

**GIVING MECHANIC'S LIEN RIGHTS TO
DESIGN PROFESSIONALS IN IDAHO:
THE LOGICAL SOLUTION**

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GIVING MECHANIC’S LIEN RIGHTS TO DESIGN PROFESSIONALS IN IDAHO: THE LOGICAL SOLUTION

COMMENT

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I. INTRODUCTION

A. The Current—Illogical—State of the Law

Are design professionals¹ entitled to mechanic’s lien rights in the state of Idaho? Currently, the answer is no, or at best, maybe.² My claim is that the answer should be a definite yes.

1. The term “design professionals” as used in this comment refers to all licensed or registered professionals who are involved in the planning, design, and development of the

Broadly speaking, a mechanic's lien secures payment for labor or materials supplied in improving real property.³ The real value of a mechanic's lien lies in the power it gives to a lienholder to force the sale of the real property that the lien encumbers.⁴ The proceeds of this foreclosure sale are then applied to satisfy the lien holder's unpaid debt.⁵ Traditionally, mechanic's liens provide protection to the various parties essential to any building project including general contractors, subcontractors, suppliers, materialmen, and laborers.⁶ Interestingly, although design professionals' services are just as—or arguably more—essential to construction projects as the parties just listed, they are often left without the valuable rights afforded by mechanic's liens.⁷ Most states have realized how illogical this omission is and have statutorily provided mechanic's lien rights to design professionals.⁸ Idaho however, has yet to do so.

Perhaps a hypothetical will illustrate the problem. Picture this: a real estate developer purchases a tract of land with the intention of developing a large mixed-use development in a growing suburban Idaho city. The developer has grand visions of a vibrant destination with various amenities such as office space, retail stores, a movie theater, civic space, residential units, and a hotel. To facilitate the realization of this vision, the developer hires an architectural firm. The firm signs a contract whereby it agrees to provide complete design and entitlement services—without which the project could never be built⁹—and the developer agrees to guide the design process and promptly pay for the firm's services. This firm employs all design professionals necessary for the

built environment including, architects, civil engineers, landscape architects, planners, structural engineers, mechanical engineers, electrical engineers, and geotechnical engineers. *See also* FLA. STAT. ANN. § 713.03 (2012), *and* MD. REAL PROPERTY CODE ANN. § 9-102 (1988) (noting that Florida and Maryland also provide mechanic's lien rights to interior designers).

2. *Bastian v. Gafford*, 98 Idaho 324, 325 n.1, 563 P.2d 48, 49 n.1 (1977).

3. BLACK'S LAW DICTIONARY 1008 (9th ed. 2009).

4. Babcock, Scott, & Babcock, *Protecting Your Money: Utah's Mechanic's Lien Law*, 4 (2007) available at http://www.babcockscott.com/documents/Protecting%20Your%20Money_2007.pdf [hereinafter *Protecting Your Money*].

5. *Id.*

6. Thomas Warner Smith, III, *Mechanic's Lien Priority Rights for Design Professionals*, 46 WASH. & LEE L. REV. 1035, 1039 (1989). *See also*, *Hill v. Twin Falls Salmon River Land & Water Co.*, 22 Idaho 274, 125 P. 204 (1912) (implying that generally mechanic's lien law provides lien rights to original contractors, subcontractors, laborers, and materialmen).

7. *See infra*, note 107 (listing all state statutes that do not expressly grant or are ambiguous regarding design professionals' lien rights).

8. *See infra*, note 106 (listing all state statutes that expressly grant lien rights to design professionals).

9. *See, e.g.*, Registered Design Professional Form, CITY OF BOISE PLANNING & DEVELOPMENT SERVS. (Feb. 28, 2012), http://pds.cityofboise.org/media/103544/304_RegisteredDesignPro.pdf [hereinafter Design Professional Form]. This form provides that as a prerequisite to obtaining a building permit in the City of Boise, Idaho, an applicant must designate a licensed design professional who will be "responsible for reviewing and coordinating all submittal documents prepared by consultants (typically other design professionals) for compatibility with the building design." This requirement is in addition to the requirement that only licensed design professionals can prepare the various construction drawings necessary to obtain a building permit. *Id.*

parties who contribute to the improvement of real property on construction projects.¹⁴

However, in Idaho there is one important caveat: the right of design professionals to file a mechanic's lien is not a clearly defined right.¹⁵ This lack of clarity arises because the Idaho statute is ambiguous on the rights of design professionals. Specifically, Idaho Code § 45-501 provides:

Every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of any [improvement upon land] . . . and every professional engineer or licensed surveyor . . . who prepares or furnishes designs, plans, plats, maps, specifications, drawings, surveys, estimates of cost, on-site observation or supervision, or who renders any professional service whatsoever . . . in connection with any land or building development or improvement . . . has a lien upon the same for the work or labor done or professional services or materials furnished.¹⁶

The ambiguity of §45-501 arises from the language that expressly provides lien rights to "professional engineer[s] or licensed surveyor[s]" but does not specifically mention architects.¹⁷ However, in the next clause of the statute, architects are expressly mentioned. That clause states:

[E]very contractor, subcontractor, *architect*, builder or any person having charge of any mining claim, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this chapter.¹⁸

Because the statute expressly mentions architects in one clause and leaves them out of another clause, opponents of granting lien rights to design professionals, argue that the drafters may have intended that architects be included as those who are held to be agents of the owner with respect to construction supervision, but not necessarily those who have lien rights.

Furthermore, the ambiguity in the statute is exacerbated by the fact that engineers are but one type of design professional.¹⁹ The question arises: why would the legislature expressly grant lien rights to one type of design professional but not others? Are we to assume only engi-

14. See *generally id.* at 5–11 (discussing the various parties generally entitled to mechanic's lien rights including contractors, subcontractors, material suppliers, laborers, professionals, equipment renters, and mining explorers).

15. Bastian v. Gafford, 98 Idaho 324, 325 n.1, 98 P.2d at 49 n.1 (1977).

16. IDAHO CODE ANN. § 45-501 (2010).

17. *Id.*

18. *Id.* (emphasis added).

19. See Dunham Assocs., Inc. v. Group Inv., Inc., 223 N.W.2d 376, 380 (Minn. 1974).

gue for a logical and definitive resolution of the lien rights of design professionals in Idaho.

The structure of this comment is as follows: Part I introduces the issue and gives a broad overview of the solution to the current ambiguity that exists in the Idaho statute. Part II argues that the Idaho Supreme Court should resolve the ambiguity by expressly granting lien rights to design professionals. Specifically, Part II explains that the court should look to the policy behind mechanic's liens as set forth in Idaho's and other states' case law. Further, it will analyze the language of the statute and discuss principles of statutory interpretation that support the conclusion that design professionals should be entitled to lien rights. Importantly, Part II describes a recent opinion issued by an Idaho trial court that held that design professionals are entitled to lien rights. This opinion is significant because it will likely influence the Idaho Supreme Court's decision if and when it decides the issue. Part III advocates that in the absence of an Idaho Supreme Court ruling on the issue, the Idaho legislature should proactively resolve the ambiguity in the statute by updating the statute or, in the alternative, adopting a wholly new lien that is applicable to the unique circumstances presented by design professionals. In particular, Part III gives a brief description of two potential statutory schemes that define liens applicable specifically to design professionals. Part III discusses and analyzes the potential ramifications of adopting a new lien applicable to design professionals. Part IV concludes that design professionals in Idaho should be given lien rights either by judicial or legislative action.

B. Idaho's Options

To resolve the current ambiguity in Idaho's mechanic's lien statute, Idaho has two options: (1) the Idaho Supreme Court should expressly answer the question and decide that all design professionals are entitled to mechanic's liens, or (2) in the absence of an Idaho Supreme Court ruling on the question, the Idaho Legislature should clarify the existing law or, better yet, provide a wholly updated mechanic's lien statute.

