

# Tennessee



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## Frequently Asked Questions

- 1. Does Tennessee law require any notice or filing prior to the performance of the work?** Tennessee law requires a prime contractor (one dealing directly with the owner(s)) to give a Notice to Owner prior to commencing the improvement to the real property or the making of the contract. In addition, a contractor may gain priority over a mortgagee when the contractor provides the mortgagee with written notice sent by certified or registered mail prior to the beginning of work or labor or the furnishing of materials, services, equipment or machinery and if the mortgagee either consents or does not object.
- 2. What is the time frame for filing a claim of lien?** Before the filing of a Notice of Lien and Sworn Statement, a remote contractor must properly give a Notice of Nonpayment within ninety (90) days of the last day of each month within which labor or work was provided or materials, services, equipment, or machinery were furnished. After giving the Notice of Nonpayment, a remote contractor also must properly give to the owner and file with the register's office a Notice of Lien and Sworn Statement within ninety (90) days after completion of the improvement. A prime contractor (a direct contract with the owner) does not have to file a formal notice of lien to preserve its lien rights as to the owner, unless a Notice of Completion is served; however, to protect its rights against third parties, the prime contractor must either properly record a copy of the contract or properly file a Notice of Lien and Sworn Statement.
- 3. What is the deadline for filing suit to initiate a lien foreclosure action?** A remote contractor must file suit within ninety (90) days of properly giving and filing the Notice of Lien and Sworn Statement. A contractor with a direct contract with the owner must file suit within one (1) year after the improvement is completed or abandoned.
- 4. Does Tennessee lien law impose mandatory notice requirements?** Yes. Depending on the party seeking a lien, Tennessee law imposes various mandatory Notice Requirements.
- 5. Does Tennessee lien law impose special requirements or limitations on lower tier subcontractors or suppliers?** No.
- 6. When is a contractor deemed to have last performed work or furnished materials so as to trigger the start of the lien filing period?** The triggering event that starts the running of the lien period is the completion of the improvement or the filing of a Notice of Completion. Depending on the party seeking the lien, other notices and filings may be necessary to perfect the lien. All parties should thoroughly understand the specific rights and obligations set out in the statutes in order to protect their lien rights.
- 7. Does Tennessee law provide a procedure for bonding or otherwise removing the claim of lien?** Yes. A Bond to Discharge Lien or filing accompanied by a payment bond may be used to remove a lien claim from the real property.
- 8. What construction project participants are not protected by the lien law?** T.C.A. Section 66-11-146 has been modified and the last portion of the statute, which stated "No lien, except as provided in this subsection (b), shall exist on the property under the contract in favor of a remote contractor who does the work or any part of the work, or furnishes the materials, services, equipment, or machinery or any part of the materials, or puts any fixtures, machinery or materials on the property, ordered by or through those persons," has been deleted. The presumption against liens for remote contractors has been removed. However, when the owner of residential real property and the "general contractor" are the same person, or such a person controls entities owning the property and a general contracting business on contracts to improve residential real property, a mechanics' and materialmen's lien only exists in favor of the general contractor and lienor in contractual privity with the owner or general contractor.

9. **What costs or damages are typically not allowed in a lien claim?** Tennessee lien law typically limits claims secured by liens for labor, materials, equipment, services, and machinery, to the contract price and the extras in the contract between the owner and the prime contractor.<sup>1</sup> The lien amount should not include any interest, service charges, late fees, attorneys' fees, or other amounts to which a lienor may be entitled by contract or law. If the circumstances are appropriate, courts may also award other contract and equitable damages.

## Lien Law Basics

Tennessee provides statutory protection to parties that supply materials, services, and/or furnish labor for the improvement of real property as a means of collection for services rendered.<sup>2</sup> The statutes define several key terms, among which are “furnish materials,” “improvement,” “laborer,” “prime contractor,” “remote contractor,” and “visible commencement of operations.”<sup>3</sup>

*“Prime Contractor”* means a person, including a land surveyor as defined in § 62-18-102, a person licensed to practice architecture or engineering under Title 62, Chapter 2, and any person other than a remote contractor who supervises or performs work or labor or who furnishes material, services, equipment or machinery in furtherance of any improvement, provided that the person is in direct privity of contract with an owner, or owner’s agent, of the improvement. A “prime contractor” also includes a person who takes over from a prime contractor the entire remaining work under such a contract;

*“Remote Contractor”* means a person, including a land surveyor as defined in § 62-18-102 and a person licensed to practice architecture or engineering under Title 62, Chapter 2, who provides work or labor or who furnishes material, services, equipment or machinery in furtherance of any improvement under a contract with a person other than an owner.

