

Construction Lending News

Volume 28, Third Quarter 2009

Builders, Financial Service Companies Partnering to Stimulate Regional Economy

by Peter L. Mosca¹

Challenging economic times call for new ideas; solutions and a commitment to helping communities solve their current problems and move ahead financially positioned for the future. In Wyomissing, Pennsylvania two diverse, yet intertwined companies are pooling their resources to meet the needs of the people they serve. VIST Financial Corp. recently announced it has created an initiative to offer low-interest mortgages to qualified homebuyers who purchase new homes with local homebuilders who are clients of VIST. The initiative will be offered through the company's mortgage division, VIST Mortgage.

"With this type of impact being the bedrock of any financial recovery, we hope other banks in the region and across the country will create similar programs to aid their communities as well," said Robert Davis, President & Chief Executive Officer of VIST Financial.

Under the "Community Builder" initiative, the bank has committed up to \$40 million available to offer 30-year fixed rate mortgages at 3.99 percent APR to credit-worthy borrowers purchasing primary residences. VIST officials cited a report by the National Association of Home Builders which estimates the immediate and ongoing impact of home building and home sales could mean as much as \$245 million in income, taxes, and wages as well as the creation of more than 1300 jobs over the next seven years.

"We are fortunate to be able to work with such a great group of builders who want to provide new homes to their customers in an economic environment which has delayed the dream of home ownership for many in our region," added Ron Rohrbach, Executive

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Builders, Financial Service Companies Partnering to Stimulate Regional Economy

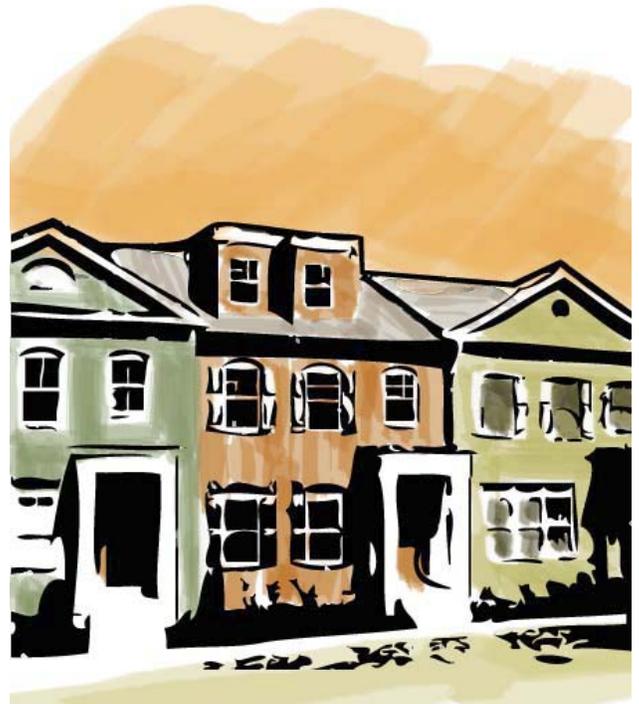
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Director of the Home Builders Association of Berks County, who shared Davis' enthusiasm for the program. "They, like VIST, understand the importance homeowners play in creating and maintaining stable neighborhoods and healthy communities." The plan grew from a portion of the funds the bank accepted from the Federal government's investment under the Capital Purchase Program, in which the Federal government invests in solid, well-capitalized financial institutions in exchange for Preferred Shares of company stock. Davis is quick to point out the difference between the CPP and the bailouts of larger institutions.

"The investment the government made in VIST Financial wasn't necessary to provide a bailout as it was with many of the larger institutions that dominate the news coverage," explained Davis. "Rather, the government shares our belief that a sustainable recovery in the housing and credit sectors will come not from these enormous institutions, but from the community lenders like VIST. This is an outstanding program that will put the taxpayers' investment to work in visible ways." "Programs like the Community Builder are important for every community in that not only does it help people realize the dream of home ownership but it also drives other factors important to our local economies, such as consumer spending, job creation, and expanded tax bases," said R. Stanley Schuck, President & Chief Executive Officer of the Main Line Chamber of Commerce.

The \$40 million dollar Community Builder was announced at a press conference held at VIST Financial's corporate headquarters with company officials being joined by the Home Builders Association, Berks and Main Line Chambers, and state and local officials. Responding to a question about the program's timeframe, Davis noted that the Community Builder could be extended depending on how quickly the public takes advantage of the \$40 million, which could lead to more than 200 home sales.