In presenting these two options, this comment shows that denying lien rights to design professionals runs contrary to the purpose and intent of Idaho's mechanic's lien statute. Further, this comment shows that all design professionals should be expressly provided lien rights in Idaho—either through judicial or legislative action—because Idaho's mechanic's lien statute is to be liberally construed in favor of lien claimants and is established to promote justice. Moreover, design professionals add value to a construction project both prior to and after construction, they provide skilled labor and materials to a construction project, their work is essentially identical to that of engineers who are themselves design professionals and are already granted lien rights under the current statute, and design professionals are essential to all building projects—indeed, without them the project often cannot be completed.

Therefore, the only logical solution for Idaho is to grant design professionals the right to claim mechanic's liens.

II. OPTION #1 – THE IDAHO SUPREME COURT SHOULD EXPRESSLY GRANT MECHANIC'S LIEN RIGHTS TO ALL DESIGN PROFESSIONALS

A. Overview

The Idaho Supreme Court should grant design professionals mechanic's lien rights for several reasons that are illustrated in Idaho case law, other states' case law, and as a matter of statutory interpretation. Specifically, Idaho case law provides that the mechanic's lien statute is to be liberally construed in favor of those performing labor or professional services on a project.²³ The statute is also to be interpreted in a manner that will "promote justice" in favor of the lien claimant.²⁴ Further, as a matter of statutory interpretation, the Idaho statute already provides mechanic's lien rights to design professionals because the statute expressly grants lien rights to engineers; other design professionals' services are essentially the same as the services an engineer performs on a construction project.²⁵ In addition, the statute grants lien rights to "[e]very person *performing labor upon, or furnishing materials to be used* in the construction . . . of any . . . building."²⁶ Certainly, the labor design professionals perform to create construction drawings, and the construction drawings themselves, are materials that are "to be used" in the construction of a building. Moreover, in resolving this issue the Idaho Supreme Court will likely look to Idaho courts that have already answered the question. One such court has analyzed the issue and has determined that design professionals, specifically architects, are entitled to lien rights. Finally, not only does Idaho case law lead to that conclusion, but other states' case law also provides ample evidence that design professionals should be granted lien rights.

23. See *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942 (D. Idaho 1913) (noting that mechanic's liens are to be construed liberally); *Franklin Bldg. Supply Co. v. Sumpter*, 139 Idaho 846, 850, 87 P.3d 955, 955–56 (2004) (noting that the laws regarding mechanic's liens are liberally construed in favor of the person who performs labor upon or furnishes materials to be used in construction).

24. See *Fairfax v. Ramirez*, 133 Idaho 72, 982 P.2d 375 (1999); *Chief Indus., Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978); *Boone v. P & B Logging Co.*, 88 Idaho 111, 397 P.2d 31 (1964) (noting that mechanic's liens are meant to "promote justice"); see also *Moore-Mansfield Constr. Co. v. Indianapolis N. C. & T. R. Co.*, 101 N.E. 296, 302 (Ind. 1913) ("The mechanic's lien laws of America, in general, reveal the underlying motive of justice and equity in dedicating, primarily, buildings and the land on which they are erected to the payment of the labor and materials incorporated, and which have given to them an increased value. The purpose is to promote justice and honesty, and to prevent the inequity of an owner enjoying the fruits of the labor and materials furnished by others, without recompense").

25. See *Dunham Assocs., Inc. v. Group Inv., Inc.*, 223 N.W.2d 376 (Minn. 1974).

26. IDAHO CODE ANN. § 45-501 (2010) (emphasis added).

B. Rationale that Supports Granting Lien Rights to Design Professionals

Idaho case law is rife with language that justifies the grant of mechanic's lien rights to design professionals. Included in the justifications is the rationale oft repeated by the Idaho Supreme Court that I.C. §45-501 is to be "liberally construed" in favor of those who "[perform] labor upon or furnish material to be used in construction of a building."²⁷ The Idaho Supreme Court has also stated that the statute is to be liberally construed "with a view to effect their objects and promote justice."²⁸ Furthermore, the purpose of the statute is "remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to the value of the property of another by their materials or labor."²⁹ Each of these justifications deserves a closer look.

The Idaho Supreme Court has held that I.C. § 45-501 is to be liberally construed in favor of those performing labor or furnishing materials to be used in the construction of a building.³⁰ By definition, the term "liberal" as used in this context implies that the statute is not to be literally or strictly interpreted.³¹ Rather, the statute should be viewed broadly and applied generously. Given this standard, certain questions arise. Specifically, what constitutes "labor" for purposes of mechanic's lien rights, and what exactly is meant by "materials to be used" in construction?

Traditionally, labor in the construction context has meant actual physical labor that was performed upon the building itself—hammering a nail, setting a form, finishing concrete, laying a brick, painting a wall. However, Idaho's statute does not contain any restriction that limits the right to a lien only to physical labor. On the contrary, the statute expressly recognizes lien rights for "professional services . . . furnished."³² However, the term "professional services" in the context of §45-501 only refers to the services of a professional engineer or licensed surveyor.³³ Nevertheless, the important point is that a lien can be claimed for non-

27. *Franklin Bldg. Supply Co.*, 139 Idaho at 850, 87 P.3d at 959; *see generally Chief Indust., Inc.*, 99 Idaho at 682, 587 P.2d at 823; *Pierson v. Sewell*, 97 Idaho 38, 539 P.2d 590 (1975); *Durfee v. Parker*, 90 Idaho 118, 410 P.2d 962 (1965); *Boone*, 88 Idaho at 111, 397 P.2d at 31; *Dybvig v. Willis*, 59 Idaho 160, 82 P.2d 95 (1938); *Poynter v. Fargo*, 48 Idaho 271, 281 P. 1111 (1929); *Boise Payette Lumber Co. v. Sharp*, 45 Idaho 611, 264 P. 665; *Armitage v. Bernheim*, 32 Idaho 594, 187 P. 938 (1919); *Phillips v. Salmon River Mining & Dev. Co.*, 9 Idaho 149, 72 P. 886 (1903) (all noting that the mechanic's lien statute is to be liberally construed).

28. *Metropolitan Life Ins. Co. v. First Sec. Bank of Idaho*, 94 Idaho 489, 493, 491 P.2d 1261, 1265 (1971).

29. *Baker v. Boren*, 129 Idaho 885, 895, 934 P.2d 951, 961 (1997).

30. *Franklin Bldg. Supply*, 139 Idaho at 850, 87 P.3d at 959.

31. *Liberal*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/liberal> (last visited Sept. 21, 2012) (defining as "not literal or strict").

32. IDAHO CODE ANN § 45-501 (2010).

33. *Id.*

Moreover, granting mechanic's lien rights to design professionals is in accord with the Idaho Supreme Court's rationale that Idaho's mechanic's lien statute is to be liberally construed "with a view to effect [its] objects and *promote justice*."³⁹ Granting lien rights to design professionals promotes justice because the statute already expressly grants lien rights to engineers who are simply one form of a design professional.⁴⁰ In fact, engineers perform essentially the same work as architects for purposes of a mechanic's lien. Other states have recognized this fact when analyzing the lien rights of design professionals. For example, the Minnesota Supreme Court stated:

[W]e see no rational distinction between the services of an architect who prepares plans and specifications for a building and the services of an engineer who prepares structural, mechanical, and electrical plans for a building. If one is entitled to a lien, it would seem that the other is also.⁴¹

Indeed, typically a full set of drawings for the construction of a building contains drawings created by an architect, a structural engineer, a mechanical engineer, an electrical engineer, a civil engineer, a landscape architect, and a surveyor. To provide mechanic's lien rights to all the engineers involved in the creation of drawings but deny the same lien rights to the other professionals who created drawings that are a part of the same set of construction documents is not logical. Idaho courts should realize that such a conclusion would run counter to the notion of promoting justice in favor of those who have improved the property.

