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ALASKANS FOR LIEN LAW REFORM  
840 K STREET SUITE 200  
ANCHORAGE, ALASKA 99501  
(907) 274-6581

February 3, 1986

M. Mike Miller  
Judiciary Committee Chairman  
Alaska State Legislature  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Re: Alaskans for Lien Law Reform  
House Bill 494

Dear Mike:

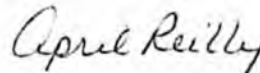
Please find enclosed a copy of the information packet we have been distributing and using in our efforts to gain support for House Bill 494.

It's purpose is to provide background information on the existing lien law and to summarize our position regarding the proposed changes.

Gaining support from the general public appeared to start out slowly. However, through public meetings, personal contacts, and mail-outs, support is steadily increasing.

Thank-you for your time and consideration concerning House Bill 494.

Sincerely,



APRIL REILLY  
Steering Committee

ALASKANS

FOR

LIEN LAW REFORM

## LIEN LAW HISTORY

In 1979 certain amendments were made to the Alaska Lien Laws which have caused large monetary losses to material suppliers and sub-contractors. The intent of these amendments was to expedite loan closings on the sale of real property and also to assure that no liens could be attached after the property was sold. In a joint meeting held between suppliers, sub-contractors, title companies, and lending institutions it was agreed that this new bill would allow the lending institutions to be secured by a first deed of trust on their interim construction financing which gave them priority over all liens or encumbrances which may be recorded by a material supplier or sub-contractor.

In exchange for giving up a historical priority position, suppliers and sub-contractors were to be provided a vehicle by which they could put the lending institution on notice that they were a supplier of record, and in so doing, protect the suppliers interest. The methods provided to material suppliers and sub-contractors under the new law were:

1. Notice of Right to Lien and
2. Stop Payment Notice

The intent of the "Notice of Right to Lien" was to inform the lending institution, and the property owner, that a supplier or sub-contractor had provided materials or services to a specific project and they may have a claim on the interim construction financing. The further intent of this notice was to guarantee that the lending institution would monitor the disbursing of interim construction funds to assure that persons who had given them a "Notice of Right to Lien" would be paid from each draw.

The "Stop Payment Notice" amendment was added as an additional method for securing a payment, when past due from interim construction financing. The intent of this amendment was to cause the lending institution to withhold the amount claimed by the material supplier or sub-contractor from the next draw and to disburse the funds directly to the claimant.

Since there is no liability on the part of the lending institution for failing to disregard the intent of these amendments, they have been circumvented to a large degree. Interim construction draws are being disbursed directly to the contractor with no assurance that the material supplier or sub-contractor will be paid. In many instances the contractor will use these funds for purposes other than paying his suppliers or sub-contractors.

A "Stop Payment Notice" rarely accomplishes the purpose for which it was intended. The lending institutions in many instances interpret this notice as indication that the contractor is in financial trouble and they will call the loan; thereby stopping all draw requests until the liens are removed or the loan is satisfied. Or they may just hold the notice for a period of 30 days at which time the current law mandates that a law suit be instigated to collect the debt. In addition, the current law mandates that a claimant must provide a bond equal to the amount of the claim. With the current cost of bonding, legal fees and the length of time it takes to get a court date a claimant will rarely recover the amount owed to him. Interestingly enough the lending institutions continue making draws to satisfy their interest charges.

A "Claim of Lien" in many instances has no value. The lending institution has priority over all other encumbrances through their First Deed of Trust position. In the event of foreclosure the lending institutions First Deed of Trust must be paid in its entirety before any other claims can be satisfied, in spite of the fact that the lending institution may have disbursed construction funds directly to the contractor with no regard to a supplier, or sub-contractors "Notice of Right to Lien".

## POSITION

The suppliers and sub-contractors position is really quite simple:

We should have the right to reasonably expect to be compensated for the materials supplied and work performed that adds value to someone else's property, and in the event this does not occur we have equal opportunity for recovery under the law.

The trade off or "trust me legislation" of 1979 is simply not working.

Lending institutions are in the best position to review and determine a contractor's financial capability. They have or can have complete access to a contractor's financial information because they control the purse strings. However, loan officers have little or no incentive under existing law to control disbursements so as to assure that suppliers and sub-contractors are paid. At a minimum all they need do is assure that the materials are incorporated into the real estate before they disburse to the contractor. Whether the contractor pays the suppliers or the sub-contractors is really of little concern, because they (the lending institution) are always in first position. This enables them to foreclose and extinguish the liens of suppliers and sub-contractors in the event the contractor ultimately fails to perform. When an institution fails to exercise good control of funds, it is difficult to understand why their investment should be given priority at the expense of suppliers and sub-contractors.

There is no viable vehicle for a supplier or sub-contractor to compel a lending institution to disburse loan draws for materials purchased or work performed.

When the supplier or sub-contractor attempts to utilize a stop payment, or otherwise involve the loan officers, typically the lending institutions' first reaction is to draw down available proceeds to cover interest and other charges or even to call the loan.

**Conclusion.** The make up of the lending institutions as well as the environment under which the legislation was drafted in 1979, differs from that of today and perhaps is one of the prime reasons requiring a change in this legislation.

It is evident that the current law is not working. The unusual large numbers of business failures, bankruptcies, and foreclosures bear this out. If some form of protection for sub-contractors and material suppliers is not legislated, there will continue to be many bankruptcies and foreclosures. In addition, the cost of construction will increase dramatically due to the increase in cost of materials and services to cover the losses sustained through the inequities in the existing law.

**CASE HISTORY  
EXAMPLE**

**PROJECT** Residential Units - Fairbanks  
**LENDER** Bank  
**ACCOUNT PROFILE** Customer for several years  
Slow payment record

**HISTORY.** Because of previous problems with this customer and before supplier would enter into an agreement to sell the project, the lending institution agreed to monitor the loan and disburse funds direct to the supplier. After the project was in process the account went 30 days past due and was closed. The supplier contacted the bank was told they (the bank) were working on the draws and payment would be sent in about 10 days. Additionally, the bank requested that the account be left open.

When the account was (45) days past due and no payment received, the supplier again called the bank and was told the loan officer was on vacation. Again the bank requested that the account remain open and that if the materials were allowed to go they would cover the purchases. The supplier was also told there were more than enough funds to cover the balance due. A check would be cut as soon as the loan officer returned.

When the account was (60) days past due the supplier closed the account. The bank was contacted. The loan officer met with supplier, who was again advised that they were working on draws that would bring the account current. The loan officer requested that the account still be left open. Supplier recorded claim of liens.

When the account was (70) days past due the bank filed foreclosure with no advance notice to supplier.

**ACTION TAKEN.** Timely recorded Notice of Right to Lien and notified lender. Filed Claim of Liens totaling \$214,000.

**RESULTS.** Without notice bank filed foreclosure notices. Bank offered supplier \$85,000 in settlement. Customer filed bankruptcy. Loan officer resigned from his position at the bank.

**SUMMARY.** Under the existing law supplier filed all proper documents, and additionally had the assurance of the lending institution that they would disburse directly to them. The supplier had no other recourse except to sue the lending institution or settle because of the first position given the bank under the present lien law.

1986 - PROPOSED AMENDMENTS TO THE LAW

- Abolishment of Acknowledgement of Right to Lien
  
- Adoption of a Direct-Payment Notice which requires the owner's construction lender to make a direct payment to the claimant from the next construction draw, unless the owner timely objects to the Notice, in which case the lender is required to make a joint payment to the claimant and owner and leave it up to them to work out their disputes.
  
- Claimants other than individual laborers are given equal priority with a prior-recorded deed of trust for construction financing in cases of original construction. Individual laborers (excluding individual sub-contractors) and trustees of employment benefit trusts for such laborers continue to have priority over prior-recorded deeds of trust.
  
- The deadline is extended for recording a Notice of Right to Lien or Claim of Lien after a Notice of Completion is recorded to give the latter job trades more time to prepare their statements and determine if they have a payment problem.



TESTIMONY OF

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ALASKA CHAPTER  
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO

HOUSE LABOR AND COMMERCE COMMITTEE

ON

LIEN LAW REFORM

HB 494

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FEBRUARY 26, 1986

AGC-Alaska on behalf of our over 800 member firms appreciates the opportunity to comment on HB 484.

The proposed legislation affects three significant areas of the existing law: WHO CAN CLAIM A LIEN; THE ABILITY TO IMPACT CONSTRUCTION DRAWS; and PRIORITY OF LIENS.

#### Who Can Claim a Lien

Presently, a person without a direct contract with an owner (most subcontractors and suppliers) may not claim a lien unless an "acknowledgment of right to lien" signed by the owner is obtained by the owner (an exception to this requirement is a person claiming a labor lien for work he performed). Without the existence of a lien law there is no right to sue an owner because no contract exists between the owner and a subcontractor or supplier.

HB 494 eliminates the "Acknowledgment of Right to Lien" requirement. Thus, anyone who supplied labor, materials, services or equipment may file a lien. There is no requirement that the owner even know the claimant was one of the persons supplying the labor, materials, services or equipment.

HB 494 would institute an optional "Notice of Intent to Furnish Labor, Materials, Sources or Equipment." (See Section 6) The purported effect is to shift the burden of proof in any action based on a lien. However, it does not limit the ability of anyone to file a lien. Further, this provision does not

require a lien claimant to prove that the owner knew or consented to the claimant supplying the materials, services or equipment.

In short, the proposed change will result in a substantial increase in the filing of liens by persons unknown to the owner. Owners and financial institutions will retain a greater portion of the general contractors money and property sales will be impeded and more litigation will result.

#### The Ability To Impact Construction Draws

Under existing law a "stop payment notice" can be given by a lien claimant to the lending institution, if payment is more than 20 days overdue. However, to stop payment for more than 30 days the claimant must file suit within that 30 day period.

HB 494 would substitute a "direct payment notice" for the existing "stop payment notice." Under the proposed "direct payment notice" the lending institution must pay the claimant directly unless an objection is received by the owner within 10 days. If an objection is received the lender must distribute the money directly to the claimant and the owner.

The net effect of the provision would be to tie up money anytime there is a dispute between a general and subcontractor or supplier. The result could be an increasing number of projects not being completed, i.e. more foreclosures.

## Priority of Liens

Under existing law a prior encumbrance is preferred to a lien (except a lien by a person actually performing labor). HB 494 proposes to give equal priority to all liens for "original" construction with a prior recorded encumbrance. While the term "original construction" needs to be defined, AGC concurs with the overall intent of this provision - equal priority of liens with construction lenders.

