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**Testimony of Attorney Steven B. Kaplan
Legal Counsel to the Connecticut Subcontractors Association
Re: Raised Bill 6644--
An Act Concerning Priority of Mechanic's Liens
April 8, 2011**

My name is Steven Kaplan. I am a partner with the Hartford law firm of Michelson, Kane, Royster & Barger, P.C. in Hartford, where I have concentrated in the practice of construction law for 30 years. I routinely represent contractors, subcontractors, construction managers, design professionals, and owners in all matters involving contracts for public and private construction. I have litigated issues concerning mechanic's liens in Connecticut throughout my entire legal career. I also have taught numerous courses and seminars about mechanic's liens in Connecticut. Presently, I am Chairman, and a founding member, of the Construction Law Section of the Connecticut Bar Association. For the last fifteen years, I have acted as Legal Counsel to the Connecticut Subcontractors Association.

The Connecticut Subcontractors Association (CSA) opposes Raised Bill 6644, An Act Concerning Mechanic's Liens. The CSA thanks the Judiciary Committee for considering the CSA's comments on this bill.

The CSA is a leading trade association that represents the interests of construction trade contractors in Connecticut. The great majority of CSA's members are trade contractors who work in public and private construction in Connecticut, and oftentimes find it necessary to file, and in some instances litigate, mechanic's liens as a critical method of getting paid on private construction projects.

In the construction industry, payments are not always made in a timely fashion by owners or general contractors for work performed by trade contractors/ subcontractors, or for materials supplied by vendors—even after that work or materials have been incorporated into the project and payment is properly due. The statutory procedures in Connecticut for filing a mechanic's lien on the owner's property, and initiating foreclosure proceedings on that lien if necessary (per Conn. Gen. Stat. §§49-33 through -40a and §§49-51 & -52), have been in place for many decades. The basic premise is that if the owner has benefitted from labor or materials provided by a contractor or material supplier, then the owner should pay for that benefit; absent payment, the owner's property can provide security for ultimate payment of those obligations.

Connecticut's mechanic's lien process works remarkably well, in large part due to its relative simplicity and fundamental fairness. Within ninety days of providing labor or materials for which it has not been paid, the unpaid contractor or supplier can file a lien against the owner's property.

Within a year of filing the lien, the lienor can initiate a foreclosure action. When a foreclosure action begins, all lienors are brought into that action and, generally, are treated as an equal class, whose valid claims are then paid out of the available lienable fund (from the owner or its property's equity) on a pro rata basis. There are no artificial distinctions imposed based on when a lien was filed, when work was performed, or what kind of work was performed. Similarly, there are no artificial filing or notice impediments that would negate a valid claimant's lien rights.

(At any time during this process, a bond for lien can be substituted as security for the lien, effectively transforming the action; it no longer would operate as an action against the ownership interest in the property because alternative, adequate security for payment has been provided via the bond.)

One critical, and exemplary aspect of the Connecticut mechanic's lien system is that, with few exceptions, all lienors with valid claims are treated equally. Each lienor is treated equally as long as each meets the statutory time framework for timely notice and filing of the mechanic's lien itself—after the debt has arisen. With very few exceptions, all subcontractors and suppliers who are owed money and have filed valid liens are entitled to share, on a pro rata basis, in the available proceeds (the "lienable funds") due from the owner—regardless of when each lienor filed its lien. This is critical to the fairness of this system, because it provides equivalent relief to the first subcontractor or vendor who works on the project, and the last sub or vendor who closes out the project.

Without this salutary feature, Connecticut's mechanic's lien system would devolve into a mad dash to file notices or liens, on a "first come first serve" basis, that would reward the first lienor and punish the last lienor.

House Bill 6644 would upset the present simple and effective system by injecting a new and totally unnecessary requirement into the mix: Per section 1 of the act, a "notice of commencement of work," to be filed on the local land records, would be added to the mechanic's lien statutes. Per sections 2 & 3 of the act, foreclosure on mechanic's liens would be governed by a new priority system based on whether or not, and when, a subcontractor or vendor filed such "notice of commencement of work."

These new provisions would inject unnecessary confusion and paperwork, and create an artificial "caste system" for recovery by mechanic's lienors. The predictable result would be a bonanza for construction lawyers—and a disaster for unpaid subcontractors and vendors. In very real terms, Connecticut's mechanic's lien system—which presently functions quite well, and above all fairly for all valid lienors—would be transformed into an unmanageable mess.

First and foremost, the "notice of commencement of work" would have to be filed by every contractor or vendor for every private project as soon as they commenced work—regardless whether there are or would ever be payment issues, or the need to even file a mechanic's lien later. (Otherwise, mechanic's lien rights would likely evaporate in real terms.) The cost of private construction would thus be significantly increased—although recording fees for local town clerks would balloon.

More importantly, priorities of liens would now be determined by artificial filing requirements. Contractors and vendors who commence work later in the project would automatically lose their mechanic's lien rights because they would be doomed to lower priorities in foreclosing on the lienable funds.

Furthermore, legal battles would rage as to implementing this new, artificial system of prioritizing liens rights based on a preliminary notice requirement.

There is no apparent connection between the proposed "notice of commencement of work" and the basic notion of fairly paying subcontractors and suppliers for the labor and materials they have provided to a private construction project. Presently, project owners must authorize work in order for it to be subject to mechanic's liens—so a new "notice of commencement of work" provision for owners is completely unnecessary. As for lenders and title insurance companies, these entities presently require affidavits from owners regarding mechanic's liens. Beyond that, even a modicum of due diligence provides all the information necessary for a lender or title company to discern whether significant work has been performed within ninety days of closing on project financing.

Thus, it is very difficult to discern what fair benefit would be conveyed, or what legitimate need would be addressed, for anyone involved in the private construction process by adding the provisions of this bill.

Thanks again to the Chairmen and all members of the Judiciary Committee for considering the CSA's comments on this legislation.