Participating builders include: Greth Homes, GG&F Construction, Pine Brook Construction, Grande Construction, Summer Hill Building & Contracting, Inc., New Vision Builder Inc., Heidelberg Custom Builders, DiBiase Construction Inc., Casa Bella Builders, D'Arcangelo Builders, Inc., Alexaki Construction, DeSantis Development, Shaffer Group, Judd Builders and Squire Home Builders.



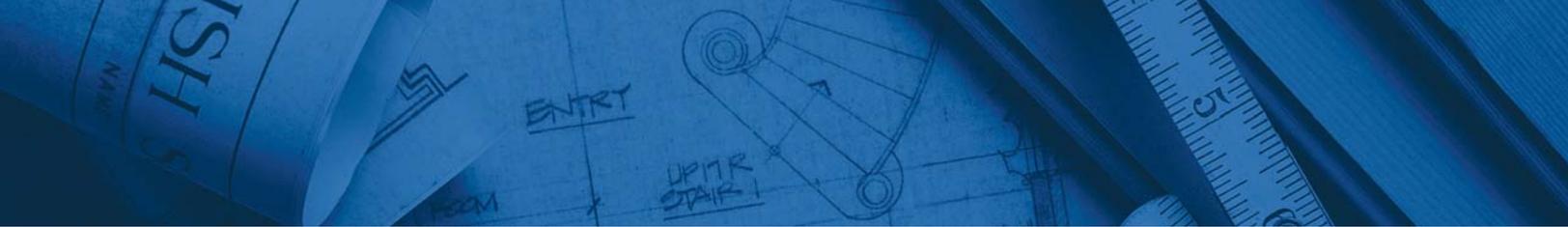
VIST and the local builders of Wyomissing are examples of what an America, one that works together to help the citizens of its community, can accomplish when political squabbles and indifferences are set aside for the betterment of those who need it most.

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U.S. Housing Starts, Permits Rise in August²

by Lucia Mutikani; editing by Neil Stempleman

WASHINGTON (Reuters) - New U.S. housing starts and permits rose in August to their highest level since November, lifted by a rebound in multifamily homes, a government report showed on Thursday (September 10, 2009).

The Commerce Department said housing starts rose 1.5 percent to a seasonally adjusted annual rate of 598,000 units, just shy of market expectations for 600,000 units. July's housing starts were revised upwards to 589,000 units from the previously reported 581,000 units.

Groundbreaking for single-family homes, however, fell 3 percent in August to an annual rate of 479,000 units, after five straight monthly increases. Starts for the volatile multifamily segment jumped 25.3 percent to a 119,000 annual pace, reversing the previous month's slump.

Compared to August last year, housing starts declined 29.6 percent. The housing market, the main trigger of the worst U.S. recession in seven decades, is showing steady signs of healing and analysts expect activity in the sector to contribute to gross domestic product growth this quarter.

A survey on Wednesday showed confidence among U.S. home builders reached its highest level in 16 months in September, which bodes well for future home construction.

New building permits, which give a sense of future home construction, climbed 2.7 percent to 579,000 units in August. That compared to analysts' forecasts for 580,000 units. Compared to the same period a year-ago, building permits fell 32.4 percent.

The inventory of total houses under construction fell to a record low 595,000 units in August, the department said, while the total number of permits authorized but not yet started also hit an all-time trough of 99,000 units.



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An "ALL MEMBER" conference call is hosted each quarter at 2:00PM Eastern Time (1:00PM Central Time, noon Mountain Time, 11:00AM Pacific Time). The call is also open to any interested parties. To participate, please email Executive Director, Richard Nirk at rwnirk@narcl.org.

2009 Call Schedule:

Wednesday, December 23, 2009 (2:00 EST, 12:00 MST)

For more information on NARCL contact:

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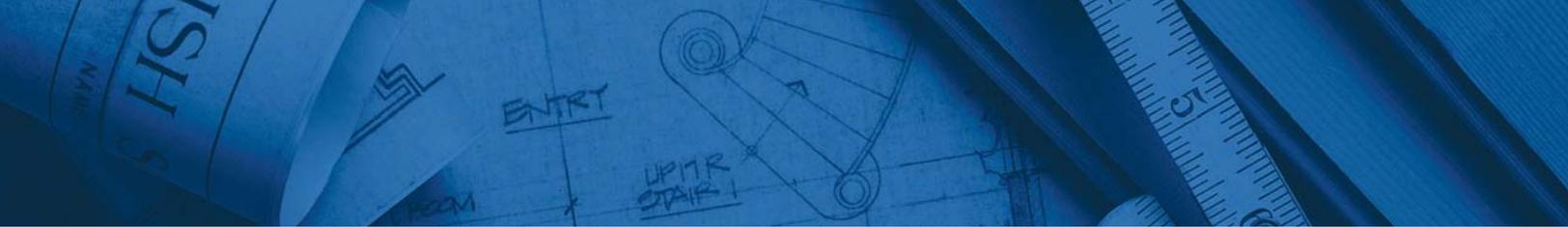
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The Experts for Construction Lending



