

ADVISORY TO NACM MEMBERS REGARDING ATTORNEYS' FEES AND EXPIRED NOTICES OF COMMENCEMENT

We would like to make you aware of two important issues that could affect your business with respect to lien law issues:

ISSUE 1: The *Trytek* Case and Attorneys' Fees

The Florida Supreme Court rendered a decision in December 2008 in the case of *Trytek v. Gale Industries* which gives judges considerable latitude in making a determination as to who is a prevailing party for purposes of an award of attorneys' fees. Recovering some portion of your lien no longer insures that you will be considered the prevailing party. Although the NACM-ICPC tried to more clearly define prevailing party during the 2009 Legislative Session, members of the Construction Coalition and the Florida Bar Construction Law Committee could not reach an agreement on this issue and the bill did not pass. Hopefully the issue will be resolved as we work together with the industry and their construction attorneys over the next year. However, in the meantime, we want to make you aware of another layer of protection available to you.

OUR RECOMMENDATION: Serve a Written Demand on the Owner

After you record a claim of lien, you have the right to serve a written demand on the owner pursuant to 713.16(5). This request can be served separately or along with the copy of the recorded claim of lien (which must be served on the owner within 15 days from the date the lien has been recorded). Under s. 713.16(5)(b), any owner who does not provide the statement within 30 days after demand, or who provides a false or fraudulent statement, is not a prevailing party for purposes of an award of attorney's fees in a lien foreclosure action. *A recommended form for making this written demand is below.*

THE ISSUE: Expired Notices of Commencement

If a notice of commencement has expired and the project has not been properly abandoned or recommenced by the owner, you should be aware that any lien you record on the project will attach to the property on the date you record your lien and will not relate back to the recording date of the expired notice of commencement. This has been a problem ever since the legislature created the one-year automatic expiration date on a notice of commencement, but has become even more of a problem during these difficult economic times when many projects are stalled. While individual local governments had been extending the expiration of building permits on a piecemeal basis, Senate Bill 360 which passed during the 2009 Session and has the potential to exacerbate the problem by attempting to provide a means for extension of existing development and building permits for an additional two years (dating back to September 1, 2008 and through January 1, 2012). For this reason we may see an increase in notices of commencements that expire before construction is complete and wanted you to be aware of the issue. DCA Secretary Tom Pelham issued the following statement regarding the change in the law:

DCA's Statement Regarding Permit Extensions Under Senate Bill 360

Section 14(1) of Senate Bill 360 provides in part as follows:

Except as provided in subsection (4), and in recognition of 2009 real estate market conditions, any permit issued by the Department of Environmental Protection or a water management district pursuant to Part IV of Chapter 373, Florida Statutes, that has an expiration date of September 1, 2008, through January 1, 2012, is extended and renewed for a period of two years following its date of expiration. This extension includes any local government-issued development order or building permit. The two-year extension also applies to build-out dates including any build-out date extension previously granted under s. 380.06(19)(c), Florida Statutes.

The Department has received numerous inquiries about the agency's interpretation of the above-quoted provisions. The extension of permits issued by the Department of Environmental Protection, water management districts, and local governments for non-Developments of Regional Impact (DRI) related development orders and building permits are not within the jurisdiction of the Department of Community Affairs. Accordingly, the Department has no authority to issue binding interpretations of the statutory language pertaining to permits issued by those agencies. Local governments will have to determine the scope of the statutory extension for local government-issued development orders or building permits except for those that pertain to developments of regional impact.

The Department of Community Affairs does have jurisdiction over local development orders that pertain to DRIs, including local actions which approve extension of build-out dates pursuant to s. 380.06(19)(c), Florida Statutes. The Department interprets the above-quoted statutory provisions as granting a two-year extension of the expiration date and build-out date for any local government-issued DRI development order and related building permits which have an expiration date of September 1, 2008, through January 1, 2012.

Secretary Tom Pelham
June 16, 2009

OUR RECOMMENDATION: Record your claim of lien early

If you are owed money on a project that has an expired notice of commencement, you may want to record your liens earlier than you would otherwise to preserve your priority over other liens that may be filed.

**DEMAND FOR SWORN STATEMENT OF ACCOUNT
TO OWNER PURSUANT TO SECTION 713.16, FLORIDA STATUTES**

Certified Mail Return Receipt # _____

To: _____

(Owner's name and address)

The undersigned hereby demands a written statement under oath from the owner for improvements to the property described as follows:

[insert description of project sufficient to identify it and/or legal description of property]

The written statement of the owner must provide the following information:

1. The amount of the direct contract between the owner and _____ (the contractor).
2. The dates and amounts paid or to be paid by or on behalf of the owner for all improvements described in the direct contract.
3. The reasonable estimated costs of completing the direct contract.
4. If known, the actual cost of completion.

The lienor also hereby requests a copy of the direct contract and agrees to pay for the reasonable costs of reproducing the same.

DATED _____

(signature of lienor)

Address: _____

**WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT WITHIN 30 DAYS OR
THE FURNISHING OF A FALSE STATEMENT WILL RESULT IN THE LOSS OF YOUR RIGHT TO
RECOVER ATTORNEY FEES IN ANY ACTION TO ENFORCE THE CLAIM OF LIEN OF THE
PERSON REQUESTING THIS STATEMENT.**