting data from the other party, (2) recommend that Owner reject the Claim in whole or in part, (3) recommend that Owner approve the Claim, (4) suggest a compromise, or (5) advise the parties that the Architect is unable to resolve the Claim if the Architect lacks sufficient information to evaluate the merits of the Claim or if the Architect concludes that, in the Architect's sole discretion, it would be inappropriate for the Architect to resolve the Claim.

4.4.3 In evaluating Claims, the Architect may, but shall not be obligated to, consult with or seek information from either party or from persons with special knowledge or expertise who may assist the

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Architect in rendering a decision. The Architect may request the Owner to authorize retention of such persons at the Owner's expense.

4.4.4 If the Architect requests a party to provide a response to a Claim or to furnish additional supporting data, such party shall respond, within ten days after receipt of such request, and shall either provide a response on the requested supporting data, advise the Architect when the response or supporting data will be furnished or advise the Architect that no supporting data will be furnished.

4.4.5 The Architect will make its recommendation in writing, which shall state the reasons therefore. Upon considering the Architect's recommendation, and other information that the Owner deems relevant, the Owner shall notify the Architect and other parties of any change in the Contract Sum or Contract Time or both.

4.4.7 Upon receipt of a Claim against the Contractor or at any time thereafter, the Architect or the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of a Contractor's default, the Architect or the Owner may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

4.4.8 If a Claim relates to or is the subject of a mechanic's lien, the party asserting such Claim may proceed in accordance with applicable law to comply with the lien notice or filing deadlines prior to resolution of the Claim.

4.5 MEDIATION

4.5.1 Any Claim arising out of or related to the Contract, except those waived as provided for in Subparagraphs 9.10.4 and 9.10.5 shall, after initial decision by the Owner or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the Contract and with the American Arbitration Association. Absent statute of limitations concerns, mediation shall proceed in advance of the filing of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation and reduced to one or more writings signed by both parties shall be enforceable as settlement agreements in any court having jurisdiction thereof.

ARTICLE 5 SUBCONTRACTORS

5.1 DEFINITIONS

5.1.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

14.1.3 If one of the reasons described in Subparagraph 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

14.1.4 If the Work is stopped for a period of 60 consecutive days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.3.

14.2 TERMINATION BY THE OWNER FOR CAUSE

14.2.1 The Owner may terminate the Contract if the Contractor:

- .1 refuses or fails to supply enough properly skilled workers or proper materials;
- .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- .3 disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
- .4 otherwise is guilty of breach of a provision of the Contract Documents.

14.2.2 When any of the above reasons exist, the Owner may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractors surety, if any, seven days written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 accept assignment of subcontracts pursuant to Paragraph 5.4; and
- .3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

14.2.3 When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, and other damages incurred by the Owner and not expressly waived, such excess shall be paid to the Contractor. If such costs and damages exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

APPENDIX B

Chapter 60.04 RCW

MECHANICS' AND MATERIALMEN'S LIENS

Sections

| | |
|-----------|---|
| 60.04.011 | Definitions. |
| 60.04.021 | Lien authorized. |
| 60.04.031 | Notices—Exceptions. |
| 60.04.035 | Acts of coercion—Application of chapter 19.86 RCW. |
| 60.04.041 | Contractor registration. |
| 60.04.051 | Property subject to lien. |
| 60.04.061 | Priority of lien. |
| 60.04.071 | Release of lien rights. |
| 60.04.081 | Frivolous claim—Procedure. |
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| 60.04.101 | Separate residential units—Time for filing. |
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| 60.04.900 | Liberal construction—1991 c 281. |
| 60.04.901 | Captions not law—1991 c 281. |
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| 60.04.903 | Effective date—1992 c 126. |
| 60.04.904 | Application of chapter 281, Laws of 1991, to actions pending as of June 1, 1992—1993 c 357. |

Crop lien for furnishing work or labor: RCW 60.11.040.

60.04.011 Definitions. Unless the context requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Construction agent" means any registered or licensed contractor, registered or licensed subcontractor, architect, engineer, or other person having charge of any improvement to real property, who shall be deemed the agent of the owner for the limited purpose of establishing the lien created by this chapter.

(2) "Contract price" means the amount agreed upon by the contracting parties, or if no amount is agreed upon, then the customary and reasonable charge therefor.

(3) "Draws" means periodic disbursements of interim or construction financing by a lender.

(4) "Furnishing labor, professional services, materials, or equipment" means the performance of any labor or professional services, the contribution owed to any employee benefit plan on account of any labor, the provision of any supplies or materials, and the renting, leasing, or otherwise supplying of equipment for the improvement of real property.

(5) "Improvement" means: (a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property; and (c) providing profes-

sional services upon real property or in preparation for or in conjunction with the intended activities in (a) or (b) of this subsection.

(6) "Interim or construction financing" means that portion of money secured by a mortgage, deed of trust, or other encumbrance to finance improvement of, or to real property, but does not include:

(a) Funds to acquire real property;

(b) Funds to pay interest, insurance premiums, lease deposits, taxes, assessments, or prior encumbrances;

(c) Funds to pay loan, commitment, title, legal, closing, recording, or appraisal fees;

(d) Funds to pay other customary fees, which pursuant to agreement with the owner or borrower are to be paid by the lender from time to time;

(e) Funds to acquire personal property for which the potential lien claimant may not claim a lien pursuant to this chapter.

(7) "Labor" means exertion of the powers of body or mind performed at the site for compensation. "Labor" includes amounts due and owed to any employee benefit plan on account of such labor performed.

(8) "Mortgagee" means a person who has a valid mortgage of record or deed of trust of record securing a loan.

(9) "Owner-occupied" means a single-family residence occupied by the owner as his or her principal residence.

(10) "Payment bond" means a surety bond issued by a surety licensed to issue surety bonds in the state of Washington that confers upon potential claimants the rights of third party beneficiaries.

(11) "Potential lien claimant" means any person or entity entitled to assert lien rights under this chapter who has otherwise complied with the provisions of this chapter and is registered or licensed if required to be licensed or registered by the provisions of the laws of the state of Washington.

(12) "Prime contractor" includes all contractors, general contractors, and specialty contractors, as defined by chapter 18.27 or 19.28 RCW, or who are otherwise required to be registered or licensed by law, who contract directly with a property owner or their common law agent to assume primary responsibility for the creation of an improvement to real property, and includes property owners or their common law agents who are contractors, general contractors, or specialty contractors as defined in chapter 18.27 or 19.28 RCW, or who are otherwise required to be registered or licensed by law, who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year.

(13) "Professional services" means surveying, establishing or marking the boundaries of, preparing maps, plans, or specifications for, or inspecting, testing, or otherwise performing any other architectural or engineering services for the improvement of real property.

(14) "Real property lender" means a bank, savings bank, savings and loan association, credit union, mortgage company, or other corporation, association, partnership, trust, or individual that makes loans secured by real property located in the state of Washington.

(15) "Site" means the real property which is or is to be improved.

(16) "Subcontractor" means a general contractor or specialty contractor as defined by chapter 18.27 or 19.28 RCW, or who is otherwise required to be registered or licensed by law, who contracts for the improvement of real property with someone other than the owner of the property or their common law agent. [1992 c 126 § 1; 1991 c 281 § 1.]

60.04.021 Lien authorized. Except as provided in RCW 60.04.031, any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner. [1991 c 281 § 2.]

60.04.031 Notices—Exceptions. (1) Except as otherwise provided in this section, every person furnishing professional services, materials, or equipment for the improvement of real property shall give the owner or reputed owner notice in writing of the right to claim a lien. If the prime contractor is in compliance with the requirements of RCW 19.27.095, 60.04.230, and 60.04.261, this notice shall also be given to the prime contractor as described in this subsection unless the potential lien claimant has contracted directly with the prime contractor. The notice may be given at any time but only protects the right to claim a lien for professional services, materials, or equipment supplied after the date which is sixty days before:

- (a) Mailing the notice by certified or registered mail to the owner or reputed owner; or
- (b) Delivering or serving the notice personally upon the owner or reputed owner and obtaining evidence of delivery in the form of a receipt or other acknowledgement signed by the owner or reputed owner or an affidavit of service.

