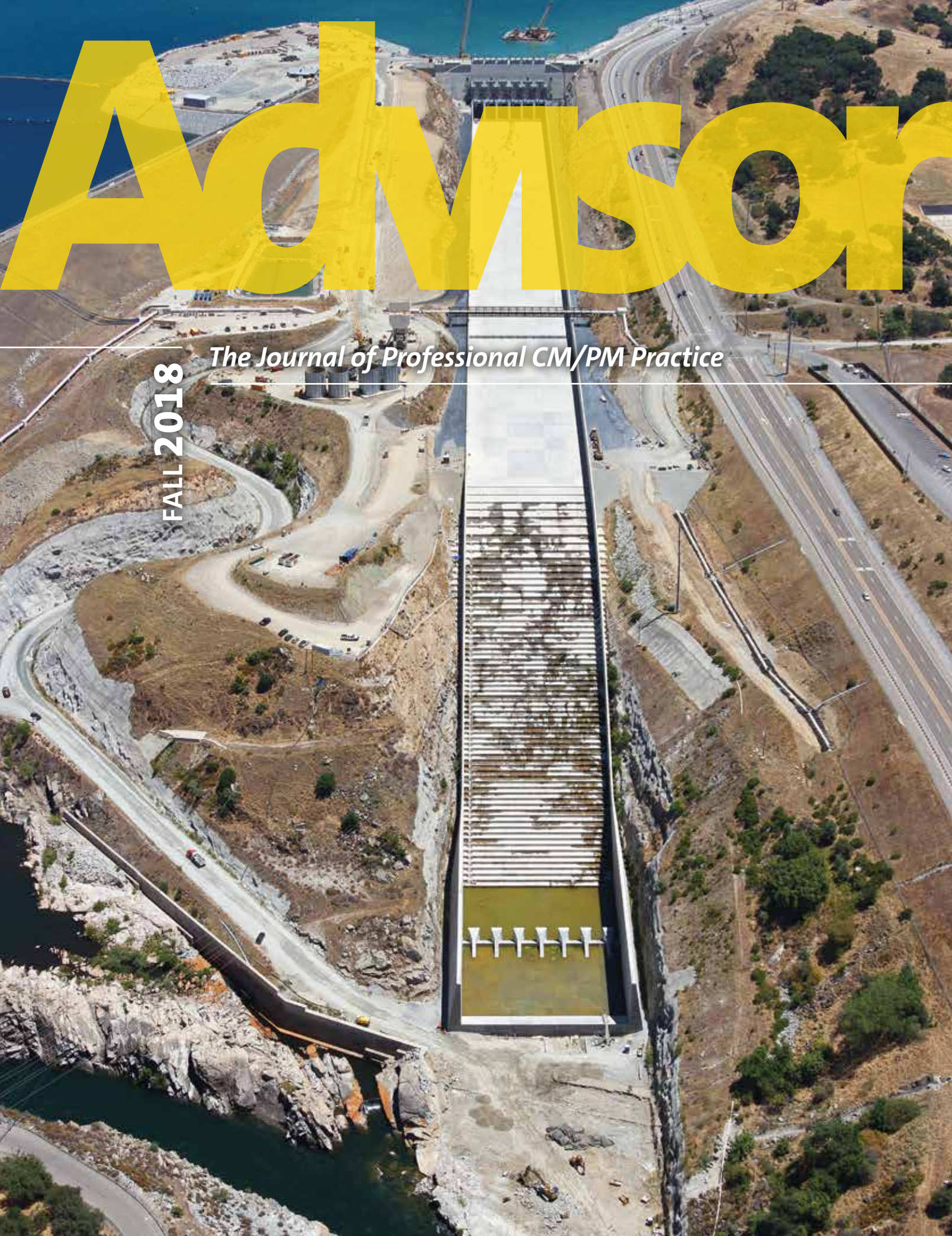

Advisor

The Journal of Professional CM/PM Practice

FALL 2018

Advisor

CMAA Advisor, published quarterly by the CMAA, reports on and follows the industry as a service to its members. Submission of articles, ideas and suggestions is appreciated and encouraged.

The Mission of CMAA is to promote the profession of Construction Management and the use of qualified Construction Managers on all capital projects and programs

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ISSN 1084-75327

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MECHANIC'S LIENS FOR PRE-CONSTRUCTION SERVICES

BY HENRY L. GOLDBERG, ESQ. & ROBERT FRYMAN, ESQ.

With the expanding acceptance and use of design-build project delivery in both the public and private sectors, the availability of a mechanic's lien to secure payment for design and other pre-construction services increases in importance. Construction managers (CMs) may be more regularly called upon to provide pre-construction services, even before project-wide financing is fully secured. This raises the risk of non-payment.

PRE-CONSTRUCTION SERVICES

Pre-construction services can include a wide range of activities such as preliminary planning, as well as design and engineering services. This often involves defining the project scope, schedule, and cost, as early as possible, so as to develop a firm cost estimate and to assist in securing financing and required permits or regulatory approvals.