*“General Contractor”* means the person responsible for the supervision or performance of substantially all of the work, labor, and the furnishing of materials in furtherance of the improvement to the property.<sup>4</sup>

*“Laborer”* means any individual who, under contract, of any degree of remoteness, personally performs labor for improving real property on the site of the improvement.<sup>5</sup>

*“Improvement”* means the result of any action or any activity in furtherance of constructing, erecting, altering, repairing, demolishing, removing, or furnishing materials or labor for any building, structure, appurtenance to the building or structure, fixture, bridge, driveway, private roadway, sidewalk, walkway, wharf, sewer, utility, watering system, or other similar enhancement, or any part thereof, upon, connected with, or beneath the surface; the drilling or finishing of a well, other than a well for gas or oil; the furnishing of any work and labor relating to the placement of tile for the drainage of any lot or land, the excavation, cleanup, or removal of hazardous and non-hazardous material or waste from real property; the enhancement or embellishment of real property by seeding, sodding, or the planting thereon of any shrubs, trees, plants, vines, small fruits, flowers, nursery stock, or vegetation or decorative materials of any kind; the taking down, cleanup, or removal of any existing shrubs, trees, plants, vines, small fruits, flowers, nursery stock, or vegetation or decorative materials of any kind then existing; excavating, grading or filling to establish grade; the work of land surveying, as defined in § 62-18-102, and the performance of architectural or engineering work, as defined in Title 62, Chapter 2, with respect to an improvement actually made to the real estate. As the context requires, “improvement” also means the real property thus improved.

“*Furnish materials*” means:

- (a) to supply materials that are intended to be and are incorporated in the improvement;
- (b) to supply materials that are intended to be and are delivered to the site of the improvement and become normal wastage in construction operations;
- (c) to specifically fabricate materials for incorporation in the improvement and, if not delivered to the site of the improvement, are not readily resalable by the lienor;
- (d) to supply materials that are used for the construction and do not remain in the improvement, subject to diminution by the salvage value of such material; or
- (e) to supply tools, equipment, or machinery as permitted by § 66-11-102(g).

The delivery of materials to the site of the improvement shall be prima facie evidence of the incorporation of such material in the improvement.

“*Visible commencement of operations*” means the first actual work of improving upon the land or the first delivery to the site of the improvement of materials, that remain thereon until actually incorporated in the improvement, of such manifest and substantial character as to notify interested persons that an improvement is being made or is about to be made on the land, excluding, however, demolition, surveying, excavating, clearing, filling or grading, placement of sewer or drainage lines or other underground utility lines or work preparatory therefor, erection of temporary security fencing and the delivery of materials therefor.

The protection provided by the statutes is in the form of a “mechanic’s lien,” which may attach to the real estate, improvements, or to certain insurance proceeds made available to the owner of the real estate.<sup>6</sup> Certain materials furnished to the project premises, but not paid for, are not subject to attachment, execution, or other legal process if in good faith the materials are about to be applied to improve the real property, except to satisfy a debt due for the purchase price thereof.<sup>7</sup> In addition, if a project upon which improvements have been made is abandoned before completion, or, though completed, and certain materials delivered are not used and have not been paid for, the person delivering such materials for such improvement may repossess the materials.<sup>8</sup>

“Lien rights” relate to and take effect from the time of the visible commencement of operations.<sup>9</sup> Some activities are excluded from the visible commencement of operations requirement, such as demolition, surveying, excavating, clearing, filling or grading, the placement of sewer or drainage lines or other underground utility lines or work preparatory therefore, erection of temporary security fencing and the delivery of materials therefore.<sup>10</sup> If the project is abandoned for more than ninety (90) days, any lien for labor or material furnished after the project is resumed would arise as of the date visible operations are resumed.<sup>11</sup>

Tennessee law prohibits a prime or remote contractor of a lessee of real property from encumbering the fee estate unless the lessee is deemed to be the fee owner’s agent.<sup>12</sup> In determining whether a lessee is the fee owner’s agent, the court shall determine whether the fee owner has the right to control the conduct of the lessee with respect to the improvement and shall consider:

- (1) whether the lease requires the lessee to construct a specific improvement on the fee owner’s property;
- (2) whether the cost of the improvement actually is borne by the fee owner through corresponding offsets in the amount of rent the lessee pays;
- (3) whether the fee owner maintains control over the improvement; and

- (4) whether the improvement becomes the property of the fee holder at the end of the lease.<sup>13</sup>

Tennessee law has special lien restrictions and requirements for improvements upon leaseholds relating to oil, gas, or other mineral rights.<sup>14</sup>

Tennessee lien law limits claims secured by liens for labor, materials, equipment, services, machinery, overhead and profit to the contract price and the extras in the contract between the owner and the prime contractor.<sup>15</sup> The lien amount should not include any interest, service charges, late fees, attorneys' fees, or other amounts to which a lienor may be entitled by contract or law that do not result in an improvement to the real property or are otherwise not permitted.<sup>16</sup> Under certain circumstances, if the lienor exaggerates the amount for which he claims a lien, the court may, in its discretion, not allow recovery on the lien.<sup>17</sup> The lienor may also be liable for actual expenses incurred by the injured party, including attorneys' fees, as a result of the exaggeration.<sup>18</sup>