In the case of new construction of a single-family residence, the notice of a right to claim a lien may be given at any time but only protects the right to claim a lien for professional services, materials, or equipment supplied after a date which is ten days before the notice is given as described in this subsection.

(2) Notices of a right to claim a lien shall not be required of:

- (a) Persons who contract directly with the owner or the owner's common law agent;
- (b) Laborers whose claim of lien is based solely on performing labor; or
- (c) Subcontractors who contract for the improvement of real property directly with the prime contractor, except as provided in subsection (3)(b) of this section.

(3) Persons who furnish professional services, materials, or equipment in connection with the repair, alteration, or remodel of an existing owner-occupied single-family residence or appurtenant garage:

- (a) Who contract directly with the owner-occupier or their common law agent shall not be required to send a written notice of the right to claim a lien and shall have a lien for the full amount due under their contract, as provided in RCW 60.04.021; or
- (b) Who do not contract directly with the owner-occupier or their common law agent shall give notice of the right to

claim a lien to the owner-occupier. Liens of persons furnishing professional services, materials, or equipment who do not contract directly with the owner-occupier or their common law agent may only be satisfied from amounts not yet paid to the prime contractor by the owner at the time the notice described in this section is received, regardless of whether amounts not yet paid to the prime contractor are due. For the purposes of this subsection "received" means actual receipt of notice by personal service, or registered or certified mail, or three days after mailing by registered or certified mail, excluding Saturdays, Sundays, or legal holidays.

(4) The notice of right to claim a lien described in subsection (1) of this section, shall include but not be limited to the following information and shall substantially be in the following form, using lower-case and upper-case ten-point type where appropriate.

NOTICE TO OWNER

IMPORTANT: READ BOTH SIDES OF THIS NOTICE CAREFULLY.

PROTECT YOURSELF FROM PAYING TWICE

To: Date:

Re: (description of property: Street address or general location.)

From:

AT THE REQUEST OF: (Name of person ordering the professional services, materials, or equipment)

THIS IS NOT A LIEN: This notice is sent to you to tell you who is providing professional services, materials, or equipment for the improvement of your property and to advise you of the rights of these persons and your responsibilities. Also take note that laborers on your project may claim a lien without sending you a notice.

OWNER/OCCUPIER OF EXISTING RESIDENTIAL PROPERTY

Under Washington law, those who furnish labor, professional services, materials, or equipment for the repair, remodel, or alteration of your owner-occupied principal residence and who are not paid, have a right to enforce their claim for payment against your property. This claim is known as a construction lien.

The law limits the amount that a lien claimant can claim against your property. Claims may only be made against that portion of the contract price you have not yet paid to your prime contractor as of the time this notice was given to you or three days after this notice was mailed to you. Review the back of this notice for more information and ways to avoid lien claims.

COMMERCIAL AND/OR NEW RESIDENTIAL PROPERTY

We have or will be providing professional services, materials, or equipment for the improvement of your commercial or new residential project. In the event you or your contractor fail to pay us, we may file a lien against your property. A lien may be claimed for all professional services, materials, or

equipment furnished after a date that is sixty days before this notice was given to you or mailed to you, unless the improvement to your property is the construction of a new single-family residence, then ten days before this notice was given to you or mailed to you.

Sender:
Address:
Telephone:

Brief description of professional services, materials, or equipment provided or to be provided:

IMPORTANT INFORMATION
ON REVERSE SIDE

IMPORTANT INFORMATION
FOR YOUR PROTECTION

This notice is sent to inform you that we have or will provide professional services, materials, or equipment for the improvement of your property. We expect to be paid by the person who ordered our services, but if we are not paid, we have the right to enforce our claim by filing a construction lien against your property.

LEARN more about the lien laws and the meaning of this notice by discussing them with your contractor, suppliers, Department of Labor and Industries, the firm sending you this notice, your lender, or your attorney.

COMMON METHODS TO AVOID CONSTRUCTION LIENS: There are several methods available to protect your property from construction liens. The following are two of the more commonly used methods.

DUAL PAYCHECKS (Joint Checks): When paying your contractor for services or materials, you may make checks payable jointly to the contractor and the firms furnishing you this notice.

LIEN RELEASES: You may require your contractor to provide lien releases signed by all the suppliers and subcontractors from whom you have received this notice. If they cannot obtain lien releases because you have not paid them, you may use the dual payee check method to protect yourself.

YOU SHOULD TAKE APPROPRIATE STEPS TO PROTECT YOUR PROPERTY FROM LIENS.

YOUR PRIME CONTRACTOR AND YOUR CONSTRUCTION LENDER ARE REQUIRED BY LAW TO GIVE YOU WRITTEN INFORMATION ABOUT LIEN CLAIMS. IF YOU HAVE NOT RECEIVED IT, ASK THEM FOR IT.

(5) Every potential lien claimant providing professional services where no improvement as defined in RCW 60.04.011(5) (a) or (b) has been commenced, and the professional services provided are not visible from an inspection of the real property may record in the real property records of the county where the property is located a notice which shall contain the professional service provider's name, address, telephone number, legal description of the property, the

owner or reputed owner's name, and the general nature of the professional services provided. If such notice is not recorded, the lien claimed shall be subordinate to the interest of any subsequent mortgagee and invalid as to the interest of any subsequent purchaser if the mortgagee or purchaser acts in good faith and for a valuable consideration acquires an interest in the property prior to the commencement of an improvement as defined in RCW 60.04.011(5) (a) or (b) without notice of the professional services being provided. The notice described in this subsection shall be substantially in the following form:

NOTICE OF FURNISHING
PROFESSIONAL SERVICES

That on the (day) day of (month and year), (name of provider) began providing professional services upon or for the improvement of real property legally described as follows:

[Legal Description
is mandatory]

The general nature of the professional services provided is

The owner or reputed owner of the real property is

.....
(Signature)
.....
(Name of Claimant)
.....
(Street Address)
.....
(City, State, Zip Code)
.....
(Phone Number)

(6) A lien authorized by this chapter shall not be enforced unless the lien claimant has complied with the applicable provisions of this section. [1992 c 126 § 2; 1991 c 281 § 3.]

60.04.035 Acts of coercion—Application of chapter 19.86 RCW. The legislature finds that acts of coercion or attempted coercion, including threats to withhold future contracts, made by a contractor or developer to discourage a contractor, subcontractor, or material or equipment supplier from giving an owner the notice of right to claim a lien required by RCW 60.04.031, or from filing a claim of lien under this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. These acts of coercion are not reasonable in relation to the development and preservation of business. These acts of coercion shall constitute an unfair or deceptive act or practice in trade or commerce for the purpose of applying the consumer protection act, chapter 19.86 RCW. [1992 c 126 § 3.]

60.04.041 Contractor registration. A contractor or subcontractor required to be registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW, or otherwise required to be registered or licensed by law, shall be deemed the construction agent of the owner for the purposes of establishing the lien created by this chapter only if so registered or licensed. Persons dealing with contractors or subcontractors may rely, for the purposes of this section, upon a certificate of registration issued pursuant to chapter 18.27 RCW or license issued pursuant to chapter 19.28 RCW, or other certificate or license issued pursuant to law, covering the period when the labor, professional services, material, or equipment shall be furnished, and the lien rights shall not be lost by suspension or revocation of registration or license without their knowledge. No lien rights described in this chapter shall be lost or denied by virtue of the absence, suspension, or revocation of such registration or license with respect to any contractor or subcontractor not in immediate contractual privity with the lien claimant. [1992 c 126 § 4; 1991 c 281 § 4.]

60.04.051 Property subject to lien. The lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance, directly or through a common law or construction agent the labor, professional services, equipment, or materials were furnished, as the court deems appropriate for satisfaction of the lien. If, for any reason, the title or interest in the land upon which the improvement is situated cannot be subjected to the lien, the court in order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien. [1992 c 126 § 5; 1991 c 281 § 5.]

