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BILL ANALYSIS

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Senate Bill 1099 (as introduced 2-28-06)

Sponsor: Senator Michael D. Bishop

Committee: Economic Development, Small Business and Regulatory Reform

Date Completed: 5-31-06

CONTENT

The bill would create the "Commercial Real Estate Broker's Lien Act" to do the following:

- **Provide that a commercial real estate broker's lien would be available to an individual licensed as a real estate broker.**
- **Describe the circumstances under which a commercial real estate broker's lien would be created on commercial real estate.**
- **Establish requirements for the attachment of a commercial real estate broker's lien, including the recording of a claim of lien.**
- **Require the establishment of an escrow account if a lien otherwise would prevent the closing of a real estate transaction.**
- **Allow a person claiming a lien to bring an action to enforce it in the circuit court for the county where the real estate was located, within the time frame set forth in the bill.**
- **Allow a court to enter a judgment ordering the sale of any interest in commercial real estate to which a lien was attached.**

The proposed Act would apply only to a written commission agreement signed after the Act's effective date.

Lien Creation

Under the bill, a commercial real estate broker's lien would be available only to an individual licensed as a real estate broker under Article 25 of the Occupational Code. A commercial real estate broker's lien would not be available to an employee, agent,

subagent, or independent contractor of a licensed real estate broker.

A potential lien would be created on commercial real estate owned or to be acquired by a person obligated to pay a real estate broker's commission in the amount due to the real estate broker for licensed services if either of the following circumstances existed:

- The real estate broker had a written agreement with the seller or the agent of the seller of the commercial real estate for the payment of the commission and the broker recorded a notice of potential lien within 10 days after the agreement was signed (except as provided below).
- The real estate broker had a written agreement with a prospective buyer or the agent of a prospective buyer for the payment of the commission.

If a potential commercial and real estate broker's lien arose because of the exercise of an option to extend a lease or expand the leased premises, a notice of potential lien would have to be recorded within 90 days after the lessee or the lessee's tenant took possession under the extended lease or of the expanded premises.

A notice of potential lien would have to be substantially in the form provided in the bill.

"Commercial real estate" would mean real estate or an interest in real estate that was not any of the following:

- Real estate zoned for single family use and on which no building or structure was located.

- Real estate on which four or fewer residential units were located.
- Real estate on which more than four residential units were located if the units were single-family residential units, including houses, condominiums, or townhouses in a subdivision or condominium site, that were sold, leased, or otherwise conveyed on a unit-by-unit basis.

Attachment; Claim of Lien

A commercial real estate broker's lien would attach to commercial real estate in favor of a real estate broker if all of the following circumstances existed:

- The real estate broker had a written commission agreement and had filed a notice of potential lien.
- The real estate broker was entitled to a commission under the written commission agreement.
- Except as otherwise provided, the real estate broker recorded a claim of lien within 90 days after the actual conveyance of the commercial real estate, in which case the lien would attach on the date the claim of lien was recorded.

Except as otherwise provided, when payment of a real estate broker's commission was due in installments, one or more of which were due after the conveyance of the commercial real estate, a claim of a commercial real estate broker's lien for the payments due after the date of the conveyance could be recorded after the date of the conveyance and before the dates on which the payments were due. The lien would be effective against the commercial real estate only to the extent payment was still owed to the seller by the buyer. A single claim of lien claiming a commission due under an installment agreement recorded before the conveyance of the commercial real estate would not be enforceable as to a claim for a commission due after the conveyance. The lien for the payments due after the date of conveyance would attach on the date the claim of lien was recorded.

If a real estate broker were owed a commission because of a lease, the broker would have to record a claim of real estate broker's lien within 90 days after the lessee

or the lessee's tenant took possession of the leased premises or after a modification of an existing lease was confirmed in writing. If a real estate broker were owed a commission because of an option to extend a lease or expand the leased premises and the real estate broker recorded a notice of potential lien, the lien would attach when the option to extend the lease or expand the leased premises was exercised. If written notice of the intent to enter into a lease that included the date on which the lease was intended to be signed were personally served on the real estate broker at least 10 days before the intended date of signing, the broker would have to file the claim of lien before the intended date of signing and the lien would attach on the date the claim of lien was recorded. ("Lease", as used in this paragraph, would include a lease, sublease, assignment of lease, or other modification of an existing lease.)