Iconic Skyscrapers Invigorated by Going Green

By Chris Kahn, Associated Press³

NEW YORK — When owners of the Empire State Building decided to blanket its towering facade this year with thousands of insulating windows, they were only partly interested in saving energy.

They also needed tenants.

After 78 years, Manhattan's signature office building had lost its sheen as one of the city's most desirable places to work. To get it back, the owners did what an increasing number of property owners have done — they went green, shelling out \$120 million on a variety of environmental improvements, a move would have been considered a huge gamble a few years ago.

Buildings that define city skylines across the country, some national icons, are catching up to the sleek, new structures designed with efficiency in mind, as property owners and managers become convinced that a greener building now makes financial sense.

That's because in recent years environmental retrofits have begun to pay off for owners and tenants alike. Higher-profile companies are seeking out more efficient office space, and new technology at older buildings has started to translate into higher property values, leases and occupancy rates.

"In a good market, we're going to get the best rents for the best tenants," said Anthony Malkin, who leads a real estate group that owns the Empire State Building. "In a bad market like we have now, we're going to get tenants when other buildings won't."

Renovation specialists around the country have been plugging porous walls in numerous old buildings, adding high tech water systems and using recycled material in carpets and tile.

One of them is the Christman Building in Lansing, Mich., an 81-year-old Elizabethan Revival office that's listed on the National Register of Historic



Places. While repairing the limestone exterior and preserving unique details like the mica light fixtures, the building owners spent \$8.5 million to add water-efficient plumbing and increased the amount of natural light. They also capped the building with a reflective "cool" roof.

Chicago's Sears Tower announced late last month that it will embark on a five-year, \$350 million green renovation. The 110-story, staggered skyscraper, which turned 36 this year, will crown its rooftops with solar panels, wind turbines and up to 35,000 square feet of sunlight-absorbing gardens.

When complete, the improvements will cut the tower's annual electricity use by 80% and save 24 million gallons (90 million

liters) of water, property managers say.

Building owners trumpet their environmental commitment when extensive modifications are made, yet in many cases those changes are being pushed by tenants.

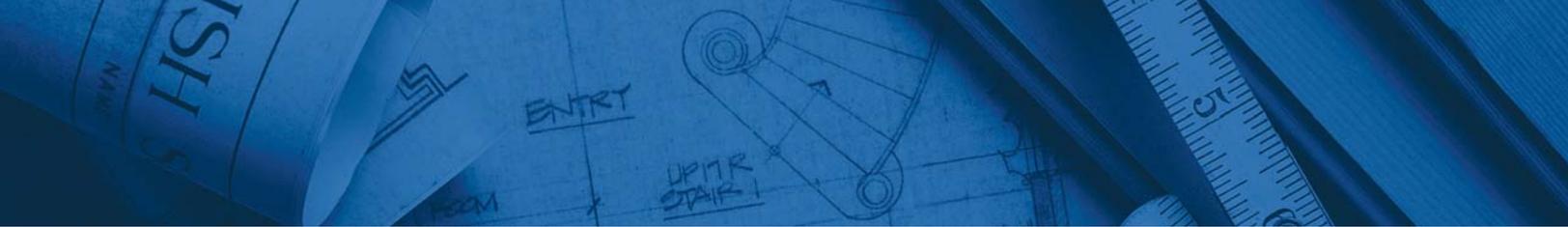
Many high-profile tenants won't even consider moving into a property without the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) certification, said Allan Skodowski with Transwestern management group. They may not even know what the certification means, he said, but they demand it nonetheless.

"They say 'We want LEED,'" Skodowski said, "and that's it."

Nine of Transwestern's properties received certification this year. A combination of energy efficient light bulbs and other green equipment helped those buildings slash energy consumption. On average, they've seen a 2% drop in energy costs, even as electricity rates jumped 10% to 40%, Skodowski said.