60.04.061 Priority of lien. The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant. [1991 c 281 § 6.]

60.04.071 Release of lien rights. Upon payment and acceptance of the amount due to the lien claimant and upon demand of the owner or the person making payment, the lien claimant shall immediately prepare and execute a release of all lien rights for which payment has been made, and deliver the release to the person making payment. In any suit to compel deliverance of the release thereafter in which the court determines the delay was unjustified, the court shall, in addition to ordering the deliverance of the release, award the costs of the action including reasonable attorneys' fees and any damages. [1991 c 281 § 7.]

60.04.081 Frivolous claim—Procedure. (1) Any owner of real property subject to a recorded claim of lien under this chapter, or contractor, subcontractor, lender, or lien claimant who believes the claim of lien to be frivolous and made without reasonable cause, or clearly excessive may apply by motion to the superior court for the county where the property, or some part thereof is located, for an order directing the lien claimant to appear before the court at a time

no earlier than six nor later than fifteen days following the date of service of the application and order on the lien claimant, and show cause, if any he or she has, why the relief requested should not be granted. The motion shall state the grounds upon which relief is asked, and shall be supported by the affidavit of the applicant or his or her attorney setting forth a concise statement of the facts upon which the motion is based.

(2) The order shall clearly state that if the lien claimant fails to appear at the time and place noted the lien shall be released, with prejudice, and that the lien claimant shall be ordered to pay the costs requested by the applicant including reasonable attorneys' fees.

(3) If no action to foreclose the lien claim has been filed, the clerk of the court shall assign a cause number to the application and obtain from the applicant a filing fee pursuant to RCW 36.18.016. If an action has been filed to foreclose the lien claim, the application shall be made a part of that action.

(4) If, following a hearing on the matter, the court determines that the lien is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order releasing the lien if frivolous and made without reasonable cause, or reducing the lien if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the lien claimant. If the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

(5) Proceedings under this section shall not affect other rights and remedies available to the parties under this chapter or otherwise. [2006 c 192 § 3; 1992 c 126 § 6; 1991 c 281 § 8.]

60.04.091 Recording—Time—Contents of lien. Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

- (1) Shall state in substance and effect:
 - (a) The name, phone number, and address of the claimant;
 - (b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;
 - (c) The name of the person indebted to the claimant;
 - (d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;
 - (e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and
 - (f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08

RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

....., claimant, vs, name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to *chapter 64.04 RCW. In support of this lien the following information is submitted:

- 1. NAME OF LIEN CLAIMANT:
TELEPHONE NUMBER:
ADDRESS:

- 2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE:

- 3. NAME OF PERSON INDEBTED TO THE CLAIMANT:

- 4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property):

- 5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"):

- 6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED:

- 7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS:

- 8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE:

....., Claimant
.....
.....
(Phone number, address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF, ss.

....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

Subscribed and sworn to before me this day of

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181. [1992 c 126 § 7; 1991 c 281 § 9.]

*Reviser's note: The reference to chapter 64.04 RCW appears to be erroneous. Reference to chapter 60.04 RCW was apparently intended.

60.04.101 Separate residential units—Time for filing. When furnishing labor, professional services, materials, or equipment for the construction of two or more separate residential units, the time for filing claims of lien against each separate residential unit shall commence to run upon the cessation of the furnishing of labor, professional services, materials, or equipment on each residential unit, as provided in this chapter. For the purposes of this section a separate residential unit is defined as consisting of one residential structure together with any garages or other outbuildings appurtenant thereto. [1991 c 281 § 10.]

60.04.111 Recording—Fees. The county auditor shall record the notice of claim of lien in the same manner as deeds and other instruments of title are recorded under chapter 65.08 RCW. Notices of claim of lien for registered land need not be recorded in the Torrens register. The county auditor shall charge no higher fee for recording notices of claim of lien than other documents. [1991 c 281 § 11.]

60.04.121 Lien—Assignment. Any lien or right of lien created by this chapter and the right of action to recover therefor, shall be assignable so as to vest in the assignee all rights and remedies of the assignor, subject to all defenses thereto that might be made. [1991 c 281 § 12.]

60.04.131 Claims—Designation of amount due. In every case in which the notice of claim of lien is recorded against two or more separate pieces of property owned by the same person or owned by two or more persons jointly or otherwise, who contracted for the labor, professional services, material, or equipment for which the notice of claim of lien is recorded, the person recording the notice of claim of lien

shall designate in the notice of claim of lien the amount due on each piece of property, otherwise the lien is subordinated to other liens that may be established under this chapter. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon any of such pieces of property. [1991 c 281 § 13.]

60.04.141 Lien—Duration—Procedural limitations.

No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time in the superior court in the county where the subject property is located to enforce the lien, and service is made upon the owner of the subject property within ninety days of the date of filing the action; or, if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of such credit; and in case the action is not prosecuted to judgment within two years after the commencement thereof, the court, in its discretion, may dismiss the action for want of prosecution, and the dismissal of the action or a judgment rendered thereon that no lien exists shall constitute a cancellation of the lien. This is a period of limitation, which shall be tolled by the filing of any petition seeking protection under Title Eleven, United States Code by an owner of any property subject to the lien established by this chapter. [1992 c 126 § 8; 1991 c 281 § 14.]

60.04.151 Rights of owner—Recovery options.

The lien claimant shall be entitled to recover upon the claim recorded the contract price after deducting all claims of other lien claimants to whom the claimant is liable, for furnishing labor, professional services, materials, or equipment; and in all cases where a claim of lien shall be recorded under this chapter for labor, professional services, materials, or equipment supplied to any lien claimant, he or she shall defend any action brought thereupon at his or her own expense. During the pendency of the action, the owner may withhold from the prime contractor the amount of money for which a claim is recorded by any subcontractor, supplier, or laborer. In case of judgment against the owner or the owner's property, upon the lien, the owner shall be entitled to deduct from sums due to the prime contractor the principal amount of the judgment from any amount due or to become due from the owner to the prime contractor plus such costs, including interest and attorneys' fees, as the court deems just and equitable, and the owner shall be entitled to recover back from the prime contractor the amount for which a lien or liens are established in excess of any sum that may remain due from the owner to the prime contractor. [1992 c 126 § 9; 1991 c 281 § 15.]

60.04.161 Bond in lieu of claim. Any owner of real property subject to a recorded claim of lien under this chapter, or contractor, subcontractor, lender, or lien claimant who disputes the correctness or validity of the claim of lien may record, either before or after the commencement of an action to enforce the lien, in the office of the county recorder or auditor in the county where the claim of lien was recorded, a bond issued by a surety company authorized to issue surety bonds in the state. The surety shall be listed in the latest fed-

eral department of the treasury list of surety companies acceptable on federal bonds, published in the Federal Register, as authorized to issue bonds on United States government projects with an underwriting limitation, including applicable reinsurance, equal to or greater than the amount of the bond to be recorded. The bond shall contain a description of the claim of lien and real property involved, and be in an amount equal to the greater of five thousand dollars or two times the amount of the lien claimed if it is ten thousand dollars or less, and in an amount equal to or greater than one and one-half times the amount of the lien if it is in excess of ten thousand dollars. If the claim of lien affects more than one parcel of real property and is segregated to each parcel, the bond may be segregated the same as in the claim of lien. A separate bond shall be required for each claim of lien made by separate claimants. However, a single bond may be used to guarantee payment of amounts claimed by more than one claim of lien by a single claimant so long as the amount of the bond meets the requirements of this section as applied to the aggregate sum of all claims by such claimant. The condition of the bond shall be to guarantee payment of any judgment upon the lien in favor of the lien claimant entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien. The effect of recording a bond shall be to release the real property described in the notice of claim of lien from the lien and any action brought to recover the amount claimed. Unless otherwise prohibited by law, if no action is commenced to recover on a lien within the time specified in RCW 60.04.141, the surety shall be discharged from liability under the bond. If an action is timely commenced, then on payment of any judgment entered in the action or on payment of the full amount of the bond to the holder of the judgment, whichever is less, the surety shall be discharged from liability under the bond.