Liens for the furnishing of tools, equipment, or machinery are limited by the reasonable rental value for the period of actual use and any reasonable period of non-use taken into account in the rental contract; the rental value and reasonable periods of use need not be determined solely by the contract.<sup>19</sup> Liens may arise for the purchase price of tools, equipment, and machinery, but the lien for such price only arises if the items were purchased for use in the particular improvement and have no value to the lienor after the completion of the improvement.<sup>20</sup>

The rights and obligations of parties entitled to lien rights are very specific and are set out in the *Tennessee Code Annotated* Section 66-11-101 through 66-11-208. All parties should thoroughly understand their specific rights and obligations as set out in the statutes in order to protect their lien rights. Lien rights are in addition to other rights a claimant may have, such as, but not limited to, contract rights.

## Types of Construction Projects

There are two types of construction projects: *public* and *private*. Public projects, which are those owned by local, state, or federal government, are not subject to the attachment of liens as a matter of public policy. To protect remote contractors and laborers providing labor and/or materials, on most public projects, both federal and Tennessee laws require the prime contractor to post a performance bond and a payment bond. Federal government contracts are governed by 40 U.S.C. §§ 3131 and 3133. Tennessee and local government contracts are governed by T.C.A. 66-11-204 et seq., which provide similar bonding protection.

### Public Projects

#### ***40 USC §§ 3131 and 3133***

Under 40 U.S.C. § 3131, before any contract of more than \$100,000 for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person must furnish a performance bond and a payment bond.<sup>21</sup> The amount of the performance bond shall be determined by the awarding officer.<sup>22</sup> The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines in writing that a payment bond in that amount is impracticable, in which case, the officer shall set the amount of the bond.<sup>23</sup> In no case shall the amount of the payment bond be less than the amount of the performance bond.<sup>24</sup>

Under 40 U.S.C. § 3133, any subcontractor or any person having a direct relationship with a subcontractor, but not a contractual relationship expressed or implied with the contractor furnishing the payment bond, must give written notice to the contractor within ninety (90) days from the day that the person performed the last labor or furnished or supplied the last material for which the claim is made.<sup>25</sup> There are very specific notice requirements that must be followed.<sup>26</sup>

A suit to enforce the claim on the bond must be filed in the United States District Court in any district in which the contract was to be performed and executed, regardless of the amount in controversy.<sup>27</sup> However, suit must be filed before the expiration of one (1) year after the date the last day labor was performed and/or material was supplied.<sup>28</sup> The action must be brought in the name of the United States for the use of the person bringing the action, but the Government is not liable for the payment for any costs or expenses in such an action.<sup>29</sup>

### ***Tennessee Public Works***

Tennessee only requires a contractor to supply a payment bond on contracted public work in Tennessee or in any city, county, or state authority for contracts in excess of \$100,000.<sup>30</sup> The amount of the payment bond shall be for 25% of the contract price.<sup>31</sup> A contractor may substitute cash or certain securities for the bond requirement.<sup>32</sup>

Any remote contractor on a public construction project which has a payment bond must, within ninety (90) days after the completion of the public work, give written notice of any nonpayment by return receipt, registered mail or by personal delivery, either to the contractor who executed the bond or to the public official who had the charge of letting the contract or awarding the contract.<sup>33</sup> There are very specific notice requirements that must be followed.<sup>34</sup>

Suit to execute on the bond must be filed within six (6) months following the completion of the public work or the furnishing of such labor or materials.<sup>35</sup>

### **Private Projects**

Tennessee lien law classifies private projects into two (2) distinct categories – Residential and Nonresidential/Commercial. It is important that a potential lien claimant ascertain the type of project before commencing work in order to best protect his or her interests.

#### ***Residential***

Tennessee law defines "residential real property" as a building consisting of one dwelling unit in which the owner of the real property intends to reside or resides as the owner's principal place of residence. "Residential real property" also includes being a building consisting of two, three, or four dwelling units where the owner of the real property intends to reside or resides in one of the units as the owner's principal place of residence.<sup>36</sup>

T.C.A. Section 66-11-146 has been modified and the last portion of the statute, which stated “No lien, except as provided in this subsection (b), shall exist on the property under the contract in favor of a remote contractor who does the work or any part of the work, or furnishes the materials, services, equipment, or machinery or any part of the materials, or puts any fixtures, machinery or materials on the property, ordered by or through those persons,” has been deleted. The presumption against liens for remote contractors has been removed. However, when the owner of residential real property and the “general contractor” are the same person, or such a person controls entities owning the property and a general contracting business on contracts to improve residential real property, a mechanics’ and materialmen’s lien only exists in favor of the general contractor and lienor in contractual privity with the owner or general contractor.<sup>37</sup>

### ***Nonresidential/Commercial (All other Projects)***

All private projects in Tennessee, except for owner/occupied Residential projects described above, are subject to liens by contractor, mechanics, laborers, founders or machinists, surveyors, architects and engineers as set out in TCA 66-11-102.

