Submitted by: New York State Law Revision Commission

S __________ MEMORANDUM OF SUPPORT:

TITLE OF BILL: An act to amend the lien law, in relation to requirements for posting a bond to discharge a mechanics' lien on a private or public improvement.

PURPOSE: This bill would streamline the process by which an owner or prime contractor posts a bond to discharge a mechanics' lien on either a private or public improvement. The bill establishes that the amount of a bond to discharge a lien be 110% of the lien amount, thereby eliminating the need to apply to a court to fix the amount. The bill also reformulates the procedures for effectuating the discharge of the lien in relation to the qualifications of the surety issuing the bond and incorporates the provisions set forth in article 25 of the CPLR governing undertakings.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1. Repeals subsection (4) of section 19 of the lien law, which prescribes the ways in which a mechanics' lien on a private improvement may be discharged.

Section 2. Adds a new subsection (4) to section 19 of the lien law that statutorily sets the amount of a bond to discharge a lien at 110% of the lien amount, establishes the procedures for filing a bond to discharge a lien and, except as provided, substitutes the procedure set forth in article 25 of the CPLR.

Section 3. Repeals subsection (5) of section 21 of the Lien Law, which prescribes the ways in which a mechanics' lien on a public improvement may be discharged.

Section 4. Adds a new subsection (5) to section 21 of the Lien Law that statutorily sets the amount of a bond to discharge a lien at 110% of the lien amount, establishes the procedures for filing a bond to discharge a lien and, except as provided, substitutes the procedure set forth in article 25 of the CPLR.

STATEMENT IN SUPPORT:

The Lien Law prescribes two types of mechanics' liens: those under contracts for privately owned improvements and those under contracts for public improvements. Both types of liens were enacted to protect contractors, subcontractors and suppliers who have a financial interest in an improvement to real property. A private improvement lien attaches to the real property on which the improvement is made. A public improvement lien attaches to the monies the state or public entity has appropriated for the improvement.

Under the statutory schemes prescribed for both private and public improvement mechanics' liens, the owner or prime contractor may avoid the effect of the lien by posting a bond to discharge a lien, commonly known as "bonding off the lien." Posting a bond to discharge a lien currently requires the owner or contractor to secure two court orders. This bill would omit the need for court involvement in routine bonding applications where the bond is issued by a surety authorized by the State and substitute statutory requirements that continue to protect the rights and interests of the respective parties.

To successfully discharge a mechanics' lien on either a public or private improvement, the owner or contractor must secure a court order fixing the amount of the bond. The bond must be "not less than the amount claimed in the notice of lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien" (Lien Law § 19[4], § 21[5]). The amount may also include costs and interest.

When fixing the amount of the bond, New York courts generally have an internal rule of thumb that requires no particular judicial expertise: the face amount of the claim plus one year's interest plus a small increment for statutory costs. Depending on the individual court's caseload, there can be substantial delay in obtaining such an order. In the meantime the property [or state fund if the lien is on a public improvement] remains encumbered, which, in turn, will often prompt the owner [or state or public corporation] to withhold payments to the prime contractor, thus cutting off needed cash flow. The Commission concluded, therefore, that the expense and time required to obtain a court order is unnecessary.

The Commission recommends that the amount of the bond be set by statute rather than a court, and further recommends that the amount be 110% of the amount sought by the lien. This figure reflects the existing practice of courts, ensures that the lienholder's interests are protected and permits the owner or contractor to discharge the lien in a timely and cost efficient manner. A sampling of states that have adopted a similar approach are Arkansas, California, Florida, Kentucky, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas and Virginia.

Additionally, current law requires an owner or prime contractor to obtain a second court order approving the bond and discharging the lien. However, in the overwhelming majority of cases, neither the lienholder nor the court object to the sufficiency of the bond. Under such circumstances, the time and expense associated with securing a court order is inefficient.

The Commission recommends, therefore, that the procedure by which bonds issued by sureties that are authorized by the State be permitted to be filed and become effective without a court order approving the bond and discharging the lien. Additionally, in such instances, the Commission recommends that CPLR article 25 (undertakings) otherwise govern bonds discharging mechanics' liens. Significantly, article 25 governs the bonding procedure for the filing of bonds in virtually all other undertakings provided in civil actions and proceedings, including appeals bonds. CPLR article 25 provides sound protection for the lienholder while eliminating unnecessary court involvement. Importantly, the lienholder may apply to the court seek justification or modification of the amount or terms of the original bond at any time, thus guaranteeing that the lienholder will obtain full satisfaction as circumstances change. The vast majority of the sampling of states studied by the Commission have adopted a bonding scheme that is similar to that offered by CPLR article 25, including Arkansas, California, Florida, Kentucky, Massachusetts, Michigan, New Jersey, North Carolina, Tennessee and Texas.

However, if the party seeking to discharge the lien fails to secure a bond from an authorized surety, the provisions of CPLR article 25 will not apply and the party will be required to obtain a court order approving the bond and discharging the lien.

FISCAL IMPLICATIONS: None

EFFECTIVE DATE: January 1, 2003