Given Idaho's strong policy language, it seems a design professional who provides construction drawings for a building has performed "labor" and furnished "materials to be used in the construction of a building." Consequently, design professionals should have mechanic's lien rights for the services they provide.

C. An Idaho District Court's Recent Analysis of the Issue

In addition to Idaho's rationales behind the mechanic's lien statute, an Idaho district court has recently analyzed the issue in favor of design

The nature of the work done by an architect, e.g., plans and specifications which are drawn prior to the first work done on the land, is work which is not seen on the land itself. However, it leads to the work which is done on the land. *These services are necessary before the actual physical construction upon the land can take place, and without which such construction would not occur.* (emphasis added).

39. Metropolitan Life Ins. Co. v. First Sec. Bank of Idaho, 94 Idaho 489, 493, 491 P.2d 1261, 1265 (1971); *see also* Utah Implement-Vehicle Co. v. Bowman, 209 F. 942 (D. Idaho 1913) (noting that mechanic's liens must be construed liberally with a view to effecting their object and doing substantial justice); Fairfax v. Ramirez, 133 Idaho 72, 982 P.2d 375 (1999) (noting that mechanic's liens are to be construed to promote justice).

40. IDAHO CODE ANN. § 45-501 (2010) (providing that "every professional engineer . . . has a lien for . . . professional services . . . furnished").

41. Dunham Assocs., Inc. v. Group Inv., Inc., 223 N.W.2d 376, 380 (Minn. 1974).

ments with Eza's arguments by stating that Eza argued that an architect's work is in fact "labor" for the purpose of the mechanic's lien statute.⁵¹

The court's analysis of the actual issue before it, namely "whether a firm of architects has a right to a statutory mechanic's lien where the firm's design is actually incorporated into a building," begins by noting that the question is unresolved in Idaho.⁵² Given that the question is unresolved, the court recognized that it must interpret the language of § 45-501.⁵³

The court then noted some general principles of statutory interpretation. To begin, the court quoted an important Idaho case regarding statutory interpretation, which states:

When interpreting a statute, this Court must strive to give force and effect to the legislature's intent in passing the statute. It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction.⁵⁴

The court continued by discussing Idaho case law on interpreting ambiguous statutes. The court noted that a statute is ambiguous when it is susceptible to two reasonable interpretations.⁵⁵ Further, the court stated that it is appropriate for a court to consider legislative history and other factors to determine the meaning of an ambiguous statute.⁵⁶ Finally, the court recognized that it can consider other factors such as "the exact language, the context of the language, the reasonableness of a proposed interpretation, and the policy reasons for the statute."⁵⁷

The court then turned to an application of these statutory interpretation principles. After concluding that § 45-501 is ambiguous because it can reasonably be interpreted in either way suggested by the parties,

in the provision of the statute by which a lien is given in certain cases to the laborer and the material man.

The case further illustrates that this reasoning is premised on the idea that

The whole theory of a lien for labor and materials rests upon the basis, that such labor and materials have entered into and contributed to the production or equipment of the thing upon which the lien is impressed . . . can it be said that materials furnished for and towards building a ship, when no part of them enters into or becomes a part of the ship?

51. *Eza*, No. CV-2008-0000580-C at 7.

52. *Id.* at 2, 6. (citing *Bastian v. Gafford*, 98 Idaho 324, 325, 563 P.2d 48 49 (1997)).

53. *Id.*

54. *Id.*; see also *Wheeler v. Idaho Dept. of Health & Welfare*, 147 Idaho 257, 263, 207 P.3d 988, 994 (2009).

55. *Id.* at 7; see also *Rath Co. v. Kit Mfg. Co.*, 137 Idaho 330, 335, 48 P.3d 659, 664 (2002).

56. *Id.*; see also *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).

57. *Id.*

The court then turned its attention to the term “labor” as it is found in the text of § 45-501. Specifically, the court noted that § 45-501 does not actually define “labor,” and Idaho case law does not provide much guidance on what is or is not considered labor under the statute.⁶⁷ Ultimately, the court concluded that decisions regarding whether architect services constitute labor under various state mechanic’s lien laws can be found on both sides of the issue.⁶⁸

However, before reaching its conclusion on the issue, the court noted the principle that when determining lien rights under § 45-501, the court “must construe the statute liberally.”⁶⁹ Further, the court stated that it must consider the policy behind § 45-501.⁷⁰ The Idaho Supreme Court addressed the policy behind the statute when it stated, “This statute is evidently based on the theory that whoever contributes labor or material whereby the real property of another is enhanced in value shall be entitled to a lien upon the whole property in the sum due.”⁷¹ After noting these important principles, the court turned to its conclusion on the issue:

In the Court’s view, Idaho Code §45-501 should be interpreted so that architects, whose plans are actually incorporated in the building, have performed “labor” as that term is used in that statute, and have the right to a mechanic’s lien. *While it is true that the architect does not perform physical labor upon the building, the plans and specifications of the architect are no less incorporated into the building, and the owner’s property is thereby improved and enhanced.*⁷²

After making this conclusion, the court was quick to point out that its interpretation of the statute does not make the 1971 amendment, which extended lien rights to engineers and surveyors, meaningless.⁷³ Indeed, the amendment was not rendered moot because it “provided engineers and surveyors the right to lien for professional services related to improvements to the land, as opposed to the construction, alteration or repair of a building or structure.”⁷⁴ Thus, the court’s decision essen-

67. *Id.* (citing *Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 132 Idaho 754, 763, 979 P.2d 627, 636 (1999)). The *Great Plains* court found that a “[c]arrier who provided general liability and equipment insurance for the general contractor for construction of natural gas pipeline did not have mechanic’s lien for unpaid insurance premiums, as the providing of such insurance was neither ‘labor’ nor ‘material’ consumed in the process of structurally improving real property.” *Id.*

68. *Id.*

69. *Id.* (citing *Phillips v. Salmon River Mining & Dev. Co.*, 9 Idaho 149, 151, 72 P. 886, 886 (1903)). The *Salmon River Mining* court stated, “All provisions of our mechanic’s and laborer’s lien law, as well as all other statutes, must be liberally construed, with a view to effect their objects and promote justice.” *Id.*

70. *Id.*

71. *Id.* at 10 (citing *Steltz v. Armory Co.*, 15 Idaho 551, 554, 99 P. 98, 101 (1908)).

72. *Id.* (emphasis added).

73. *Id.*

74. *Id.*

ic's lien statute since its inception in 1893.⁷⁹ In particular, the court again highlighted the 1971 amendment to § 45-501 of the statute, which expressly provided lien rights to engineers.⁸⁰ In addition, the court noted that the 1971 legislature also amended § 45-506 with new language to address priority issues between an engineer and a mortgagee as follows:

The liens provided for in this chapter are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials *or professional services* were commenced to be furnished.⁸¹

After noting these amendments, the court observed that “frequently an architect will have devoted substantial efforts prior to the commencement of any construction” and then stated that “giving priority to an intervening mortgagee over an architect who provided architectural services prior to construction activities would unfairly deprive an architect of the protection intended by the lien statutes.”⁸² This language is significant not just for its implications with respect to priority (as the court used it), but it illustrates the court’s acknowledgement that architects are indeed entitled to lien rights and that the court is seeking to “promote justice” in favor of architects in the mechanic’s lien context.⁸³ Thus, assuming the Idaho Supreme Court would rely on this or similar analysis, the logical extension of this discussion is simply that leaving design professionals without recourse to the protection provided by a mechanic’s lien would not be promoting justice.