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Iconic Skyscrapers

(cont'd)

Leasing rates have not risen as a result of the changes, Skodowski said, yet at the same time occupancy rates have not fallen. That's a victory for an industry hit hard by the recession. Vacancy rates at office buildings nationwide have gone from 10.9% at the end of 2007 to 12.4% in the first quarter of this year.

"If one extra tenant comes and looks at the building, if the owner gets an extra penny or so a foot, then at the end of the day it's paying for itself," Skodowski said.

A recent analysis by real estate researcher CoStar Group, Inc. found that green-certified buildings had fewer vacancies than other buildings with similar age, size and location.

The CoStar study, which included about 3,000 green-certified offices, found that buildings with the council's certification enjoyed higher occupancy rates (90.3 percent) than their peers (84.7 percent) in the first three months of 2009.

Certified buildings have fetched higher lease rates for several years. The CoStar report said the buildings rented at an average of \$38.86 per square foot in the first quarter of 2009 compared with \$29.80 per square foot for their peers.

"This isn't just a 'We are doing the right thing' movement," said Marc Heisterkamp, U.S. Green Building Council's director of commercial real estate. "In the end, the numbers pencil out."

At the Empire State Building, Malkin proposed a top-to-bottom renovation that included a \$13.2 million investment in new green technologies. The goal was to sufficiently reduce greenhouse gases without spending more than he could justify to his investors.

What the owners settled on was a series of upgrades that include retrofitting all 6,500 windows. Under every window, radiators will be padded with extra insulation. The building's lighting, cold water and ventilation systems also will be upgraded.

The renovation should take 18 months. Afterward, the owners expect an annual energy savings of \$4.4 million, enough to pay off the new technologies in about three years.

Already, the renovation has lured upscale, energy-conscious companies like Swedish construction firm Skanska, said Ray Quartararo with Jones Lang Lasalle, which is managing the renovation.

Skanska wanted its U.S. headquarters to have a LEED "platinum" certification — reserved for only the most efficient of buildings — and it found a willing partner in the Empire State Building. Skanska officials said the building's management helped them install bike racks and add other energy-saving details on the 32nd floor.

"We had looked at several downtown spaces, but the Empire State Building made the most sense," a company spokeswoman said.

Jacques Catafago, an attorney who works 16 floors above Skanska's new office, is also happy with the changes. Catafago has fought the building management before on other fees, but he said he wouldn't mind paying more rent if it goes toward renovations that cut his electric bill.

Besides, Catafago said, he's already checked out the rent for similar buildings in the city and realizes he has a pretty good deal at the Empire State Building.

"We'd be paying twice as much" uptown, he said.



Kentucky Mechanics' Lien Law

By Matthew Gillies⁴



Kentucky's mechanics' lien laws protect those providing labor or materials to both residential and commercial construction projects. While Kentucky also allows liens to be filed on public projects (on the funds), this article will focus on private project liens.

Who Can Claim a Lien?

KRS 376.010(1) provides that "any person who performs labor or furnishes materials . . . by contract with, or by the written consent of, the owner, contractor, subcontractor, architect, or authorized agent, shall have a lien . . .". This generally includes general contractors, subcontractors, and material suppliers. The lien statute, however, does not confer a lien on a material supplier who furnishes material to another material supplier.⁵

What Work Qualifies?

Any labor or materials used in the construction qualifies. A lien can be granted for furnishing any materials used in the construction of a building and which are within the scope of the contract between the owner and the contractor.⁶ As long as the material is actually delivered to the jobsite,⁷

a lien may also be acquired for material furnished to the jobsite but not actually incorporated into the improvement. For example, a lien will be allowed for the full value of lumber purchased and used for constructing concrete forms that were consumed or rendered useless by their use.⁸ The mechanics' lien statute also provides that labor may form the basis of a lien against a property,⁹ even if the labor was performed off the jobsite, as long as the labor was "necessary for the improvement."

To What Does the Lien Attach?

Liens attach to "the land upon which the improvements were made or any interest the owner has therein."¹⁰ This includes any interest of the owner that is transferable, assignable, or conveyable in the real estate on which the improvement is made and includes leasehold interests. Once created, the lien attaches to any existing buildings or improvements as well as those subsequently erected.

When Does the Lien Attach?

Mechanics' liens are created and "attach" as soon as one begins to furnish work.¹¹ Of course, while the lien may already exist, it is of no use until it is perfected under the statute.

What are the Notice Requirements?

