

# Mechanics' Liens in Practice (VA)

TIMOTHY R. HUGHES, JUANITA F. FERGUSON, AND STEPHEN D. CARUSO,  
BEAN KINNEY & KORMAN PC, WITH PRACTICAL LAW REAL ESTATE

Search the [Resource ID numbers in blue](#) on Westlaw for more.

A Practice Note discussing statutory mechanics' liens that may arise out of construction projects for the improvement of privately owned residential and commercial real property in Virginia. This Note focuses on providing practical guidance on the processes and procedures for perfecting, enforcing, and releasing mechanics' liens in Virginia.

A mechanics' lien can be a powerful tool to protect a contractor, subcontractor, or supplier that has not been paid for work or services performed, or materials furnished, to improve privately owned real property. Title 43 of the Virginia Code governs mechanics' liens on privately owned residential and commercial real property in Virginia. (Va. Code Ann. §§ 43-1 to 43-71.)

This Note discusses the processes and procedures when:

- Preparing a valid memorandum of lien.
- Perfecting and enforcing lien rights.
- Determining the priority of lien rights.
- Releasing or discharging a mechanics' lien.

The Virginia mechanics' lien statutes do not govern improvements to public property (*Legg v. Cty. Sch. Bd. & Nat'l Sur. Co.*, 160 S.E. 60 (Va. 1931)).

For more information on mechanics' liens in Virginia, see State Q&A, Real Estate Finance: Virginia ([5-553-7847](#)).

## PRE-LIEN MATTERS

### PERSONS ENTITLED TO A MECHANICS' LIEN

A mechanics' lien may be claimed by any person who performed labor or furnished materials of \$150 or more for:

- The construction, removal, repair, or improvement of any building or structure permanently a part of real property.
- The reasonable rental or use value of equipment. (Va. Code Ann. § 43-3.)

A mechanics' lien may only be claimed by:

- A general contractor or other person with a direct contractual relationship with the owner or a person who has the consent of the owner, including:
  - trade contractors (for example, plumbing contractors);
  - laborers;
  - architects;
  - mechanical service providers (mechanics); and
  - persons furnishing materials (materialmen).
- A subcontractor with a direct contractual relationship with the general contractor.

(Va. Code Ann. § 43-1.)

The Virginia mechanics' lien statutes do not define sub-subcontractor. However, the statutes set out the steps for perfecting a lien by a person who furnishes materials or performs labor for a subcontractor (Va. Code Ann. § 43-9; see *Creating and Perfecting a Mechanics' Lien*).

Only a person with a valid contractor's license or the proper class of license for the value of the work performed may claim a mechanics' lien (Va. Code Ann. §§ 43-3(D) and 54.1-1100; see *Weinberg v. JPMorgan Chase & Co.*, 2016 WL 1070817 (Va. Mar. 15, 2016)). Unlicensed laborers may file a lien if they certify that the work or labor performed does not require a license.

### WORK AND MATERIALS COVERED BY A MECHANICS' LIEN

A party may claim a mechanics' lien to secure payment for materials furnished and services performed if the labor and materials are for the improvement of a building or structure permanently attached to the land. When claiming a mechanics'

lien, the following are considered structures permanently attached to the land:

- Wells.
- Excavations.
- Sidewalks.
- Driveways.
- Pavement.
- Parking lots.
- Retaining walls.
- Curbs and gutters.
- Breakwaters.
- Storage tanks and connected dispensing equipment.
- Water systems.
- Drainage structures.
- Filtering systems, including septic or waste disposal systems.
- Swimming pools.
- Earth, sand, gravel, bricks, stones, pipes, and other similar materials.

A claim may also include the reasonable rental or use value of equipment and any surveying, grading, clearing, or earth moving required for the improvement (Va. Code Ann. § 43-2).

Materials provided or labor performed on machinery and equipment may be secured by a mechanics' lien if the machinery or equipment is:

- Permanent in character.
- Essential to the purposes for which the building is occupied.
- Passes with the building.
- Considered part of the building, even if capable of being severed without physical damage to the equipment or real property.

(Va. Code Ann. § 43-3; see *Haskins Wood Vulcanizing Co. v. Cleveland Ship-Bldg. Co.*, 26 S.E. 878, 880 (Va. 1897).)

