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SENATE BILL NO. 319

Offered January 10, 2018

Prefiled January 8, 2018

A BILL to amend and reenact §§ 43-3 and 43-21 of the Code of Virginia, relating to general contractors; waiver or diminishment of lien rights; subordination of lien rights.

Patron—Ruff

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:

1. That §§ 43-3 and 43-21 of the Code of Virginia are amended and reenacted as follows:

§ 43-3. Lien for work done and materials furnished; waiver of right to file or enforce lien.

A. All persons performing labor or furnishing materials of the value of $150 or more, including the reasonable rental or use value of equipment, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold, and all persons performing any labor or furnishing materials of like value for the construction of any railroad, shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof, and upon such railroad and franchises for the work done and materials furnished, subject to the provisions of § 43-20. But when the claim is for repairs or improvements to existing structures only, no lien shall attach to the property repaired or improved unless such repairs or improvements were ordered or authorized by the owner, or his agent.

If the building or structure being constructed, removed or repaired is part of a condominium as defined in § 55-79.41 or under the Horizontal Property Act (§§ 55-79.1 through 55-79.38), any person providing labor or furnishing material to one or more units or limited common elements within the condominium pursuant to a single contract may perfect a single lien encumbering the one or more units which are the subject of the contract or to which those limited common elements pertain, and for which payment has not been made. All persons providing labor or furnishing materials for the common elements pertaining to all the units may perfect a single lien encumbering all such condominium units. Whenever a lien has been or may be perfected encumbering two or more units, the proportionate amount of the indebtedness attributable to each unit shall be the ratio that the percentage liability for common expenses appertaining to that unit computed pursuant to subsection D of § 55-79.83 bears to the total percentage liabilities for all units which are encumbered by the lien. The lien claimant shall release from a perfected lien an encumbered unit upon request of the unit owner as provided in subsection B of § 55-79.46 upon receipt of payment equal to that portion of the indebtedness evidenced by the lien attributable to such unit determined as herein provided. In the event the lien is not perfected, the lien claimant shall upon request of any interested party execute lien releases for one or more units upon receipt of payment equal to that portion of the indebtedness attributable to such unit or units determined as herein provided but no such release shall preclude the lien claimant from perfecting a single lien against the unreleased unit or units for the remaining portion of the indebtedness.

B. Any person providing labor or materials for site development improvements or for streets, stormwater facilities, sanitary sewers or water lines for the purpose of providing access or service to the individual lots in a development or condominium units as defined in § 55-79.41 or under the Horizontal Property Act (§§ 55-79.1 through 55-79.38) shall have a lien on each individual lot in the development for the fractional part of the total value of the work contracted for by the claimant in the subdivision as is obtained by using "one" as the numerator and the number of lots being developed as the denominator and in the case of a condominium on each individual unit in an amount computed by reference to the liability of that unit for common expenses appertaining to that condominium pursuant to subsection D of § 55-79.83, provided, however, *that* no such lien shall be valid as to any lot or condominium unit unless the person providing such work shall, prior to the sale of such lot or condominium unit, file with the clerk of the circuit court of the jurisdiction in which such land lies a document setting forth a full disclosure of the nature of the lien which may be claimed, the total value of the work contracted for by the claimant in the subdivision and the portion thereof allocated to each lot as required herein, and a description of the development or condominium, and shall, thereafter, comply with all other applicable provisions of this chapter. "Site development improvements" means improvements which are provided for the development, such as project site grading, traffic signalization, and installation of electric, gas, cable, or other utilities, for the benefit of the development rather than for an individual lot. In determining the individual lots in the development for the purpose of allocating value of the work contracted for by the claimant, parcels of land within the development which are common area, or

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which are being developed for the benefit of the development as a whole and not for resale, shall not be included in the denominator of the disclosure statement.

Nothing contained herein shall be construed to prevent the filing of a mechanics' lien under the provisions of subsection A, or require the lien claimant to elect under which subsection the lien may be enforced.

C. Any right to file or enforce any mechanics' lien granted hereunder may be waived in whole or in part at any time by any person entitled to such lien, except that a *general contractor,* subcontractor, lower-tier subcontractor, or material supplier may not waive or diminish his lien rights in a contract in advance of furnishing any labor, services, or materials. A provision that waives or diminishes a *general contractor's,* subcontractor's, lower-tier subcontractor's, or material supplier's lien rights in a contract executed prior to providing any labor, services, or materials is null and void. In the event that payments are made to the contractor without designating to which lot the payments are to be applied, the payments shall be deemed to apply to any lot previously sold by the developer such that the remaining lots continue to bear liability for an amount up to but not exceeding the amount set forth in any disclosure statement filed under the provisions of subsection B.

D. A person who performs labor without a valid license or certificate issued by the Board for Contractors pursuant to Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1, or without the proper class of license for the value of the work to be performed, when such a license or certificate is required by law for the labor performed shall not be entitled to a lien pursuant to this section.

§ 43-21. Priorities between mechanics' and other liens.

No lien or encumbrance upon the land created before the work was commenced or materials furnished shall operate upon the building or structure erected thereon, or materials furnished for and used in the same, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied; nor shall any lien or encumbrance upon the land created after the work was commenced or materials furnished operate on the land, or such building or structure, until the lien in favor of the person doing the work or furnishing the materials shall have been satisfied.

Unless otherwise provided in the subordination agreement, if the holder of the prior recorded lien of a purchase money deed of trust subordinates to the lien of a construction money deed of trust, such subordination shall be limited to the construction money deed of trust and said prior lien shall not be subordinate to mechanics' and materialmen's liens to the extent of the value of the land by virtue of such agreement.

In the enforcement of the liens acquired under the previous sections of this chapter, any lien or encumbrance created on the land before the work was commenced or materials furnished shall be preferred in the distribution of the proceeds of sale only to the extent of the value of the land estimated, exclusive of the buildings or structures, at the time of sale, and the residue of the proceeds of sale shall be applied to the satisfaction of the liens provided for in the previous sections of this chapter. Provided that liens filed for performing labor or furnishing materials for the repair or improvement of any building or structure shall be subject to any encumbrance against such land and building or structure of record prior to the commencement of the improvements or repairs or the furnishing of materials or supplies therefor. Nothing contained in the foregoing proviso shall apply to liens that may be filed for the construction or removal of any building or structure.

Notwithstanding the provisions of subsection C of § 43-3, a general contractor may, prior to or after providing any labor, services, or materials, contract to subordinate his lien rights to prior recorded and later recorded deeds of trust, provided that such contract is (i) in writing and (ii) signed by any general contractor whose lien rights are subordinated pursuant to such contract.