

Private Improvement on Public Land – Needs Improvement

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The New York Lien Law has traditionally been construed liberally by the courts to secure the beneficial interests and purposes of the statute, which embodies the public policy of the State that those that actually perform construction and improvements to property (public or private) should be paid timely and have mechanic's lien rights. Whether the improvement is public or private, the Lien Law provides for different means of protection, however, the same objective is met, making sure that protected parties are promptly paid.

A private improvement is any improvement of real property owned by a private individual and/or entity and a public improvement is an improvement to property belonging to the State or a public entity. Private improvement liens are filed with the County Clerk where the real property being improved is located. The lien attaches to the owner's property and become a cloud to the title. Public improvement liens are filed with the head of the department or bureau having charge of such improvement and with the comptroller of the State or with the financial officer of the public corporation. The public lien attaches to the monies of the State or public corporation funding the improvement.

There is, however, a third type of improvement, private improvement on public land. For this type of improvement, there are no lien rights because the real property being improved is public property and there are no monies of the state or public corporation because the improvement is being privately funded. To address this gap, Lien Law § 5 requires:

[w]here no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement.

Lien Law § 5 and the posting of a bond or other form of undertaking has become a highly contested issue and was the center of a recent court decision. In this case there was no dispute that the project was private improvement on public land. The private owner (for the development on public land) hired a construction manager to oversee the construction of a large building. After a number events occurred during construction that severely delayed and impacted the project, the construction manager notified the private owner of

its intent to terminate the construction management agreement. Shortly thereafter, the construction manager notified the owner that the agreement was terminated and commenced suit. The construction manager alleged, among other things, that the owner: provided defective designs, changed the scope of work without issuing change orders and failed to provide adequate security as required by Lien Law § 5.

The private owner moved to dismiss certain causes of actions asserted, including the claim that the owner violated Lien Law § 5. The private owner posted a “Guaranty” from an affiliated company that would “cause Substantial Completion of the Improvements and perform the Development Work,” including “to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work, including, but not limited to, the costs of constructing, equipping and furnishing the Guaranteed Work.” The private owner argued that this Guaranty complied with Lien Law §5 and that the Guaranty was accepted by the public entity that owned the real property being developed. In opposition, the construction manager argued that this Guaranty did not comply with Lien Law § 5 and that the private owner was required to post a payment bond.

The court held that the Guaranty complied with Lien Law § 5’s “other form of undertaking.” The court reviewed the legislative history of Lien Law § 5 and the definition of an undertaking to find that an undertaking is a formal promise or guarantee.” The Guaranty followed the letter of the statute guaranteeing prompt payment to contractors. While the court pointed out that there are better guarantees available, such as letters of credit, ultimately, the public entity that owned the real property accepted the Guaranty.

Commentary

This case highlights one of a number of problems with Lien Law § 5. Here, the Court explained that the Legislature, by design, left the “other form of undertaking” vague and put the responsibility on the public entity that owns the real property to decide what “other form of undertaking” to accept. Although the Guaranty was accepted by the public owner of the real property, the Guaranty does not satisfy the requirements of the statute. The most glaring problem is that the affiliated company that posted the Guaranty is a company. If it goes out of business or files for bankruptcy protection the Guaranty becomes meaningless. The court should have understood this fact and required a bond issued by a surety or some other undertaking, like a letter of credit, that is not contingent on the viability of the issuer. The dissenting opinion understood this distinction and held that the alternative undertaking should be something that is an identifiable fund of money, like a letter of credit.

Another glaring problem with Lien Law § 5 is that the statute leaves it up to the public entity that owns the real property to require the bond or other undertaking. This means, if the public entity that owns the real property does not insist on the private developer’s posting of a bond or other undertaking, the contractors and subcontractors improving the property are left without a Lien Law § 5 remedy. The statute does not have a provision

that allows the contractor to have a direct action against the public entity that owns the real property in the event it fails to require the private developer to post a bond or other form of undertaking.

As a contractor and/or subcontractor looking to provide labor and/or materials on a private improvement of public land, the first item to obtain is a copy of the bond or other form of undertaking posted by the private developer. Having a copy of the bond or other form of undertaking before the work commences provides the contractor and/or subcontractor with the knowledge and understanding of what protections are being afforded and any steps are needed to take to enforce payment rights.

Feel free to contact me to discuss liens and private developments on public property.