To be entitled to a mechanics' lien, a lien claimant must show that its labor or materials have some permanent connection to the land, even when the property on which it worked was not fixed and irremovable (*Belle View Condominiums v. Drytech, Inc.*, 2004 WL 1662293 (Va. Cir. Ct. June 24, 2004) and *Weinberg*, 2016 WL 1070817, at \*3).

#### PROPERTY INTERESTS SUBJECT TO A MECHANICS' LIEN

Property interests to which a mechanics' lien may attach include:

- Permanent structures or buildings on which the labor was performed or materials were provided.
- As much of the surrounding land as is necessary for the use and enjoyment of the structures or buildings.

When the claim is for repairs or improvements to existing structures only, no lien attaches to the property repaired or improved unless ordered or authorized by the property owner or its agent. (Va. Code Ann. § 43-3(A).)

Virginia law does not permit liens against several parcels of land (blanket liens). A lien only applies to property on which work was

done or to which material or equipment was supplied. (*Woodington Elec., Inc. v. Lincoln Sav. & Loan Ass'n*, 385 S.E.2d 872, 876 (Va. 1989).)

Any person providing labor or materials to one or more lots, units, or common areas of an apartment or condominium under a single contract may perfect a single lien covering the lots or units which are the subject of the contract. If the claim is for work performed or materials or equipment supplied to multiple units, the mechanics' lien must be apportioned to reflect the amount owned by each unit owner. (Va. Code Ann. § 55-79.46(B); see *Belle View Condominiums*, 2004 WL 1662293, at \*3.) The lien is not valid unless, before the sale of the lot or unit, the claimant files with the clerk of the circuit court of the jurisdiction where the property lies, a document describing:

- The nature of the lien claimed.
- The total value of the work contracted for by the claimant.
- The portion allocated to each lot or unit.

(Va. Code Ann. § 43-3(B).)

#### Mechanics' Liens Against Leasehold Interests

A mechanics' lien attaches only to the lessee's interest and the claimant has no lien rights against the landowner-lessor (Va. Code Ann. § 43-20; see *Atlas Portland Cement Co. v. Main Line Realty Corp.*, 70 S.E. 536, 538 (Va. 1911)).

When leasing to a tenant who will be making improvements to the property, the landlord should take steps to protect the property from any mechanics' liens arising from the tenant's improvements. For example, the landlord may require that the lease contains provisions that require or permit one or more of the following:

- A bond for the full amount of any construction agreement as a condition precedent to the tenant contracting for any improvements to the property.
- The establishment of an escrow account to cover all construction costs as a condition precedent to the tenant contracting for any improvements to the property.
- The tenant to discharge or bond over a lien for tenant improvements that attach to the landlord's fee interest.
- The tenant to indemnify the landlord for any losses due to a lien being placed on the property for improvements contracted for by the tenant.
- The landlord has the right to discharge or bond over any liens for improvements by the tenant and seek compensation directly from the tenant for:
  - the cost of obtaining the discharge; or
  - the cost of obtaining the bond.

(See *Removing a Lien by Payment or Bond*.)

Before entering into a construction contract with a tenant, a contractor should:

- Review all provisions of the lease that relate to improvements to the property.
- Note any provisions of the lease concerning ownership of the improvements.
- Be aware of all obligations of the tenant.

## CREATING AND PERFECTING A MECHANICS' LIEN

### MEMORANDUM OF LIEN

A mechanics' lien is perfected when the person performing the services or furnishing the materials records a memorandum of lien:

- With the land records of the circuit court for the county where the real property is located.
- At any time after commencing work or furnishing materials.
- No later than 90 days from the last day of the month in which the claimant last performs work or furnished materials.
- No later than 90 days from the time the claimant completes the building or structure, or when the work on the building or structure is otherwise terminated.

The memorandum of lien cannot include sums for work performed or materials furnished more than 150 days before the last day on which the claimant performed work or furnished materials before the filing of the lien. The lien may include:

- Retainages for work performed or materials furnished:
  - at any time before the memorandum of lien was filed; and
  - not exceeding ten percent of the total contract price.
- Sums not yet due because the party with whom the claimant contracted has not been paid by the property owner or another third party.

(Va. Code Ann. § 43-4.)

Virginia law sets out separate requirements for filing a memorandum of lien by:

- General contractors (Va. Code Ann. § 43-4).
- Subcontractors (Va. Code Ann. § 43-7).
- Sub-subcontractors (Va. Code Ann. § 43-9).

