

Senate Bill 466

By: Senators Tippins of the 37th, Williams of the 19th, Rogers of the 21st, Gooch of the 51st, Jackson of the 24th and others

A BILL TO BE ENTITLED
AN ACT

1 To amend Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to
2 mortgages, conveyances to secure debt, and liens, so as to provide for lenders to give notice
3 to contractors when a construction loan is nearing default; to provide for definitions; to
4 provide for procedures and limitations; to provide for related matters; to provide for an
5 effective date; to repeal conflicting laws; and for other purposes.

6 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

7 **SECTION 1.**

8 Chapter 14 of Title 44 of the Official Code of Georgia Annotated, relating to mortgages,
9 conveyances to secure debt, and liens, is amended by adding a new article to read as follows:

10 "ARTICLE 10

11 44-14-650.

12 (a) As used in this article, the term:

13 (1) 'Borrower' means the person or entity to which a construction loan is extended under
14 a loan agreement with the lender. Unless otherwise specified in the notice of
15 commencement, for notice purposes under this article, the borrower shall be presumed
16 to be the owner of the real estate, or some other person acting for the owner, as specified
17 in a notice of commencement, if any, filed or posted pursuant to subsection (b) of Code
18 Section 44-14-361.5, relative to the improvement of the real estate.

19 (2) 'Construction loan' means any loan of money by a lender to a borrower in whole or
20 in part for the payment for work performed and labor, materials, and services provided
21 for the development, building, or construction upon real estate, including improvements,
22 modifications, or additions thereto, which loan is secured by an interest in the improved
23 real estate; provided, however, that this article shall not apply to any construction loan:

24 (A) Not exceeding \$1 million in principal; or

25 (B) Relating to residential real estate other than for work performed relative to
 26 subdivision, multiple lot, or tract development work, including such work as grading;
 27 utility installation; curb, gutter, and street installation; landscaping; and work of similar
 28 nature not exclusively for the benefit of a single lot of residential real estate.

29 (3) 'Default' means any act or omission by a borrower relative to its obligations to a
 30 lender concerning a construction loan and related loan agreements and documents that
 31 would entitle the lender to cease further funding under the construction loan or to exercise
 32 any right of foreclosure against or otherwise pursue its security interest in or sale or
 33 transfer of the real estate in satisfaction of the construction loan obligations.

34 (4) 'Lender' means a person extending a construction loan to a borrower, including any
 35 assignee or transferee of such loan. For notice purposes under this article, the person
 36 identified as the construction lender in a notice of commencement, if any, filed or posted
 37 pursuant to subsection (b) of Code Section 44-14-361.5, relative to the improvement of
 38 the real estate, may be deemed to be the lender of record.

39 (b) The definition of terms in Code Section 44-14-360 shall also apply to such terms when
 40 used in this article.

41 44-14-651.

42 (a) If, prior to the distribution of all funds available under a construction loan, a lender
 43 either:

44 (1) Makes a final determination to cease or materially delay or interrupt for more than
 45 five days further advance of funds to the borrower pursuant to the loan; or

46 (2) Gives notice of default to the borrower,

47 whichever first occurs, the lender shall within five days thereafter serve written notice, as
 48 described in subsection (b) of this Code section, of that determination or notice of default
 49 on the contractor and any subcontractor or materialman who have given written notice to
 50 the lender as described in subsection (c) of this Code section.

51 (b) The written notice required of the lender under subsection (a) of this Code section shall
 52 be transmitted by the lender by registered or certified mail or statutory overnight delivery
 53 to each such contractor, subcontractor, or materialman having given written notice to the
 54 lender as described in subsection (c) of this Code section, provided that the notice
 55 described in subsection (c) of this Code section is received by the lender at least five days
 56 prior to the determination to cease or delay payment or giving of notice of default by the
 57 lender to the borrower required by subsection (a) of this Code section. The written notice
 58 by the lender shall be addressed to each contractor, subcontractor, or materialman at the
 59 address shown on the notice to the lender given under subsection (c) of this Code section

60 and shall set forth the date of the determination to cease or delay payment or notice of
61 default to the borrower.

62 (c) In order to be entitled to the notice by the lender under subsection (b) of this Code
63 section, a contractor, subcontractor, or materialman shall give written notice to the lender
64 by one of the following methods:

65 (1) Furnishing a copy to the lender of the notice to the contractor, when and in the form
66 required to be given to the owner or the agent of the owner and to the contractor pursuant
67 to subsection (c) of Code Section 44-14-361.5, at the address set forth for the construction
68 lender in the notice of commencement filed pursuant to subsection (b) of Code Section
69 44-14-361.5, or if no notice of commencement is recorded, to the lender's registered agent
70 as shown in the records of the Secretary of State; or

71 (2) Furnishing such notice by registered or certified mail or statutory overnight delivery
72 to the lender at the address shown on any notice of commencement filed pursuant to
73 subsection (b) of Code Section 44-14-361.5, or if no notice of commencement is
74 recorded, to the lender's registered agent as shown on the records of the Secretary of State
75 setting forth:

76 (A) The name, address, and telephone number of the person providing labor, services,
77 or materials;

78 (B) The name and address of each person at whose instance the labor, services, or
79 materials are being furnished;

80 (C) The name of the project and location of the project set forth in the notice of
81 commencement; and

82 (D) A description of the labor, services, or materials being provided and, if known, the
83 contract price or anticipated value of the labor, services, or materials to be provided or
84 the amount claimed to be due, if any.