The district court’s ultimate resolution of the question before it was that an architect’s lien relates back and thus has priority from the date the architectural services were first provided.⁸⁴ Importantly, before reaching its conclusion, the court stated, “[t]he significant work of an architect, much like the work of the engineer, is almost always in the planning and development stages of a project, prior to any construction activities.”⁸⁵ This comment is significant for our purposes because it both recognizes the reality that design professionals’ work is functionally equivalent for purposes of mechanic’s lien, no matter if the professional is an architect, engineer, or otherwise, and it illustrates the court’s recognition and respect for the services of an architect in relation to a construction project. Again, were the Idaho Supreme Court to rely

79. *Id.* at 3.

80. *Id.* at 5.

81. *Id.* at 6 (emphasis added).

82. *Id.*

83. See *Fairfax v. Ramirez*, 133 Idaho 72, 982 P.2d 375 (1999); see also *Dunham Assocs., Inc. v. Group Inv., Inc.*, 223 N.W.2d 376, 380 (Minn. 1974). While the court’s analysis here is applicable specifically to architects, it is important to reiterate that the services of an architect, engineer, or other design professional are functionally equivalent.

84. *In re Tamarack Resort Foreclosure and Related Proceedings*, 10 (Idaho 4th Dist., Sept. 8, 2010).

85. *Id.*

date of the breach of the contract?⁹⁵ Before addressing the issue, the court noted various rationales behind the mechanic's lien statute.⁹⁶ Specifically, the court stated, "the provisions of our lien laws must be liberally construed with a view to effect their objects and promote justice."⁹⁷ After noting this, the court addressed the contractor's argument that he was entitled to a lien for his drawing of plans and specifications for the project.⁹⁸ In answering the question, the court stated that it was impossible to determine whether the trial court had allowed the contractor any specific amount of the value of the lien for the drawing of plans and specifications.⁹⁹ However, the court then analyzed the contractor's claim that he was entitled to a lien for "planning and directing" the work on the home.¹⁰⁰ Importantly, the court answered this claim in the affirmative, stating, "We conclude that [the contractor] is entitled to a lien . . . for services in planning and directing the work of repairing and reconstructing the appellant's residence."¹⁰¹ Although this language does not answer the question of lien rights for design professionals, it does provide an example of where the Idaho Supreme Court recognized the value of planning work. Given this reasoning, it does not seem a stretch for the court to answer the question and fully extend lien rights to the actual designing and drawing of plans and specifications, which are essentially a form of planning.

Moreover, the resolution of the question of whether design professionals have lien rights in Idaho may depend on whether courts decide that design professionals' preparation of construction plans and specifications constitutes "furnishing materials to be used in . . . construction."¹⁰² The answer to this question seems apparent; any building or structure of substance will be constructed in accordance with a set of construction drawings and specifications prepared by multiple licensed design professionals. Furthermore, the materials furnished—the drawings and specifications—for use in construction are arguably not only the drawings themselves, but the skill and expertise the design professionals used to prepare the drawings. Thus, it seems illogical to conclude that a materialman, who provides actual physical materials to a construction site, can claim a lien while the architect who provides the actual physical drawings that specify how to incorporate the materialman's materials into the project cannot claim a lien.

In addition, a building does not usually gain notoriety for the contractors, subcontractors, laborers, and materialmen who contributed to the it; rather, buildings are often known for the architect or other pro-

95. *Id.* at 98.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Franklin Bldg. Supply Co. v. Sumpster*, 139 Idaho 846, 87 P.3d 955 (2004).

torily entitled to mechanic's lien rights in some form.¹⁰⁶ The remaining states have generally-worded mechanic's lien statutes that create ambi-

106. See ALASKA STAT. § 34.35.050 (2012) (providing mechanic's lien rights to a person who "performs services under a contract with the owner or the agent of the owner in connection with the preparation of plans, surveys, or architectural or engineering plans or drawings for the construction, alteration, or repair of a building or improvement, whether or not actually implemented on that property"); ARIZ. REV. STAT. ANN. § 33-981 (2011) (granting mechanic's lien rights to "every person who labors or furnishes *professional services*") (emphasis added); ARK. CODE ANN. § 18-44-105 (2012) (providing mechanic's lien rights to "[e]very architect, engineer, surveyor . . . who shall do or perform any architectural, engineering, surveying . . . services"); CAL. CIV. CODE §§ 8300-8319 (West 2012) (for discussion of California's "Design Professional Lien" see Section III.C.ii., *infra*); COLO. REV. STAT. § 38-22-101 (2011) (providing lien rights to "architects, engineers, draftsmen, and artisans who have furnished designs, plans, plats, maps, specifications, drawings, estimates of cost, surveys, or superintendence, or who have rendered other professional or skilled service"); DEL. CODE ANN. tit. 25, § 2702 (2011) (providing lien rights for "the services rendered and labor performed and materials furnished by architects"); FLA. STAT. ANN. § 713.03 (2012) (providing mechanic's lien rights to "[a]ny person who performs services as architect, landscape architect, interior designer, engineer, or surveyor and mapper"); GA. CODE ANN. § 44-14-361 (2011) (providing mechanic's lien rights to "[a]ll registered architects furnishing plans, drawings, designs, or other architectural services on or with respect to any real estate" and "[a]ll registered land surveyors and registered professional engineers performing or furnishing services on or with respect to any real estate"); HAW. REV. STAT. §§ 507-41-42 (2011) (providing mechanic's lien rights for "professional services rendered in furnishing the plans for or in the supervision of the improvement"); 770 ILL. COMP. STAT. 60/1 (2006) (providing mechanic's lien rights to every "architect, structural engineer, professional engineer, land surveyor or property manager"); KY. REV. STAT. ANN. § 376.075 (2012) (providing mechanic's lien rights to "[a]ny professional engineer, licensed architect, licensed landscape architect, real estate broker, or professional land surveyor who performs professional services"); LA. REV. STAT. ANN. § 9:4801(5) (West Supp. 1988) (granting mechanic's lien rights to "[r]egistered or certified surveyors or engineers, or licensed architects, or their professional subconsultants"); MASS. GEN. LAWS ANN. ch. 254, § 2C (2010) (granting mechanic's lien rights to "[a] design professional entering into a written contract with the owner of any interest in real property . . . for the provision of professional services"); MD. REAL PROPERTY CODE ANN. § 9-102 (1988) (providing mechanic's lien rights to "the provision of building or landscape architectural services, engineering services, land surveying services, or interior design services that pertain to interior construction and are provided by a certified interior designer." Interestingly, Maryland and Florida are the only states that expressly provides lien rights to interior designers); ME. REV. STAT. ANN. tit. 10, § 3251 (2011) (providing mechanic's lien rights to whoever "performs services as a surveyor, an architect or an engineer"); MICH. COMP. LAWS ANN. §§ 570.1104, 1107 (2012) (providing mechanic's lien rights to those providing "surveying, engineering and architectural planning" services); MINN. STAT. ANN. § 514.01 (2011) (granting mechanic's lien rights to persons who perform "engineering or land surveying services"); MISS. CODE ANN. § 85-7-131 (2012) (providing lien rights to "architects, engineers, surveyors, laborers, rental or lease equipment suppliers and materialmen and/or contractors who rendered services and constructed the improvements shall have a lien therefor"); MO. ANN. STAT. § 429.015 (2011) (provides lien rights to architects, engineers, land surveyors, and landscape architects); MONT. CODE ANN. §§ 71-3-522-523 (2007) (granting mechanic's lien rights for "preparation of plans, surveys, or architectural or engineering plans or drawings"); NEB. REV. STAT. § 52-130 (2012) (Provides mechanic's lien rights for "[p]reparation of plans, surveys, or architectural or engineering plans or drawings for any change in the physical condition of land or structures"); NEV. REV. STAT. § 108.2214 (2011) (provides lien rights to "any person who performs services as an architect [or] engineer"); N.J. STAT. ANN. § 2A:44A-2 (1995) (providing mechanic's lien rights to "A licensed architect, engineer or land surveyor or certified landscape architect who is not a salaried employee of the contractor or the owner, performing professional services related to the improvement of property in direct contract with the property owner shall be considered a "contractor" for the purposes of this act"); N.Y.