### General Contractor's Memorandum of Lien

A general contractor's memorandum of lien must be subscribed and sworn to by the lien claimant and contain:

- A statement that the claimant intends to claim the benefit of the lien.
- The name and address of the property owners.
- The name and address of the lien claimant.
- The board of contractor's license or certificate number of the claimant.
- The issuance date and expiration date of the claimant's license or certificate.
- If no license or certificate is required, a certification that a license or certificate is not required by law for the work done for which the lien is claimed.
- A description of the work performed or materials furnished.
- The amount claimed.
- The type of structure on which the work was performed or materials furnished.
- A brief description of the real property and its location.
- An affidavit by the claimant or its agent certifying that it mailed a copy of the memorandum of lien to the last known address

of the property owner. The claimant should mail a copy of the memorandum of lien to all known addresses of the property owner.

(Va. Code Ann. § 43-4.)

The Virginia mechanics' lien statute includes a statutory form for the general contractor's memorandum of lien and affidavit (Va. Code Ann. § 43-5).

Use of the statutory memorandum of lien form is not required. Counsel should ensure that the information contained in the lien memorandum conforms to the requirements of the statute. Courts will not invalidate a lien memorandum if the lien claimant has substantially complied with the requirements of the statute. (*Desai v. A.R. Design Grp., Inc.*, 799 S.E.2d 506 (Va. 2017).)

Indicate the title of the person who signs the memorandum on behalf of the claimant (*Artitech, Inc. v. Naser*, 2008 WL 6744125 (Va. Cir. Ct. Feb. 19, 2008)).

### Subcontractor's Memorandum of Lien

To perfect a mechanics' lien, a subcontractor must:

- Follow all the requirements for general contractor's memorandum of lien.
- Mail a copy of the memorandum of lien to the property owner or its agent (after filing the lien) by certified or registered mail, return receipt requested. A return receipt is prima facie proof of the owner's or agent's receipt.

(Va. Code Ann. § 43-4.)

Note that a subcontractor is not required to certify that it mailed a copy of the memorandum of lien to the last known address of the property owner (Va. Code Ann. § 43-7; see General Contractor's Memorandum of Lien).

A property owner that does not receive written notice of a lien has no obligation to the subcontractor (*Mills v. Moore's Super Stores*, 227 S.E.2d 719, 723 (Va. 1976)).

There is no requirement that a subcontractor's written notice to the owner be given within any specified time (*Mills*, 227 S.E.2d at 722).

A subcontractor's lien is limited to either:

- The amount of the owner's debt to the general contractor at the time of the subcontractor's notice to the owner.
- The total amount of the owner's future liability to the general contractor.

(Va. Code Ann. § 43-7.)

A subcontractor's lien is not valid if the property owner owed nothing to the general contractor at the time the subcontractor gave written notice to the owner (*Waterval v. William Doolan Elevator Serv., Inc.*, 181 S.E.2d 637, 639 (Va. 1971)).

The Virginia mechanics' lien statute includes a statutory form for a subcontractor's memorandum of lien and affidavit. Use of the statutory form is not required. Counsel should ensure that the information contained in the lien memorandum conforms to the requirements of the statute. (Va. Code Ann. § 43-8.)

### Sub-Subcontractor's Memorandum of Lien

To perfect a mechanics' lien, any person performing labor or furnishing materials under contract with a subcontractor must:

- Follow the requirements for a general contractor's memorandum of lien.
- Give written notice of the amount and character of its claim to:
  - the property owner or its agent; and
  - the general contractor or its agent.

The amount of a sub-subcontractor's lien cannot exceed the amount for which the subcontractor could claim a lien (Va. Code Ann. § 43-9).

The Virginia mechanics' lien statute includes a statutory form for a sub-subcontractor's memorandum of lien and affidavit. Use of the statutory form is not required. (Va. Code Ann. § 43-10.) Sub-subcontractors should include contractors with a superior interest in the memorandum of lien.

### Subcontractor's or Sub-Subcontractor's Reliance on a General Contractor's Lien

A subcontractor or sub-subcontractor that has not perfected their own separate mechanics' lien on a building or structure may rely on a general contractor's perfected lien by giving written notice of its claim against the general contractor or subcontractor:

- To the property owner or its agent.
- Before the amount of the general contractor's lien is paid off or discharged.

(Va. Code Ann. § 43-18; see *VNB Mortg. Corp. v. Lone Star Indus., Inc.*, 209 S.E.2d 909, 913 (Va. 1974).)