Nothing in this section shall in any way prohibit or limit the use of other methods, devised by the affected parties to secure the obligation underlying a claim of lien and to obtain a release of real property from a claim of lien. [1992 c 126 § 10; 1991 c 281 § 16.]

60.04.171 Foreclosure—Parties. The lien provided by this chapter, for which claims of lien have been recorded, may be foreclosed and enforced by a civil action in the court having jurisdiction in the manner prescribed for the judicial foreclosure of a mortgage. The court shall have the power to order the sale of the property. In any action brought to foreclose a lien, the owner shall be joined as a party. The interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party.

A person shall not begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a party plaintiff or defendant to the prior action, he or she may apply to the court to be joined as a party thereto, and his or her lien may be foreclosed in the same action. The filing of such application shall toll the running of the period of limitation established by RCW 60.04.141 until disposition of the application or other time set by the court. The court shall grant the application for joinder unless to do so would create

an undue delay or cause hardship which cannot be cured by the imposition of costs or other conditions as the court deems just. If a lien foreclosure action is filed during the pendency of another such action, the court may, on its own motion or the motion of any party, consolidate actions upon such terms and conditions as the court deems just, unless to do so would create an undue delay or cause hardship which cannot be cured by the imposition of costs or other conditions. If consolidation of actions is not permissible under this section, the lien foreclosure action filed during the pendency of another such action shall not be dismissed if the filing was the result of mistake, inadvertence, surprise, excusable neglect, or irregularity. An action to foreclose a lien shall not be dismissed at the instance of a plaintiff therein to the prejudice of another party to the suit who claims a lien. [1992 c 126 § 11; 1991 c 281 § 17.]

60.04.181 Rank of lien—Application of proceeds—Attorneys' fees. (1) In every case in which different construction liens are claimed against the same property, the court shall declare the rank of such lien or class of liens, which liens shall be in the following order:

- (a) Liens for the performance of labor;
 - (b) Liens for contributions owed to employee benefit plans;
 - (c) Liens for furnishing material, supplies, or equipment;
 - (d) Liens for subcontractors, including but not limited to their labor and materials; and
 - (e) Liens for prime contractors, or for professional services.
- (2) The proceeds of the sale of property must be applied to each lien or class of liens in order of its rank and, in an action brought to foreclose a lien, pro rata among each claimant in each separate priority class. A personal judgment may be rendered against any party personally liable for any debt for which the lien is claimed. If the lien is established, the judgment shall provide for the enforcement thereof upon the property liable as in the case of foreclosure of judgment liens. The amount realized by such enforcement of the lien shall be credited upon the proper personal judgment. The deficiency, if any, remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against any party liable therefor.

(3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section.

(4) Real property against which a lien under this chapter is enforced may be ordered sold by the court and the proceeds deposited into the registry of the clerk of the court, pending further determination respecting distribution of the proceeds of the sale. [1992 c 126 § 12; 1991 c 281 § 18.]

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60.04.190 Destruction or concealment of property—Removal from premises—Penalty. See RCW 61.12.030, 9.45.060.

60.04.191 Effect of note—Personal action preserved. The taking of a promissory note or other evidence of indebtedness for any labor, professional services, material, or equipment furnished for which a lien is created by this chapter does not discharge the lien therefor, unless expressly received as payment and so specified therein.

Nothing in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for the furnishing of labor, professional services, material, or equipment to maintain a personal action to recover the debt against any person liable therefor. [1991 c 281 § 19.]

60.04.201 Material exempt from process—Exception. Whenever material is furnished for use in the improvement of property subject to a lien created by this chapter, the material is not subject to attachment, execution, or other legal process to enforce any debt due by the purchaser of the material, except a debt due for the purchase money thereof, so long as in good faith, the material is about to be applied in the improvement of such property. [1991 c 281 § 20.]

60.04.211 Lien—Effect on community interest. The claim of lien, when filed as required by this chapter, shall be notice to the spouse or the domestic partner of the person who appears of record to be the owner of the property sought to be charged with the lien, and shall subject all the community interest of both spouses or both domestic partners to the lien. [2008 c 6 § 641; 1991 c 281 § 21.]

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

60.04.221 Notice to lender—Withholding of funds. Any lender providing interim or construction financing where there is not a payment bond of at least fifty percent of the amount of construction financing shall observe the following procedures and the rights and liabilities of the lender and potential lien claimant shall be affected as follows:

(1) Any potential lien claimant who has not received a payment within five days after the date required by their contract, invoice, employee benefit plan agreement, or purchase order may within thirty-five days of the date required for payment of the contract, invoice, employee benefit plan agreement, or purchase order, give a notice as provided in subsections (2) and (3) of this section of the sums due and to become due, for which a potential lien claimant may claim a lien under this chapter.

(2) The notice shall be signed by the potential lien claimant or some person authorized to act on his or her behalf.

(3) The notice shall be given in writing to the lender at the office administering the interim or construction financing, with a copy given to the owner and appropriate prime contractor. The notice shall be given by:

(a) Mailing the notice by certified or registered mail to the lender, owner, and appropriate prime contractor; or

(b) Delivering or serving the notice personally and obtaining evidence of delivery in the form of a receipt or

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other acknowledgment signed by the lender, owner, and appropriate prime contractor, or an affidavit of service.

(4) The notice shall state in substance and effect as follows:

(a) The person, firm, trustee, or corporation filing the notice is entitled to receive contributions to any type of employee benefit plan or has furnished labor, professional services, materials, or equipment for which a lien is given by this chapter.

(b) The name of the prime contractor, common law agent, or construction agent ordering the same.

(c) A common or street address of the real property being improved or the legal description of the real property.

(d) The name, business address, and telephone number of the lien claimant.

The notice to the lender may contain additional information but shall be in substantially the following form:

NOTICE TO REAL PROPERTY LENDER
(Authorized by RCW)

TO:
(Name of Lender)

.
(Administrative Office-Street Address)

.
(City) (State) (Zip)

AND TO:
(Owner)

AND TO:
(Prime Contractor-If Different Than Owner)

.
(Name of Laborer, Professional,
Materials, or Equipment Supplier)

whose business address is, did at the property located at

(Check appropriate box) () perform labor () furnish professional services () provide materials () supply equipment as follows:

.
which was ordered by
(Name of Person)

whose address was stated to be

The amount owing to the undersigned according to contract or purchase order for labor, supplies, or equipment (as above mentioned) is the sum of Dollars (\$). Said sums became due and owing as of

.
(State Date)

You are hereby required to withhold from any future draws on existing construction financing which has been made on the subject property (to the

extent there remain undisbursed funds) the sum of Dollars (\$).

IMPORTANT

Failure to comply with the requirements of this notice may subject the lender to a whole or partial compromise of any priority lien interest it may have pursuant to RCW 60.04.226.

DATE:

By:

Its:

(5) After the receipt of the notice, the lender shall withhold from the next and subsequent draws the amount claimed to be due as stated in the notice. Alternatively, the lender may obtain from the prime contractor or borrower a payment bond for the benefit of the potential lien claimant in an amount sufficient to cover the amount stated in the potential lien claimant's notice. The lender shall be obligated to withhold amounts only to the extent that sufficient interim or construction financing funds remain undisbursed as of the date the lender receives the notice.

(6) Sums so withheld shall not be disbursed by the lender, except by the written agreement of the potential lien claimant, owner, and prime contractor in such form as may be prescribed by the lender, or the order of a court of competent jurisdiction.

(7) In the event a lender fails to abide by the provisions of *subsections (4) and (5) of this section, then the mortgage, deed of trust, or other encumbrance securing the lender shall be subordinated to the lien of the potential lien claimant to the extent of the interim or construction financing wrongfully disbursed, but in no event more than the amount stated in the notice plus costs as fixed by the court, including reasonable attorneys' fees.

(8) Any potential lien claimant shall be liable for any loss, cost, or expense, including reasonable attorneys' fees and statutory costs, to a party injured thereby arising out of any unjust, excessive, or premature notice filed under purported authority of this section. "Notice" as used in this subsection does not include notice given by a potential lien claimant of the right to claim liens under this chapter where no actual claim is made.