guity regarding lien rights for some or all design professionals.¹⁰⁷ However, because the type of work performed by design professionals is not

LIEN LAW §§ 2, 3 (Consol. 2012) (providing mechanic's lien rights to the "drawing by any architect or engineer or surveyor, of any plans or specifications or survey"); N.C. GEN. STAT. § 44A-8 (2012) (granting mechanic's lien rights to persons who perform "professional design or surveying services"); OR. REV. STAT. § 87.010(5) (2009) (providing mechanic's lien rights to "[a]n architect, landscape architect, land surveyor or registered engineer who, at the request of the owner or an agent of the owner, prepares plans, drawings or specifications"); 49 PA. CONS. STAT. ANN. § 1201 (2012) (those entitled to mechanic's lien rights "includes an architect or engineer who, by contract with the owner, express or implied, in addition to the preparation of drawings, specifications"); R.I. GEN. LAWS § 34-28-1, 7 (2012) (providing mechanic's lien rights to architects and engineers); S.C. CODE ANN. § 29-5-10 (2011) (providing mechanic's lien rights to any person to who performs labor, the definition of labor includes, "the preparation of plans, specifications, and design drawings and the work of making the real estate suitable as a site for the building or structure."); TENN. CODE ANN. § 66-11-102(c)(1) (Supp. 1988) (providing mechanic's lien rights to "any person licensed to practice architecture or engineering"); TEX. PROP. CODE ANN. § 53.021 (2012) (granting mechanic's lien rights to "[a]n architect, engineer, or surveyor who prepares a plan or plat . . . in connection with the actual or proposed design, construction, or repair of improvements on real property . . . lien on the property"); UTAH CODE ANN. §38-1-2(13). (2010) (for discussion of Utah's "Preconstruction Services Lien" see Section III.C.i., *infra*); WASH. REV. CODE ANN. §§ 60.04.011, 021 (2012) (granting mechanic's lien rights to architects and engineers); WISC. STAT. ANN. § 779.01 (2011) (provides lien rights to "architect[s] [and] professional engineer[s]"); WYO. STAT. §§ 29-1-201, 29-2-101 (1981) (provides mechanic's lien rights to architects, professional engineers, and surveyors).

107. See ALA. CODE § 35-11-210 (1975) (providing mechanic's lien rights to "[e]very mechanic, person, firm, or corporation who shall do or perform any work, or labor upon, or furnish any material, fixture, engine, boiler, waste disposal services and equipment, or machinery for any building or improvement on land"); CONN. GEN. STAT. ANN. § 49-33(a) (West 2011) (providing mechanic's lien rights to any "materials furnished or services rendered in the construction, raising, removal or repairs of any building or any of its appurtenances or in the improvement of any lot or in the site development or subdivision of any plot of land"); IDAHO CODE § 45-501 (2011) (granting mechanic's lien rights to professional engineers and licensed surveyors but ambiguous as to other design professionals); IND. CODE § 32-28-3-1 (1999) (providing mechanic's lien rights to "[a] contractor, a subcontractor, a mechanic, a lessor leasing construction and other equipment and tools, whether or not an operator is also provided by the lessor, a journeyman, a laborer, or any other person performing labor or furnishing materials or machinery, including the leasing of equipment or tools"); IOWA CODE ANN. § 572.2 (West 2011) (providing mechanic's lien rights to "[e]very person who shall furnish any material or labor for, or perform any labor upon, any building or land for improvement, alteration, or repair thereof"); KAN. STAT. ANN. § 60-1101 (2011) (providing mechanic's lien rights to "[a]ny person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property"); N.H. REV. STAT. ANN. § 447:2 (2012) (providing mechanic's lien rights to "any person [who] shall . . . perform labor or furnish materials . . . for erecting or repairing a house or other building or appurtenances"); N.M. STAT. ANN. § 48-2-2 (2012) (providing mechanic's lien rights to "[e]very person performing labor upon, providing or hauling equipment, tools or machinery for or furnishing materials to be used in . . . construction"); N.D. CENT. CODE § 35-27-02 (2012) (providing mechanic's lien rights to "[a]ny person who improves real estate"); OHIO REV. CODE ANN. § 1311.02 (LexisNexis 2012) (providing mechanic's lien rights to "[e]very person who performs work or labor upon or furnishes material in furtherance of any improvement"); OKLA. STAT. ANN. tit. 42, § 141 (West 2012) (granting mechanic's lien rights to any person who "perform[s] labor, furnish[es] material or lease[s] or rent[s] equipment used on . . . land"); S.D. CODIFIED LAWS ANN. § 44-9-1 (2011) (granting mechanic's lien rights to "whoever shall . . . furnish skill, labor, [or] ser-

visible like actual physical construction, each state differs in their statutory approach to the issue. Moreover, in many states, the specific facts of each case will determine whether a design professional will be entitled to lien rights. Indeed, an American Law Reports article on the subject noted various factors courts consider when determining the applicability of mechanic's lien statutes to design professionals, namely: "whether the architect merely drew plans and specifications, drew plans and supervised the resultant work, or performed other miscellaneous tasks . . . [and] the use or nonuse of an architect's plans in construction."¹⁰⁸ An examination of other states' approaches to solving the question of design professionals' lien rights will provide examples for Idaho to model.

To begin, in *Dunham Associates, Inc. v. Group Investments, Inc.*, a noteworthy case out of Minnesota, the Minnesota Supreme Court provided a persuasive argument for Idaho to grant mechanic's lien rights to design professionals.¹⁰⁹ The case involved an engineering firm that was hired "to prepare drawings, reports, and supervise the construction" of an apartment building.¹¹⁰ The firm also "undertook to prepare mechanical and electrical plans for the building."¹¹¹ After the engineer prepared the drawings and other items provided for under the contract, "[t]he building was never constructed nor were there any visual improvements on the land."¹¹² Given those facts, it was necessary for the court to interpret Minnesota's mechanic's lien statute, which provided in pertinent part, "Whoever contributes to the improvement of real estate by performing labor, or furnishing skill . . . shall have a lien upon the improvement, and upon the land on which it is situated."¹¹³ Accordingly, the question before the court was, "[c]an an engineer who prepares engineering structural plans and mechanical and electrical plans for a proposed building have a lien against the land on which the building was to be erected if it is never built or the plans are not used for the purpose of constructing the building?"¹¹⁴ The court's analysis of the question begins with language that is critical to the interpretation of Idaho's mechanic's lien statute. Specifically, the court stated:

We see no rational distinction between the services of an architect who prepares plans and specifications for a building and the

vices"); VT. STAT. ANN. tit. 9, § 1921 (2012) (providing mechanic's lien rights "for erecting, repairing, moving or altering improvements to real property or for furnishing labor or material therefor"); VA. CODE ANN. § 43-3 (2012) (providing mechanic's lien rights to "[a]ll persons performing labor or furnishing materials . . . including the reasonable rental or use value of equipment, for the construction, removal, repair or improvement of any building or structure"); W. VA. CODE ANN. § 38-2-1 (LexisNexis 2011) (granting mechanic's lien rights to "[e]very person, firm or corporation who erects, builds, constructs, alters, removes or repairs any building").

108. Simmons, *supra* note 22.

109. *Dunham Assocs., Inc. v. Group Inv., Inc.*, 223 N.W.2d 376 (Minn. 1974).