The provision is a safeguard for subcontractors and sub-subcontractors that do not file a mechanics' lien. Lien claimants should ensure the validity of its lien by filing an independent mechanics' lien.

### Identification of Mechanics' Lien Agent (Residential Only)

Virginia law allows an owner-developer constructing one- or two-family structures to designate a mechanics' lien agent to receive notices from lien claimants. A mechanics' lien agent must:

- Be designated in writing by the owner.
- Consent to act as the owner's agent to receive notices from any person entitled to claim a lien for labor performed or materials furnished on the property.

A mechanics' lien agent must be a Virginia-licensed:

- Attorney.
- Title insurance company.
- Title insurance agent.
- Bank or other financial institution.

(Va. Code Ann. § 43-1.)

The designation of a mechanics' lien agent is not mandatory. If an owner appoints a mechanics' lien agent, Virginia law requires the building permit for the project to identify the mechanics' agent. The building permit must:

- Be conspicuously posted on the property before any work begins.
- Remain until all work has been completed.

(Va. Code Ann. § 43-4.01(A).)

If the building permit contains the name, address, and telephone number of a mechanics' lien agent, a lien claimant must first give written notice to the mechanics' lien agent by registered or certified mail or by personal delivery before it files a memorandum of lien for labor performed or material furnished. The notice must contain:

- The name, mailing address, and telephone number of the person giving notice.
- The person's board of contractor's license or certificate number and its expiration date.
- The building number on the property's building permit.
- A description of the property as shown on the building permit.
- A statement that the claimant seeks payment for labor performed or material furnished.

(Va. Code Ann. § 43-4.01(B).)

The lien claimant must give the written notice to the mechanics' lien agent within:

- 30 days of the first day that the claimant performs labor or furnishes materials.
- 30 days of the date that the building permit was issued if the labor or materials were performed or furnished before the building permit was issued.

(Va. Code Ann. § 43-4.01(C).)

After the lien claimant gives the written notice to the mechanics' lien agent, it may then perfect its lien for the value of labor and materials provided (see Memorandum of Lien).

A lien claimant's failure to give timely notice to a mechanics' lien agent within the 30-day period is not a complete bar to recovery. If the claimant gives late notice under section 43-4.01(B), the claimant's lien is limited to labor performed or materials furnished on or after the date the claimant gives the notice. (Va. Code Ann. § 43-4.01(C).)

### WAIVING THE MECHANICS' LIEN

Any person entitled to file or enforce a mechanics' lien may not waive or diminish its lien rights in a contract before furnishing any labor, service, or materials. Any attempt to do so is null and void.

A lien claimant may waive its lien rights in whole or in part at any time after it provides labor, service, or materials. Lien waivers typically occur in connection with payment agreements. (Va. Code Ann. § 43-3(C).)

A lien waiver may be express or implied. If implied, it must be established by clear and convincing evidence. (*First Am. Bank of Virginia v. J.S.C. Concrete Const., Inc.*, 523 S.E.2d 496, 500 (Va. 2000).) To avoid confusion, a lien waiver should be in writing.

## ENFORCING THE MECHANICS' LIEN

### TIME LIMITATION

A claimant enforces a mechanics' lien by filing a civil action. The claimant must file the complaint no later than:

- Six months after the date the claimant records the memorandum of lien.
  - 60 days after the completion of the building or structure.
  - The date the work on the building or structure was terminated.
- (Va. Code Ann. § 43-17; see Memorandum of Lien.)

The right to enforce a mechanics' lien is extinguished if the claimant does not file suit to enforce the lien within the limitation period (*Neff v. Garrard*, 219 S.E.2d 878, 879-80 (Va. 1975)).

### FILING AN ACTION TO ENFORCE THE LIEN

A suit to enforce a mechanics' lien must be filed in the circuit court for either the city or county where:

- All or part of the building or structure is situated.
- The property owner resides.

The lien claimant must file with its complaint:

- An itemized statement of account, showing the amount and character of the work done or materials supplied.
- The prices charged for the work or materials.
- Any payments made on account.
- The balance due.
- The time from which interest is claimed.

(Va. Code Ann. § 43-22.)

The claimant or its agent must verify the statement of account.

### NECESSARY PARTIES

The Virginia mechanics' lien statutes do not define the necessary parties to a suit to enforce a lien. Lien claimants should name all parties with an "immediate interest in resisting the enforcement of a mechanics' lien." (*Bush Constr. Co. v. Patel*, 412 S.E.2d 703 (Va. 1992).)