(9)(a) Any owner of real property subject to a notice to real property lender under this section, or the contractor, subcontractor, lender, or lien claimant who believes the claim that underlies the notice is frivolous and made without reasonable cause, or is clearly excessive may apply by motion to the superior court for the county where the property, or some part thereof is located, for an order commanding the potential lien claimant who issued the notice to the real property lender to appear before the court at a time no earlier than six nor later than fifteen days from the date of service of the application and order on the potential lien claimant, and show cause, if any he or she has, why the notice to real property lender should not be declared void. The motion shall state the grounds upon which relief is asked and shall be supported by the affidavit of the applicant or his or her attorney setting forth a concise statement of the facts upon which the motion is based.

(b) The order shall clearly state that if the potential lien claimant fails to appear at the time and place noted, the notice to lender shall be declared void and that the potential lien claimant issuing the notice shall be ordered to pay the costs requested by the applicant including reasonable attorneys' fees.

(c) The clerk of the court shall assign a cause number to the application and obtain from the applicant a filing fee of thirty-five dollars.

(d) If, following a hearing on the matter, the court determines that the claim upon which the notice to real property lender is based is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order declaring the notice to real property lender void if frivolous and made without reasonable cause, or reducing the amount stated in the notice if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the person who issued the notice. If the court determines that the claim underlying the notice to real property lender is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the issuer of the notice to be paid by the applicant.

(e) Proceedings under this subsection shall not affect other rights and remedies available to the parties under this chapter or otherwise. [1992 c 126 § 13; 1991 c 281 § 22.]

***Reviser's note:** The reference to subsections (4) and (5) of this section appears to be erroneous. Engrossed Senate Bill No. 6441 changed the subsection numbers. Subsections (4) and (5) are now subsections (5) and (6).

60.04.226 Financial encumbrances—Priorities. Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory. [1991 c 281 § 23.]

60.04.230 Construction projects—Notice to be posted by prime contractor—Penalty. (1) For any construction project costing more than five thousand dollars the prime contractor shall post in plain view for the duration of the construction project a legible notice at the construction job site containing the following:

(a) The legal description, or the tax parcel number assigned pursuant to RCW 84.40.160, and the street address if available, and may include any other identification of the construction site by the prime contractor;

(b) The property owner's name, address, and phone number;

(c) The prime contractor's business name, address, phone number, current state contractor registration number and identification; and

(d) Either:

(i) The name, address, and phone number of the office of the lender administering the interim construction financing, if any; or

(ii) The name and address of the firm that has issued a payment bond, if any, on behalf of the prime contractor for

the protection of the owner if the bond is for an amount not less than fifty percent of the total amount of the construction project.

(2) For any construction project which requires a building permit under local ordinance, compliance with the posting requirements of RCW 19.27.095 shall constitute compliance with this section. Otherwise, the information shall be posted as set forth in this section.

(3) Failure to comply with this section shall subject the prime contractor to a civil penalty of not more than five thousand dollars, payable to the county where the project is located. [1991 c 281 § 28; 1984 c 202 § 3.]

60.04.250 Informational materials on construction lien laws—Master documents. The department of labor and industries shall prepare master documents that provide informational material about construction lien laws and available safeguards against real property lien claims. The material shall include methods of protection against lien claims, including obtaining lien release documents, performance bonds, joint payee checks, the opportunity to require contractor disclosure of all potential lien claimants as a condition of payment, and lender supervision under *RCW 60.04.200 and 60.04.210. The material shall also include sources of further information, including the department of labor and industries and the office of the attorney general. [1990 c 81 § 1; 1988 c 270 § 1.]

***Reviser's note:** RCW 60.04.200 and 60.04.210 were repealed by 1991 c 281 § 31, effective April 1, 1992.

Effective date—1988 c 270: "This act shall take effect July 1, 1989." [1988 c 270 § 4.]

60.04.255 Informational materials on construction lien laws—Copies—Liability. (1) Every real property lender shall provide a copy of the informational material described in RCW 60.04.250 to all persons obtaining loans, the proceeds of which are to be used for residential construction or residential repair or remodeling.

(2) Every contractor shall provide a copy of the informational material described in RCW 60.04.250 to customers required to receive contractor disclosure notice under RCW 18.27.114.

(3) No cause of action may lie against the state, a real property lender, or a contractor arising from the provisions of RCW 60.04.250 and this section.

(4) For the purpose of this section, "real property lender" means a bank, savings bank, savings and loan association, credit union, mortgage company, or other corporation, association, partnership, or individual that makes loans secured by real property in this state. [1988 c 270 § 2.]

Effective date—1988 c 270: See note following RCW 60.04.250.

60.04.261 Availability of information. The prime contractor shall immediately supply the information listed in RCW 19.27.095(2) to any person who has contracted to supply materials, equipment, or professional services or who is a subcontractor on the improvement, as soon as the identity and mailing address of such subcontractor, supplier, or professional is made known to the prime contractor either directly or through another subcontractor, supplier, or professional. [1991 c 281 § 24.]

APPENDIX C

Chapter 60.04 RCW
(Pre – 1991/1992 Amendments)
MECHANICS' AND MATERIALMEN'S LIENS

Sections

- 60.04.010 Lien authorized – Bond by railroad company
- 60.04.020 Notice that materialmen's lien may be claimed
- 60.04.030 Property subject to lien
- 60.04.040 Lien for improving real property
- 60.04.045 Lien on real property for labor or services on timber and lumber
- 60.04.050 Priority of lien
- 60.04.060 Claim – Contents – Form – Filing – Joinder
- 60.04.064 Owner may record notice to lien claimants
- 60.04.067 Separate residential units – When time for filing lien claims commences to run – Definition
- 60.04.070 Recording – Fees
- 60.04.080 Assignability
- 60.04.090 Claims must designate amount due on property charged
- 60.04.100 Duration of lien – Limitation of action – When action commenced
- 60.04.110 Extent of contractor's right to recover – Settlements – Rights of owner
- 60.04.115 Action to enforce recorded claim of lien – Bond in lieu of claim
- 60.04.120 Foreclosures – Parties
- 60.04.130 Rank of lien – Application of proceeds – Attorney's fees
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- 60.04.170 When land not subject to lien – Power of court to order removal and sale of property
- 60.04.180 Personal action preserved
- 60.04.200 Interim or construction financing – Definitions
- 60.04.210 Interim or construction financing – Notice of lien – Duty of lender to withhold from disbursements – Liabilities of lender and lien claimant
- 60.04.220 Interim or construction financing – Priorities

60.04.010. Lien authorized--Bond by railroad company
Every person performing labor upon, furnishing material, or renting, leasing or otherwise supplying equipment, to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power or any other structure or who performs labor in any mine or mining claim or stone quarry, or trustees of any type of employee benefit plan, has a lien upon the same for the labor performed, contributions owed to the employee benefit plan on account of such labor performed, material furnished, or equipment supplied by each, respectively, whether performed,

furnished, or supplied at the instance of the owner of the property subject to the lien or his agent; and every registered or licensed contractor, registered or licensed subcontractor, architect, or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter: Provided, That whenever any railroad company shall contract with any person for the construction of its road, or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics, materialmen, and equipment suppliers, and persons who supply such contractors with provisions, all just dues to such person or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the county auditor in each county in which any part of such work is situated. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor. Contractors or subcontractors required to be registered under chapter 18.27 RCW or licensed under chapter 19.28 RCW shall be deemed the agents of the owner for the purposes of establishing the lien created by this chapter only if so registered or licensed. Persons dealing with contractors or subcontractors may rely, for the purposes of this section, upon a certificate of registration issued pursuant to chapter 18.27 RCW or license issued pursuant to chapter 19.28 RCW covering the period when the work or material shall be furnished, and lien rights shall not be lost by suspension or revocation of registration or license without their knowledge.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 1. Amended by Laws 1905, ch. 116, § 1; Laws 1959, ch. 279, § 1; Laws 1971, Ex.Sess., ch. 94, § 2, eff. Jan. 1, 1972; Laws 1975, ch. 34, § 3.