In summary, AGC recommends that no changes be made to the present system of claiming and establishing liens or stop payment notices. AGC does support legislative changes to the priority presently enjoyed by construction lenders.

HB494.1d

# STATE OF ALASKA THE LEGISLATURE

## LEGISLATIVE AFFAIRS AGENCY

### LEGISLATIVE REFERENCE LIBRARY

POUCH Y - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

May, 1986

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS date base CM 14. In order to save space copies of minutes have not been left in the files.

Jeanie Henry

House Judiciary	3/27/86	1:30 pm
" "	4/16/86	1:30 pm
" "	4/17/86	1:30 pm

**HOUSE  
COMMITTEE REPORT**

(7)

Date referred: 3/24/86

FURTHER REFERRALS:

DATE: \_\_\_\_\_

The JUDICIARY Committee has considered HB 494

"An Act relating to liens for labor or materials furnished."

and recommends:

- do pass
- do not pass
- do pass with attached amendment(s)
- no recommendation
- replace with CSHB494 (JUD)  same title
- new title

and recommends \_\_\_\_\_

further referral to the \_\_\_\_\_ Committee

- and attaches:
- letter of intent
  - first fiscal note
  - new fiscal note
  - zero fiscal note

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

[Signature]  
[Signature]  
[Signature]  
[Signature]  
ROD E CRON  
[Signature]  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[Signature] - NO REC  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

[Signature]  
Chairman

Original sponsors: Cotten, Szymanski,  
Phillips, et al

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 494 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to liens for labor or material  
7 furnished."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 34.35.062 is repealed and reenacted to read:

10 Sec. 34.35.062. CONSTRUCTION FINANCING. (a) A claimant to whom  
11 payment for the labor, material, service, or equipment furnished for a  
12 project is past due may give the lender a stop-lending notice. The  
13 claimant shall at the same time give a copy of the notice to the owner  
14 and to each prime contractor with whom or through whom the claimant or  
15 the claimant's debtor has contracted. A stop-lending notice shall

16 (1) instruct the lender to stop disbursing, advancing, or  
17 otherwise providing construction financing for the project;

18 (2) be verified by the claimant;

19 (3) state the claimant's name, address, and telephone  
20 number;

21 (4) describe the labor, material, service, or equipment  
22 furnished by the claimant and state the name of the person to whom  
23 furnished;

24 (5) describe the real property improved by the labor,  
25 material, service, or equipment and state the name of the person the  
26 claimant believes to be the owner of the real property;

27 (6) state the amount due and unpaid to the claimant for the  
28 labor, material, service, or equipment.

29 (b) A stop-lending notice is binding upon a lender from the time

1 the lender has received it and had a reasonable opportunity to act  
2 upon it until it expires or is revoked. A notice expires on the 91st  
3 day after it is received by the lender unless the claimant has com-  
4 menced an action on the claim that is the subject of the notice before  
5 that day and the lender has received written notification of the  
6 action. A stop-lending notice may be revoked at any time in writing  
7 signed by the claimant. Expiration or revocation of a notice extin-  
8 guishes the liability of the lender to the claimant under (c) of this  
9 subsection.

10 (c) A lender who disburses, advances, or otherwise provides  
11 construction financing for a project after it is the subject of a  
12 stop-lending notice is liable to the claimant in an amount equal to  
13 the lowest of the following amounts:

14 (1) the amount of construction financing disbursed, ad-  
15 vanced, or otherwise provided by the lender after receipt of the  
16 claimant's stop-lending notice; if there are two or more stop-lending  
17 notices when the disbursement occurs, the lender's liability to each  
18 claimant is based on the claimant's ranking under AS 34.35.112;

19 (2) the amount owed to the claimant, including interest,  
20 costs, and attorney's fees, for labor, material, service, or equipment  
21 furnished for the project by the claimant as established by a written  
22 agreement signed on or after the date of the stop-lending notice by  
23 the claimant, the owner and the prime contractor with whom or through  
24 whom the claimant or the claimant's debtor has contracted or by a  
25 final judgment in an action in which the owner, the claimant and the  
26 claimant's debtor are named and, if necessary, served parties;

27 (3) 150 percent of the amount stated in the stop-lending  
28 notice.

29 (d) Within 10 days after receiving the written agreement or a

1 certified copy of the judgment under (c)(2) of this section estab-  
2 lishing the amount owed to a claimant from whom it has a binding  
3 stop-landing notice, a lender shall send to the claimant a verified  
4 statement showing, by date and amount, all construction financing  
5 provided by the lender for the project. Except as provided in (e) of  
6 this section, the lender shall include with the statement payment in  
7 the amount of the lender's liability to the claimant under (c) of this  
8 section.

9 (e) If there are two or more claimants to whom a lender is or  
10 may be liable under (c) of this section and the lender is uncertain as  
11 to the amount of its liability or possible liability to each, the  
12 lender may bring an action to require the claimants to interplead  
13 their claims.

14 (f) A draw against construction financing may be made only after  
15 certification of job progress is delivered to the lender by the owner.  
16 The form of the certification may be prescribed by the lender and  
17 shall include

18 (1) a statement of the progress of the project, including  
19 the percentage of completion of the project;

20 (2) the name, address, and telephone number of each prime  
21 contractor who has furnished labor, material, service, or equipment  
22 for the project;

23 (3) the amount owed by the owner to each listed prime  
24 contractor; and

25 (4) the portion of the draw that the owner will pay to each  
26 listed prime contractor.

27 (g) The owner shall use each draw as indicated in the certifi-  
28 cates given by them to the lender under (f) of this section. The  
29 lender may not be required to verify the information in a certificate

1 and is not liable for an error in a certificate.

2 (h) An owner who intentionally fails to apply construction  
3 financing proceeds as indicated by the certificate required under (f)  
4 of this section is guilty of a class A misdemeanor. The penalty  
5 provided under this subsection does not replace any other penalty that  
6 may be provided for by law for the same conduct.

7 (i) Within 10 days after being requested, a lender shall provide  
8 a person who has given the lender a stop-lending notice with a copy of

9 (1) each certificate received by the lender under (f) of  
10 this section; and

11 (2) a verified certificate stating the amount of construc-  
12 tion financing proceeds committed by the lender for the project that  
13 have not been disbursed by the lender.

14 (j) The lender may not provide construction financing proceeds  
15 for payment of indebtedness of the owner that is not incurred for the  
16 project.

17 \* Sec. 2. AS 34.35.064(a) is amended to read:

18 (a) Before furnishing labor, material, service, or equipment for  
19 a project, a person [AFTER ENTERING INTO A CONTRACT, A CLAIMANT] may  
20 give a notice of right to lien to the owner or owner's agent [AND THE  
21 LENDER]. If the notice is given in accordance with this section, the  
22 owner has the burden of proof to show that the owner did not know of  
23 or consent to the furnishing of the labor, material, service, or  
24 equipment by the claimant in an action to foreclose the claimant's  
25 lien on the property under AS 34.35.050 - 34.35.120. Otherwise the  
26 claimant has the burden of proof to show that the owner knew of and  
27 consented to the furnishing of the labor, material, service, or equip-  
28 ment. The notice of right to lien sha'll be in writing, state that it  
29 is a notice of a right to assert a lien against real property [A

BUILDING OR OTHER IMPROVEMENT] for labor, materials, services, or equipment furnished in connection with a project [CONSTRUCTION, ALTERATION, OR REPAIR OF THE BUILDING OR OTHER IMPROVEMENT], and contain

(1) a legal description sufficient for identification of the real property [UPON WHICH THE BUILDING OR OTHER IMPROVEMENT IS LOCATED];

(2) the name of the owner;

(3) the name and address of the claimant;

(4) the name and address of the person with whom the claimant contracted;

(5) a general description of the labor, materials, services, or equipment provided or to be provided;

(6) a statement that the claimant may be entitled to record a claim of lien; and

(7) the following statement in type no smaller than that used in providing the information required by (1) - (6) of this subsection: WARNING: Unless provision is [HAS BEEN] made for payment of sums that may be due to the undersigned, your above property may be subject to foreclosure to satisfy those sums even though you may pay [THIS CLAIM, YOU MAY BE LIABLE FOR PAYMENT DIRECTLY TO THIS CLAIMANT, NOTWITHSTANDING THE FACT THAT PAYMENT HAS BEEN MADE TO] a prime contractor or other person for the labor, material, service, or equipment furnished by the undersigned [PARTY].

\* Sec. 3. AS 34.35.067 is amended to read:

Sec. 34.35.067. RECORDING NOTICE OF RIGHT TO LIEN. A notice of right to lien may be recorded by a claimant at any time after the claimant enters [ENTERING] into a contract for or first furnishes labor, material, service, or equipment [FURNISHED] in connection with a project [THE CONSTRUCTION, ALTERATION OR REPAIR OF A BUILDING OR

OTHER IMPROVEMENT]. The notice shall be recorded in the same manner as specified for the recording of a claim of lien under AS 34.35.070.

\* Sec. 4. AS 34.35.070(a) is amended to read:

(a) A [SUBJECT TO THE PROVISIONS OF AS 34.35.069(a), A] claimant may record a claim of lien after entering into a contract for a project [THE CONSTRUCTION, ALTERATION, OR REPAIR OF A BUILDING OR IMPROVEMENT]. A claim of lien may not be recorded later than the time specified under AS 34.35.068.

\* Sec. 5. AS 34.35.071(a) is amended to read:

(a) The owner of real property that may be subject to a lien under AS 34.35.050 - 34.35.120 may announce the date of completion of the project [A BUILDING OR OTHER IMPROVEMENT ON THE PROPERTY] by

(1) recording a notice of completion after completion of the project [CONSTRUCTION, ALTERATION OR REPAIR OF THE BUILDING OR OTHER IMPROVEMENT] in the office of the recorder of the district in which the real property [BUILDING OR OTHER IMPROVEMENT] is situated; and

(2) giving notice at least five days before the recording of the notice of completion to all claimants who have given a notice of right to lien or a stop-lending [STOP-PAYMENT] notice to the owner and the lender prior to 10 days before recording a notice of completion; the notice must include a copy of the notice of completion and a statement advising claimants that a notice of completion will be recorded not earlier than five days after the date of the notice.

\* Sec. 6. AS 34.35 is amended by adding a new section to read:

Sec. 34.35.074. CIVIL SUITS. (a) A person injured by a violation of AS 34.35.050 - 34.35.120 may bring a civil action

(1) except as provided in AS 34.35.062(c), for actual and consequential damages that are proximately caused by the violation

plus costs, including reasonable attorney's fees;

(2) to enjoin the violation, and if the person prevails, the person shall be awarded costs, including reasonable attorney's fees.