In many states, pre-construction services are broadly considered as any services before actual, physical construction work begins. This expansive definition raises issues as to mechanic's lien rights regardless of whether the physical construction has, or ever will, commence.

Pre-construction services have also been argued to encompass services such as management or supervision, for example, "aiding or assisting in procuring subcontracts or subcontractors." Such sweeping inclusions have led to disputes as to the validity and/or priority of mechanic's liens for pre-construction services.

STATUTORY AND JUDICIAL TREATMENT OF LIENS FOR PRE-CONSTRUCTION SERVICES

Mechanic's liens are a creature of state law, and the rules and requirements vary from state to state. Many states have addressed the issue of what types of pre-construction services are lienable, and when they become lienable. This has typically been done on an ad hoc basis, by judicial interpretation of mechanic's lien statutes that, when enacted, did not expressly contemplate pre-construction services. Other states have attempted to expressly define pre-construction services, and whether (or when) they are lienable, via specific new legislation.

For example, Utah Code 38-1-2, amended in 2011, defines pre-construction services as the following:

> (a) means to plan or design, or to assist in the planning or design of, an improvement or a proposed improvement: (i) before construction of the improvement commences; and (ii) for compensation separate from any compensation paid or to be paid for construction service for the improvement; and (b) includes consulting, conducting a site investigation or assessment, programming, preconstruction cost or quantity estimating, preconstruction scheduling, performing a preconstruction construction feasibility review, procuring construction services, and preparing

> a study, report, rendering, model, boundary or topographic survey, plat, map, design, plan, drawing, specification, or contract document. Utah Code Title 38, Chapter 1, Mechanic's Liens.

Nevada's mechanic's lien laws were amended in 2003 so that a contractor or design professional seeking to enforce its lien would no longer need to demonstrate that 'visible work' existed at the project site in order to have a valid lien preconstruction services and to have priority over a subsequently recorded lender's deed of trust . Nev. Rev. Stat. Ann. §108.225.

However, notwithstanding the changes to the Nevada lien law, in *J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC*, in 2011, the Nevada Supreme Court again considered the revised statutory scheme of "visibility" as to pre-construction services. The pre-construction services involved included preparing project schedules, review and coordination of architect's and subcontractors' drawings, holding meetings with subcontractors and other "planning related work." The lender for the project acknowledged that the contractor had performed the claimed pre-construction work. It even approved the contractor for the project, and entered into an agreement with the contractor, in which the lender sought to have the contractor agree to subordinate its mechanic's lien rights to the lenders deed of trust. However, the contractor refused and the subordination clause was removed from the final version of the agreement.

Subsequently, the contractor filed a mechanic's lien and commenced an action to establish that its lien had priority over the lender's lien. The lender argued that its lien had priority over the pre-construction services

Mechanic's liens are a creature of state law, and the rules and requirements vary, accordingly, from state to state.

The law regarding mechanic's liens presents a state by state technical minefield, with numerous statutory definitions.

mechanic's lien "because 'no visible work had been performed on the property and no visible equipment or materials had been furnished to the property' as of the date it recorded its deed of trust, [and] construction had not commenced". *J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC*, 249 P.3d 501, 504, 127 Nev. 72, 76-77, 2011 Nev. LEXIS 6, 127 Nev. Adv. Rep. 5 (2011).

The Nevada Court of Appeals held, notwithstanding the lender's actual notice of the contractor's pre-construction services and the legislature's 2003 amendment to the lien law, that the amended statute still "requires visibility for work performed, including pre-construction services, in order for a mechanic's lien to take a priority position over a deed of trust." J.E. Dunn, 249 P.3d at 506-7.

In Washington state, although having a statutory "visibility" scheme regarding notice of pre-construction work similar to Nevada, the Court of Appeals ruled in favor of an architecture firm against a lender which sought to disregard its actual notice of the pre-construction services to claim priority over the architect's mechanic's lien. In *Zervas Grp. Architects, PS v. Bay View Tower, LLC*, the court found:

> The plain meaning of the statute is that when a subsequent mortgagee has reason to know of the professional services, its lien is subordinate. Such is the case here. Indeed, the Bank admits it had actual notice that architectural services had been provided. And at the time it recorded its deeds of trust, the Bank had ample information from which to deduce, through implication or inquiry, the existence of a potential professional services lien claimant, to wit, the architect on the project. *Zervas Grp. Architects, PS v. Bay View*

Tower, LLC, 161 Wn. App. 322, 328, 254 P.3d 895, 898, 2011 Wash. App. LEXIS 870, *8-10 (2011)

Thus, Washington takes a more pre-construction contractor friendly view to the realities of the construction and development industries than Nevada, i.e. that many valuable pre-construction services are rendered prior to the start of physical construction work, and often before the securing of financing. Indeed, many of those pre-construction services are necessary to obtain construction financing, initial zoning and regulatory approvals and CMs should be afforded the recognition of the value of the pre-construction services provided, and the same ability to secure themselves with regard to the property.