60.04.020. Notice that materialmen's lien may be claimed

Every person, firm or corporation furnishing materials or supplies or renting, leasing or otherwise supplying equipment, to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power, or any other building, or any other structure, or mining claim or stone quarry, shall give to the owner or reputed owner of the property on, upon or about which such materials or supplies or equipment is and/or were used, a notice in writing, which notice shall cover the material, supplies or equipment furnished or leased during the sixty days preceding the giving of such notice as well as all subsequent materials, supplies or equipment furnished or leased, stating in substance and effect that such person, firm or corporation is and/or has furnished materials and supplies, or equipment for use thereon, with the name of the contractor or agent ordering the same, and that a lien may be claimed for all materials and supplies, or equipment furnished by such person, firm or corporation for use thereon, which notice shall be given to the owner or reputed owner by (1) mailing the same by registered or certified mail in an envelope addressed to the owner or reputed owner at his place of residence or reputed residence, or (2) by serving the same personally upon the owner or reputed owner and obtaining evidence of such service in the form of a receipt or

other acknowledgment signed by such owner or reputed owner, and (3) if the prime contractor complies with RCW 60.04.230, the notice shall also be given to the prime contractor as defined in RCW 60.04.200(6) by (a) any form of mail requiring a return receipt or (b) by serving the notice personally upon the prime contractor or the prime contractor's representative and obtaining evidence of such service in the form of a receipt or other acknowledgement signed by the prime contractor or the prime contractor's representative: Provided, however, That with respect to materials or supplies or equipment used in construction, alteration or repair of any single family residence or garage such notice must be given not later than ten days after the date of the first delivery of such materials or supplies or equipment. No materialmen's lien shall be enforced unless the provisions of this section have been complied with: Provided, That in the event the notice required by this section is not given within the time specified by this section, any lien or claim of lien shall be enforceable only for materials and supplies or equipment delivered subsequent to such notice being given to the owner or reputed owner, and such lien or claim of lien shall be secondary to any lien or claim of lien established where such notice was given within the time limits prescribed by this section.

1990 Main Volume Credit(s)

Enacted by Laws 1909, ch. 45, § 1. Amended by Laws 1911, ch. 77, § I; Laws 1957, ch. 214, § I; Laws 1959, ch. 278, § 1; Laws 1959, ch. 279, § 2; Laws 1965, ch. 98, § I; Laws 1969, Ex.Sess., ch. 84, § I; Laws 1977, Ex.Sess., ch. 57, § I, eff. Jan, 1, 1978; Laws 1984, ch. 202, § 4.

60.04.030. Property subject to lien

The lot, tract or parcel of land upon which the improvement is made or the property is situated, subject to the lien created by RCW 60.04.010, or so much thereof as may be necessary to satisfy the lien and the judgment thereon, to be determined by the court on rendering judgment in a foreclosure of the lien, is also subject to the lien to the extent of the interest of the person or company, who in his or its own behalf, or who, through any of the persons designated in RCW 60.04.010 to be agent of the owner or owners caused the performance of the labor, or the construction, alteration or repair of the property.

1990 Main Volume Credit(s)

Enacted by Laws 7893, ch. 24, § 2. Amended by Laws 1905, ch. 116, § 2.

60.04.040. Lien for improving real property

Any person who, at the request of the owner of any real property, or his agent, clears, grades, fills in or otherwise improves the same, or any street or road in front of, or adjoining the same, and every person who, at the request of the owner of any real property, or his agents, rents, leases, or otherwise supplies equipment, or furnishes materials, including blasting powder, dynamite, caps and fuses, for clearing, grading, filling in, or otherwise improving any real property or any street or road in front of or adjoining the same, and every trustee of any type of employee benefit plan, has a lien

upon such real property for the labor performed, contributions owed to the employee benefit plan on account of the labor performed, the materials furnished, or the equipment supplied for such purposes.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, 3. Amended by Laws 1929, ch. 230, § 1; Laws 1959, ch. 279, § 3; Laws 1971, Ex.Sess., ch. 94, § 3, eff., Jan. 1, 1972; Laws 1975, ch. 34, § 4.

60.04.045. Lien on real property for labor or services on timber and lumber

The lot tract, parcel of land, or any other type of real property or real property improvements upon which the type of activities listed in RCW 60.24.020, 60.24.030, or 60.24.035 are to be performed, or so much property thereof as may be necessary to satisfy the lien and the judgment thereon, to be determined by the court on rendering judgment in a foreclosure of lien, shall also be subject to the lien to the extent of its interest of the persons who in their own behalf, or through any of their agents, caused any of the types of activities listed in RCW 60.24.020, 60.24.030, or 60.24.035.

1990 Main Volume Credit(s)

Enacted by Laws 1986, ch. 179, § 1.

60.04.050. Priority of lien

The liens created by this chapter are preferred to any lien, mortgage or other incumbrance which may attach subsequently to the time of the commencement of the performance of the labor, the obligation to pay contributions to any type of employee benefit plan, the furnishing of the materials, or the supplying of the equipment for which the right of lien is given by this chapter, and are also preferred to any lien, mortgage or other incumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice of the same prior to that time, and of which the lien claimant had no notice.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 4. Amended by Laws 1959, ch. 279, § 4; Laws 1975, ch. 34, § 5.

60.04.060. Claim--Contents--Form--Filing--Joinder

No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date the contributions to any type of employee benefit plan are due, of the cessation of the performance of such labor, the furnishing of such materials, or the supplying of such equipment, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof to be affected thereby, is situated. Such claim shall state, as nearly as may be, the date contributions to any type of employee benefit plan became due, the time of the commencement and cessation of

performing the labor, furnishing the material, or supplying the equipment, the names of the trustees of the employee benefit plan, the name of the person who performed the labor, furnished the material, or supplied the equipment, the name of the person by whom the laborer was employed (if known), the name of the person required by agreement or otherwise to pay contributions to any type of employee benefit plan, or to whom the material was furnished, or equipment supplied, a description of the property to be charged with the lien sufficient for identification, the name of the owner, or reputed owner if known, and if not known, that fact shall be mentioned, the amount for which the lien is claimed, and shall be signed by the claimant, or by some person in his behalf, and be verified by the oath of the claimant, or some person in his behalf, to the effect that the affiant believes the claim to be just; in case the claim shall have been assigned the name of the assignee shall be stated; and such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, insofar as the interests of third parties shall not be affected by such amendment. A claim of lien shall also state the address of the claimant. A claim of lien by trustees of any type of employee benefit plan shall state, as nearly as is known to the trustees, the names of all employees on whose behalf contributions are claimed. A claim for lien substantially in the following form shall be sufficient:

claimant, vs.

Notice is hereby given that on the day (date of commencement of performing labor or contributions to any type of employee benefit plan became due or furnishing material or supplying equipment) at the request of commenced to perform labor (or to furnish material or supply equipment to be used) upon... (here describe property subject to the lien) of which property the owner, or reputed owner, is (or if the owner or reputed owner is not known, insert the word "unknown"), the performance of which labor (or the furnishing of which material or supply of which equipment) ceased on the day of ; that said labor performed (the amount of contributions owed or material furnished or equipment supplied) was of the value of dollars, for which labor (or contributions) (or material) (or equipment) the undersigned claims a lien upon the property herein described for the sum of dollars. (In case the claim has been assigned, add the words "and is assignee of said claim", or claims, if several are united.)

....., Claimant.
.....
.....

(Address, city, and state of claimant)

STATE OF WASHINGTON, COUNTY OF 55.

being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative or agent of trustees of an employee benefit plan) above named; I have heard the foregoing claim read and know the contents thereof, and believe the same to be just.

Subscribed and sworn to before me this day of

Any number of claimants may join in the same claim for the purpose of filing the same and enforcing their liens, but in such case the amount claimed by each original lien or, respectively, shall be stated: Provided, It shall not be necessary to insert in the notice of claim of lien provided for by this chapter any itemized statement or bill of particulars of such claim.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 5. Amended by Laws 1949, ch. 217, § 1(5a); Laws 1959, ch. 279, § 5; Laws 1971, Ex.Sess., ch. 94, § I, eff. Jan. 1, 1972; Laws 1975, ch. 34, § 6.

