

ESTABLISHING A MECHANIC'S LIEN'S PRIORITY OVER OTHER SECURED INDEBTEDNESS

With the unprecedented decline in land values these days, a mechanic's lien claimant's ability to get paid will likely hinge upon whether the lien claimant can obtain priority over other indebtedness that is secured by a deed of trust or mortgage against the same real property and improvements. In Nevada, there are certain situations where the lien claimants can obtain that priority, even though the mortgage or deed of trust was recorded prior to the recordation of the mechanic's lien. This is known as "priming" the mortgage or deed of trust.

Given the potential for "priming" the mortgage or deed of trust, it is now as critical as ever that the lien claimant find out the status and amount of any indebtedness secured by the property that is subject to the lien, and determine whether there is any basis to establish a case for "priming."

Under Nevada Revised Statutes, a valid mechanic's lien has priority over any mortgage or deed of trust "*which may have attached to the property after the commencement of construction of the work on improvement.*" The statute explains further that "*commencement of construction*" means the date on which either work performed or materials or equipment furnished in connection with a work of improvement, are visible from a reasonable inspection of the site. Therefore, preliminary work items, such as installation of a fence or leaving a dumpster on-site may be sufficient to establish that commencement of construction would have been "visible from a reasonable inspection of the site."

Furthermore, although earlier Nevada case law has held that architectural, soil testing, and survey work was insufficient to constitute the commencement of an improvement so as to entitle a lien claimant to priority, the statutory definition of "improvement" has now been expanded. The definition now includes numerous categories, including the demolition or removal of existing improvements, trees, or other vegetation, the drilling of test holes, grading, grubbing, filling, or excavating, constructing or installing sewers or other public utilities, a system for irrigation, plants, sod or other landscaping, and various other categories of work.

In light of the foregoing, it is important for any mechanics lien claimant who is seeking recovery of amounts due for work performed, to analyze the existence of any other indebtedness, and determine the date upon which work was commenced on the project in relation to the date of recordation of any other encumbrance against the property.