

THE COMMUNITY BUILDER

Notice of Commencement... *Why it Should be Important to You*

A Notice of Commencement (or NOC) is part of Florida Statute 713, the Construction Lien Law. It is applicable to contracts that a Board enters into, when the amount is \$2500.00 or greater for painting, construction services, pool refinishing, roofing, fencing, windows or for any service where a contractor would use materials that had to be purchased from another source or supplier, or sub-contracted portions of the labor to another contractor. The Construction Lien Law statute provides notices to contractors, owners, subcontractors, material men and laborers, so each has everybody else's notice that they're working on this job.

The effect of NOT following the law and not executing a Notice of Commencement is that the Association would be directly responsible for the payment of materials or labor should the contractor not pay those parties, when paid by the Association. An example would be: A roofing contract. The roofing contractor has to purchase the shingles, valley material, stacks, drip edge, tar paper, nails, bull and other materials to replace a roof. The association enters into a contract, signs off and tells the roofer to "start immediately". The roofer does the job and puts in the invoice for payment. He gets paid \$50,000.00. But he has not paid the supplier for the shingles, valley material, etc., which amounts to \$30,000 of that \$50,000 that you've already paid the roofer. The supplier now has the right to place a lien on the building or buildings that have been roofed using those materials. The Board is now responsible for paying the supplier. So instead of a \$50,000 job, it has now cost \$80,000 plus (legal fees and whatever other costs are applicable), all because no Notice of Commencement was filed. A Notice of Commencement can only be filed by the property owner or the owner's agent and must be filed in the County where the property is located. It becomes a public record. It must be filed PRIOR to the work being commenced and then posted (Or a Certified Notice of Filing



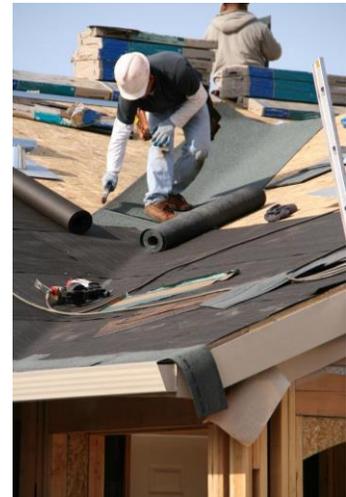
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prior to the original being returned) on the property. Once recorded, the work on the project must begin within 90 days.

So, let's go back to the beginning and see what it takes to do it the way that provides the ultimate protection for the Association and the Board.

For projects with a cost of \$2500 or more, the Board is generally going to make the decision on this at a board meeting to have the details reflected in the Minutes (the official record of the Association). That decision will be generally based on proposals containing the details of the job. Proposals are not always the final contract. Under the law (again Construction Lien Law), specifically section 713.015FS, the contract provided to the Board from the contractor is required to have specific language in 12 pt. font, boldfaced type either on the front page or a separate page, that spells out specifically the section from 713 the rights of the subcontractors or material suppliers to lien your property for non-payment by the contractor if there is no Notice of Commencement filed. (Your legal counsel should check all work contracts for this language).

The community manager should now be aware you have decided to have this work done and will proceed with the Notice of Commencement. Sentry Management has a specific procedure to get the Notice processed. At most, with the information provided being correct, this process will take no more than 3 days in total, and most of the time, less. The process will ensure the Notice is processed, check request made for the Recording and a certified Notice of Filing, along with a copy of the Notice, will be produced and returned to the manager to post on the property so the work can begin. When the original Notice of Commencement has been recorded and returned, it will be provided to the manager to post on the property.



Once the Notice is recorded, it triggers the obligation of subcontractors and material suppliers to provide a form Notice to Owner to protect their lien rights. If they fail to provide that notice, they will effectively waive their rights to sue the owner upon completion of the project.

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It should also be noted, that jobs such as roofing, painting, construction all require permits to be pulled. A county will not issue a permit to a contractor without a Notice of Commencement. Work that requires a permit that is being done without one is another issue, however - it should also be a RED FLAG to the board if the contractor indicates he doesn't need one or proceeds without it.

During the project, let's assume for the moment there will be draws or interim payments being made for the work to the contractor. Each time he makes an application for payment, before he can receive a check, his application must be accompanied by a Waiver and Release of Lien including one from any material suppliers or subcontractors, for Progress Payment. This will waive his rights (or suppliers or subcontractors) to lien the property for materials used up to this point in the project. The manager should not release a check to the vendor without these fully executed and notarized forms. This means that the terms of the project and payments have been understood and agreed upon in advance, with the forms being provided to the contractor for this purpose.

Again, let's resume the project, all else goes well and now the project is completed. The contractor will make his last application for payment. Prior to the contractor receiving that check, he must provide a fully executed and notarized Waiver of Release of Lien upon Final Payment AND a Contractor's Final Affidavit. The completion and submission of these documents (in this scenario) will provide proof that the contractor has paid suppliers, labor, etc., and the Association has met their legal obligation to protect the members from any further charges for this job. In real life, however, there could be complications that would require additional waivers.

While all of this makes it seem very complex, if the Board advises the manager and ensures they are involved from the beginning, the manager and Sentry Management will be able to provide the guidance and resources to help ensure the Association does not pay a second time. The liability for the board who makes the decision to engage a contractor without going through this process is much greater, not to mention the issues it causes when trying to get that vendor paid.

I think we will all agree that not every job may get to its completion successfully. During the execution of the work, there could be a difference of opinion on what was actually contracted for or work that should have been done that has not been completed and the contractor and the board agree to end their



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relationship before the work is completed. Should this occur, a new contractor cannot come in and begin work under the existing Notice of Commencement. If this happens within the first 90 days, a Notice of Termination must be filed, but not before it is determined that all of the current suppliers or subcontractors have been paid. A new Notice of Commencement must be filed prior to the new contractor completing the job.

Work must start within 90 days after the NOC is filed or it becomes null and void. Additionally, an NOC will naturally expire one (1) year after its recording.

Remember, a Notice of Commencement is a public record. This record affects closings that occur during the job period. It appears in a title search, and a special affidavit is required for closings taking place while a Notice of Commencement is active.

The liability that exists by not going through the process of filing an NOC is vastly underestimated, until it happens to your community. My personal experience is that it saved one of my communities about \$93,000 when undergoing a massive reconstruction and one of the suppliers was not paid by the contractor. We had the proper paperwork in the file, so the supplier then had to deal directly with the contractor. It was a good day.

We are not lawyers and these procedures have been explained to us by our lawyers and by association attorneys. We are summarizing here what we have been told and what we have experienced ourselves. Any legal advice must come from legal counsel. We urge you to contact your own legal counsel for any remaining questions or issues that may come up as a result of this information.