60.04.064. Owner may record notice to lien claimants

The owner may within ten days after there has been a cessation of the performance of such labor, the furnishing of such material, or the supplying of such equipment thereon for a period of thirty days, file for record in the office of the county auditor, in the county where the property is situated, a notice setting forth the date on which cessation of the performance of such labor, the furnishing of such materials, or the supplying of such equipment occurred together with his name, address and the nature of his title, a legal description of the property and a statement that a copy of this notice was delivered or mailed to the general contractor, if any. The notice must be verified by the owner or by some person in his behalf. Where the ownership of the property is in several persons any one or more of the several owners may execute and file such notice, but the notice must state the names, addresses and nature of title of all of such owners. Such notice shall be conclusive evidence of the cessation of the performance of such labor, the furnishing of such materials, or the supplying of such equipment on or before the date of cessation as stated in said notice, unless controverted by claimant's claim of lien which must be recorded within sixty days from the date of recording of such notice by the owner. This provision shall not extend the time for filing lien claims as provided by RCW 60.04.060.

1990 Main Volume Credit(s)

Enacted by Laws 1949, ch. 217, § 1(5b). Amended by Laws 1959, ch. 279, § 6.

**60.04.067. Separate residential units--When time for filing lien claims commences to run--
Definition**

Where such labor is performed, such contributions owed to any type of employee benefit plan, such materials are furnished, or such equipment is supplied in the construction of two or more separate residential units the time for filing claims of lien against each separate residential unit shall commence to run upon the cessation of the performance of such labor, the date contributions to any type of employee benefit plan became due, the furnishing of such materials, or the supplying of such equipment on each such residential unit as provided in this chapter. A separate residential unit is defined as consisting of one residential structure together with any garages or other outbuildings appurtenant thereto.

1990 Main Volume Credit(s)

Enacted by Laws 1949, ch. 217, § 1(5c). Amended by Laws 1959, ch. 279, § 7; Laws 1975, ch. 34, § 7.

60.04.070. Recording--Fees

The county auditor must record the claims and notices mentioned in this chapter in a book to be kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which the auditor shall receive the same fees as are required by Law for recording and indexing deeds and other conveyances.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 6. Amended by Laws 1949, ch. 217, §2; Laws 1985, ch. 44, § 10.

60.04.080. Assignability

Any lien or right of lien created by law and the right of action to recover therefor, shall be assignable so as to vest in the assignee all rights and remedies of the assignor, subject to all defenses thereto that might be made if such assignment had not been made.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 7.

60.04.090. Claims must designate amount due on property charged

In every case in which one claim is filed against two or more separate pieces of property owned by the same person, or owned by two or more persons who jointly contracted for the labor, material, or equipment for which the lien is claimed, the person filing such claim must designate in the claim the amount due him on each piece of property, otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon either of such pieces of property.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 8. Amended by Laws 1959, ch. 279, § 8.

60.04.100. Duration of lien--Limitation of action--When action commenced

No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; or, if credit be given and the terms thereof be stated in the claim of lien, then eight calendar months after the expiration of such credit; and in case such action be not prosecuted to judgment within two years after the commencement thereof, the court, in its discretion, may dismiss the

same for want of prosecution, and the dismissal of such action or a judgment rendered therein; that no lien exists, shall constitute a cancellation of the lien: Provided, That, for the purposes of this chapter, an action to enforce such lien shall not be timely commenced unless the filing of summons and complaint in a court of competent jurisdiction shall be made prior to the expiration of the eight month period, and service of the summons and complaint shall be made upon all necessary parties personally, or by commencement of service by publication, not later than ninety days after the filing of the summons and complaint.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 9. Amended by Laws 1943, ch. 209, § 1; Laws 1975, 1st Ex.Sess., ch. 231, § I.

60.04.110. Extent of contractor's right to recover--Settlements--Rights of owner

The contractor shall be entitled to recover upon the claim filed by him only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for labor performed, for contributions owed to any type of employee benefit plan, materials furnished, and equipment supplied; and in all cases where a claim shall be filed under this chapter for labor performed, contributions owed to any type of employee benefit plan, materials furnished, or equipment supplied to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which the claim is filed; and in case of judgment against the owner or his prop- city, upon the lien, the owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of the judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor or if the owner shall have settled with the contractors in full, he shall be entitled to recover back from the contractor the amount, including costs for which the lien is established, in excess of any sum that may remain due from him to the contractor.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 10. Amended by Laws 1959, ch. 279, § 9; Laws 1975, ch. 34, § 8.

60.04.115. Action to enforce recorded claim of lien--Bond in lieu of claim

Any owner of real property subject to a recorded claim of lien under RCW 60.04.060, or the contractor or subcontractor who disputes the correctness or validity of the claim of lien may record, either before or after the commencement of an action to enforce the claim of lien, in the office of the county recorder or auditor in the county where the claim of lien was recorded, a bond issued by an insurance company authorized to issue surety bonds in the state, that is acceptable to the lien claimant and contains a description of the claim of lien and real property involved, and in an amount equal to the greater of five thousand dollars or two and one-half times the amount of the claim of lien if it is twenty thousand dollars or less, and in an amount equal to the greater of thirty thousand dollars

or two times the amount of claim of lien if it is in excess of twenty thousand dollars. If the claim of lien affects more than one parcel of real property and is segregated to each parcel, the bond may be segregated the same as in the claim of lien. A separate bond shall be required for each claim of lien. The condition of the bond shall be to guarantee the payment of the judgment entered in any action to recover the amount claimed in a claim of lien, or on the claim asserted in the claim of lien. The effect of recording a bond shall be to release the real property described in the claim of lien from the lien and any action brought to recover the amount claimed. Unless otherwise prohibited by law, if no action is filed to recover on a claim of lien within the time specified in RCW 60.04.100 the surety shall be discharged from liability under the bond. If such an action is timely filed, then on payment of any judgment entered in the action or on payment of the full amount of the bond to the holder of the judgment, whichever is less, the surety shall be discharged from liability under the bond.

1990 Main Volume Credit(s)

Enacted by Laws 1986, ch. 314, § 4.

60.04.120. Foreclosure--Parties

The liens provided by this chapter, for which claims have been filed, may be foreclosed and enforced by a civil action in the court having jurisdiction; in any action brought to foreclose a lien, all persons who, prior to the commencement of such action, have legally filed claims of liens against the same property, or any part thereof shall be joined as parties, either plaintiff or defendant; and no person shall begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a party plaintiff or defendant to such prior action, he may apply to the court to be joined as a party thereto, and his lien may be foreclosed in such action; and no action to foreclose a lien shall be dismissed at the instance of a plaintiff therein to the prejudice of another party to the suit who claims a lien.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 11.

60.04.130. Rank of lien--Application of proceeds--Attorney's fees

In every case in which different liens are claimed against the same property, the court, in the judgment, must declare the rank of such lien or class of liens, which shall be in the following order:

- (1) All persons performing labor.
- (2) Contributions owed to employee benefit plans.
- (3) All persons furnishing material or supplying equipment.
- (4) The subcontractors.

(5) The original contractors.

The proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and personal judgment may be rendered in an action brought to foreclose a lien, against any party personally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon the property liable as in case of foreclosure of mortgages; and the amount realized by such enforcement of the lien shall be credited upon the proper personal judgment, and the deficiency, if any remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against the party liable therefor. The court may allow to the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for filing or recording the claim, and a reasonable attorney's fee in the superior court, court of appeals, and supreme court.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 12. Amended by Laws 1959, ch. 279, § 10; Laws 1969, ch. 38, § 1; Laws 1971, ch. 81, § 129, eff. March 23, 1971; Laws 1975, ch. 34, § 9.

60.04.140. Lien not discharged by taking note

The taking of a promissory note or other evidence of indebtedness for any labor performed, material furnished, or equipment supplied for which lien is created by law, shall not discharge the lien therefor, unless expressly received as payment and so specified therein.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 14. Amended by Laws 1959, ch. 279, § II.

