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April 10, 2002

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SENT VIA EMAIL AND FIRST CLASS MAIL
assemblymember.dutra@assembly.ca.gov

Honorable Assembly Member John Dutra
Sacramento Office
P.O. Box 942849
Sacramento, CA 94249-0001

RE: AB 568

Dear Assembly Member Dutra:

Although I believe that you are truly trying to protect consumers, on behalf of numerous Builders Exchanges, Construction Trade Associations and their thousands of members, I must oppose your referenced Bill. A review of the California Law Revision Commission's (CLRC) file will show that I have been active in the process. Your staff will confirm this statement.

The reasons for the opposition are as follows:

- 1 The CLRC did not carry out the task that was assigned to it;
- 2 The CLRC did not even attempt to determine the scope of the problem;
- 3 The CLRC perceived a problem and thereafter did nothing other than look to find a fix;
- 4 The proposed fix violates the California Constitution;
- 5 Credit transactions in the construction industry cannot be compared to other credit transactions; and
- 6 The proposed fix is overkill and its only attribute is simplicity--do away with lien rights.

In our first letter to the Law Revision Commission dated January 3, 2000, we pointed out that the Commission should determine "... whether the process needs wholesale changing rather than minor changes that are similar to the ones that have been made over time." We pointed out that it seemed foolish to change something that had worked for over a hundred years without conducting a study to determine if a problem exists, and if so, the scope of the problem. We stated, "Quite honestly, it appears to me that the very first thing that this Commission should do is determine whether wholesale changes in the process are appropriate." The Commission never did that. The Legislature's charge to the Commission was to do a comprehensive study. The Commission did not do a comprehensive study. It perceived a problem and set out to fix the problem. This is especially inappropriate with respect to a Constitutionally protected right. Although the Commission recommendation might lead one to believe that it received

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information from the Contractors Board, that is not true. A member of the Contractors' Board staff attended some meetings but had no information concerning the scope of the problem.

One of the first memoranda written by the CLRC dealt with the Constitutional protection of lien rights. When reading the first draft, it was clear that the staff had already made up its mind and was trying to justify that mindset. We pointed that out to the Commission by letter dated June 14, 2000, along with a responsive memorandum. We not only quoted the Constitution, wherein the word "shall" is included twice, however, we also pointed out that the staff glossed over the two most recent cases which were given no weight whatsoever when compared with the staff memorandum that dealt with cases that were over 100 years old. Wherever the staff talked about a decision that was not favorable to its position, they stated that it was a four to three (4 to 3) decision. This clearly pointed out a prior mind set, which was being justified.

Recognizing that the Commission was going to ignore the California Constitution, we had suggested a better option, utilizing existing law dealing with bonds, joint control and notices. At first, that was pooh-poohed. Indeed, the unauthorized representative of the Contractors' State License Board stated that the concept would be unworkable. When we pointed out that that Contractors' Board is allowing such things to happen (was utilizing this method) in allowing blanket bonds, the Commission was told that those were not mechanic's lien bonds. We would point out that the Contractors' Board requires contractors to call them "payment and performance bonds." That is required on the documents presented to the consumers. After much discussion, an underwriter of a rather large bonding company stated that his company would write those bonds and they would not be exorbitant in cost. It appears that any alternative, other than doing away with lien rights in home improvement contracts would be determined not workable by the CLRC. The Commission totally disregarded better notices and allowing people to utilize mechanisms that are available today.

Our frustration at the Commission, listening but not hearing all of our arguments, was presented on May 11, 2001. We wrote a letter admitting that we were advocating on behalf of contractors and material suppliers but did not expect that the Commission would be advocating any particular issue. We pointed out that we had heard no horror stories dealing with Stop Notices and yet the Commission was looking at doing away with Stop Notice Rights. We pointed out that the Legislature asked the commission to "review" whereas the Commission set out to "overhaul." We pointed out that the Commission's first consultant's report indicated that the changes that they had suggested were not appropriate. We pointed out that the California appellate courts thought more of the various decisions than did the staff. We pointed out that one of the Commission's consultants, as well as Legislative Counsel, had determined that any intrusion into the Constitutionally protected right to a mechanic's lien would be unconstitutional and would require a Constitutional amendment.