In order to perfect a lien, parties without a direct contract with the owner must send written notice to the owner before filing a lien.¹² Such notices must: (1) be in writing; (2) be sent within 120 days (or 75 days for claims less than \$1,000.00); (3) inform the owner of the intent to file the lien; and (4) state the amount of the lien.¹³ A lien statement or complaint filed and served on the owner of the property within the statutory time period is not a substitute for the preliminary notice of one's intent to file a lien.¹⁴ Additionally, this 120-day time limit for giving notice cannot be extended by furnishing labor or material that is "trivial and not necessary for the completion of the contract."¹⁵

⁴ Matthew Gillies is construction attorney who represents owners, (both public and private), contractors, construction managers, subcontractors, suppliers, sureties, and design professionals in a variety of construction-related transactions and disputes. Mr. Gillies is a partner with Stites & Harbison, PLLC and is based in their Louisville, Kentucky office. He may be reached at 502.681.0589 or MGillies@stites.com.

⁵ *Hightower v. Bailey*, 56 S.W. 147, 149 (1900).

⁶ *Marion Steam Shovel Co. v. Union Indemnification Co.*, 75 S.W.2d 541 (Ky. 1934).

⁷ *Whitfield v. Kentucky Sales Corp.*, 278 S.W. 105 (Ky. 1925).

⁸ *Avery v. Woodruff*, 137 S.W. 1088.

⁹ KRS 376.010(1).

¹⁰ KRS 376.010(1).

¹¹ *Metal Sales Mfg. Corp. v. Newton*, 12 S.W.3d 691 (Ky. Ct. App. 1999).

¹² KRS 376.010(3) and (4); *Siler v. Corbin Building and Supply Company*, 176 S.W.2d 250 (Ky. 1943).

¹³ KRS 376.010(3) and (4).

¹⁴ *Middletown Engineering Co. v. Main Street Realty, Inc.*, 839 S.W.2d 274 (Ky. 1992); *Laferty*, 708 S.W.2d 107.

¹⁵ *Drummy v. Stern*, 269 S.W.2d 198, 200 (Ky. 1954); *Vogt v. Cannon Electric Co.*, 54 S.W.2d 338, 340 (Ky. 1932).



Matthew Gillies

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Kentucky Mechanics' Lien Law

(cont'd)

How is a Lien Perfected?

The claimant must, within six months of the last furnishing of labor or materials, file with the appropriate county clerk a sworn statement of lien. This requirement is independent of the preliminary notice required by those without a direct contract with the owner. The lien statement must include the amount due, a property description, the owner's name, whether the materials or labor were furnished by contract with the owner or with a contractor or subcontractor, and the name and address of the claimant. The lien statement must also be "subscribed and sworn to" by the person claiming the lien.¹⁶ For example, in *Hubb City Wholesale Electric, Inc. v. Mik-Beth Electric Company*, the Court held that, because the notary's acknowledgement on the lien statement did not contain the words "sworn and subscribed to," the lien was invalid.¹⁷

Are There Additional Notices?

A copy of the lien statement must be sent to the owner within seven days after filing the statement of lien with the county clerk.¹⁸ Failure to do so causes the lien to be dissolved and renders it unenforceable.¹⁹

What is the Effect of a Perfected Mechanics' Lien?

A mechanics' lien is a security interest in the amount of the debt secured. Once the lien is perfected, the lien is in effect for twelve months from the date of lien filing, unless suit is brought within that time to enforce the lien. If no suit is brought to enforce the lien, it expires in twelve months. If suit is filed, the lien remains in effect until resolution of the dispute. Mechanics' liens take priority over subsequent mortgages and other conveyances unless the mortgage or subsequent conveyance was "for value" and "without notice."



How are Mechanics' Lien Claims Enforced?

Legal proceedings to enforce a mechanics' lien are "in rem" against the property itself and not against the owner of the property.²⁰ A mechanics' lien suit is a foreclosure on the property and the interest to which the lien attaches. All lien-holders, the property owner, and anyone else who may have an interest in the property against which the lien is to be enforced, must be joined in the lawsuit.

What Happens if a Judgment is Entered Foreclosing the Lien?

A judgment enforcing a mechanics' lien is a judgment against the property itself, not against the property owner. The judgment is similar to a mortgage foreclosure judgment in that the property is ordered sold, and sale proceeds are distributed in accordance with lien priorities. Usually, this means that lien claimants participate pro rata in any sale proceeds remaining after the secured mortgage is paid. If there is any surplus after the lien amounts are satisfied, then it is paid to the owner.