(b) A claimant who files a stop-lending notice or has a claim of lien recorded under AS 34.35.075 and who fails to promptly remove the stop-lending notice or claim of lien from the record upon receiving payment in full on the claim or discovering that the stop-lending notice or claim of lien is in error, unjust, premature or excessive is liable for actual and consequential damages caused by the filing of the stop-lending notice or improperly recorded claim of lien plus costs, including reasonable attorney's fees.

\* Sec. 7. AS 34.35.080(a) is amended to read:

(a) A lien provided for in AS 34.35.050 - 34.35.120 does not bind real property [A BUILDING, STRUCTURE, OR OTHER IMPROVEMENT] for more than six months after the claim of lien is recorded [FILED], unless an action is commenced in [SUIT IS BROUGHT BEFORE] the proper court to enforce the lien within

(1) [WITHIN] that time; [,] or

(2) [WITHIN] six months after recording of an extension notice in the same recording office within the original six-month period showing the recording date and the book and page or instrument number of the initial claim of lien, and the balance owing.

\* Sec. 8. AS 34.35.080 is amended by adding a new subsection to read:

(c) A lien whose duration is extended by commencement of an action under (a) of this section is void as against a person who, after the commencement of the action and without knowledge or actual notice of its pendency, acquires an interest in the subject property in good faith for valuable consideration, unless a notice of the

1 pendency of the action has been duly filed for record before the time  
2 the person's conveyance is duly filed for record. Notice of the  
3 pendency of the action shall conform to the requirements of AS 09.45.-  
4 790.

5 \* Sec. 9. AS 34.35.112 is amended to read:

6 Sec. 34.35.112. PAYMENT OF CLAIMANT'S LIENS. (a) If more than  
7 one lien created under AS 34.35.050 - 34.35.120 is claimed against  
8 property, the court in its judgment shall declare the rank of each  
9 lien or class of liens in the following order:

10 (1) all persons other than prime contractors or subcontractors  
11 with lien rights under AS 34.35.050(1);

12 (2) the trustees of employment benefit trusts for persons  
13 described in (1) of this subsection;

14 (3) all materialmen and subcontractors;

15 (4) [SUBCONTRACTORS, INCLUDING] prime contractors other  
16 than the general contractor [AND PERSONS DESCRIBED IN AS 34.35.050-  
17 (5)];

18 (5) the general contractor.

19 (b) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of  
20 the foreclosure sale of the property are insufficient to pay the lien  
21 claims of all persons who have recorded claims [A CLAIM] of lien, the

22 (1) [THE] liens of all individuals with lien rights under  
23 AS 34.35.050(1) shall first be paid in full, or pro rata if the pro-  
24 ceeds are insufficient to pay them in full;

25 (2) [THE] liens of trustees of employment benefit trusts  
26 for persons described in (1) of this subsection shall be paid in full  
27 or pro rata if the proceeds are insufficient to pay them in full;

28 (3) [THE] liens of materialmen and subcontractors shall be  
29 paid in full or pro rata if the proceeds are insufficient to pay them

in full;

(4) liens of persons described in AS 34.35.050(5) and [OUT OF THE REMAINDER THE SUBCONTRACTORS, INCLUDING] prime contractors, other than the general contractor, shall be paid in full [,] or pro rata if the remainder is insufficient to pay them in full; and

(5) lien of the general contractor [THE BALANCE] shall be paid out of [TO THE GENERAL CONTRACTOR; A GENERAL CONTRACTOR IS ENTITLED TO EXECUTION FOR] the balance [DUE AFTER DISTRIBUTION].

\* Sec. 10. AS 34.35.112 is amended by adding a new subsection to read:

(c) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of the foreclosure sale of the property are sufficient to pay the lien claims of all persons who have recorded claims of lien, the balance shall be paid to the person who owned the property before the foreclosure sale.

\* Sec. 11. AS 34.35.114(c) is repealed and reenacted to read:

(c) A person who receives a stop-lending notice or notice of right to lien identifying a project for which the person is not the lender shall notify the claimant in writing within 10 days after receipt of the notice that the person is not the lender.

\* Sec. 12. AS 34.35.114(d) is repealed and reenacted to read:

(d) A claimant shall, within 10 days after receipt of a request, provide an owner or lender to whom the claimant has given a stop-lending notice or notice of right to lien a written statement of the amount due to the claimant and unpaid.

\* Sec. 13. AS 34.35.117(a) is amended to read:

(a) Except as provided under (b) of this section, a written waiver of lien or stop-lending [STOP-PAYMENT] notice of rights created under AS 34.35.050 - 34.35.120 signed by a claimant requires no consideration and is valid and binding. A waiver permitted under this

section may not relate to labor, materials, services, or equipment furnished after the date the waiver is signed by the claimant.

\* Sec. 14. AS 34.35.120(4) is amended to read:

(4) "construction financing" means [THAT PORTION OF] money loaned or other credit extended to an owner secured by an encumbrance on real property to finance a project on that [ORIGINAL CONSTRUCTION OF A BUILDING OR OTHER IMPROVEMENT ON, OR DEVELOPMENT OF,] real property [, BUT DOES NOT INCLUDE

(A) FUNDS TO ACQUIRE REAL PROPERTY;

(B) FUNDS TO PAY PRINCIPAL AMORTIZATION OF ENCUMBRANCES WITH PRIORITY OVER THE ENCUMBRANCE SECURING THE CONSTRUCTION FINANCING;

(C) FUNDS TO PAY LOAN, COMMITMENT, TITLE, LEGAL, CLOSING, RECORDING OR APPRAISAL FEES ON THE CONSTRUCTION LOAN];

\* Sec. 15. AS 34.35.120(9) is amended to read:

(9) "give notice" means to mail a notice required under AS 34.35.050 - 34.35.120 by first-class mail and by using a form of mail requiring a signed receipt, or to deliver the notice and obtain a receipt signed by the person to whom it is directed or an agent of that person; a notice is effective when given or delivered to

(A) [TO] a lender at the address designated in the encumbrance securing that lender;

(B) [TO] an owner at the last known address of the owner;

(C) [TO] a prime contractor at the last known address of the prime contractor;

(D) [TO] a potential lien claimant at the address specified in a stop-lending [STOP-PAYMENT] notice or notice of right to lien or claim of lien;

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\* Sec. 16. AS 34.35.120(13) is amended to read:

(13) "owner" means a person who owns real property or a possessory interest in real property [THE BUILDING OR OTHER IMPROVEMENT] and who enters into a contract, express or implied, for a project on that property [THE CONSTRUCTION, ALTERATION OR REPAIR OF A BUILDING OR IMPROVEMENT];

\* Sec. 17. AS 34.35.120 is amended by adding a new paragraph to read:

(17) "project" means construction, alteration, or repair of an improvement on real property or work done to enhance the real property itself.

\* Sec. 18. AS 34.35.069, 34.35.080(b), 34.35.114(e), and 34.35.118 are repealed.

Cook  
4/18/86

Original sponsors: Cotten, Szymanski,  
Phillips, et al

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 494 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to liens for labor or material  
7 furnished."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 34.35.062 is repealed and reenacted to read:

10 Sec. 34.35.062. CONSTRUCTION FINANCING. (a) A claimant to whom  
11 payment for the labor, material, service, or equipment furnished for a  
12 project is past due may give the lender a stop-lending notice. The  
13 claimant shall at the same time give a copy of the notice to the owner  
14 and to each prime contractor with whom or through whom the claimant or  
15 the claimant's debtor has contracted. A stop-lending notice shall

16 (1) instruct the lender to stop disbursing, advancing, or  
17 otherwise providing construction financing for the project;

18 (2) be verified by the claimant;

19 (3) state the claimant's name, address, and telephone  
20 number;

21 (4) describe the labor, material, service, or equipment  
22 furnished by the claimant and state the name of the person to whom  
23 furnished;

24 (5) describe the real property improved by the labor,  
25 material, service, or equipment and state the name of the person the  
26 claimant believes to be the owner of the real property;

27 (6) state the amount due and unpaid to the claimant for the  
28 labor, material, service, or equipment.

29 (b) A stop-lending notice is binding upon a lender from the time

1 the lender has received it and had a reasonable opportunity to act  
2 upon it until it expires or is revoked. A notice expires on the 91st  
3 day after it is received by the lender unless the claimant has com-  
4 menced an action on the claim that is the subject of the notice before  
5 that day and the lender has received written notification of the  
6 action. A stop-lending notice may be revoked at any time in writing  
7 signed by the claimant. Expiration or revocation of a notice extin-  
8 guishes the liability of the lender to the claimant under (c) of this  
9 subsection.

10 (c) A lender who disburses, advances, or otherwise provides  
11 construction financing for a project after it is the subject of a  
12 stop-lending notice is liable to the claimant in an amount equal to  
13 the lowest of the following amounts:

14 (1) the amount of construction financing disbursed, ad-  
15 vanced, or otherwise provided by the lender after receipt of the  
16 claimant's stop-lending notice; if there are two or more stop-lending  
17 notices when the disbursement occurs, the lender's liability to each  
18 claimant is based on the claimant's ranking under AS 34.35.112;

19 (2) the amount owed to the claimant, including interest,  
20 costs, and attorney's fees, for labor, material, service, or equipment  
21 furnished for the project by the claimant as established by a written  
22 agreement signed on or after the date of the stop-lending notice by  
23 the claimant, the owner and the prime contractor with whom or through  
24 whom the claimant or the claimant's debtor has contracted or by a  
25 final judgment in an action in which the owner, the claimant and the  
26 claimant's debtor are named and, if necessary, served parties;

27 (3) 150 percent of the amount stated in the stop-lending  
28 notice.

29 (d) Within 10 days after receiving the written agreement or a

1 certified copy of the judgment under (c)(2) of this section estab-  
2 lishing the amount owed to a claimant from whom it has a binding  
3 stop-lending notice, a lender shall send to the claimant a verified  
4 statement showing, by date and amount, all construction financing  
5 provided by the lender for the project. Except as provided in (e) of  
6 this section, the lender shall include with the statement payment in  
7 the amount of the lender's liability to the claimant under (c) of this  
8 section.

9 (e) If there are two or more claimants to whom a lender is or  
10 may be liable under (c) of this section and the lender is uncertain as  
11 to the amount of its liability or possible liability to each, the  
12 lender may bring an action to require the claimants to interplead  
13 their claims.