110. *Id.* at 378.

111. *Id.*

112. *Id.* at 379.

113. *Id.*

114. *Id.* at 379–80.

preme Court or the Idaho Legislature were to expressly grant lien rights to design professionals, they would undoubtedly have to deal with the issue of what to do when a design professional's drawings and specifications are never utilized because the project is never built. When confronted with this scenario, Idaho could model its approach after Minnesota's decision in *Dunham* and hold that design professionals provide constructive improvements to property prior to actual physical construction and thus should be entitled to lien rights.¹²⁰

The principles articulated by the Minnesota court were similarly discussed in a case out of Indiana.¹²¹ In that case, an architect brought suit to foreclose on a mechanic's lien for labor, services, materials, and supplies furnished by him in preparing plans and specifications, and supervising the remodeling of a Y.M.C.A. building into a hotel.¹²² The specific question before the court was "whether an architect is entitled to a mechanic's lien for his services in the preparation of plans and specifications, and for his services in supervising the construction or repair of a building."¹²³ Interestingly, the court noted that the question was one of first impression at that time in Indiana. This is significant because, should the issue come before the Idaho Supreme Court, it could look to the Indiana court's analysis as an example of how to deal with the novel issue. The Indiana mechanic's lien statute in effect at the time of the case provided lien rights for "contractors, subcontractors, mechanics, journeymen, laborers and all persons performing labor in the construction or alteration of any building."¹²⁴ The defendant in the case argued that the plaintiff architect did not come within the provisions of the statute because he was not a "laborer."¹²⁵ In refuting the defendant's position and answering the question before it, the court cited a Virginia case that stated, "We are unable to draw the distinction between one who puts his labor into plans for the erection of a building and . . . one who in the role of a bricklayer or carpenter actually performs a manual service."¹²⁶ Furthermore, the court concluded its opinion by stating:

The labor and skill of an architect in drawing plans and specifications . . . are a part of the expense of construction, and as an

120. See also *Cubit Corp. v. Hausler*, 845 P.2d 125 (N.M. 1992) (Plaintiff architect sought to foreclose its mechanic's lien for planning and design services relating to real estate which was to be part of a planned community development. After examining several cases, the court declared that because architects relied upon their entitlement to a lien (per the statute) against property upon which they had contributed labor, the lien statutes should not be given a construction so narrow as to defeat their intent and purpose. To do so, cautioned the court, would undermine the purpose of insuring payment to those who rendered services toward a project that had been abandoned through no fault of the claimant. This case is only persuasive if we assume Idaho's statute grants design professionals lien rights rather than just to engineers—as argued in *Dunham*).

121. *Beeson v. Overpeck*, 44 N.E.2d 195 (1942).

122. *Id.* at 196.

123. *Id.*

124. *Id.*

125. *Id.* at 197.

126. *Id.* (quoting *Cain v. Rea*, 166 S.E. 478 (Va. 1932)).

courts would do well to recognize the cogent conclusions reached by the Ohio court.

Looking more locally,¹³² the Washington Supreme Court addressed the issue of design professional lien rights when construing former Washington Revised Code § 1129, which was substantially similar to Idaho Code § 45-501.¹³³ There, the court addressed the issue of whether an architect had a lien right for preparing plans and specifications and concluded that “the great weight of authority, as well as the better reason, appears to support the view that the lien exists where the language of the statute is general.”¹³⁴ The court also stated, “Had the legislature intended it not to be sufficiently broad to include the labor of the architect in preparing plans and specifications . . . it would doubtless have made use of more restrictive terms.”¹³⁵ Opponents of granting lien rights to design professionals in Idaho may well cite this case to argue that Idaho’s statute is not as general in nature as the Washington Court described. Rather, it could be argued that because the statute mentions architects in one portion of the statute but leaves them out of another portion that mentions engineers, the Idaho legislature intended to not include all forms of design professionals.

Nevertheless, the Washington case is valuable to the question in Idaho because it provides language that supports the grant of lien rights to design professionals. Specifically, the court cited cases that support the notion that:

[T]he labor and skill of an architect . . . are a part of the expense of erecting a building, and not unfrequently [sic] an indispensable and highly valuable part. As an item of such expense, they enter into and help to form the value of the building, and we can conceive of no sound reason in the nature of things why the person who performs such labor, and furnishes such skill, should not receive the same protection as the carpenter, the mason, the lumber dealer, or the hardware merchant.¹³⁶

This language recognizes several points that have been discussed in this comment. Namely that design professionals provide indispensable and valuable services to construction projects. Further, they provide skilled labor much the same as contractors, subcontractors, and labor-

132. In resolving the ambiguity in Idaho’s statute, it seems most logical for the Idaho Supreme Court to look to surrounding states in the region to see how they have dealt with similar issues. Alternatively, if the Idaho Legislature updates the statute, the surrounding states can serve as models for Idaho to follow. Looking to surrounding states rather than eastern or mid-western states will give Idaho design professionals a measure of security in knowing what to expect when they contract for work in surrounding states because they will not have to significantly modify their dealings as it relates to their mechanic’s lien rights when doing work in the region.

133. *Gould v. McCormick*, 134 P. 676 (Wash. 1913).

134. *Id.* at 679.

135. *Id.*

136. *Id.* at 680.

ers. Consequently, Idaho would do well to follow the analysis of Washington and determine that there is “no sound reason” why design professionals should not receive the same lien rights as the traditional mechanic’s lien holders.

Continuing to look regionally, Oregon has also decided cases that lend strong evidence to support the conclusion of granting lien rights to design professionals. In one case, the Oregon Supreme Court held that a contractor was entitled to a mechanic's lien for excavation of a basement in preparation for building a home.¹³⁷ At first glance, the opinion does not seem to shed any light on the question of design professionals’ lien rights. However, in reaching its conclusion, the court reasoned that “all the component undertakings in the construction of a finished building” should be treated as lienable work.¹³⁸ The logical application of this reasoning is that design professionals’ drawings are “components” that are used in the construction of an improvement.

In another case, the Oregon Supreme Court held that a contractor who contributed to clearing land in preparation for a development was entitled to a mechanic's lien.¹³⁹ There, the court reasoned that the contractor's work was “a necessary step in the undertaking of an improvement.”¹⁴⁰ Again, the logical application is that design professionals’ drawings are a necessary step in the construction of an improvement to real property.

Given that the majority of states have already granted lien rights to design professionals and other states’ case law supports interpreting lien rights in favor of design professionals, Idaho should follow the logical trend and also grant lien rights to design professionals. In support of this conclusion, the Idaho Supreme Court should utilize the analysis and reasoning of the cases just set forth as well as look to other states for examples of how courts resolve the issue.

F. Conclusion—Idaho Supreme Court Should Resolve the Issue

The Idaho Supreme Court should seek to resolve the ambiguity in the Idaho statute by expressly granting mechanic’s lien rights to design professionals. The rationale behind mechanic’s liens as well as the reasoning that the statute should be construed in favor of lien rights so as to promote justice both lead to the conclusion that design professionals should be entitled to lien rights. Furthermore, an Idaho trial court has already resolved the issue in favor of design professionals—the Idaho Supreme Court would do well to follow the trial court’s analysis and conclusion. Further, Idaho case law, while not directly on point, already supports the conclusion. Finally, the court should look to surrounding

137. *Robison v. Thatcher*, 451 P.2d 863 (Or. 1969).

138. *Id.* at 864.

139. *Abajian v. Hill*, 601 P.2d 837 (Or. Ct. App. 1979).

140. *Id.* at 839.

states for examples and analysis of why design professionals should be entitled to lien rights.