60.04.150. Material exempt from process--Exception

Whenever material shall have been furnished for use in the construction, alteration or repair of property subject to a lien created by this chapter, such material shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such material, except a debt due for the purchase money thereof, so long as in good faith the said material is about to be applied in the construction, alteration or repair of such property.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 15.

60.04.160. Effect of filing claim on community interest

The claim of lien, when filed as required by this chapter, shall be notice to the husband or wife of the person who appears of record to be the owner of the property sought to be

charged with the lien, and shall subject all the community interest of both husband and wife to said lien.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 16.

60.04.170. When land not subject to lien--Power of court to order removal and sale of property

When, for any reason the title or interest in the land, upon which the property subject to the lien is situated cannot be subjected to the lien, the court may order the sale and removal from the land of the property subject to the lien to satisfy the lien.

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 17.

60.04.180. Personal action preserved

Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for labor performed, material furnished, or equipment supplied to maintain a personal action to recover such debt against the person liable therefor. -

1990 Main Volume Credit(s)

Enacted by Laws 1893, ch. 24, § 13. Amended by Laws 1959, ch. 279, § 12.

60.04.200. Interim or construction financing--Definitions

As used in this chapter, the following meanings shall apply:

- (1) "Lender" means any person or entity regularly providing interim or construction financing.
- (2) "Interim or construction financing" means that portion of money secured by mortgage, deed of trust, or other encumbrance to finance construction of improvements on, or development of, real property, but does not include:
 - (a) Funds to acquire real property;
 - (b) Funds to pay interest, insurance premiums, lease deposits, taxes, assessments, or prior encumbrances;
 - (c) Funds to pay loan, commitment, title, legal, closing, recording or appraisal fees;

(d) Funds to pay other customary fees; which pursuant to agreement with the owner or borrower are to be paid by the lender from time to time;

(e) Funds to acquire personal property for which the potential lien claimant may not claim a lien pursuant to chapter 60,04 RCW.

(3) "Owner" means the record holder of the legal or beneficial title to the real property to be improved or developed.

(4) "Potential lien claimant" means any person or entity entitled to assert lien rights pursuant to this chapter and has otherwise complied with the provisions of this chapter and the requirements of chapter 18.27 RCW if required by the provisions thereof.

(5) "Draws" means periodic disbursements of interim or construction financing by a lender.

(6) "Prime contractor" includes all contractors, general contractors, and specialty contractors as defined in RCW 18.27.010 who contract to perform for a property owner and includes property owners or their authorized representatives who are contractors, general contractors, or specialty contractors as defined in RCW 18.27.010 who offer to sell their property without occupying or using the structures, projects, developments, or improvements for more than one year.

(7) "Construction project" means construction work contracted for by a property owner or the owners authorized representative with a prime contractor on real property controlled by the owner.

1990 Main Volume Credit(s)

Enacted by Laws 1973, 1st Ex.Sess., ch. 47, § 1. Amended by Laws 1984, ch. 202, § 1.

60.04.210. Interim or construction financing--Notice of lien--Duty of lender to withhold from disbursements--
-Liabilities of lender and lien claimant

Any lender providing interim or construction financing where there is not a payment bond of at least fifty percent of the amount of construction financing shall observe the following procedures:

(1) Draws against construction financing shall be made only after certification of job progress by the general contractor and the owner or his agent in such form as may be prescribed by the lender.

(2) Any potential lien claimant who has not received a payment within five days after the date required by his contract, employee benefit plan agreement, or purchase order may within twenty days thereafter file a notice as provided herein of the sums due and to

become due, for which a potential lien claimant may claim a lien under chapter 60.04 RCW.

(3) The notice must be filed in writing with the lender at the office administering the interim or construction financing, with a copy furnished to the owner and appropriate general contractor. The notice shall state in substance and effect that such person, firm, trustee, or corporation is entitled to receive contributions to any type of employee benefit plan, has furnished labor, materials and supplies, or supplied equipment for which right of lien is given by this chapter, with the name of the general contractor, agent or person ordering the same, a common or street address of the real property being improved or developed, or if there be none the legal description of said real property, description of the labor, or material furnished, or equipment leased, or a brief statement describing the nature of the contributions owed to any type of employee benefit plan, the name, business address and telephone number of said lien claimant which notice shall be given by mailing the same by registered or certified mail, return receipt requested.

(4) After the receipt of such notice, the lender shall withhold from the next and subsequent draws such percentage thereof as is equal to that percentage of completion as certified in subsection (I) of this section, which is attributable to the potential lien claimant as of the date of the certification of job progress for the draw in question less contracted retainage. The percentage of completion attributable to the lien claimant shall be calculated from said certification of job progress, and shall be reduced to reflect any sums paid to or withheld for the potential lien claimant. Alternatively, the lender may obtain from the general contractor or borrower a payment bond for the benefit of the potential lien claimant in such sum.

(5) Sums so withheld shall not be disbursed by the lender except by the written agreement of the potential lien claimant, owner and general contractor in such form as may be prescribed by the lender, or the order of a court of competent jurisdiction.

(6) In the event a lender fails to abide by the provisions of subsections (4) or (5) of this section, then the mortgage, deed of trust or other encumbrance securing the lender will be subordinated to the lien of the potential lien claimant to the extent of the interim or construction financing wrongfully disbursed, but in no event in an amount greater than the sums ultimately determined to be due the potential lien claimant by a court of competent jurisdiction, or more than the sum stated in the notice, whichever is less.

(7) Any potential lien claimant shall be liable for any loss, cost or expense, including reasonable attorney fees, to the party injured thereby arising out of any unjust, excessive or premature notice of claim under this section. For purposes of this subsection, "notice of claim" does not include notice given by a potential lien claimant of the right to claim liens under this chapter where no actual claim is made.

1990 Main Volume Credit(s)

Enacted by Laws 1973, 1st Ex.Sess., ch. 47, § 2. Amended by Laws 1975, ch. 34, § 10; Laws 1984, ch. 202, § 2.

60.04.220. Interim or construction financing--Priorities

Except as provided in RCW 60.04.050 or in RCW 60.04.200 through 60.04.220 any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust and other encumbrances which have not been recorded prior to the recording of such mortgage or deed of trust to the extent of all sums secured by such mortgage or deed of trust regardless of when the same are disbursed or whether such disbursements are obligatory.

1990 Main Volume Credit(s)

Enacted by Laws 1973, 1st Ex.Sess., ch. 47, § 3.

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

64178-6

J. E. DUNN NORTHWEST, INC.,
a Washington corporation,

Appellant

v.

BELLTOWN DEVELOPMENT PARTNERS, LLC,
a Washington limited liability company,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE GREGORY P. CANOVA

DECLARATION OF SERVICE

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FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2010 FEB 17 PM 2:33

ORIGINAL

The undersigned declares under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

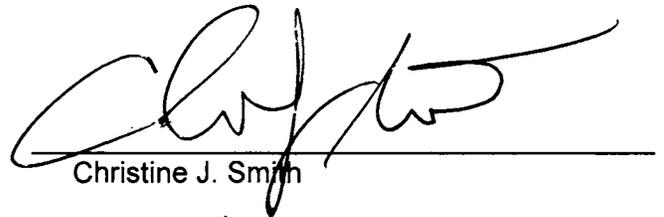
On the date shown below, I caused to be served in the manner noted copies of the following upon the parties of record in this action:

1. Brief of Appellant; and
2. This Declaration of Service.

| | | |
|--|-----|-----------------------|
| Colm P. Nelson/Jeremy R. Larson | [] | By United States Mail |
| FOSTER PEPPER, PLLC | [] | By Federal Express |
| 1111 Third Avenue, Suite 3400 | [X] | By Legal Messenger |
| Seattle, WA 98101-3299 | [] | By Facsimile |
| Phone: 206-447-6470 | [] | By Email |
| Fax: 206-749-1981 | | |
| nelco@foster.com | | |
| larsj@foster.com | | |

*Attorneys for Defendant
Belltown Development Partners, LLC*

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was signed this Wednesday, February 17, 2010, in Seattle, Washington.



Christine J. Smith