85 (d) The lender shall not be liable to the contractor or any other subcontractor or
86 materialman based upon the determination by the lender to cease, delay, or interrupt further
87 advances to the borrower under the construction loan or to give the borrower notice of
88 default if the lender gives such contractor, subcontractor, or materialman notice of such
89 determination in accordance with this article, and the determination or notice is otherwise
90 permitted under the loan documents, or if such contractor, subcontractor, or materialman
91 failed to give written notice to the lender pursuant to subsection (c) of this Code section,
92 or such notice, if given, was not received by the lender at least five days prior to such
93 determination or notice to the borrower.

94 (e) The failure of the lender to give notice to the contractor and to any other subcontractor
95 or materialman under subsections (a) and (b) of this Code section may subject the lender
96 to liability to the particular contractor and any other subcontractor or materialman to the

97 extent of the then unpaid amount of the actual value of the work performed or materials,
98 supplies, services, and direct labor costs furnished by the respective contractor or other
99 subcontractor or materialman, plus 15 percent for overhead, profit, and all other costs from
100 the date on which the notice of the lender's determination or notice should have been served
101 on the contractor and any other subcontractor or materialman and the date on which the
102 notice of the lender's determination or notice is served, as provided in this Code section,
103 to the extent that such contractor, subcontractor, or materialman would have been entitled
104 to assert a claim of special lien on the improved real estate. The lender may agree in
105 writing with the respective contractor and any other subcontractor or materialman to any
106 other reasonable method of determining the value of the labor, services, and materials
107 furnished.

108 (f) The liability of the lender shall in no event be greater than the amount of undisbursed
109 construction loan funds at the time the notice by lender should have been given under
110 subsections (a) and (b) of this Code section, unless the failure to give such notice was done
111 for the purpose of inducing continued performance by any contractor, subcontractor, or
112 materialman of any work or furnishing of labor, materials, or services or otherwise
113 defrauding the contractor or any other subcontractor or materialman. The lender is not
114 liable to the contractor or any other subcontractor or materialman for consequential or
115 punitive damages for failure to give timely notice under this article. The contractor and
116 any other subcontractor or materialman entitled to receive notice by the lender pursuant to
117 subsections (a) and (b) of this Code section shall have a separate cause of action against the
118 lender, as provided in this Code section, for damages sustained as a result of the lender's
119 failure to give timely notice under this article. Such separate cause of action may not be
120 used to hinder or delay any foreclosure action filed by the lender, may not be the basis of
121 any claim for an equitable lien or for equitable subordination relating to the lender's
122 security interest, and may not be asserted as an offset or a defense in the foreclosure case.
123 In any such separate action by a contractor, subcontractor, or materialman seeking to
124 enforce the rights under this article, the prevailing party is entitled to recover costs and
125 expenses of such litigation, including reasonable fees for the services of its attorneys and
126 costs for bringing such action, including but not limited to trial and appeal, in an amount
127 to be determined by the court.

128 (g) For purposes of serving notice on the contractor, subcontractor, or materialman under
129 this article, the lender may rely on the name and address of the contractor, subcontractor,
130 and materialman listed in the notice to the lender given under subsection (c) of this Code
131 section.

132 (h) The contractor or any other subcontractor or materialman may not waive the right to
133 receive notice under this article.

134 (i) Any contractor or other subcontractor or materialman receiving notice of a lender's
 135 determination to cease or delay payment or notice of default under subsection (a) of this
 136 Code section shall have the right to suspend further work on or furnishing of labor,
 137 materials, or services to the real estate upon giving five days' prior written notice to the
 138 lender, the borrower, the contractor, and any other party with whom it contracted for the
 139 performing of such work or furnishing of labor, materials, or services, notwithstanding any
 140 contrary contractual provisions and without any obligation for ongoing performance or
 141 supply. Unless the contractor or any other subcontractor or materialman giving such a
 142 notice of intention to stop work, within 30 days after giving such notice, receives:

143 (1) Full payment of all amounts then due for work performed or labor, materials, and
 144 services furnished; and

145 (2) Reasonable evidence adequately assuring that the construction loan funding by the
 146 lender will resume and continue or that other suitable financial arrangements have been
 147 made by the borrower to reasonably assure the contractor, subcontractor, or materialman
 148 that funds will be available for funding performance of further work and furnishing of
 149 additional labor, material, or services contracted to be performed on the real estate,

150 then such contractor, subcontractor, or materialman may, upon additional five days' written
 151 notice to the same persons, terminate any existing contract or agreement to the extent
 152 further performance or furnishing would otherwise be required and shall be entitled to and
 153 may pursue all remedies available to it for nonpayment and the breach of the contract. Any
 154 such notice shall be given in the form and manner and to the persons to whom the notices
 155 were required to be given by the contractor, subcontractor, and materialman under
 156 subsection (c) of this Code section.

157 (j) The exercise by any contractor, subcontractor, or materialman of any rights against a
 158 lender under this article shall not affect any other rights and remedies otherwise available
 159 to it against other persons or parties, legally, contractually, or equitably, for full payment
 160 for the work performed or labor, materials, and services provided."

161 **SECTION 2.**

162 This Act shall become effective upon its approval by the Governor or upon its becoming law
 163 without such approval.

164 **SECTION 3.**

165 All laws and parts of laws in conflict with this Act are repealed.