

## Insights

# Avoiding Common Problems Caused by Notices of Commencement

Article

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In Florida, a Notice of Commencement (NOC) must be recorded in the public records of the county where construction of certain property improvements occurs. This document serves two key functions.

First, it provides subcontractors, who do not have direct contracts with the owner, with crucial information about the project and the property itself. By law, a certified copy of the NOC must be posted at the job site, ensuring that subcontractors have easy access to this information

Second, and more importantly, the NOC establishes a benchmark for the priority of lien claims filed by subcontractors. Their lien rights will have priority as of the NOC recording date covering their work. Without the NOC, each subcontractor's lien would have priority based on the date it was recorded, creating a situation that the Florida Legislature wanted to avoid. The NOC ensures equal treatment of all subcontractors.

### Form and Requirements

The form of a NOC is prescribed by Florida Statutes, Section 713.13, and generally consists of one or two pages containing various blocks that must be completed with the necessary information before being signed, notarized and recorded. This form is readily available from multiple sources and is sometimes typed or completed in pen.

Notwithstanding that this seems like a simple process, mistakes in preparing NOCs are not unusual and can be costly to correct.

### Exceptions to NOC Requirement

The first issue to consider is whether a NOC is even required for the type of work being performed. There are several different types of work that do not require the recording of a NOC, including:

- Work by parties providing professional services, like architects, landscape architects, interior designers, engineers, surveyors, and

mappers;

- Work to make a property suitable as the site of an improvement (generally referred to as site work or subdivision improvements, as opposed to building construction), such as grading, leveling, excavating and filling land; grading and paving streets, curbs, and sidewalks; constructing ditches and other drainage facilities; laying pipes and conduits for water, gas, electric, sewage, and drainage; constructing canals; and altering, repairing, and redoing such work;
- Work performed by parties who have a direct contract with the property owner (as opposed to being subcontractors); and
- Improvements for which the direct contract price is less than \$2,500.

If one of these exceptions applies, recording a NOC is not only inappropriate, but in the case of site work or subdivision improvements, the applicable statute states that a NOC shall not be filed.

There is also a provision in Florida Statutes, Section 713.135(1)(f) stating that a building department cannot require the recording of a NOC as a condition to permit application or issuance. However, they often require it anyway. If this happens and the NOC is not legally required, the owner or its representative (normally the general contractor) seeking the building permit should push back against such a request.

### **Legal and Practical Considerations**

Although a NOC does not itself constitute a lien on the improved property, it establishes the priority date for future subcontractor liens. Consequently, the NOC will be listed as a title exception in any owner's or lender's title insurance policy issued while the NOC is effective, typically one year after recording unless otherwise specified. This makes it objectionable to purchasers or mortgage lenders because their interest is subject to later subcontractor lien claims.

### **Clearing a NOC**

The process to clear a NOC from a property's title to property can be complicated and is triggered when a NOC was either erroneously or properly recorded, but must be terminated for a sale or financing transaction. This process is discussed in more detail in another article by this author. It generally involves (i) recording a Termination of the NOC, with a Final Contractor's Affidavit attached, confirming that the general contractor and all subcontractors involved in the work were paid in full, and (ii) obtaining final lien waivers from all subcontractors who sent statutory Notices to Owner informing the owner that they were on the job. A title insurance company may also want an Indemnity Agreement from the owner if it is about to issue title insurance to a purchaser or lender insuring over the NOC, holding the title insurer harmless against any lien claims. If a NOC was recorded when it was not supposed to be, some title insurance companies may approve the recording of a Termination stating that fact, without requiring all of the additional documentation referred to above. All this can be time-consuming and potentially expensive, since it will involve attorneys and title insurance underwriters in addition to the owner's staff. It is therefore important to verify if a NOC is required to be recorded for the type of work being performed.

### **Completing a NOC**

After confirming that a NOC is required, it is important to consider potential issues involved in completing it. Most blocks within a NOC seem easy to address, such as the property address and legal description, improvement(s) description, identities of the owner, general contractor, lender, and any surety issuing a bond for the work, and

where a subcontractor sends notices. However, the following two blocks discussed below deserve special attention.

### *Owner Identification and Duration Block*

The owner of the property being improved must be properly identified and must sign the NOC. Most people assume this is the fee simple title holder, but that is not always the case. Tenants may be allowed by their leases to make improvements. If so, the tenant is considered the “owner” of a leasehold interest being improved. The tenant should be listed and sign the NOC as the owner, stating its interest is that of a lessee.

If the fee simple title holder (landlord) is listed instead, or if the landlord signs the NOC, lien claims could be improperly asserted against the landlord instead of the tenant who is the responsible party. This can also violate lease terms, trigger a default under the landlord’s existing mortgage financing, and cause problems (including delays) in any future sale or financing transactions involving the landlord while the NOC remains in effect. If the NOC must be terminated or amended to fix this, both the landlord and tenant must cooperate and incur unnecessary expense.

If an owner leases to a tenant who is permitted to improve the leased premises, it is a good idea to require in the lease that the tenant submit any proposed NOC to the landlord for approval before recording it. This allows the landlord to verify that it does not affect the landlord’s ownership interest. The lease should also state that the tenant agrees its contractors cannot lien the landlord’s interest for the tenant’s work per Florida Statutes, Section 713.10(2). If the lease has such a provision and evidence of it is recorded, the tenant’s contractors cannot claim liens against the landlord’s interest. This is discussed in more detail in another article by this author. If the NOC erroneously names the landlord as contracting for the improvements, or if the owner erroneously signs the NOC, this protection could be lost.

### *Duration of NOC*

A second issue involves the NOC’s duration. There is a block in the NOC to indicate its expiration date. If left blank, the NOC will expire one year from the date of recording. When completing this block, it is important to consider the nature of the work being done. Whether the job is expected to take more or less than one year, the duration block should be completed accordingly.

Once the specified duration is over, as long as the work is complete, the NOC will expire without the need to incur the time and expense involved in terminating it. If the estimate is wrong, the NOC can be amended to change the expiration date, which is less expensive than terminating the NOC.

Construction lien law is complicated, especially when combined with landlord/tenant law. Landlords and tenants should not just sign a general contractor’s NOC, but instead carefully review it for the potential issues identified above. Consulting an experienced real estate attorney in advance can save significant time and money later.

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