## Parties Entitled to Lien Rights

Except for remote contractors on certain Residential projects, Tennessee laws provides any party who does the work or any part of the work on a private project, furnishes the materials or any part of the materials, or puts on the real property any fixture, machinery, or material with statutory lien right protection.<sup>38</sup> An owner, or his agent, may prevent liens by remote contractors by supplying a payment bond, equal in amount to one hundred percent (100%) of the prime contractor’s contract price, in favor of such remote contractors prior to any work or labor being provided or materials, services, equipment, or machinery furnished in furtherance of the improvement.<sup>39</sup> On owner-occupied residential property, only prime contractors working on or supplying materials are entitled to lien rights (with one exception). Normally, remote contractors and laborers do not have certain lien rights on certain residential real property.<sup>40</sup>

In Tennessee, any contract provision that attempts to waive a lien right is “void and unenforceable.”<sup>41</sup> While the case authority on this issue is not fully developed, at this point, it is recommended that this provision be read as a strict prohibition against lien waiver provisions in contracts. It is unclear, but unlikely, that granting a lien waiver, or lien release, in exchange for a payment made on a project is affected by this provision. Examples of Lien Waiver forms (Partial Waiver and Release of Lien, Partial Waiver and Release of Lien Conditioned Upon Payment, and Final Waiver and Release of Lien) are enclosed for your convenience.



## Notice Requirements

### Owners

Tennessee law provides that any party authorized by the owner or purchaser of improved real property to record and then serve a copy of a Notice of Completion to obtain a certain degree of protection from liens. The Notice of Completion cuts off lien claims that have not been previously filed.<sup>42</sup> A ten-day (10-day) expiration for lien claimants applies to contracts for improvement to or on real property for one-family, two-family, three-family and four-family residential units.<sup>43</sup> On all other contracts for improvement to or on real property, the expiration for lien claimants is thirty (30) days from the date of the filing of the Notice of Completion.<sup>44</sup>

The Notice of Completion has very specific notice and content requirements that must be followed. A Notice of Completion filed before the project is actually complete is void with no effect whatsoever.<sup>45</sup>

In response to a properly filed Notice of Completion, any person claiming a lien upon the property described in the Notice of Completion, must timely send and file proper written notices to the persons at the address designated in the Notice of Completion and file certain forms with the Register of Deeds in the county in which all or part of the property lies.<sup>46</sup>

The owner or any party authorized by the owner or purchaser of improved real property must, on the same date that the Notice of Completion is filed, properly send a copy of the Notice of Completion to the prime contractor and any remote contractor who has submitted a Notice of Nonpayment. The prime contractor or remote contractor must then timely serve notice of any claim by registered or certified mail, stating the amount of the claim and that the claim does not include any amount owed on any other project or contract. The lien claimant also must comply with the other requirements of the lien statutes. If the owner fails to so advise a prime contractor or remote contractor, their liens shall not be affected by the Notice of Completion.<sup>47</sup>

### Prime Contractors

A prime contractor is a person, including a land surveyor as defined in § 62-18-102, a person licensed to practice architecture or engineering under Title 62, Chapter 2, and any person other than a remote contractor who supervises or performs work or labor or who furnishes material, services, equipment or machinery in furtherance of any improvement, provided that the person is in direct privity of contract with an owner, or owner's agent, of the improvement. A "prime contractor" also includes a person who takes over from a prime contractor the entire remaining work under such a contract.<sup>48</sup>

An often overlooked notice requirement for the prime contractor occurs **before** the contractor commences improvements on the real property. Any contractor who is about to enter into a contract, either written or oral, for improving real property with the owner shall, **prior to** commencing the improvement of the real property or making of the contract, deliver, by registered mail or otherwise, a written Notice to Owner that the contractor is about to begin improving the property according to the terms and conditions of the contract and the lien statutes.<sup>49</sup> This notice must contain specific references. If this Notice to Owner is properly given, any liens that later arise may be enforced even though the contractor has been paid in full if the contractor has not paid the persons who provided work or labor or furnished materials, services, equipment, or machinery for the improvement.<sup>50</sup> An owner may reject a contract by notifying the contractor by written notice by registered mail within three (3) days after receipt of such notice; otherwise, the contract is affirmed.<sup>51</sup>

A prime contractor does not have to file a formal notice of lien to preserve its lien rights as to the owner, unless a Notice of Completion is served; however, to protect its rights against third parties, the prime contractor must either properly record a copy of the contract or properly file a Notice of Lien and Sworn Statement.<sup>52</sup> Filing fees paid by the prime contractor shall be part of the lien amount. A more detailed discussion of the time periods for recording a copy of the contract or filing a Notice of Lien and Sworn Statement is provided below.

