



Even if you are Performing Work on a Public Road, You Might Still have Lien Rights By — George E. Spofford, IV

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What? You're probably thinking that cannot be correct because "everyone knows" that public property cannot be liened. Well, this is another one of those "everyone knows" articles where we demonstrate that what everyone knows, is not necessarily everything that needs to be known.

It is true and "everyone knows" that sovereign immunity does prohibit public property from being liened. However, that does not mean private property benefitting from the work performed on public property cannot be liened. Florida Statutes, Section 713.06 and Section 713.04 expressly allow a lien to be filed against private property that is benefitting from work performed on public property.

For example, it is very common for a local government to issue a building permit or zoning modification for a private development on the condition that the developer also improve the roads and drainage leading up to the development. If the developer hires a contractor to build the infrastructure improvements on the public right-of-way, then the contractor is performing work on public property and cannot lien the public property. But, what everyone does not know, is that the contractor can file a lien on the development. Florida Statutes, Section 713.06

states that a lienor complying with the other provisions of the lien law may have "a lien on the owner's real property for labor, services, or materials furnished to improve public property if the improvement of the public property is furnished in accordance with his or her contract and with the direct contract." Section 713.04 provides the same right to lien. Thus, even though the work is performed on public property, the contractor still may have lien rights, just not against the public property.

If the improvements are truly a public project, there will generally be a payment bond in place which stands in lieu of property subject to a lien. But, if the work on a public right-of-way is really a private job, then there is no payment bond and the security for payment is a lien against the property receiving the benefit of the improvements.

In our example involving a road contractor performing public infrastructure improvements for a private development, in order for the road contractor to perfect the lien against the developer's property, the road contractor has to comply with all of the notice provisions governing a lienors. For example, if the road contractor is working for a prime contractor, then the road contractor is a subcontractor and is not in privity with the owner of the

property. Usually, this means the contractor needs to send the prime contractor and owner a Notice to Owner within 45 days of the road contractor's first work. The Florida Statutes provide a suggested Notice to Owner form. Then, if still not paid, the road contractor needs to record the lien within 90 days of last work and serve the prime and owner with copies of the lien.

What if the road contractor failed to serve the Notice to Owner within 45 days of its first work? Well, here's another example of what everyone knows, is not necessarily everything that needs to be known. Everyone knows that if a statutory lien deadline is missed, then the lien is dead and it is not unusual for a lienor to abandon its lien on the belief that missing the 45 day deadline is fatal to the lien. Usually, missing the deadline is fatal, but readers of past articles may recall that there is an exception for subdivision improvements. A contractor performing site work on a subdivision need merely record its lien within 90 days of last work and is not required to serve a Notice to Owner. Subdivision developers frequently are required to provide improvements to public infrastructure as part of the governmental approval of their development. Thus, it would not be

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unusual on a public infrastructure/private subdivision project where an uninformed lienor believes it cannot lien, but a savvy lienor (i.e., one that regularly reads the Ditchmen) knows it is able to lien private property for work performed on a public right-of-way and be exempt from the Notice to Owner requirement.

The information needed to fill out the Notice to Owner and lien is available on the Notice of Commencement which is supposed to have been filed in the county records prior to the start of the private development. If the Notice of Commencement identifies

another party to receive the Notice to Owner and/or lien, such as a lender, then those persons are also to receive copies. If no Notice of Commencement has been recorded, then a lienor is entitled to rely on the information contained in the building permit for the development. If there is no building permit, run away.

Thus, while "everyone knows" you can't lien public property, not everyone knows that sometimes you can lien private property for the value of work performed on public property.

George Spofford is a shareholder in the Tampa office of the GrayRobinson law firm. Spofford has represented the construction industry since 1985 and serves as General Counsel to UUCF. GrayRobinson, P.A. (gray-robinson.com) is a full-service business law firm with over 275 attorneys and 10 offices across Florida. If any member has specific questions relating to this topic or any topic they would like to see addressed in future editions, please feel free to contact George at (813) 273-5000 or george.spofford@gray-robinson.com.

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