14 (f) A draw against construction financing may be made only after  
15 certification of job progress is delivered to the lender by the owner.  
16 The form of the certification may be prescribed by the lender and  
17 shall include

18 (1) a statement of the progress of the project, including  
19 the percentage of completion of the project;

20 (2) the name, address, and telephone number of each prime  
21 contractor who has furnished labor, material, service, or equipment  
22 for the project;

23 (3) the amount owed by the owner to each listed prime  
24 contractor; and

25 (4) the portion of the draw that the owner will pay to each  
26 listed prime contractor.

27 (g) The owner shall use each draw as indicated in the certifi-  
28 cates given by them to the lender under (f) of this section. The  
29 lender may not be required to verify the information in a certificate

1 and is not liable for an error in a certificate.

2 (h) An owner who intentionally fails to apply construction  
3 financing proceeds as indicated by the certificate required under (f)  
4 of this section is guilty of a class A misdemeanor. The penalty  
5 provided under this subsection does not replace any other penalty that  
6 may be provided for by law for the same conduct.

7 (i) Within 10 days after being requested, a lender shall provide  
8 a person who has given the lender a stop-lending notice with a copy of

9 (1) each certificate received by the lender under (f) of  
10 this section; and

11 (2) a verified certificate stating the amount of construc-  
12 tion financing proceeds committed by the lender for the project that  
13 have not been disbursed by the lender.

14 (j) The lender may not provide construction financing proceeds  
15 for payment of indebtedness of the owner that is not incurred for the  
16 project.

17 \* Sec. 2. AS 34.35.064(a) is amended to read:

18 (a) Before furnishing labor, material, service, or equipment for  
19 a project, a person [AFTER ENTERING INTO A CONTRACT, A CLAIMANT] may  
20 give a notice of right to lien to the owner or owner's agent [AND THE  
21 LENDER]. If the notice is given in accordance with this section, the  
22 owner has the burden of proof to show that the owner did not know of  
23 or consent to the furnishing of the labor, material, service, or  
24 equipment by the claimant in an action to foreclose the claimant's  
25 lien on the property under AS 34.35.050 - 34.35.120. Otherwise the  
26 claimant has the burden of proof to show that the owner knew of and  
27 consented to the furnishing of the labor, material, service, or equip-  
28 ment. The notice of right to lien shall be in writing, state that it  
29 is a notice of a right to assert a lien against real property [A

1 BUILDING OR OTHER IMPROVEMENT] for labor, materials, services, or  
2 equipment furnished in connection with a project [CONSTRUCTION, ALTER-  
3 ATION, OR REPAIR OF THE BUILDING OR OTHER IMPROVEMENT], and contain

4 (1) a legal description sufficient for identification of  
5 the real property [UPON WHICH THE BUILDING OR OTHER IMPROVEMENT IS  
6 LOCATED];

7 (2) the name of the owner;

8 (3) the name and address of the claimant;

9 (4) the name and address of the person with whom the claim-  
10 ant contracted;

11 (5) a general description of the labor, materials, ser-  
12 vices, or equipment provided or to be provided;

13 (6) a statement that the claimant may be entitled to record  
14 a claim of lien; and

15 (7) the following statement in type no smaller than that  
16 used in providing the information required by (1) - (6) of this  
17 subsection: WARNING: Unless provision is [HAS BEEN] made for payment  
18 of sums that may be due to the undersigned, your above property may be  
19 subject to foreclosure to satisfy those sums even though you may pay  
20 [THIS CLAIM, YOU MAY BE LIABLE FOR PAYMENT DIRECTLY TO THIS CLAIMANT,  
21 NOTWITHSTANDING THE FACT THAT PAYMENT HAS BEEN MADE TO] a prime con-  
22 tractor or other person for the labor, material, service, or equipment  
23 furnished by the undersigned [PARTY].

24 \* Sec. 3. AS 34.35.067 is amended to read:

25 Sec. 34.35.067. RECORDING NOTICE OF RIGHT TO LIEN. A notice of  
26 right to lien may be recorded by a claimant at any time after the  
27 claimant enters [ENTERING] into a contract for or first furnishes  
28 labor, material, service, or equipment [FURNISHED] in connection with  
29 a project [THE CONSTRUCTION, ALTERATION OR REPAIR OF A BUILDING OR

1 OTHER IMPROVEMENT]]. The notice shall be recorded in the same manner  
2 as specified for the recording of a claim of lien under AS 34.35.070.

3 \* Sec. 4. AS 34.35.070(a) is amended to read:

4 (a) A [SUBJECT TO THE PROVISIONS OF AS 34.35.069(a), A] claimant  
5 may record a claim of lien after entering into a contract for a proj-  
6 ect [THE CONSTRUCTION, ALTERATION, OR REPAIR OF A BUILDING OR IMPROVE-  
7 MENT]. A claim of lien may not be recorded later than the time spec-  
8 ified under AS 34.35.068.

9 \* Sec. 5. AS 34.35.071(a) is amended to read:

10 (a) The owner of real property that may be subject to a lien  
11 under AS 34.35.050 - 34.35.120 may announce the date of completion of  
12 the project [A BUILDING OR OTHER IMPROVEMENT ON THE PROPERTY] by

13 (1) recording a notice of completion after completion of  
14 the project [CONSTRUCTION, ALTERATION OR REPAIR OF THE BUILDING OR  
15 OTHER IMPROVEMENT] in the office of the recorder of the district in  
16 which the real property [BUILDING OR OTHER IMPROVEMENT] is situated;  
17 and

18 (2) giving notice at least five days before the recording  
19 of the notice of completion to all claimants who have given a notice  
20 of right to lien or a stop-lending [STOP-PAYMENT] notice to the owner  
21 and the lender prior to 10 days before recording a notice of comple-  
22 tion; the notice must include a copy of the notice of completion and a  
23 statement advising claimants that a notice of completion will be  
24 recorded not earlier than five days after the date of the notice.

25 \* Sec. 6. AS 34.35 is amended by adding a new section to read:

26 Sec. 34.35.074. CIVIL SUITS. (a) A person injured by a viola-  
27 tion of AS 34.35.050 - 34.35.120 may bring a civil action

28 (1) except as provided in AS 34.35.062(c), for actual and  
29 consequential damages that are proximately caused by the violation

1 plus costs, including reasonable attorney's fees;

2 (2) to enjoin the violation, and if the person prevails,  
3 the person shall be awarded costs, including reasonable attorney's  
4 fees.

5 (b) A claimant who files a stop-lending notice or has a claim of  
6 lien recorded under AS 34.35.075 and who fails to promptly remove the  
7 stop-lending notice or claim of lien from the record upon receiving  
8 payment in full on the claim or discovering that the stop-lending  
9 notice or claim of lien is in error, unjust, premature or excessive is  
10 liable for actual and consequential damages caused by the filing of  
11 the stop-lending notice or improperly recorded claim of lien plus  
12 costs, including reasonable attorney's fees.

13 \* Sec. 7. AS 34.35.080(a) is amended to read:

14 (a) A lien provided for in AS 34.35.050 - 34.35.120 does not  
15 bind real property [A BUILDING, STRUCTURE, OR OTHER IMPROVEMENT] for  
16 more than six months after the claim of lien is recorded [FILED],  
17 unless an action is commenced in [SUIT IS BROUGHT BEFORE] the proper  
18 court to enforce the lien within

19 (1) [WITHIN] that time; [,] or

20 (2) [WITHIN] six months after recording of an extension  
21 notice in the same recording office within the original six-month  
22 period showing the recording date and the book and page or instrument  
23 number of the initial claim of lien, and the balance owing.

24 \* Sec. 8. AS 34.35.080 is amended by adding a new subsection to read:

25 (c) A lien whose duration is extended by commencement of an  
26 action under (a) of this section is void as against a person who,  
27 after the commencement of the action and without knowledge or actual  
28 notice of its pendency, acquires an interest in the subject property  
29 in good faith for valuable consideration, unless a notice of the

1 pendency of the action has been duly filed for record before the time  
2 the person's conveyance is duly filed for record. Notice of the  
3 pendency of the action shall conform to the requirements of AS 09.45.-  
4 790.

5 \* Sec. 9. AS 34.35.112 is amended to read:

6 Sec. 34.35.112. PAYMENT OF CLAIMANT'S LIENS. (a) If more than  
7 one lien created under AS 34.35.050 - 34.35.120 is claimed against  
8 property, the court in its judgment shall declare the rank of each  
9 lien or class of liens in the following order:

10 (1) all persons other than prime contractors or subcontrac-  
11 tors with lien rights under AS 34.35.050(1);

12 (2) the trustees of employment benefit trusts for persons  
13 described in (1) of this subsection;

14 (3) all materialmen and subcontractors;

15 (4) [SUBCONTRACTORS, INCLUDING] prime contractors other  
16 than the general contractor [AND PERSONS DESCRIBED IN AS 34.35.050-  
17 (5)];

18 (5) the general contractor.

19 (b) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of  
20 the foreclosure sale of the property are insufficient to pay the lien  
21 claims of all persons who have recorded claims [A CLAIM] of lien, the

22 (1) [THE] liens of all individuals with lien rights under  
23 AS 34.35.050(1) shall first be paid in full, or pro rata if the pro-  
24 ceeds are insufficient to pay them in full;

25 (2) [THE] liens of trustees of employment benefit trusts  
26 for persons described in (1) of this subsection shall be paid in full  
27 or pro rata if the proceeds are insufficient to pay them in full;

28 (3) [THE] liens of materialmen and subcontractors shall be  
29 paid in full or pro rata if the proceeds are insufficient to pay them

1 in full;

2 (4) liens of persons described in AS 34.35.050(5) and [OUT  
3 OF THE REMAINDER THE SUBCONTRACTORS, INCLUDING] prime contractors,  
4 other than the general contractor, shall be paid in full [,] or pro  
5 rata if the remainder is insufficient to pay them in full; and

6 (5) lien of the general contractor [THE BALANCE] shall be  
7 paid out of [TO THE GENERAL CONTRACTOR; A GENERAL CONTRACTOR ENTI-  
8 TLED TO EXECUTION FOR] the balance [DUE AFTER DISTRIBUTION].

9 \* Sec. 10. AS 34.35.112 is amended by adding a new subsection to read:

10 (c) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of  
11 the foreclosure sale of the property are sufficient to pay the lien  
12 claims of all persons who have recorded claims of lien, the balance  
13 shall be paid to the person who owned the property before the foreclo-  
14 sure sale.

15 \* Sec. 11. AS 34.35.114(c) is repealed and reenacted to read:

16 (c) A person who receives a stop-lending notice or notice of  
17 right to lien identifying a project for which the person is not the  
18 lender shall notify the claimant in writing within 10 days after  
19 receipt of the notice that the person is not the lender.