The lien is valid for one (1) year after completion of the improvement, but during that one (1) year, the contractor must bring suit to enforce the lien.<sup>53</sup> If suit is filed during the one (1) year period, the lien remains valid until a final decision in the litigation is reached.<sup>54</sup>

Although a prime contractor does not have to give formal notice of its lien rights (unless a Notice of Completion is served), a contractor must exercise one of two options in order to preserve the lien against a third party who purchases or obtains an interest in the property without notice of the lien. First, a contractor may acknowledge and record a copy of the contract in the lien book in the register's office in the county where the property is located or any part of the affected real property lies. However, the contract must state the contract price and describe the real property with reasonable certainty.<sup>55</sup> As an alternative, the contractor may file in the register's office a Notice of Lien and Sworn Statement in lieu of recording the contract. The sworn statement should include the amount due and a reasonably certain property description.<sup>56</sup> This sworn statement should be recorded no later than ninety (90) days after the improvement is completed or abandoned, prior to which time the lien shall be effective against purchasers or encumbrancers without recordation.<sup>57</sup> The owner shall serve thirty (30) days' notice on prime contractors prior to the owner's transfer of any interest to a subsequent purchaser or encumbrancer for valuable consideration.<sup>58</sup> If the sworn statement is not recorded within such time, the lien's priority as to such parties shall be determined as if it attached as of the time the sworn statement is recorded.<sup>59</sup>

### **Remote Contractors**

There are two separate notice provisions that a remote contractor **must** comply with in order to perfect any lien rights it may have when it does not have a direct contract with the owner.

### **Notice of Nonpayment**

The first notice required for a remote contractor who has not been paid for work, labor, materials, services, equipment, or machinery furnished is a Notice of Nonpayment. Notice of Nonpayment must be sent to the owner **and** the prime contractor in contractual privity with the remote contractor within ninety (90) days of the last day of each month within which work, or labor was provided or materials, services, equipment, or machinery furnished. This notification must be made each month when payment is not made in order to protect the lien rights.<sup>60</sup> The Notice of Nonpayment must contain very specific information.<sup>61</sup>

### **Notice of Lien and Sworn Statement**

The second notice requirement provides that remote contractors must send a Notice of Lien and Sworn Statement to the owner **and** file the Notice of Lien and Sworn Statement with the register's office in the county where the property is located. Filing fees paid by the remote contractor shall be part of the lien amount. The Notice of Lien and Sworn Statement must be sent and filed within ninety (90) days from the completion of the project.<sup>62</sup>

## Time Limitation for Filing Lien Claims

A prime contractor does not have to file a formal Notice of Lien to preserve its lien rights as to the owner (unless a Notice of Completion is served); however, to protect its rights against third parties, the prime contractor must either properly record a copy of the contract or properly file a Notice of Lien and Sworn Statement. The Notice of Lien and Sworn Statement must be filed within ninety (90) days of the completion of the structure.<sup>63</sup> A prime contractor is required to institute a lawsuit to enforce the lien within one (1) year after the improvement is completed.<sup>64</sup> The lien then remains valid until the final decree is entered in the litigation.

A remote contractor must serve a Notice of Nonpayment upon the owner and prime contractor in contractual privity with the remote contractor within ninety (90) days after the end of each month in which the services or materials were provided and not paid for. In addition, a remote contractor must file a Notice of Lien and Sworn Statement with the register's office and serve on the owner either within ninety (90) days after completion of the improvement.<sup>65</sup> A remote contractor must file suit within ninety (90) days of filing its Notice of Lien and Sworn Statement.<sup>66</sup> The lien then remains valid until the final decree is entered in the litigation.

## Locations of Filing Lien Claims

All notices required to be filed or registered must be filed in the Office of the Register of Deeds in the county where the premises, or any part of it, is located.<sup>67</sup> In many instances, filing fees become part of the lien amount.

## Enforcement of Lien Claims

A lawsuit must be filed to "perfect" and perpetuate a lien claim. A prime contractor is required to institute a lawsuit to enforce the lien within one (1) year after the improvement is finished.<sup>68</sup> The lien then remains valid until the final decree is entered in the litigation.

A remote contractor must file suit within ninety (90) days of filing the Notice of Lien and Sworn Statement.<sup>69</sup> The lien then remains valid until the final decree is entered in the litigation.

A lien claimant also must file a Writ of Attachment, a Fiat, and an Attachment Bond. The court's determination of the amount of the Attachment Bond may vary with the local jurisdiction.