Necessary parties include:

- Condominium owners subject to mechanics' liens (*Mendenhall v. Douglas L. Cooper, Inc.*, 387 S.E.2d 468, 470 (Va. 1990)).
- A general contractor in a subcontractor's suit to enforce a lien (*In re Richardson Builders, Inc.*, 123 B.R. 736, 738 (Bankr. W.D. Va. 1990)).
- Beneficiaries and trustees under a deed of trust (*Walt Robbins, Inc. v. Damon Corp.*, 348 S.E.2d 223, 226 (Va. 1986)).
- A bond surety (*George W. Kane, Inc. v. Nuscope, Inc.*, 416 S.E.2d 701, 703 (Va. 1992)).

### CHALLENGES TO LIEN VALIDITY

Any party with an interest in the property subject to a mechanics' lien has the right to challenge the lien before an action to enforce the lien has been started. To challenge the lien, the interested party must:

- File a petition with the circuit court for the county or city where the building or structure is located requesting a hearing on the validity of the lien.

- Give reasonable notice to the lien claimant and any party who would benefit from the lien.

If the court finds that the lien is invalid, the court orders that the memorandum or notice of lien be released from record (Va. Code Ann. § 43-17.1; see Memorandum of Lien).

### PRIORITY OF LIENS

#### Priority of Mechanics' Liens on the Same Project

The priority of lien claimants of equal status on the same project is as follows:

- The lien of a subcontractor has priority over that of its general contractor.
- The lien of persons performing labor or furnishing materials to a subcontractor have priority over that of the subcontractor.
- The lien of manual laborers has priority over materialmen for labor performed during the 30 days immediately preceding the date of the performance of the last labor.

(Va. Code Ann. § 43-23.)

#### Priority Between Mechanics' Liens and Other Liens

A mechanics' lien has priority over other liens, including prior deeds of trust, as to improvements to the real property covered by the lien (Va. Code Ann. § 43-21; see *York Fed. Sav. & Loan Ass'n v. William A. Hazel, Inc.*, 506 S.E.2d 315, 316-17 (Va. 1998)).

A mechanics' lien does not have priority over other liens, including deeds of trust:

- As to the value of the land at the date of judicial sale.
- For the recovery of costs to repair, improve, or renovate an existing building or structure.

(Va. Code Ann. § 43-21.)

Costs incurred by a property owner following a general contractor's refusal to complete a project have priority over other liens (Va. Code Ann. § 43-16).

### RELEASING OR DISCHARGING LIENS

When a mechanics' lien has been placed against real property, a property owner, general contractor, or other party in interest may obtain a release of the lien either before or after suit to enforce the lien has been filed.

#### Releasing a Lien

A property owner may obtain a release of mechanics' lien by making payment to the lienholder (Va. Code Ann. § 43-67).

A property owner may also obtain a release of a mechanics' lien by making payment into the court or by filing a bond.

A person with an interest in the real property subject to a mechanics' lien may apply to the circuit court where the lien is recorded to release the lien. The person seeking the release must give 20 days' notice to the lien claimant and prove either that:

- The lien has been paid.
- 20 years have elapsed since the maturity of the lien, raising a presumption of payment.

- No suit has been brought to enforce the lien on a timely basis (see Time Limitation).

(Va. Code Ann. § 43-68.)

#### **Removing a Lien by Payment or Bond**

Before a suit to enforce the lien has been filed, the person seeking to remove a lien may, after giving five days' notice to the lien claimant, ask the court for approval to either:

- Pay into court the amount of the lien.
- File a bond to release the lien.

(Va. Code Ann. § 43-71.)

After suit to enforce the lien has been filed, the person seeking to remove the lien may, after giving five days' notice to the lien claimant, ask the court for approval to either:

- Pay into court an amount sufficient to discharge the lien and cover the costs of suit.
- Provide a surety bond for double the amount of the lien and costs of suit.

(Va. Code Ann. § 43-70; see Enforcing the Mechanics' Lien.)

In both cases, the court holds the money or bond until the court has finally determined the validity of the lien or as the parties direct if the matter is settled.

#### **ABOUT PRACTICAL LAW**

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at [legalsolutions.com/practical-law](https://legalsolutions.com/practical-law). For more information or to schedule training, call **1-800-733-2889** or e-mail [referenceattorneys@tr.com](mailto:referenceattorneys@tr.com).