20 \* Sec. 12. AS 34.35.114(d) is repealed and reenacted to read:

21 (d) A claimant shall, within 10 days after receipt of a request,  
22 provide an owner or lender to whom the claimant has given a stop-lend-  
23 ing notice or notice of right to lien a written statement of the  
24 amount due to the claimant and unpaid.

25 \* Sec. 13. AS 34.35.117(a) is amended to read:

26 (a) Except as provided under (b) of this section, a written  
27 waiver of lien or stop-lending [STOP-PAYMENT] notice of rights created  
28 under AS 34.35.050 - 34.35.120 signed by a claimant requires no con-  
29 sideration and is valid and binding. A waiver permitted under this

1 section may not relate to labor, materials, services, or equipment  
2 furnished after the date the waiver is signed by the claimant.

3 \* Sec. 14. AS 34.35.120(4) is amended to read:

4 (4) "construction financing" means [THAT PORTION OF] money  
5 loaned or other credit extended to an owner secured by an encumbrance  
6 on real property to finance a project on that [ORIGINAL CONSTRUCTION  
7 OF A BUILDING OR OTHER IMPROVEMENT ON, OR DEVELOPMENT OF,] real prop-  
8 erty [, BUT DOES NOT INCLUDE

9 (A) FUNDS TO ACQUIRE REAL PROPERTY;

10 (B) FUNDS TO PAY PRINCIPAL AMORTIZATION OF ENCUM-  
11 BRANCES WITH PRIORITY OVER THE ENCUMBRANCE SECURING THE CONSTRUC-  
12 TION FINANCING;

13 (C) FUNDS TO PAY LOAN, COMMITMENT, TITLE, LEGAL,  
14 CLOSING, RECORDING OR APPRAISAL FEES ON THE CONSTRUCTION LOAN];

15 \* Sec. 15. AS 34.35.120(9) is amended to read:

16 (9) "give notice" means to mail a notice required under  
17 AS 34.35.050 - 34.35.120 by first-class mail and by using a form of  
18 mail requiring a signed receipt, or to deliver the notice and obtain a  
19 receipt signed by the person to whom it is directed or an agent of  
20 that person; a notice is effective when given or delivered to

21 (A) [TO] a lender at the address designated in the  
22 encumbrance securing that lender;

23 (B) [TO] an owner at the last known address of the  
24 owner;

25 (C) [TO] a prime contractor at the last known address  
26 of the prime contractor;

27 (D) [TO] a potential lien claimant at the address  
28 specified in a stop-lending [STOP-PAYMENT] notice or notice of  
29 right to lien or claim of lien;

1 \* Sec. 16. AS 34.35.120(13) is amended to read:

2 (13) "owner" means a person who owns real property or a  
3 possessory interest in real property [THE BUILDING OR OTHER IMPROVE-  
4 MENT] and who enters into a contract, express or implied, for a proj-  
5 ect on that property [THE CONSTRUCTION, ALTERATION OR REPAIR OF A  
6 BUILDING OR IMPROVEMENT];

7 \* Sec. 17. AS 34.35.120 is amended by adding a new paragraph to read:

8 (17) "project" means construction, alteration, or repair of  
9 an improvement on real property or work done to enhance the real  
10 property itself.

11 \* Sec. 18. AS 34.35.069, 34.35.080(b), 34.35.114(e), and 34.35.118 are  
12 repealed.

Cook  
4/16/86

Original sponsors: Cotten, Szymanski,  
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2 CS FOR HOUSE BILL NO. 494 ( )

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5 A BILL

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14 and to each prime contractor with whom or through whom the claimant or  
15 the claimant's debtor has contracted. A stop-lending notice shall

16 (1) instruct the lender to stop disbursing, advancing, or  
17 otherwise providing construction financing for the project;

18 (2) be verified by the claimant;

19 (3) state the claimant's name, address, and telephone  
20 number;

21 (4) describe the labor, material, service, or equipment  
22 furnished by the claimant and state the name of the person to whom  
23 furnished;

24 (5) describe the real property improved by the labor,  
25 material, service, or equipment and state the name of the person the  
26 claimant believes to be the owner of the real property;

27 (6) state the amount due and unpaid to the claimant for the  
28 labor, material, service, or equipment.

29 (b) A stop-lending notice is binding upon a lender from the time

1 the lender has received it and had a reasonable opportunity to act  
2 upon it until it expires or is revoked. A notice expires on the 91st  
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10 (c) A lender who disburses, advances, or otherwise provides  
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16 claimant's stop-lending notice; if there are two or more stop-lending  
17 notices when the disbursement occurs, the lender's liability to each  
18 claimant is based on the claimant's ranking under AS 34.35.112;

19 (2) the amount owed to the claimant, including interest,  
20 costs, and attorney's fees, for labor, material, service, or equipment  
21 furnished for the project by the claimant as established by a written  
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1 certified copy of the judgment under (c)(2) of this section estab-  
2 lishing the amount owed to a claimant from whom it has a binding  
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5 provided by the lender for the project. Except as provided in (e) of  
6 this section, the lender shall include with the statement payment in  
7 the amount of the lender's liability to the claimant under (c) of this  
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19 the percentage of completion of the project;

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28 cates given by them to the lender under (f) of this section. The  
29 lender may not be required to verify the information in a certificate

1 and is not liable for an error in a certificate.

2 (h) An owner who intentionally fails to apply construction  
3 financing proceeds as indicated by the certificate required under (f)  
4 of this section is guilty of a class C felony. If the owner is not a  
5 natural person, upon conviction the owner may be fined in an amount  
6 not to exceed \$50,000.

7 (i) Within 10 days after being requested, a lender shall provide  
8 a person who has given it a stop-lending notice with a copy of

9 (1) each certificate received by the lender under (f) of  
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27 claimant enters [ENTERING] into a contract for or first furnishes  
28 labor, material, service, or equipment [FURNISHED] in connection with  
29 a project [THE CONSTRUCTION, ALTERATION OR REPAIR OF A BUILDING OR

1 OTHER IMPROVEMENT]. The notice shall be recorded in the same manner  
2 as specified for the recording of a claim of lien under AS 34.35.070.

3 \* Sec. 4. AS 34.35.070(a) is amended to read:

4 (a) A [SUBJECT TO THE PROVISIONS OF AS 34.35.069(a), A] claimant  
5 may record a claim of lien after entering into a contract for a proj-  
6 ect [THE CONSTRUCTION, ALTERATION, OR REPAIR OF A BUILDING OR IMPROVE-  
7 MENT]. A claim of lien may not be recorded later than the time spec-  
8 ified under AS 34.35.068.

9 \* Sec. 5. AS 34.35.071(a) is amended to read:

10 (a) The owner of real property that may be subject to a lien  
11 under AS 34.35.050 - 34.35.120 may announce the date of completion of  
12 the project [A BUILDING OR OTHER IMPROVEMENT ON THE PROPERTY] by

13 (1) recording a notice of completion after completion of  
14 the project [CONSTRUCTION, ALTERATION OR REPAIR OF THE BUILDING OR  
15 OTHER IMPROVEMENT] in the office of the recorder of the district in  
16 which the real property [BUILDING OR OTHER IMPROVEMENT] is situated;  
17 and

18 (2) giving notice at least five days before the recording  
19 of the notice of completion to all claimants who have given a notice  
20 of right to lien or a stop-lending [STOP-PAYMENT] notice to the owner  
21 and the lender prior to 10 days before recording a notice of comple-  
22 tion; the notice must include a copy of the notice of completion and a  
23 statement advising claimants that a notice of completion will be  
24 recorded not earlier than five days after the date of the notice.

25 \* Sec. 6. AS 34.35 is amended by adding a new section to read:

26 Sec. 34.35.074. CIVIL SUITS. (a) A person injured by a viola-  
27 tion of AS 34.35.050 - 34.35.120 may bring a civil action

28 (1) for actual damages that are proximately caused by the  
29 violation plus costs, including reasonable actual attorney's fees;

1 (2) to enjoin the violation, and if the person prevails,  
2 the person shall be awarded costs, including reasonable actual attor-  
3 ney's fees.

4 (b) A claimant who files a stop-payment notice or has a claim of  
5 lien recorded under AS 34.35.075 and who fails to promptly remove the  
6 stop-payment notice or claim of lien from the record upon receiving  
7 payment in full on the claim or discovering that the stop-payment  
8 notice or claim of lien is in error is liable for actual damages  
9 caused by the improperly filed stop-payment notice or improperly  
10 recorded claim of lien plus costs, including reasonable actual attor-  
11 ney's fees.

12 \* Sec. 7. AS 34.35.080(a) is amended to read:

13 (a) A lien provided for in AS 34.35.050 - 34.35.120 does not  
14 bind real property [A BUILDING, STRUCTURE, OR OTHER IMPROVEMENT] for  
15 more than six months after the claim of lien is recorded [FILED],  
16 unless an action is commenced in [SUIT IS BROUGHT BEFORE] the proper  
17 court to enforce the lien within

18 (1) [WITHIN] that time; [,] or

19 (2) [WITHIN] six months after recording of an extension  
20 notice in the same recording office within the original six-month  
21 period showing the recording date and the book and page or instrument  
22 number of the claim of lien, and the balance owing.

23 \* Sec. 8. AS 34.35.080 is amended by adding a new subsection to read:

24 (c) A lien whose duration is extended by commencement of an  
25 action under (a) of this section is void as against a person who,  
26 after the commencement of the action and without knowledge or actual  
27 notice of its pendency, acquires an interest in the subject property  
28 in good faith for valuable consideration, unless a notice of the  
29 pendency of the action has been duly filed for record before the time

1 the person's conveyance is duly filed for record. Notice of the  
2 pendency of the action shall conform to the requirements of AS 09.45.-  
3 790.

4 \* Sec. 9. AS 34.35.112 is amended to read:

5 Sec. 34.35.112. PAYMENT OF CLAIMANT'S LIENS. (a) If more than  
6 one lien created under AS 34.35.050 - 34.35.120 is claimed against  
7 property, the court in its judgment shall declare the rank of each  
8 lien or class of liens in the following order:

9 (1) all persons other than prime contractors or subcontrac-  
10 tors with lien rights under AS 34.35.050(1);

11 (2) the trustees of employment benefit trusts for persons  
12 described in (1) of this subsection;

13 (3) all materialmen and subcontractors;

14 (4) [SUBCONTRACTORS, INCLUDING] prime contractors other  
15 than the general contractor [AND PERSONS DESCRIBED IN AS 34.35.050-  
16 (5)];

17 (5) the general contractor.