The owner of the real property is a necessary party to an enforcement action; the complainant may also include any contractor with whom he is in contractual privity.<sup>70</sup>

An action is timely filed if a suit seeking the issuance of an attachment is filed within the applicable period of time, even if the attachment is not issued or served within the applicable period.<sup>71</sup> Before issuing an attachment, the Clerk of Court will require the plaintiff to execute a bond payable to the defendant in the amount of one thousand dollars (\$1,000) or the amount of the lien claimed, whichever is less<sup>72</sup>, and conditioned that the plaintiff will prosecute the attachment with effect or pay the defendant all costs and damages sustained by the wrongful suing out of the attachment.<sup>73</sup>

Where a bond has been provided pursuant to T.C.A. 66-11-124, 66-11-136, or 66-11-142, an attachment on the real property shall not be necessary after the bond has been recorded. The plaintiff shall still be liable to the defendant all costs and damages sustained by wrongful assertion of the lien.

## Priority

Each lienor shall have a lien in proportion to the amount and value of the work such person does or the materials such person provides. All such liens, except liens of laborers, are on a parity and shall be settled *pro rata*. Liens of laborers have preference over other mechanics' liens.<sup>74</sup>

A contractor may gain priority over a mortgagee of the project when the contractor provides the mortgagee with written notice sent by certified or registered mail prior to the beginning of work or the furnishing of materials and the mortgagee either consents or does not object by certified or registered mail within ten (10) days of receipt of the notice.<sup>75</sup> If notice is not properly served on the mortgagee, then the lien shall not have priority over a mortgage otherwise entitled to priority over the lien under applicable law.<sup>76</sup>

## Discharging Liens

Tennessee law permits any person to file a bond to indemnify against and discharge a lien.<sup>77</sup> The Bond to Discharge Lien must be in an amount equal to the lien claim amount. If the prime contractor or remote contractor has a valid payment bond, the contractor may file a copy of the payment bond in lieu of any other bond.<sup>78</sup> There are particular notice and content requirements for each type of bond.

## Multiple Lots or Improvements

When the contract is for work or labor performed or materials, services, equipment, or machinery furnished for a single improvement that sits on contiguous or adjacent lots, parcels, or tracts of land the lienor is required to file only one lien claim covering the entire demand against the real property.<sup>79</sup>

In instances where two or more lots, parcels, or tracts of land are improved under the same contract and the improvements are not operated as a single improvement, the lienor must apportion its contract price between the individual lots, parcels or tracts of land and improvements thereon and serve a separate notice of lien for the amount claimed against each lot, parcel, or tract of land and improvements.<sup>80</sup> Where a materialman provides materials used in the construction of multiple townhome units, the lienor is required to apportion its lien and perfect a lien for each townhome unit; a 'blanket lien' on a townhome building is not effective and does not give priority against subsequent purchasers and encumbrances of separate townhome units.<sup>81</sup> In addition, whenever more than one building or other improvement is constructed upon a single lot, parcel, or tract of land or on contiguous lots, parcels, or tracts of land the date of "visible commencement of operations" with respect to **each** such separate building, unit, or improvement will be different, unless the improvements are to be operated as single improvement.<sup>82</sup> Accordingly, the time periods for giving or filing Notice of Nonpayment and Notice of Lien and Sworn Statement will commence independently as each building, unit, or improvement is completed or abandoned.<sup>83</sup>

A lienor who has furnished work, labor, or materials, services, equipment, or machinery for improvements that are to be operated as a single improvement on a single lot, parcel, or tract of land or contiguous lots, parcels, or tracts of land, that lienor shall be required to serve or record only a single notice of lien covering the lienor's entire claim against such real property.<sup>84</sup>

Except as expressly provided in the “Horizontal Property Act,” Title 66, Chapter 27, a lien arising by reason of an improvement that is part of a common interest community does not attach to the common elements but to the units. If the improvement was contracted for by the association of unit owners, the lien attaches to all units in the community for which the association acts, unless the association notifies the lienor, when the contract is made, that the lien may attach only to the unit(s) on or for the benefit of which the improvement was made. If the improvement was contracted for by a unit owner, the lien attaches only to the owner’s unit.<sup>85</sup>

## Lien Waivers

Any contract provision that purports to waive any right of lien is void and unenforceable in the state of Tennessee.<sup>86</sup>

If a lien claimant accepts a note or notes for all or any part of the amount of the lien claimant's demand, such acceptance **shall not** constitute a waiver of the lien claimant's lien, unless expressly agreed in writing. Such acceptance also shall not in any way affect the period for filing the claim of lien under this part.<sup>87</sup> The lien statutes do not require a particular lien waiver form; however, all parties should thoroughly understand their specific rights and obligations before executing such a waiver. Examples of Lien Waiver forms (Partial Waiver and Release of Lien, Partial Waiver and Release of Lien Conditioned Upon Payment, and Final Waiver and Release of Lien) are enclosed for convenience.