III. OPTION #2 – PROVIDE LIEN RIGHTS TO DESIGN PROFESSIONALS BY MODIFYING IDAHO’S EXISTING STATUTE OR INTRODUCING A NEW CATEGORY OF LIEN

A. Overview

If the Idaho Supreme Court does not address the issue, or if it addresses the question and decides that design professionals are not entitled to mechanic’s lien rights, then the Idaho legislature should remedy the issue by modifying the existing mechanic’s lien statute to expressly provide architects and other design professionals with mechanic’s lien rights. By revising the statute, the legislature would be following the majority of states who have either included design professionals in their mechanic’s lien statute or have actually created entirely new liens that specifically address the unique situation presented by design professionals.¹⁴¹ Essentially, to provide design professionals with lien rights, the Idaho Legislature could either update the existing statutory language to expressly provide all design professionals mechanic's lien rights, or it could create an entirely new type of lien such as a "design professional" lien or "pre-construction" lien.

B. Update Current Statute to Expressly Provide Lien Rights to Design Professionals

An easy solution to the question would be to simply add design professionals to those already entitled to lien rights under the current statute. Perhaps the better solution would be to replace the terms “professional engineer or licensed surveyor” as contained in the statute with the term “design professional.”¹⁴² However, absent a definition of exactly what a design professional is, doing so would create an ambiguity in the statute. Thus, rather than using the term “design professional,” the least ambiguous solution would be to insert the words, “architect, professional engineer, landscape architect, planner, or licensed surveyor” in place of “professional engineer or licensed surveyor.” Making this change would resolve the current ambiguity in the statute but would create issues that do not exist with the current statute. Specifically, providing lien rights to design professionals would create the question of priority with respect to liens for design professionals’ services provided before construction begins.¹⁴³

141. See *supra*, note 106 (listing all state statutes that expressly grant lien rights to design professionals).

142. IDAHO CODE ANN. § 45-501 (2003).

143. See D. Scott DeGraffenried, *Preconstruction Service Liens: A New Chapter in Utah’s Mechanics’ Lien Law*, 24 UTAH BAR JOURNAL, No. 6, Nov/Dec 2011, available at http://www.utahbar.org/barjournal/pdf/Nov_Dec_2011_FINAL.pdf.

If this simple change were implemented, the attendant priority issues would undoubtedly arise over the coming years as design professionals began to claim mechanic's liens for professional services rendered prior to construction. The ramifications of such a change and its likely priority implications are beyond the scope of this comment. However, those ramifications are not necessary to discuss. Rather than wait for judicial interpretation of the issue, the Idaho Legislature could bypass the lengthy process and simply enact a new statute that addresses the issue of priority and creates an entirely new category of lien tailored to design professionals.

C. Create a New Category of Lien

The alternative to simply modifying the existing mechanic's lien statute would be to create an entirely new category of lien specifically designed for design professionals and related services that are performed prior to any visible improvements on a project. Two regional states that have adopted such a model are Utah and California. While these states' approaches are different from each other, they serve the same purpose of addressing the issue of providing mechanic's lien rights to design professionals, while still balancing the rights of other parties engaged in the development process.

1. Utah's "Pre-construction" Lien

The Idaho Legislature need not look far to find a viable solution to the problem. The state of Utah has recently made significant changes to its mechanic's lien statutes. Specifically, although design professionals had been entitled to mechanic's lien rights in Utah under the previous statutory scheme, the Utah Legislature created a new type of lien to address the unique circumstances presented by design professionals.¹⁴⁴ In 2011, the Utah Legislature passed two bills that created two types of mechanic's liens: liens for preconstruction services and liens for construction work.¹⁴⁵ Because design professionals were already entitled to

144. UTAH CODE ANN. § 38-1a-101-804 (West 2012).

145. § 38-1a-102. This section provides the following definitions:

(10) 'Construction Work': (a) means labor, service, material, or equipment for the purpose and during the process of constructing, altering, or repairing an improvement; and (b) includes scheduling, estimating, staking, supervising, managing, materials testing, inspection, observation, and quality control or assurance involved in constructing, altering, or repairing an improvement . . . (26) Preconstruction service: (a) means to plan or design, or to assist in the planning or design of, an improvement or a proposed improvement: (i) before construction of the improvement commences; and (ii) for compensation separate from any compensation paid or to be paid for construction service for the improvement; and (b) includes consulting, conducting a site investigation or assessment, programming, preconstruction cost or quantity estimating, preconstruction schedul-

lien rights in Utah prior to the creation of the preconstruction lien, one of the overarching reasons the legislature created the new lien was to address the issue of priority with respect to design professionals. Although Idaho has not resolved the issue of design professionals' lien rights, Idaho could resolve both the lien rights issue and its attendant priority issues if it were to follow Utah's example and adopt a statutory scheme modeled after the new Utah preconstruction lien.

The Utah Legislature's action was precipitated by a perceived unfairness that design professionals often faced when attempting to claim, perfect, or foreclose on a mechanic's lien. As is often the case with mechanic's lien statutes, under Utah's previous statute, all mechanic's liens related back to the date visible construction work commenced on a project. This requirement can often be a serious impediment for design professionals seeking to perfect a mechanic's lien. As one commentator noted about the situation in Utah:

The problem for [design professionals] was that they were always at the mercy of construction commencing. An architect could spend months designing a project, performing significant services. But if actual construction never commenced, there was no date to establish the architect's lien priority, and therefore no relation back element. Similarly, if a preconstruction service provider performed services before a trust deed was recorded but construction began after the recording of the trust deed, the provider's lien fell in with the rest of the lien claimants. The lien would be deemed inferior to the trust deed. Simply put, preconstruction service providers were often relegated to an inferior priority position even though they performed their services early in the project.¹⁴⁶

As a result, a motivating reason for the Utah Legislature's creation of the preconstruction lien was to cure this unfairness against "preconstruction" service providers.¹⁴⁷ Although priority is an important element of Utah's preconstruction lien scheme, it is important for our application to design professionals' lien rights in Idaho to understand the overall framework that gives rise to a preconstruction lien in Utah.

As an initial matter, it is important to understand that the Utah statute provides that preconstruction service, "means to plan or design, or to assist in the planning or design of, an improvement or a proposed improvement: before construction of the improvement commences; and for compensation separate from any compensation paid or to be paid for

ing, performing a preconstruction construction feasibility review, procuring construction services, and preparing a study, report, rendering, model, boundary or topographic survey, plat, map, design, plan, drawing, specification, or contract document.

146. DeGraffenried, *supra* note 143.

147. *See id.*

formed.¹⁵⁴ Again, failure to meet this requirement results in a potential lien claimant forfeiting its right to claim the lien.¹⁵⁵ In addition to filing the notice with the county recorder, the lien claimant must also send a notice by certified mail to the record owner of the property that is being encumbered by the lien.¹⁵⁶ The effect of this notice to the record owner is it allows the claimant to be awarded costs and attorney's fees against the owner that will be incurred in enforcing the lien.¹⁵⁷ While not providing this notice does not extinguish the lien, it nevertheless is crucial to a lien claimant who seeks to defray the often substantial fees and costs incurred in the action to enforce the lien.