18 (b) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of  
19 the foreclosure sale of the property are insufficient to pay the lien  
20 claims of all persons who have recorded claims [A CLAIM] of lien, the

21 (1) [THE] liens of all individuals with lien rights under  
22 AS 34.35.050(1) shall first be paid in full, or pro rata if the pro-  
23 ceeds are insufficient to pay them in full;

24 (2) [THE] liens of trustees of employment benefit trusts  
25 for persons described in (1) of this subsection shall be paid in full  
26 or pro rata if the proceeds are insufficient to pay them in full;

27 (3) [THE] liens of materialmen and subcontractors shall be  
28 paid in full or pro rata if the proceeds are insufficient to pay them  
29 in full;

1           (4) liens of persons described in AS 34.35.050(5) and [OUT  
2 OF THE REMAINDER THE SUBCONTRACTORS, INCLUDING] prime contractors,  
3 other than the general contractor, shall be paid in full [,] or pro  
4 rata if the remainder is insufficient to pay them in full and

5           (5) lien of the general contractor [THE BALANCE] shall be  
6 paid out of [TO THE GENERAL CONTRACTOR; A GENERAL CONTRACTOR IS ENTI-  
7 TLED TO EXECUTION FOR] the balance [DUE AFTER DISTRIBUTION].

8 \* Sec. 10. AS 34.35.112 is amended by adding a new subsection to read:

9           (c) For purposes of AS 34.35.050 - 34.35.120, if the proceeds of  
10 the foreclosure sale of the property are sufficient to pay the lien  
11 claims of all persons who have recorded claims of lien, the balance  
12 shall be paid to the person who owned the property before the foreclo-  
13 sure sale.

14 \* Sec. 11. AS 34.35.114(c) is repealed and reenacted to read:

15           (c) A person who receives a stop-lending notice or notice of  
16 right to lien identifying a project for which the person is not the  
17 lender shall notify the claimant in writing within 10 days after  
18 receipt of the notice that the person is not the lender.

19 \* Sec. 12. AS 34.35.114(d) is repealed and reenacted to read:

20           (d) A claimant shall, within 10 days after receipt of a request,  
21 provide an owner or lender to whom the claimant has given a stop-lend-  
22 ing notice or notice of right to lien a written statement of the  
23 amount due to the claimant and unpaid.

24 \* Sec. 13. AS 34.35.117(a) is amended to read:

25           (a) Except as provided under (b) of this section, a written  
26 waiver of lien or stop-lending [STOP-PAYMENT] notice of rights created  
27 under AS 34.35.050 - 34.35.120 signed by a claimant requires no con-  
28 sideration and is valid and binding. A waiver permitted under this  
29 section may not relate to labor, materials, services, or equipment

1 furnished after the date the waiver is signed by the claimant.

2 \* Sec. 14. AS 34.35.120(4) is amended to read:

3 (4) "construction financing" means [THAT PORTION OF] money  
4 loaned or other credit extended to an owner secured by an encumbrance  
5 on real property to finance a project on that [ORIGINAL CONSTRUCTION  
6 OF A BUILDING OR OTHER IMPROVEMENT ON, OR DEVELOPMENT OF,] real prop-  
7 erty [, BUT DOES NOT INCLUDE

8 (A) FUNDS TO ACQUIRE REAL PROPERTY;

9 (B) FUNDS TO PAY PRINCIPAL AMORTIZATION OF ENCUM-  
10 BRANCES WITH PRIORITY OVER THE ENCUMBRANCE SECURING THE CONSTRUC-  
11 TION FINANCING;

12 (C) FUNDS TO PAY LOAN, COMMITMENT, TITLE, LEGAL,  
13 CLOSING, RECORDING OR APPRAISAL FEES ON THE CONSTRUCTION LOAN];

14 \* Sec. 15. AS 34.35.120(9) is amended to read:

15 (9) "give notice" means to mail a notice required under  
16 AS 34.35.050 - 34.35.120 by first-class mail and by using a form of  
17 mail requiring a signed receipt, or to deliver the notice and obtain a  
18 receipt signed by the person to whom it is directed or an agent of  
19 that person; a notice is effective when given or delivered to

20 (A) [TO] a lender at the address designated in the  
21 encumbrance securing that lender;

22 (B) [TO] an owner at the last known address of the  
23 owner;

24 (C) [TO] a prime contractor at the last known address  
25 of the prime contractor;

26 (D) [TO] a potential lien claimant at the address  
27 specified in a stop-lending [STOP-PAYMENT] notice or notice of  
28 right to lien or claim of lien;

29 \* Sec. 16. AS 34.35.120(13) is amended to read:

1 (13) "owner" means a person who owns real property or a  
2 possessory interest in real property [THE BUILDING OR OTHER IMPROVE-  
3 MENT] and who enters into a contract, express or implied, for a proj-  
4 ect on that property [THE CONSTRUCTION, ALTERATION OR REPAIR OF A  
5 BUILDING OR IMPROVEMENT];

6 \* Sec. 17. AS 34.35.120 is amended by adding a new paragraph to read:

7 (17) "project" means construction, alteration, or repair of  
8 an improvement on real property or work done to enhance the real  
9 property itself.

10 \* Sec. 18. AS 34.35.069, 34.35.070(f), 34.35.080(b), 34.35.114(e), and  
11 34.35.118 are repealed.

# Alaska State Legislature

POUCH V  
JUNEAU, ALASKA 99811  
(907) 465-4931



CHAIRMAN  
Special Committee on  
Telecommunications

DISTRICT 10  
BOX 111038  
ANCHORAGE, ALASKA 99511  
(907) 349 2192

MEMBER  
Labor and Commerce  
State Affairs  
Finance—Subcommittee Administration

Representative H. A. "Red" Boucher

March 21, 1986

Roger I. Woods, President  
Woods and Rhode, Inc.  
Alaska Truss and Millwork  
6325 Petersburg Street  
Anchorage, Alaska 99507

Dear Roger:

I just received your letter of March 13 regarding HB 494. It is unfortunate that you and others were not given the time to testify at the recent teleconferenced hearing of the bill. This seems to be happening more and more to various bills, and I am not certain what we can do to rectify it.

The shorter sessions of 120 days have made for many fewer days for hearings to be held by Committees, but that is only part of the problem; dwindling revenues and threatened budget cuts have greatly increased the amount of correspondence and requests for additional hearings on issues as more and more programs and positions become threatened, so the volume is increasing. Thus, we have more and more work to do in less and less time with the same amount of staff.

As you may have heard, this bill passed out of House Labor and Commerce Committee recently, and is currently in House Judiciary Committee awaiting scheduling. You may wish to contact Rep. Mike Miller, chair of that Committee, if you have additional concerns regarding the bill. I am taking the liberty of forwarding a copy of your letter to both the Chairman and to the sponsor of the bill, Rep. Cotton, so that it can be entered into the record. I think your comments give some additional valuable insight.

I will support this bill when it gets to the House floor.

Sincerely,

A handwritten signature in dark ink, appearing to be "Red Boucher".

Representative H.A. "Red" Boucher

RB/rp

cc: Rep. Sam Cotten  
Rep. Mike Miller



# WOODS AND ROHDE INC.

ALASKA TRUSS AND MILLWORK

6325 PETERSBURG STREET □ ANCHORAGE, ALASKA 99507

907 563-3200

March 13, 1986

House Labor and Commerce  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 98111

Re: House Bill - 494

Dear Rep. Red Boucher,

During the first teleconference, at which no one in Anchorage was given opportunity to speak, 24 interested people were in the conference room to speak or observe. Today, eighteen persons were there, nine of whom asked to testify. Only one did, because of time constraints on the part of the committee in Juneau. We all need to speak, because the fact is the existing law does not work.

It was interesting to hear Mr. Wes Clubb testify in your first committee hearing that the existing law is workable if only the subcontractors and suppliers would do the paper work.

In our experience in just the last two years, we have had at least ten liens, properly perfected, result in total loss of moneys due us, because of bank foreclosures which effectively eliminated our position. In one case our own bank advised us that there would be no money for us unless we could take them out of first position. Dollar values of first and prior positions in a foreclosure are almost invariably ten to 15 times a supplier's lien value. It is obvious that we small businesses have neither the resources nor the desire to assume ownership of properties. If we did so, in order to recapture our investment, we would be forced to compete in the market with the contractors we sell to. We have had banks verify to us, in writing, their commitment to finance a project, then later cut off financing in the middle of a commitment, and force both contractor and supplier to scramble to stay alive. We have seen this so often that most of us feel that the honor, integrity and honesty of too many bankers fluctuate with the condition of the economy.

As Swede Holmstrom testified in your hearing, when the existing law was formulated in 1978 the bankers promised to protect the rights of the subcontractors and suppliers. Today, the existing law does not work, partly because these verbal and implied promises were not honored by the bankers.

It is also interesting to hear the lawyers testify that the existing law has many remedies. All we have to do is pay a lot of money to attorneys and litigate our claims, in the hope that perhaps we will prevail.

My lawyer told me shortly after the emergence of the existing statute that it was a bad piece of legislation, poorly worded, and ambiguous. He said that it would take several years and many court cases before the scope and content of the law was determined.

It is obvious that the bankers and the lawyers want to retain the status quo; they have a good thing going for them.

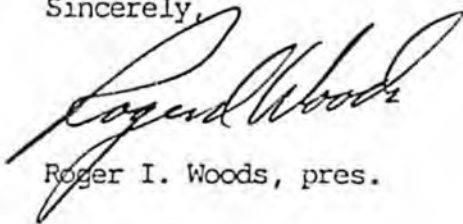
But the fact is, the law does not work. All is not sweetness - and - light in the land of construction lending.

In the past month, three individual contractors have complained long, loud, and bitterly in my office about bankers who played fast and loose with their assets, then reneged on commitments. One cited a sale flyer he published and distributed to attract buyers to a condo project he had. His values were \$90,000.00 to \$105,000.00. Within a very few days a major Anchorage bank copied his tactic, distributing flyers on a special weekend sale of foreclosed condos in the same neighborhood, with similar values, BUT the bank was asking only \$59,500.00, which would recover THEIR costs. The point is, the bank had foreclosed, all other claimants lost their interest, then the bank dumped the properties on the market in an unfair competitive practice.

We feel that the law must protect producers and suppliers as well as financiers. We need parity, or equality of rights, which is not present in the existing law. If the bankers have full control of all funds, including ours, we need to be able to force their accountability to us. We need to legally be in a position to hold their feet to the fire. The law must protect our interests because the bankers do not.

I will be most happy to discuss remedial legislation with you at your convenience.

Sincerely,

A handwritten signature in cursive script, appearing to read "Roger I. Woods".

Roger I. Woods, pres.



PROCTOR  
SALES INC.

