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Builders Lien Basics: When Does Land Become Lienable?

Quiz time! If an architect has drawn up plans for a building project and the site work never starts, can the architect claim a builders lien against the property?

The answer is no[i]. Although the *Builders Lien Act*[ii] applies to "services," including "services as an architect or engineer *whether provided before or after the construction of an improvement has begun*,"[iii] pre-construction services can only be the subject of a lien if at least some construction has taken place. The same holds true for the work of all contractors and subcontractors.

The reason is that "work" under the *Act* means specifically work done "on an improvement," which must be something actually done to the land. It helps to remember that a builders lien is not claimed against the owner of the property, but against the property itself.[iv] Fundamentally, builders liens exist in order to protect those who have created value in real property and, but for their ability to make a public legal claim to an interest in the *property*, are otherwise unable to collect their due compensation. As was stated in *Atlas Painting Ltd. v. 501 Robson Residential Partnership:*

A builder's lien is powerful pre-judgment weapon. Used properly, it protects a contractor against being unpaid for its work, often by an owner incorporated for only the project in question, and who is thus without assets to pay the contractor when the project is complete. Used improperly, a builder's lien can be employed to extract overpayment from an owner who often must discharge all liens before they can be properly contested in order, for example, to maintain project financing. [v]

The courts have, in recognition of the strong rationale for builders liens and the strength of their effect on both owners and other creditors, taken the view that the *Builders Lien Act* must be read strictly with respect to the requirements for a claimant to establish its entitlement to file a claim but with a certain greater latitude with respect to permitting enforcement once a claimant has shown its entitlement.[vi] There is always a first hurdle: has any work occurred on site such that the land is in any way *improved*?

In the not-so-distant past of March 2024, the Supreme Court of British Columbia released its decision in *Cape Group Management Ltd. v. 0793231B.C. Ltd.,*[vii] a case involving an agreement to redevelop a property in Vancouver for a commercial-residential building. The plaintiff was to provide development services,

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and the defendant was to provide the land. To that end, the plaintiff retained environmental consultants to assess whether the site needed remediation and structural and geotechnical engineers to design below-grade structures suitable for its poor soil conditions. The plaintiff also secured crane swing and underpinning agreements with the neighbouring property owners. Alas, the development did not proceed, the existing buildings stayed up, and the mortgage holder eventually began foreclosure proceedings against the property. The plaintiff went unpaid for its preconstruction efforts and filed a lien on the property for roughly two million dollars.

The Court held that the lien could not stand. The plaintiff's work might have been valuable and absolutely necessary for the intended development to take place. However, because that value was not made tangible on the land in an "improvement", it never met the threshold requirement to stake an interest in improved land. Even if construction of components had begun off-site, but these components had not yet been installed on-site, the improvement would remain a mere intention.[viii]

Does the on-site work requirement mean that a contractor can protect their claim by going onto a building site to lift a few shovelfuls of earth and scatter some bricks about? Probably not.[ix] Regardless, knowing the fundamentals of what a builders lien is for and when it can attach is important for avoiding frivolous claims, wasted legal expenses, and even judicial rebuke when a construction dispute arises.

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i See *Chaston Construction Corp. v. Henderson Land Holdings (Canada) Ltd.*, 2002 BCCA 357.

ii SBC 1997, c. 45.

iii *Ibid.*, s. 1.

iv See *Wah Fai Plumbing & Heating Inc. v. Ma*, 2011 BCCA 26 at para. 67.

v 2016 BCSC 2472 at para. 1.

vi See *Primex Industries Inc. v. The Owners, Strata Plan LMS 1751*, 2016 BCSC 2092 at paras. 18-20; but see *Iberdrola Energy Projects Canada Corporation v. Factory Sales & Engineering Inc. d.b.a. FSE Energy*, 2018 BCCA 272, in which Mr. Justice Groberman clarified that the *Builders Lien Act*'s entitlement provisions are only read narrowly because statutory interpretation finds that narrowness consistent with the language, purpose, and context of the provisions, not because the *Act* specially attracts a 'strict construction' approach.

vii 2024 BCSC 493.

viii See *Shelly Morris Business Services Ltd. v. Syncor Solutions Limited*, 2020 BCSC 2038.

ix *Ibid.*, at para. 23

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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