

BILL ANALYSIS

C.S.H.B. 1860
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Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

According to certain sources, a person who provides labor or materials for construction of an improvement to real property has a lien against the property to secure payment that may be enforced by removal of the item, if such removal can be done without material harm to the item and to the improvement. These sources contend that, although a lien for labor and materials is unenforceable by foreclosure, if the lien is subordinate to the construction loan, the foreclosure does not have that effect on a lien for a removable, allowing removal of a "removable" item.

Certain sources assert that, because of current requirements relating to mechanic's lien affidavits, it may be difficult for the parties involved in a foreclosure to determine whether a mechanic's lien is unenforceable by the foreclosure or is secured by removable items. These difficulties can slow down the foreclosure process and delay the reintroduction of newly constructed but foreclosed properties into the real estate market.

C.S.H.B. 1860 seeks to create a more equitable system for determining, after foreclosure on a construction project, whether a supplier or laborer provided removable items to the project and whether that person maintains a lien for those removables by establishing certain notification requirements for the parties involved in the foreclosure.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 1860 amends the Property Code to make its provisions relating to a waiver of priority for removables in a lien claim applicable only to a property owner who acquired title to the property by foreclosing the person's lien on the property or by purchasing the property at a foreclosure sale or from a person who foreclosed the person's lien on the property or to a title company seeking to insure title for the sale of property by a person who acquired title to the property by foreclosing the person's lien on the property to a third-party buyer.

C.S.H.B. 1860 authorizes a property owner or title company to whom the bill's provisions apply to send a written notice to a lien claimant who has filed an affidavit claiming a mechanic's lien on the property requesting the lien claimant to confirm in writing whether the lien claim includes a claim for a removable and provide invoices or other supporting documents for any material for which the lien claimant claims a priority mechanic's lien for a removable under statutory provisions governing such priority. The bill provides for the method of delivery of the notice, the determination of the lien claimant's address, and the contents of the notice, including form language for the notice statement.

C.S.H.B. 1860 prohibits a property owner or title company from sending more than one notice under the bill's provisions to a lien claimant claiming a mechanic's lien on a particular property.

The bill establishes that, if a lien claimant fails to provide a written confirmation of the mechanic's lien for a removable for which a mechanic's lien is claimed, as requested by the notice, within a specified time period, the preference of the claimant's mechanic's lien for the removable over any prior lien, encumbrance, or mortgage on the property is waived and the requestor is authorized to file an affidavit with the county clerk of the county in which the property is located. The bill requires the affidavit to include a statement that the notice was sent in compliance with the bill's provisions and the lien claimant failed to respond and either proof of delivery or a statement of the means of attempted delivery and the reason for the failure of delivery.

C.S.H.B. 1860 establishes that the sufficiency of the invoice or other supporting document provided in response to the notice is not grounds for the waiver of the lien claimant's priority. The bill establishes that an affidavit filed under the bill's provisions is prima facie evidence that the lien claimant waived any preference of the claimant's mechanic's lien for a removable over any prior lien, encumbrance, or mortgage on the property. The bill establishes that an invoice or other supporting document provided by a lien claimant in response to a notice under the bill's provisions is considered a general statement of the existence and general nature of a removable and does not limit the evidence a claimant may present at a trial or other proceeding to establish the claimant's mechanic's lien for the removable or the specific quantity or nature of the removable that may be actually proven at a trial or other proceeding.

C.S.H.B. 1860 defines "removable" to mean material furnished that can be removed without material injury to the land, a preexisting improvement, or the material.

EFFECTIVE DATE

January 1, 2012.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 1860 differs from the original by defining "removable" to mean material furnished that can be removed without material injury to the land, a preexisting improvement, or the material, whereas the original defines "removable" to mean material installed on land or on a preexisting improvement on the land that can be removed after installation without damage to the material, land, or preexisting improvement. The substitute omits provisions included in the original providing examples of items that are removables and materials that are not removables.

C.S.H.B. 1860 contains provisions not included in the original relating to a waiver of priority for removables in a lien claim.

C.S.H.B. 1860 omits a provision included in the original establishing that, in provisions of law relating to a mechanic's, contractor's, or materialman's lien, a lien for a removable item extends only to the item and does not extend to the land on which the removable item is located or to other improvements on the land.

C.S.H.B. 1860 omits an exception included in the original, in the provision of law specifying that an affidavit to perfect a lien is not required to set forth individual items of work done or material furnished or specially fabricated, requiring such an affidavit to distinguish between a claim for work done and a claim for material furnished or specially fabricated. The substitute omits a provision included in the original requiring a claim for material in the affidavit to describe the category or type of material, using the terms listed under the examples of items that are removables and materials that are not removables where appropriate, in a manner that will distinguish between a permanent fixture and a removable. The substitute omits nonsubstantive changes made in the original.

C.S.H.B. 1860 differs from the original by establishing that a lien relating to a contract entered

into before the effective date of the bill is governed by the law applicable to the lien immediately before that date, whereas the original establishes that such a lien is governed by the law in effect on the date the contract was entered into.