Although one of the CLRC consultants would abolish mechanic's liens, we pointed out that every other person with any experience in this area, disagreed with that single consultant's

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proposal, as did the CLRC's other consultant, and the Legislative Counsel. We also pointed out that as observers of the process, we believed that because of the Legislative request for a review, the Commission felt compelled to make substantial revisions to the lien process. We submitted that the old adage of, "if it is not broken, don't fix it," should serve as caution. However, our frustration fell on deaf ears.

With more frustration, in our September 19, 2001 memo, we again pointed out that the Commissioners were wittingly or unwittingly prejudiced as a result of the perceived double payment problem suffered by a single constituent of then-Assembly member Honda and perhaps by the request of certain Legislators. As a result, the Commission set out to "fix" rather than "study" the problem. We pointed out that one of the bases for that feeling was that the Commission never conducted a "comprehensive study" of the perceived problem. The Commission admitted that "the significance of this double payment problem is a matter of serious disagreement and the Commission does not have comprehensive statistics indicating the magnitude of the problems."

We again pointed out that another example of why we felt that the study was not fairly conducted was when the Commission's study was asked to give history of the law in the area, it was completely slanted and advocated the position that the right to mechanic's liens is "not so" constitutionally protected. That early memorandum gave little or no significance whatsoever to the most recent cases. Whenever the staff disagreed with a particular decision, there was a comment that it was a 4 to 3 decision. We pointed out that a 4 to 3 decision by our Supreme Court is still the law of the land. We also pointed out that the Capitol Steel Fabricators v. Mega Construction case, which was a fine overview of mechanic's lien rights in light of the Clarke v. Safeco case, should be examined and discussed. The Commission asked for information from Constitutional scholars yet they gave little heed to any of the people that had dealt with those appellate decisions, including some of those that argued the Constitutionality issue before the courts.

In response to the November staff memorandum, we again pointed out the failures of the staff report in the following area:

- 1 Constitutional rights;
- 2 Failure to determine the extent of the problem;
- 3 In response to the Commission's suggestion that special protection had been afforded to home improvement projects by the Legislature, we pointed out that the California Constitution does not distinguish between types of construction contracts--only that one contributes to a work of improvement. Although the Legislature may have treated some contracts differently, they have never taken away the right to a mechanic's lien.
- 4 We also discussed various CLRC staff citations including the one dealing with Vallejo Development Company v. Beck Development Co., which merely reaffirmed

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- that the state has police power to protect the public. That case only reaffirms that the licensing requirement provides minimal assurance to all persons that people offering such services in California have the requisite skill and character, etc.
- 5 We also responded to the staff's argument dealing with public works contract wherein there was no mechanic's lien right. We stated that this was merely the exercise of sovereign immunity by a public entity but furthermore; the failure to allow for mechanic's liens was addressed by requiring Stop Notices and mandating payment bonds. Indeed, in the Capitol Steel Fabricators, Inc. v. Mega Construction Co., the Court of Appeals followed the Clarke v. Safeco case wherein they stated that the bonds were a substitute for the mechanic's lien rights. This was a public works project.

Throughout the process we have pointed out that credit transactions in the construction industry are different than transactions in other areas of commerce. The California Constitution and courts have continuously pointed out that those who improve real property received better protection than other creditors. Where as a retail business might mark something up by 100%, a contractor rarely can get 10% of its costs. Therefore in order for a contractor to recoup a \$10,000 loss, the contractor would have to sell and complete another project in excess of \$100,000.

The latest CLRC proposal which resulted in your Bill was called the "good faith payment rule." It has nothing going for it other than simplicity. It takes away a Constitutionally protected right without even providing an alternative.

As a result of all of the foregoing, we respectfully must oppose any intrusion in to the Constitutional right to a mechanic's lien.

Respectfully submitted,
ABDULAZIZ & GROSSBART



SAM K. ABDULAZIZ

SKA: tmw