The last step necessary for a preconstruction lien claimant is to file an action to enforce the lien.¹⁵⁸ The suit to foreclose on the lien must be filed within 180 days after the day on which the claimant filed the notice in the county recorder's office.¹⁵⁹ Yet again, failure to comply with the 180-day time requirement results in the lien being "automatically and immediately void."¹⁶⁰

Returning to the issue of design professionals' priority with respect to the preconstruction lien, it is significant to note that Utah's new preconstruction lien provides a "unique priority-triggering mechanism: the date on which the first notice of retention is filed."¹⁶¹ Prior to enacting the preconstruction lien statute, Utah had recognized the "priority problem" that design professionals create in the context of mechanic's liens.¹⁶² In fact, prior to the new statute, the lien of a design professional "who renders services prior to the commencement of construction does not have priority over liens, mortgages, or other encumbrances until the time actual construction work begins."¹⁶³ The overarching idea was that of giving notice to actual improvements to the property.¹⁶⁴ As a result, the priority of a design professional's mechanic's lien did not relate back to the time the design professional "put pen to paper," rather the priority related back to when "visible, on-site commencement of construction" occurred.¹⁶⁵ This rule often placed design professionals in an inferior priority position that was perceived as unfair because a design professional "could timely file a mechanic's lien before another lien, mortgage, or other encumbrance but would not have priority over that subsequent

154. § 38-1a-402(1).

155. *Id.* at (2).

156. *Id.* at (3).

157. *Id.*

158. §38-1a-701.

159. *Id.*

160. *Id.* at (4)(a).

161. DeGraffenried, *supra* note 143.

162. *See* Zions First Nat'l Bank v. Carlson, 464 P.2d 387, 389 (Utah 1970).

163. *See Protecting Your Money, supra* note 4; *see also* Ketchum v. Heritage Mountain Dev. Co., 784 P.2d 1217, 1224 (Utah Ct. App. 1989).

164. *See* Calder Bros. Co. v. Anderson, 652 P.2d 922 (Utah 1982).

165. *Id.* at 1222; *see also* Williams & Works, Inc. v. Springfield Corp., 293 N.W.2d 304, 311 (Mich. 1980) (Michigan court affirmed the principle that visible, on-site commencement of construction is required for priority purposes.).

lien, mortgage, or encumbrance unless construction at the site had commenced.¹⁶⁶ Utah's solution to this inferior position that design professionals were often placed in was to create the preconstruction service lien.

Whether Idaho resolves the issue of design professionals' lien rights through judicial action or through legislation, it will have to confront many of the issues that Utah faced and resolved through creating the preconstruction service lien. Idaho legislators considering changes to Idaho's mechanic's lien statute would do well to study Utah's innovative solution to the complex problems design professionals create in the lien context.

2. California's "Design Professional" Lien

California's approach to the lien rights of design professionals is more specific than Utah's approach. Like Utah, California has created an entirely new category of lien called a "design professional lien."¹⁶⁷ However, unlike Utah's "pre-construction" lien which could potentially apply beyond just design professionals, California's lien applies only to design professionals. The California statute defines a "design professional" as "a person licensed as an architect . . . landscape architect . . . [or] registered as a professional engineer."¹⁶⁸ As a prerequisite to claiming a design professional lien the design professional must have provided "services pursuant to a written contract with a landowner for the design, engineering, or planning of a work of improvement."¹⁶⁹ Similar to Utah, California's creation of this new category of lien was precipitated by the unique scenario that arises when a design professional has performed work on a project that is never built.¹⁷⁰ Generally, the priority of mechanic's liens relates back to the date when visible improvements are commenced on the site.¹⁷¹ However, when visible improvement on a project site never occurs, design professionals are often left without recourse because a lien would not have any date to relate back to in order to become perfected.¹⁷² California's solution to this problem was to provide a lien that could be filed by design professionals notwithstanding the absence of actual commencement of construction.¹⁷³

Under this statutory scheme, a design professional is entitled to a lien on any real property for which he performs work, and which antici-

166. *Protecting Your Money*, *supra* note 4, at 43.

167. CAL. CIV. CODE §§ 8300-8319 (West 2012).

168. *Id.* § 8014.

169. *Id.* § 8300. See also Edmund L. Regalia, *Mechanic's Liens: Property Law's Unloved Stepchild*, 17 MILLER & STARR REAL ESTATE NEWSALERT 377, 380 (2007), available at <http://www.msrllegal.com/mediafiles/mechanics-liens-property-laws-unloved-stepchild.pdf>.

170. Regalia, *supra* note 169.

171. *Id.* at 4.

172. *Id.*

173. *Id.*

pates improvements on the property.¹⁷⁴ Importantly, actual visible construction on the property is not necessary.¹⁷⁵ The lien amount is the design professional's fee for the work or the reasonable value of the services he provided, whichever is less.¹⁷⁶ However, the statute also contains an important caveat; a design professional cannot record a "design professional" lien "unless a building permit or other municipal or governmental approval in furtherance of the work of improvement has been obtained" through the use of or in connection with the design professional's services.¹⁷⁷

In fact, there are several necessary conditions a design professional must satisfy before claiming a design professional lien.¹⁷⁸ Because of the unique and favorable priority position design professionals could be placed in under the statute, it is likely that California implemented these conditions to balance the other interests at play. These necessary conditions include that visible construction must not have commenced, that the landowner must have defaulted in paying the design professional for their services, that the design professional must have provided notice to the landowner of its intention to claim a lien no less than ten days before recording the claim of lien, and that the design professional must have properly recorded a claim of lien.¹⁷⁹ Furthermore, the lien is not perpetual in the sense that it extends after construction has commenced.¹⁸⁰ In fact, the lien is extinguished when either the work that the design professional rendered services for commenced or ninety days has passed after the design professional recorded the lien, unless the design professional filed suit to enforce the lien within the ninety days.¹⁸¹

Liens of this sort may be troubling to Idaho financial institutions worried about priority over lienholders. This is particularly true because the design professional's lien can take effect prior to and even in the absence of any construction. The California statute addresses this issue by providing that the lien does not "affect[] or take[] priority over the interest of record of a purchaser, lessee, or encumbrancer, if the interest of the purchaser, lessee, or encumbrancer in the real property was duly recorded before recordation of the claim of lien."¹⁸² Further, as Regalia notes, "nor does such lien affect or take priority over an encumbrance of a construction lender which funds the loan to commence the work of improvement for which the design professional furnished services at the request of the landowner."¹⁸³

174. CAL. CIV. CODE § 8302.

175. *Id.*

176. *Id.*

177. *Id.*

178. CAL. CIV. CODE § 8304.

179. *Id.*

180. CAL. CIV. CODE § 8306.

181. *Id.*

182. CAL. CIV. CODE § 8316.

183. *See Regalia, supra* note 169, at 381; *see also* CAL. CIV. CODE § 8316.

While California's design professional statute is certainly a novel approach to the problem, it represents a valuably innovative and proactive solution. Indeed, although Idaho is vastly different from California in population and rate of development, there seem to be few reasons why Idaho could not follow California's lead in this respect. At a minimum, Idaho's courts and its legislature should take a closer look at California's solution and seek to implement the California statute's beneficial aspects.

D. Conclusion—Modify §45-501 or Introduce a New Lien

By changing Idaho's current mechanic's lien statute to provide lien rights to design professionals, Idaho would better serve all the interests that are at play in a construction project. Expressly granting lien rights to design professionals will provide a level of protection to professionals whose services are indispensable to any building or construction project. Any modification to the existing statute or the creation of a new category of lien must also recognize the unique nature of design professionals with respect to mechanic's liens. Specifically, such a statutory modification or creation must adequately protect the priority position of design professionals. Furthermore, by addressing the issue of priority, the legislature will not leave design professionals with a hollow lien right. Rather, Idaho will adequately serve the interests of design professionals, developers, and financial institutions on construction projects.

IV. THE LOGICAL SOLUTION

The Supreme Court of Idaho should clarify the current ambiguity in Idaho's mechanic's lien statute by expressly granting lien rights to design professionals. In the alternative, the Idaho state legislature should modify the existing statute to remove the ambiguity, or the legislature should follow the model of California or Utah and create a new category of lien that deals specifically with lien rights of design professionals. By doing so, Idaho would ensure that design professionals—who are fundamental to a building project—will be entitled to the same protections accorded to all other entities involved in a development project. This is the wise and logical solution.

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