5401 Cordova Street  
Unit #303  
Anchorage, AK 99502  
TLX 090-26510  
(907) 562-2608

113494  
1086

FEBRUARY 18, 1986

M. MIKE MILLER - JUNEAU  
ALASKA STATE LEGISLATURE  
POUCH V (MS3100)  
JUNEAU, ALASKA 99811

ATTN: M. MIKE MILLER

Dear Mr. Miller,

PSI is a small Alaskan business which represents a group of heating, ventilating, and air conditioning manufacturers, primarily to provide equipment for use on commercial projects. As we sell to mechanical contractors who are sub-contractors we often find ourselves classified as second tier subs with no lien rights at all.

Added to this problem is the absurd acknowledgement of right to lien which is rarely if ever signed or acknowledged.

In the past few years we have lost thousands of dollars and spent thousands of dollars legally pursuing money for equipment provided on construction jobs. Most of the problems are tied to disbursement and our inability to have legal rights to be paid for material we provide.

I recently went through a situation so blantant?y, morally wrong that I am compelled to write this letter:

- 1) PSI provided \$20,000 worth of equipment (for a state funded elementary school) to a mechanical contractor.
- 2) We obtained joint check agreements with the general contractor to guarantee payment when funds were disbursed.
- 3) The material was shipped to the contractor in Anchorage.

PAGE 2

FEBRUARY 18, 1986

- 4) The mechanical contractor and his assets were taken over by the bank (Alaska Bank of the North) forcing the mechanical into Chapter 11.
- 5) The bank seized equipment which the contractor had not paid for and offered to release it to PSI for a \$10,000 ransom.

PSI had already paid for the equipment and as it was not delivered to the job site the general had no obligation to pay for it. We were over a barrel as if we could not secure the release of the equipment immediately the general contractor would have to order it from another source.

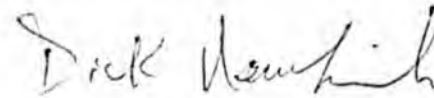
According to the current lien law the bank was in first position and we had no legal right to \$20,000 worth of equipment which we had already paid our manufacturer for.

We ended up paying the bank \$5,000 for equipment we owned in order to avoid losing the entire \$20,000. This, to me, is an outrage which I would like to see others avoid.

I strongly urge your consideration to the current lien legislation in order to assure some chance of fair play for the small Alaskan businessman.

Sincerely yours,

PROCTOR SALES INC



RICHARD M. NEWKIRK, Jr.

RMN:aeg

REPRESENTATIVE  
SAM COTTEN  
DISTRICT 15



P.O. BOX 296, EAGLE RIVER, AK 99577  
POUCH V, JUNEAU, AK 99811

ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES

MEMO

TO: House Judiciary committee members  
FROM: Rep. Sam Cotten  
DATE: March 26, 1986  
RE: CSHB 494

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The purpose of HB 494 is to clarify and strengthen the existing lien law. It was introduced at the request of suppliers and subcontractors because of increasing problems they are having with being paid for services or material they provide.

The Labor and Commerce committee substitute represents a compromise between the suppliers/subcontractors, lending institutions and the builders.

LABOR & COMMERCE COMMITTEE SUBSTITUTE  
HB 494

MAJOR POINTS

1. Clarifies the existing procedure available to suppliers and subcontractors. Changes the "stop-payment" notice to a "stop-lending" notice. (page 1, line 10)
2. Eliminates the current requirement that a claimant wait 20-30 days after an account becomes delinquent before he can give a stop-lending notice to the lender.
3. Allows a claimant to bring suit within 90 days of filing a stop-lending notice rather than 30. Removes the requirement the claimant put up a bond when taking a case to court. (page 1, line 29)
4. Before disbursing funds a lender must have a verified certificate from the owner and each prime contractor involved with the project providing information on the project. (page 2, line 29)
5. Provides for criminal penalties for owners and prime contractors who "willfully" and "intentionally" fail to apply financing draws to their stated purpose. (page 4, line 20)
6. Filing a notice of right to lien is optional. (pg 5, ln 8)  

A notice may be given to the owner any time before furnishing labor, material, service or equipment for improvement of the property. If given properly the burden of proof is on the owner to show that he/she did not know of or consent to improvements on his/her property.

A notice may be recorded anytime after the claimant enters into a contract or first furnishes labor, etc.
7. Civil actions may be brought for actual damages by a person who is injured in its business or property by a violation of any provision of the lien act. If the judgement is in favor of the person they shall be awarded triple the amount of damages, reasonable attorney fees plus costs. (page 7, line 15)
8. Subcontractors are given equal status with suppliers in sharing foreclosure sale proceeds. (page 8, line 23)
9. Clarifies definitions. (page 10)
10. Repeals the acknowledgement of right to lien provision. (page 11, line 29)

PROPOSED CHANGES TO CS HB 494

Page 3 and 4, lines 27 -15 (delete)

Removes the requirement that prime contractors provide a verified certificate to lenders prior to the lender disbursing construction funds.

Page 3, line 16

delete "verified certificate" and insert "sworn signed statement" Makes requirement clearer.

Page 4, line 20

delete "wilfully and" Wilfully is not a defined term.

Page 5, line 9

Change "may" to "shall"

Will make the notice of right to lien mandatory.

Page 7, line 19

Delete "and if the person prevails and the defendant's conduct is found to be wilful and intentional, the person shall be awarded three times the amount of actual damages"

This provided for treble damages in the case of civil action brought under this section. Deleting this language will allow actual damages only.

The changes proposed to the CS will clean up the bill even further. The requirement that prime contractors provide certificates similar to owners will be deleted. This will save builders from having to do excess paperwork.

Making notices of right to lien mandatory will help suppliers and subcontractors. Presently there is a sort of stigma attached to filing lien notices, suppliers and subcontractors fear it will affect their reputation. By making the notice mandatory the stigma is removed and suppliers/subcontractors are covered in the event of non-payment.

Removing treble damages is in response to concerns raised by Labor & Commerce committee members.

PROPOSED CS FOR HB 494  
SECTIONAL ANALYSIS

SECTION 1

page 1, ln 10

(a) Revises 34.35.062 to more clearly and accurately state the present "stop-payment" rule. "Stop-payment" is changed to "stop-lending."

Eliminates the current requirement that a claimant wait 20-30 days after an account becomes delinquent before giving a stop payment notice to the lender.

page 1, ln 29

(b) Changes to 90 days (from 30) the time within which a claimant may bring suit after filing a stop-payment notice. Eliminates the present requirement that the claimant must provide a bond.

page 2, ln 10

(c) Addresses the lender's liabilities when they disburse funds that are the subject of a binding stop-lending notice.

page 2, ln 29

(d) Requires a lender to send a verified statement to the claimant showing all construction financing provided to the owner or owner's agent within ten days of receiving a certified copy of a judgment establishing the amount owed a claimant.

page 3, ln 9

(e) Allows a lender to bring an action requiring claimants to interplead their claims when there are two or more claimants and the lender is uncertain of the amount of its liability.

page 3, ln 14

(f) A lender may not provide a draw to the owner or an agent of the owner until the owner and each prime contractor delivers a verified certificate to the lender detailing specified information about the project the draw is to be applied to.

page 4, ln 16

(g) Requires draw to be applied pursuant to the required certificate. The lender is not required to verify the information and is not liable for any error in the certificate.

page 4, ln 20

(h) Criminal penalties are provided for owners and prime contractors who willfully and intentionally fail to apply construction financing draws in accordance with the required certificate.

page 4, ln 26

(i) When requested a lender is required to provide a person who has given a notice of right to lien a copy of certificates submitted under subsection (f) and a verified certificate stating the undisbursed funds available for the project.

page 5, ln 4

(j) A lender may not disburse funds to pay for any debts that were not incurred to finance the cost of the project.

## Section 2

page 5, ln 8

(a) Notices of right to lien given to the owner shift the burden to the owner to prove that he was not aware of and did not consent to the improvements to his property. The notice may be given before furnishing labor or material.

Revises the required warning in the notice of Right to Lien to more correctly alert the owner of the significance of the notice.

## Section 3

page 6, ln 14

Clarifies recording of notice of right to lien.

## Section 4

page 6, ln 22

Technical change relating to section 3.

## Section 5

page 6, ln 29

Technical change.

## Section 6

page 7, ln 15

(a) Civil actions may be brought for actual damages by a person who is injured in its business or property by a violation of any provision of the lien act. If the judgement is in favor of the person they shall be awarded triple the amount of damages, reasonable attorney fees plus costs.

page 7, ln 26

(b) Penalizes a claimant who does not remove a lien once payment has been made.

## Section 7

page 8, ln 2

Technical change.

## Section 8

page 8, ln 13

Requires a claimant to record notice that he has brought suit to keep the lien alive. Unless it is recorded the claimant could lose his lien to a subsequent good faith purchaser who doesn't know of the claimant's action.

## Section 9

page 8, ln 23

Subcontractors are given equal status with suppliers in sharing foreclosure sale proceeds.

## Section 10

page 9, ln 27

When there are sufficient funds provided by a foreclosure sale to pay off all lien claims the balance will be payed to the person who owned the property.

## Section 11

page 10, ln 4

Clarifies responsibility of a lender wrongly named in a stop-lending notice.

## Section 12

page 10, ln 9

Clarifies claimants responsibility in providing information to an owner or lender who has been served a stop-lending notice.

## Section 13

page 10, ln 15

Technical change.

## Sections 14 - 17

page 10, ln 21

Definitions.

## Section 18

page 11, ln 29

Repeals acknowledgement of right to lien.

Repeals garbled language.

Repeals penalty to owner for failing to provide information.

Repeals claimant liability for filing unjust or premature stop-payment notice.

Repeals claimant liability for filing unjust or premature stop-payment notice.

CSHB 494, Revising Alaska's Lien Law

The following changes were made in the committee substitute:

Page 1, line 29 - line 2

deleted: "(b) After the lender has received a stop-lending notice and has had a reasonable time to act on it the lender may not disburse a draw until the notice expires or is revoked."

inserted: "(b) A stop-lending notice is binding upon a lender from the time the lender has received it and had a reasonable opportunity to act upon it until it expires or is revoked."

-Accepted lenders language.

page 2, line 10

inserted after who: "disburses, advances or otherwise"

-Lenders suggestion.

page 2, line 14

inserted after financing: "disbursed, advanced or otherwise"

-Lenders suggestion

Page 2, line 27: deleted "as due"

-Redundant

Page 3, line 14

deleted: "(f) A lender may not provide a draw to the owner or an agent of the owner until"

inserted: "(f) A draw against construction financing may be made only after certification of job progress is delivered to the lender by the owner. The form of the certification may be prescribed by the lender and shall include:"

-This is existing law except that the legislation lists four items that must be included in the certificate.