New York is among those states that do not have express statutory provisions defining or authorizing liens for pre-construction services. However, in New York, although design professionals' services in preparing plans and drawings are expressly recognized as qualifying for mechanic's lien protection (N.Y. Lien Law §2(4)), the N.Y. Lien Law is otherwise silent on other types of pre-construction services. New York's Lien Law instead focuses, generally, on whether any particular labor, services, or materials assisted in "improving" the property.

In a recent New York case, the court was required to look back almost a century for legal precedent. In *Matter of Old Post Rd. Assoc. LLC*, the court considered the application of a project owner to discharge the mechanic's lien filed by a contractor retained to provide "pre-construction management services."

The project owner did not dispute that it engaged the contractor to perform certain pre-construction management services. Indeed, the owner acknowledged that the contractor provided services for the project and attended meetings with the owner's consultants in connection with the site plan approval application. However, the owner claimed that the contractor provided those services "gratis in an ultimately unsuccessful effort to earn the position of CM for petitioner's upcoming construction project." The owner argued that the lien should be discharged because the services the lien was based upon, "pre-construction management services," did not fall within the lien law's definition of services which "improve" the property. Old Post Rd. Assoc. LLC, *Matter of Old Post Rd. Assoc. LLC (LRC Constr., LLC)*, 60 Misc. 3d 391, 293 77 N.Y.S.3d 283, 2018 N.Y. Misc. LEXIS 1778, 2018 NY Slip Op 28148392 (Supreme Court, Westchester County, 2018).

The court observed that, "[l]ittle guidance is provided in the case law as to what types of work fall within and outside the category of 'improvements' under the Lien Law. Notably, no case has been cited or found by this court explicitly considering the term 'pre-construction management services,' or discussing the definition, nature and extent of such services." The court then turned to the 1929 decision of the New York Court of Appeals (New York State's highest court) in *Goldberger-Raabin, Inc. v. 74 Second Ave. Corp.*

The lower court in *Old Post* noted that in *Goldberger-Raabin*, the Court of Appeals drew a distinction between "[lienor's] services in aiding or assisting in procuring subcontracts or subcontractors," which it held was *not* an improvement of property, and services managing the demolition of the old building and construction of the new building which it held was an "improvement of the real property" for which it was entitled to file a mechanic's lien. *Old Post Rd. Assoc. LLC*, 60 Misc. 3d at 393-394.

The *Old Post* court then turned to a more recent trial court decision,[1] observing that while the New York Lien Law did not cover merely "applying for permits and approvals," it would apply to the "professional engineering and professional surveying services rendered in connection with obtaining municipal approvals for the development," even though "no actual physical permanent improvement [took] place." The court observed that "the primary purpose of the Lien Law is to afford protection for workmen who at the request or with the consent of the owner of real property enhance its value by performing labor for the improvement thereof. If a landowner fails to take a project through to completion, for whatever reason, the claims for work done to improve the property are no less entitled to the benefits of this statute." Id.

Having concluded that a lien could, in fact, be filed for "pre-construction" services, the *Old Post* court then considered the specific labor and services provided. The CM explained in that case that as part of its pre-construction services, it recommended changes to the structural system for the project; provided finish selections, facade recommendations and mechanical, electrical and plumbing system recommendations required for the high end condominium market; prepared for and attended planning board meetings; prepared site logistics and access plans; performed a constructability review for the project; attended meetings with consultants and officials to assist the approval process; and prepared construction budgets to assist in the design development process for the project.

As a result, the *Old Post* court found the CM's lien for pre-construction services was valid, stating, "[w]hile some of the foregoing may be comparable to the non-lienable work of procuring bids or permits, some of the other described tasks, such as preparing site logistics and access plans for the property and performing a constructability review for the project at the property, appear to be comparable to the category of engineering planning work held to be covered by the Lien Law." Id. at 396.

COMMENTARY:

The law regarding mechanic's liens presents a state by state technical minefield, with numerous statutory definitions, deadlines and substantive and procedural pitfalls which, without care, could operate to waive or forfeit a CM's rights. This could occur even before work on a project has begun. In projects involving significant pre-construction work, a CM providing any pre-construction services must carefully consider the sources of project funding (public or private), and their rights and remedies under the applicable state law for the project's "venue."

Lien Law remedies for securing payment of fees must be reviewed and considered before problems arise to assure all statutory deadlines (which could be as short as a matter of months) are met. It is best to consult with experienced construction counsel in the particular state, before expending large amounts of time or money on a project in which you have concerns regarding payment.

CMs, as construction professionals, are frequently called upon to render pre-construction services for projected projects which are not fully funded. They often do so in an effort to maintain a client relationship and to facilitate chances of securing the eventual engagement as the construction manager for the planned project. The pressure to cooperate can be considerable.

Mechanic's liens were designed decades ago to provide cost-effective protection for construction contractors, materialmen, and workers against the more powerful, "monied" class of owners and developers. Such liens are designed to help "level the playing field," and protect your interests. You may want to consider this remedy, particularly where there is no formal contract in place to define and protect your interests.

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1 Citing *Chas. H. Sells, Inc. v Chance Hills Joint Venture*, 163 Misc 2d 814, 816, 622 N.Y.S.2d 422 (Sup Ct, Westchester County 1995)