No liens by remote contractors are allowed if prior to any work or labor being provided or materials, services, equipment, or machinery furnished in furtherance of the improvement, the owner, or the owner’s agent, provides a payment bond, equal in amount to the one hundred percent (100%) of the prime contractor’s contract price, in favor of such remote contractors who provide work or labor or furnish materials, services, equipment, or machinery. The bond shall be recorded in the office of the register of deeds of every county where the real property to be improved, or any affected part, lies.<sup>88</sup>

The owner of the real property often requires a full settlement and release and Final Waiver and Release of Lien from the lien claimant and prime contractor once a lien has been satisfied. There is no standard form for the settlement and release, but it often contains representations that all liens on the real property have been satisfied, that all parties have received full, complete, and final payment for all work, labor, services, and supplies, and that there are no outstanding claims of any kind by it or against it in connection with or related in any way to the Project.

## Discharge of Lien

Once a lien forfeited, expired, satisfied, or adjudged against the lienor in an action thereon, the lien claimant must file a Full Release of Lien in the Office of the Register of Deeds in the county where the premises, or any part of it, is located.<sup>89</sup> If a lienor fails to release the lien within thirty (30) days after service of written notice demanding such release, the lienor shall be liable to the owner for all damages and costs arising therefrom, including reasonable attorneys’ fees.<sup>90</sup>

## Criminal and Civil Penalties

Any owner who, with the requisite intent, procures a loan secured by a mortgage for the stated purpose of improving certain real property, but then uses such proceeds for something other than to pay for labor performed on or materials, services, equipment, or machinery furnished for such real property, and overhead and profit related thereto and while any amount due remains unpaid, commits a felony under Tennessee law.<sup>91</sup> The owner shall also be liable to an injured party for any damages and actual expenses incurred as a result of the misapplication of the loan proceeds, including attorneys' fees.<sup>92</sup>

A prime contractor or remote contractor, with the requisite intent, may also have committed a felony if such person uses proceeds paid to him or her on account of improvements made to real property for purposes other than to pay for labor performed on, or materials, services, equipment, or machinery furnished by that contractor's order for such real property, and overhead and profit related thereto.<sup>93</sup> The contractor may also be liable for damages and actual expenses, including attorneys' fees, incurred as a result of the misapplication of payment.<sup>94</sup> There is no violation, however, when funds are disbursed pursuant to a written agreement or the use of funds received and deposited in a business account for use on multiple construction projects is based on the allocation of costs and profits in accordance with generally accepted accounting principles for construction projects.<sup>95</sup>

## Contractor's Sworn Affidavit to Owner That All Liens Have Been Paid

Tennessee law requires that, upon completion of the contract or improvements and upon receipt of the contract price, a contractor (one dealing directly with the owner) **shall** deliver, by registered mail or otherwise, to the owner(s) of the real property a Sworn Affidavit to Owner.<sup>96</sup> The Sworn Affidavit affirms, among other things, that all parties that have furnished services, labor, materials or extra items on the project have been paid in full or will be paid in full within ten (10) days from the date of bill/invoice is rendered. The contractor also provides in the Sworn Affidavit an agreement and guarantee to the owner to hold the owner harmless against liens, claims or suits by parties providing services or materials on the project. TCA 66-11-205 set out the statutory form of the Sworn Affidavit to Owner to be used.

## Means of Service

For the purposes of this section, except in relation to notice to mortgagees, any notice or other document required or permitted to be served shall be served by one or more of the following means:

- (1) registered or certified mail, return receipt requested;
- (2) hand delivery, evidenced by a sworn statement, properly notarized, confirming delivery;  
or
- (3) any other commercial delivery service that provides written confirmation of delivery.<sup>97</sup>

## Forms

Notice of Nonpayment

Notice of Lien and Sworn Statement

Full Release of Lien

Bond to Discharge Lien

Writ of Attachment

Fiat

Attachment Bond

Notice of Completion

Partial Waiver and Release of Lien

Partial Waiver and Release of Lien Conditioned Upon Payment

Final Waiver and Release of Lien

Notice to Owner

Sworn Affidavit to Owner

## Notes

- 1 T.C.A. 66-11-120.
- 2 T.C.A. 66-11-101 through 66-11-208.
- 3 T.C.A. 66-11-101(4), (5), (6), (12), (14), and (16).
- 4 T.C.A. § 66-11-146(b)(1)
- 5 Although the statute defines laborer, only one section, 66-11-107, mention laborers' lien rights.
- 6 T.C.A. 66-11- 102; T.C.A. 66-11-101(13); T.C.A. 66-11-121.
- 7 T.C.A. 66-11-113.
- 8 T.C.A. 66-11-114.
- 9 T.C.A. 66-11-104.
- 10 T.C.A. 66-11-104.
- 11 T.C.A. 66-11-104.
- 12 T.C.A. 66-11-102(d).
- 13 T.C.A. 66-11-102(d).
- 14 T.C.A. 66-11-147.
- 15 T.C.A. 66-11-120.
- 16 T.C.A. 66-11-102(e)
- 17 T.C.A. 66-11-139.
- 18 T.C.A. 66-11-139.
- 19 T.C.A. 66-11-102(g)
- 20 T.C.A. 66-11-102(g)(2)
- 21 40 U.S.C. § 3131.
- 22 40 U.S.C. § 3131(b).
- 23 40 U.S.C. § 3131(b)(2).
- 24 40 U.S.C. § 3131(b)(2).
- 25 40 U.S.C. § 3133(b)(2).
- 26 40 U.S.C. § 3133(b)(2).
- 27 40 U.S.C. § 3133(b)(3).
- 28 40 U.S.C. § 3133(b)(4).
- 29 40 U.S.C. §§ 3133(b)(3) and (5).