-Removed the requirement that prime contractors provide a verified certificate to lenders prior to the lender disbursing construction funds. (pages 3-4, lines 27-15 of original bill).

Page 4, line 20

deleted "wilfully and"

page 4, line 20

deleted: "or prime contractor"

page 4, line 23

deleted: "or prime contractor"

page 4, line 24

deleted: "or prime contractor"

Page 4, line 8

deleted: "notice of right to lien"

inserted: "stop-lending notice"

-The lender will be required to provide specified information to a person who has given it a stop-lending notice instead of to everyone that has filed a notice of right to lien. The change was made because it was apparent that a person would not need the information unless there was a problem with payment.

Page 6, line 15

Changed the warning language to what had been originally proposed by the lenders and subs/suppliers. (The drafter had changed the language).

Section 6, page 6, line 26

Deleted "and if the person prevails and the defendant's conduct is found to be wilful and intentional, the person shall be awarded three times the amount of actual damages"

-Removes the awarding of treble damages.

Page 7, line 4

Changed (b) to incorporate existing language regarding penalties for filing a premature or excessive stop-payment notice. (Technical change has to be made to change "stop-payment" to "stop-lending")

page 7, line 7 -- after payment added "in full"

deleted: "A lien extended by commencement of an action in accordance with (a) of this section does not affect an interest of a person in real property acquired after the commencement of the action without knowledge or actual notice of the action if the person acquired the interest in good faith for valuable consideration. For purposes of this subsection, notice of the pendency of the action conforming to requirements under AS 09.45.790 and recorded before the person acquires the interest in property constitutes actual notice of the action."

inserted: "A lien whose duration is extended by commencement of an action pursuant to (a) of this section is void as against a person who, after the commencement of such action and without knowledge or actual notice of its pendency, acquires an interest in the subject property in good faith and for valuable consideration, unless a notice of the pendency of the action has been duly filed for record prior to the time such person's conveyance is duly filed for record. Notice of the pendency of the action shall conform to the requirements of AS 09.45.790."

-Lenders suggestion.

# CWENS & TURNER

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

1500 WEST 33RD AVENUE, SUITE 200

ANCHORAGE, ALASKA 99503-3639

TELEPHONE  
AREA CODE 907  
276-1963

THOMAS P. OWENS, JR.  
TERRANCE A. TURNER  
DAVID M. FREEMAN  
WILLIAM F. MEDE  
BETTY L. JOHNSON  
TRAEGER MACHETANZ

March 27, 1986

Judiciary Committee  
House of Representatives  
Alaska State Legislature  
P. O. Box V (MS 3100)  
Juneau, AK 99811

Re: CSHB 494

Gentlemen:

We are the attorneys for Alaskans for Lien Law Reform ("Lien Law Committee"), the group of suppliers and subcontractors that prompted the introduction of HB 494 to amend the Alaska Mechanic's and Materialman's Lien Act ("Lien Act").

HB 494 met with considerable opposition from the Alaska Bankers Association and Home Builders Association. So it was amended by the House Labor and Commerce Committee to accommodate those concerns voiced by the Bankers and Home Builders Associations which the Committee found to have merit. The resulting CSHB 494 preserves the remedial purposes intended by HB 494 and materially improves the position of suppliers and subcontractors, who were adversely impacted by the 1978 and 1979 amendments to the Lien Act. CSHB 494 is supported by the Lien Law Committee, and it urges the passage of this bill. <sup>1/</sup>

The Lien Law Committee understands that there are two major criticisms of CSHB 494 that may be posed by the Bankers and Home Builders Associations: (a) the lack of a requirement for mandatory early recording of notices of right to lien; and (b) the requirement in AS 34.35.062(f) that owners and prime contractors submit verified certificates to lenders which (1) give the progress of the construction, (2) state the amounts owed to prime contractors and suppliers and subcontractors who

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<sup>1/</sup> One technical correction to CSHB 494 is required. The bracketed language "[AND PERSONS DESCRIBED IN AS 34.35.050(5)]" in lines 5 and 6 on p. 9 of the bill should be left in amended AS 34.35.112(a)(4). Otherwise it will render the underscored language "persons described in AS 34.35.050(5)" in line 20 on p. 9 of the bill meaningless.

have a direct contractual relationship with such prime contractors, and (3) identify those suppliers and subcontractors who are not in a direct contractual relationship with such prime contractors.

The Lien Law Committee believes that CSHB 494 correctly addresses these issues for the following reasons.

1. Mandatory Early Recording of Notices of Right to Lien.

Mandatory early recording of notices of right to lien will probably not adversely affect large suppliers or subcontractors, who may routinely do so anyway. Unfortunately, it will adversely affect the many small suppliers and subcontractors that are not being currently paid, who represent the vast majority of those persons furnishing labor, material, equipment and service to construction jobs. The simple fact is that most of these small suppliers and subcontractors lack either the resources or the sophistication to prepare themselves for nonpayment in the early stages of a job by recording a notice of right to lien. Unfortunately, most of these small suppliers and subcontractors do not even begin to consider their lien rights or other legal remedies until their accounts receivable are long overdue.

CSHB 494 preserves the present law, which allows a supplier or subcontractor to record a claim of lien within 90 days after he/she completes his/her work on the benefitted property, regardless of whether he/she has recorded a notice of right to lien. Recording a notice of right to lien remains significant only in that it continues to prevent an owner from cutting off a supplier's or subcontractor's lien rights within 15 days after the owner complies with the notice of completion provisions of the Lien Act.

It is anticipated that the Bankers and Home Builders Associations will argue that mandatory early recording of notices of rights to lien is required due to the abolition of the acknowledgment of right to lien proposed by CSHB 494 (which the Associations do not oppose). That is, the Associations are expected to argue that, absent an acknowledgment of right to lien, protection of owners against the unauthorized furnishing of labor, material, service and equipment to their properties requires the mandatory early recording of notices of right to lien.

The Lien Law Committee believes that this argument is incorrect for the following reasons. First, the unauthorized furnishing of labor, material, service or equipment to properties without the knowledge or consent of the owner is not a significant problem when viewed in light of the fact that most small suppliers and subcontractors simply do not have the resources or wherewithall to comply with a requirement for mandatory early recording of notices of right to lien. Second, the proposed amendment to AS 34.35.064(a) in CSHB 494 more than adequately protects the owner. If a claimant duly gives a notice of right to lien to the owner prior to furnishing labor, material, service or equipment to a job, the owner has the burden of proof in any subsequent suit to foreclose the claimant's lien to show that the owner did not know of or consent to the furnishing of such labor, material, service or equipment. Otherwise, the claimant has the burden of proof to show that the owner knew of and consented to the furnishing of such labor, material, service or equipment in order to foreclose its lien.

Thus, it is unlikely that any innocent owners will be prejudiced by the lack of a requirement for the mandatory early recording of notices of right to lien. You should also not lose focus of the fact that the bankers and home builders would be the prime beneficiaries of a mandatory early recording requirement for notices of right to lien, because it would successfully cut off the lien rights of most small suppliers and subcontractors.

## 2. AS 34.35.062(f) Certificates.

The Lien Law Committee believes that the superior lien position that lenders obtained in the 1978 and 1979 amendments to the Lien Act (which reversed the former superiority of original construction lien claims over lenders' deeds of trust and mortgages) has resulted in a failure by construction lenders to properly monitor the progress of the construction which they are financing. The unfortunate result is that a significant number of construction projects become underfunded due to (a) diversions by owners of construction financing proceeds to other projects or uses, (b) failures by contractors to pay their suppliers and subcontractors, and (c) misrepresented construction progress estimates that result in premature financing draws.

The Lien Law Committee believes that lenders will be motivated to more diligently monitor their construction loans if the Lien Act is amended to require owners and prime contractors to furnish lenders with verified information concerning (a) the progress of construction, (b) the identity of persons furnishing work to the job, and (c) amounts owed to those persons before the

House Judiciary Committee  
March 27, 1986  
Page 4

lender can issue any construction financing draw to the owner. Such information will give the lender more insight into the status of the job as it is being constructed and, hopefully, encourage the lender to more carefully monitor its construction loan. The verified certificates required by AS 34.35.062(F) in CSHB 494 will achieve this goal.


The only argument against such certificates voiced thus far by the Bankers and Home Builders Associations is that the requirement for such certificates will materially increase the "red tape" and cost of doing business for them. Perhaps it will result in some minimal increase in "red tape" and cost. However, this appears to be a small price to pay for inducing lenders to more effectively monitor their construction loans and thereby preserve sufficient funding for suppliers and subcontractors to be paid -- which is simply not occurring today!

A poll of your constituents will likely reveal that nonpayment of small suppliers and subcontractors by prime contractors is one of the most critical problems in the local construction industry today. If lenders are unwilling to give subcontractors' and suppliers' liens equal priority with their construction deeds of trust and mortgages -- which they clearly are -- they surely should be willing to submit to a requirement that additional verified information be provided to them so that they can effectively monitor their loans and assure that suppliers and subcontractors are in fact paid.

We would be happy to answer any questions concerning CSHB 494 or provide any further information which you may require. We would also request the opportunity to respond to any further objections to CSHB 494 which the Bankers Association, the Home Builders Association or any other opponent of CSHB 494 may address to you.

Very truly yours,

OWENS & TURNER, P.C.  
Attorneys for Alaskans  
for Lien Law Reform



Terrance A. Turner

TAT/sl

cc: Alaskans for Lien Law Reform  
Rick Urion

PUBLIC OPINION MESSAGE

TO: REPRESENTATIVE M. MIKE MILLER  
FROM: MIKE SCHUESTER  
8100 PETERSBURG, #1  
ANCHORAGE 99507  
344-5732

BILL NO: HB 494

SUBJECT: LIENS FOR LABOR OR MATERIALS FURNISHED

MESSAGE:

PLEASE SUPPORT CSHB 494 AS WRITTEN. OPPOSITION TO THIS BILL PROPOSED MANDATORY EARLY RECORDING OF NOTICES OF RIGHT TO LIEN. I OBJECT TO THIS OPPOSITION AS A UNNECESSARY EXPENSE AND ALSO AS A PRACTICE WHICH WOULD DEFEAT SEVERAL ASPECTS OF THE BILL. SUB CONTRACTOR, ALASKA QUALITY INSULATORS, INC.

DATE: 04/01/86 TIME: 16:12:24 SENT BY: ANCHORAGE LIO

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SENATE MEMBERS