

**1. Notice to Lien Agent Form**

Changes to the notice to lien agent form are necessary to clarify what information must be provided, what information should not be provided, and to ensure that the lien agent can read the information provided, which will allow the lien agent to properly record the information. It is important to clarify that the notice to lien agent form cannot be combined with any other statutory lien form or processes, since the lien agent is not acting as an agent of the owner in these circumstances. Otherwise it would create confusion and false reliance on notifying the lien agent in these other lien forms and processes.

Proposed change to NCGS 44A-11.2(i) and (j):

...

(i) The form of the notice to be given under this section shall be legible, shall include the following information unless designated as "if available", and shall be substantially as follows:

**NOTICE TO LIEN AGENT**

- (1) Potential lien claimant's name, mailing address, telephone number, fax number (if available), and electronic mailing address (if available):
- (2) Name of the party with whom the potential lien claimant has contracted to improve the real property described below:
- (3) A description of the real property sufficient to identify the real property, such as the name of the project, if applicable, the physical address as shown on the building permit or notice received from the owner:
- (4) I give notice of my right subsequently to pursue a claim of lien for improvements to the real property described in this notice.  
Dated: \_\_\_\_\_

\_\_\_\_\_  
Potential Lien Claimant

(j) The service of the Notice to Lien Agent does not satisfy the service or filing requirements applicable to a Notice of Subcontract under Part 2 of Article 2 of this Chapter, a Notice of Claim of Lien upon Funds under Part 2 of Article 2 of this ~~Chapter~~ Chapter, or a Claim of Lien on Real Property under Part 1 or Part 2 of Article 2 of this Chapter. A Notice to Lien Agent shall not be combined with or make reference to any of the Notices or Claims described herein.

## 2. Timing of Appointment of Lien Agent

There is ambiguity in the current law about when a lien agent must be appointed for pre-permit work or for work where no building permit is required. This is particularly true with design professionals. The changes listed below would separate former NCGS 44A-11.1(a) into subsections to make it easier to follow, would clarify the appointment of lien agent in these circumstances, and provides a mechanism for those who improve property pre permit to the list maintained by the lien agent. This mechanism tracts the process that currently exists for design professionals.

Proposed changes to NCGS 44A-11.1(a):

(a) With regard to any improvements to real property to which this Article is applicable for which the costs of the undertaking are thirty thousand dollars (\$30,000) or more, the owner shall designate a lien agent.

(a1) The lien agent shall be designated either at the time that the original building permit is issued or, in cases in which no building permit is required or the building permit has already been issued, at the time prior to the first furnishing of labor, materials, rental equipment or professional design or survey services at the site of the improvements. the contract for the improvements is entered into with the owner, the owner shall designate a lien agent no later than the time the Notwithstanding the foregoing, if the lien agent is designated after the first furnishing of labor, materials, rental equipment or professional design or survey services at the site of the improvements, the party with whom the owner has already contracted will be deemed to have met the requirement of notice under subsections (m) and (n) of this section on the date of the lien agent's receipt of the owner's designation of the lien agent, provided the owner provides written notice to the lien agent containing the information pertaining to the party required in a notice to lien agent pursuant to subdivisions (1) through (3) of subsection (j) of this section, by any method of delivery authorized in subsection (g) of this section. The lien agent shall include the party's name and address in its response to any persons requesting information relating to persons who have given notice to the lien agent pursuant to this section. ~~owner first contracts with any person to improve the real property.~~

(a2) The ~~Provided, however, that the~~ owner is not required to designate a lien agent for improvements to an existing single-family residential dwelling unit as defined in G.S. 87-15.5(7) that is occupied by the owner as a residence, or for the addition of an accessory building or accessory structure as defined in the North Carolina Uniform Residential Building Code, the use of which is incidental to that residence.

(a3) The owner shall deliver written notice of designation to its designated lien agent by any method authorized in G.S. 44A-11.2(f), and shall include in its notice the street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably

identifies the real property for the improvements to which the lien agent has been designated, and the owner's contact information.

(a4) Designation of a lien agent pursuant to this section does not make the lien agent an agent of the owner for purposes of receiving a Claim of Lien on Real Property, a Notice of Claim of Lien upon ~~Funds~~ Funds, a Notice of Subcontract, or for any purpose other than the receipt of notices to the lien agent required under G.S. 44A-11.2.

### 3. Clarify Duties of Obligor

Claims of lien on funds perfected through claim of lien on real property; subcontractor bound by contractor's subordination. For construction transactions to continue, a potential lender must be able to obtain subordinations from the contractors (those dealing with the owner) only, at the time of closing, -- as has always been the case. The lien agent law was not intended to give subcontractors the right to prevent the contractor subordinations for construction loans. Filing with the lien agent should preserve their already existing lien rights (with the addition of the new 2012 provision that contractors cannot waive the claim of lien on funds right). It should not give lower tier subs additional priority rights to the property to prevent construction loans when those through whom they claim are subordinating or, more importantly, already have subordinated their lien rights to the deed of trust of the construction lender.

Proposed change to NCGS 44A-20(d):

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(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a claim of lien upon real property upon the interest of the obligor in the real property to the extent of the owner's personal liability under subsection (b) of this section, which claim of lien on real property shall be enforced only in the manner set forth in G.S. 44A-7 through G.S. 44A-16 and which claim of lien on real property shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon satisfaction of those requirements set forth in G.S. 44A-11. A lien waiver signed by the contractor prior to a subcontractor's perfecting its claim of lien on real property in accordance with G.S. 44A-11 waives the subcontractor's right to enforce the contractor's claim of lien on real property, but does not affect the subcontractor's right to a claim of lien on funds or the subcontractor's right to a claim of lien on real property allowed under this ~~subsection~~. subsection, provided however, the right to claim a lien on real property is subject to any subordination signed by the contractor prior to the receipt of the notice of claim of lien on funds by the obligor. The claim of lien on real property as provided under this subsection shall be in the form set out in G.S. 44A-12(c) and shall contain, in addition, a copy of the notice of claim of lien upon funds

given pursuant to G.S. 44A-19 as an exhibit together with proof of service thereof by affidavit, and shall state the grounds the lien claimant has to believe that the obligor is personally liable for the debt under subsection (b) of this section.

#### 4. Clarify NCGS 44A-23

Claim of lien on real property, subrogation; subcontractor's right to use contractor priority subject to contractor's prior subordination or waiver. It is critical that only this claim of lien for subrogation be allowed to take advantage of either start date. If a sub contractor filing a claim of lien on funds and then on real property to perfect was allowed to choose the contractor's start date, and also not be bound by the upper tier contractor's waiver (under the 2012 revisions to GS 44A-20), then the subcontractor could feasibly start after the buyer or lender transaction, but then suddenly claim priority based on the contractor's having started prior to the buyer or lender transaction and the sub not being bound by the contractor's waiver. Simply put, the post-transaction sub (unknown and unknowable at closing) would always be able to trump the buyer and lender because the sub could always get relation back and could not be cut off. So transactions could not close.

Proposed change to NCGS 44A-23(d):

...

(d) When completing the claim of lien on real property form to perfect the contractor's claim of lien on real property under this section, a first, second, or third tier subcontractor may use as the date upon which labor or materials were first or last furnished on the real property either any date on or after the date of the first furnishing of labor or materials on the real property, or any date on or before the date of the last furnishing of labor or materials on the real property by the subcontractor making the claim, or any date on or after the date of the first furnishing of labor or materials on the real property, or any date on or before the date of the last furnishing of labor or materials on the real property by the contractor through which the claim of lien on real property is being asserted.