- 30 T.C.A. 12-4-201 et seq.  
31 T.C.A. 12-4-201(a).  
32 T.C.A. 12-4-201(c).  
33 T.C.A. 12-4-205.  
34 T.C.A. 12-4-205.  
35 T.C.A. 12-4-206.  
36 T.C.A. 66-11-146(a)(1).  
37 T.C.A. 66-11-146(a)(2); T.C.A. 66-11-146(b)(2).  
38 T.C.A. 66-11-102.  
39 T.C.A. 66-11-124(c).  
40 T.C.A. 66-11-146.  
41 T.C.A. 66-11-124(b).  
42 T.C.A. 66-11-143.  
43 T.C.A. 66-11-143(e)(2)(A).  
44 T.C.A. 66-11-143(e)(2)(B).  
45 T.C.A. 66-11-143(b).  
46 T.C.A. 66-11-143(d).  
47 T.C.A. 66-11-143 and T.C.A. 66-11-145(d).  
48 T.C.A. 66-11-101(12).  
49 T.C.A. 66-11-203.  
50 T.C.A. 66-11-203.  
51 T.C.A. 66-11-204.  
52 T.C.A. 66-11-112  
53 T.C.A. 66-11-106.  
54 T.C.A. 66-11-102 and T.C.A. 66-11-106.  
55 T.C.A. 66-11-111.  
56 T.C.A. 66-11-112.  
57 T.C.A. 66-11-112.  
58 T.C.A. 66-11-112.  
59 T.C.A. 66-11-112.

- 60 T.C.A. 66-11-145. See generally, *RiverBend Materials, Inc. v. Chattanooga Assisted Living Retirement Community, LLC. et al.*, No. 00-0984, Chancery Court of Hamilton County (June 14, 2002 Memorandum Opinion and Order); *CMT, Inc. v. West End Church of Christ, et al.*, No. 03A01-9511-CH-00383, 1996 WL 64003 (Tenn. Ct. App. Feb. 15. 1996).
- 61 T.C.A. 66-11-145.
- 62 T.C.A. 66-11-115.
- 63 T.C.A. 66-11-112 and T.C.A. 66-11-115.
- 64 T.C.A. 66-11-106.
- 65 T.C.A. 66-11-112 and T.C.A. 66-11-115.
- 66 T.C.A. 66-11-115.
- 67 T.C.A. 66-11-112.
- 68 T.C.A. 66-11-106.
- 69 T.C.A. 66-11-115.
- 70 T.C.A. 66-11-126.
- 71 T.C.A. 66-11-126(3).
- 72 The parties may petition the court for an increase in the amount of the bond.
- 73 T.C.A. 66-11-126(4).
- 74 T.C.A. 66-11-107.
- 75 T.C.A. 66-11-108.
- 76 T.C.A. 66-11-108.
- 77 T.C.A. 66-11-142(a).
- 78 T.C.A. 66-11-142(b).
- 79 T.C.A. 66-11-118(a).
- 80 T.C.A. 66-118(a)(2).
- 81 *Williamson County Ready Mix, Inc. v. Pulte Homes Tennessee Limited Partnership*, No. M2007-COA-R3-CV, at \*5-\*7 (Tenn. Ct. App. Dec. 15, 2008); T.C.A. 66-11-112; T.C.A. 66-11-118(b).
- 82 T.C.A. 66-11-118(b)(1).
- 83 T.C.A. 66-11-118(b).
- 84 T.C.A. 66-11-118(b)(2).
- 85 T.C.A. 66-11-118(c).
- 86 T.C.A. 66-11-124(b).
- 87 T.C.A. 66-11-124(c).

- 88 T.C.A. 66-11-124(c).  
89 T.C.A. 66-11-135.  
90 T.C.A. 66-11-135.  
91 T.C.A. 66-11-137 and T.C.A. 66-11-140.  
92 T.C.A. 66-11-137.  
93 T.C.A. 66-11-138 and T.C.A. 66-11-140.  
94 T.C.A. 66-11-138(a).  
95 T.C.A. 66-11-138(b).  
96 T.C.A. 66-11-205.  
97 T.C.A. 66-11-149.