Can Liens be Bonded Off?

Kentucky law (KRS 376.100) allows a party to post a mechanics' lien release bond for 200% of the lien amount. The bond transfers the mechanics' lien from the real property to the bond.²¹ If a mechanics' lien is bonded off before suit is filed to enforce the lien, the

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¹⁶ KRS 376.080(1).

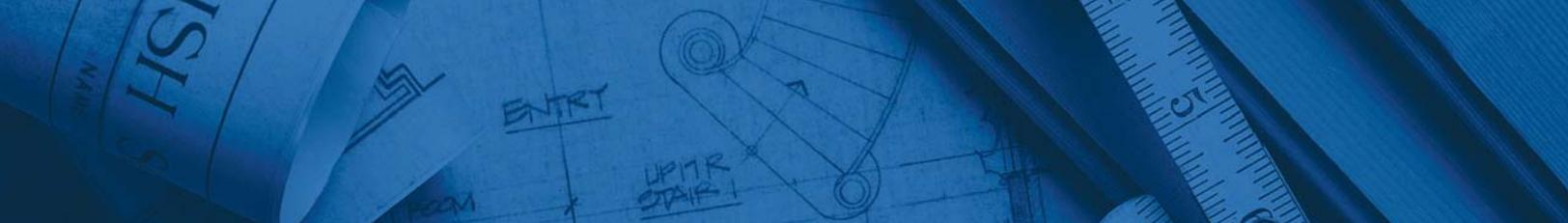
¹⁷ *Hubb City Wholesale Electric, Inc. v. Mik-Beth Electric Company*, 621 S.W.2d 242 (Ky. Ct. App. 1981).

¹⁸ KRS 376.010(1).

¹⁹ KRS 376.080(1).

²⁰ *Guarantee Electric Company v. Big Rivers Electric Corp.*, 669 F. Supp. 1371 (W.D. Ky. 1987).

²¹ *Gil Ruehl Mechanical, Inc. v. Hartford Fire Ins. Co.*, 164 S.W.3d 512, 514 (Ky. Ct. App. 2004).



Kentucky Mechanics' Lien Law

(cont'd)

lien claimant simply sues the obligors of the bond rather than the property owner.

How Do Residential Liens Differ from Commercial Liens?

Kentucky's mechanics' and materialmen's lien statutes contain specific provisions for residential construction. Residential construction is defined by KRS 376.010(4) as "owner occupied single or double family dwellings." There are two important distinctions between the residential liens and the commercial liens outlined above.

First, under KRS 376.010(4), anyone who did not contract directly with a residential owner, must provide written notice to the owner of his intent to file a lien within 75 days after the last item or material or labor is furnished, regardless of the amount claimed. This is in contrast to the typical 120 day notice period for commercial liens.

Second, and most importantly, residential liens under KRS 376.010(4) are subject to dollar-for-dollar credits to the homeowner for any payments made by the homeowner to the builder or subcontractor for the labor or materials in question, as long as such payments were made before the homeowner received notice of the lien claimant's intent to file a lien. This is an important protection that prevents a homeowner from being placed in the position of having to pay for work twice. While the general rule is that mechanics' and materialmen's liens protect those who furnish labor and materials, in this context, the homeowner also receives protection.²² This protection is only available for a homeowner's primary residence, not second homes or vacation homes.²³

Conclusion

Mechanics' liens are powerful tools for contractors to secure payment in Kentucky. Because of their power, however, the numerous legal "hoops" and notices are strictly required, and any failures render liens unenforceable. In addition to challenging a lien claimant's proper following of the statutory lien requirements, residential owners have the additional protection of knowing that they will not have to pay for work twice as long as they have properly paid their builder (regardless of whether the builder paid his subcontractors or suppliers).

²² *Campbell & Summerhays, Inc. v. Greene*, 381 S.W.2d 531 (Ky. 1964).

²³ *Bee Spring Lumber Co. v. Pucossi*, 943 S.W.2d 622, 624 (Ky. 1997)

Construction-at-a-Glance

	July 08	July 09
Total Monthly Housing Starts*	933	581
One Unit	632	490
Multifamily	301	91
YTD Permits-Single Family*	575	458
YTD Permits-Multifamily*	349	102
Monthly New Home Sales*	500	329
Unemployment Rate	5.8%	9.4%

*Thousands of Units

Source: U.S. Bureau of the Census, Construction Reports, Series C-20, Housing Starts. U.S. Bureau of Labor Statistics.

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