If a real estate broker had a written agreement with a potential buyer to act as a buyer's agent, a commercial real estate broker's lien would attach on the buyer's purchase or other acceptance of the conveyance of commercial real estate if a claim of lien were recorded within 90 days after the purchase or conveyance.

If a real estate broker were owed a commission because of an option to purchase commercial real estate and the broker had recorded a notice of potential lien, a commercial real estate broker's lien would attach on the transfer or conveyance of the real estate or interest in it pursuant to the exercise of the option to purchase.

A claim of lien would have to contain all of the following:

- The name and license number of the claimant.
- The name of the owner of the commercial real estate.
- The amount for which the lien was claimed.
- As an attachment, the legal description of the commercial real estate on which the lien was being claimed.
- As an attachment, a copy of the written instrument on which the claim for commission or fee was based if the instrument were in the possession of the real estate broker.

- If the instrument on which the claim for commission or fee was based were not in the possession of the real estate broker, a statement of that fact.
- A statement that the information contained in the claim of lien was true and accurate to the knowledge of the signer.
- The notarized signature of the real estate broker or a person authorized to sign on the broker's behalf.

The claim of lien would have to be substantially in the form provided in the bill.

Within 10 days of recording a claim of a commercial real estate broker's lien, the real estate broker would have to provide notice of the claim of lien to the owner of record of the commercial real estate and to the party who signed the written commission agreement, by mailing a copy of the claim of lien by registered or certified mail with return receipt requested to the address of the real estate that was subject to the claim of lien or by personal service. Mailing would be effective as notice when deposited in a U.S. mailbox with postage prepaid. The lien would be void and unenforceable if a copy of the claim of lien were not served within the time and in the manner required.

A lien not recorded in compliance with the proposed Act would be void and unenforceable. A valid prior-recorded lien or mortgage on commercial real estate would have priority over the lien under the Act. A valid prior-recorded lien or mortgage would include, but would not be limited to, both of the following:

- A valid construction lien recorded after a commercial real estate broker's lien was recorded that related back to a date before the lien was recorded.
- A lien securing revolving credit and future advances of construction loans that were recorded before the commercial real estate broker's lien was recorded.

A subsequently recorded mortgage would have priority over a commercial real estate broker's lien if the mortgagee did not have actual or constructive knowledge of the lien or of a notice of potential lien at the time the mortgagee advanced money under the mortgage.

Escrow Accounts

If a recorded commercial real estate broker's lien would otherwise prevent the closing of a transaction involving commercial real estate, the parties to the transaction would be required, with certain exceptions, to establish an escrow account from the proceeds of the transaction in an amount sufficient to satisfy the lien. A party could not refuse to close the transaction because of this requirement. The money would have to remain in the escrow account until the rights to the money had been determined by a written agreement of the parties, a judgment or order by a court of competent jurisdiction, or any other method agreeable to the parties.

An escrow account would not be required if either of the following circumstances existed:

- Available alternative procedures would allow the transaction to close and were acceptable to all the parties to the transaction.
- The proceeds from the transaction were insufficient to satisfy all the liens against the commercial real estate under the proposed Act.

If an amount sufficient to satisfy a commercial real estate broker's lien were escrowed, the lien would be extinguished and the real estate broker would have to provide a release of lien in substantially the form provided in the bill.

Lien Enforcement

A person claiming a commercial real estate broker's lien could bring an action to enforce it in the circuit court for the county where the commercial real estate was located by filing a complaint and affidavit that the lien had been recorded. The plaintiff in an action would have to name as defendants all people who, at the time the action was filed, had an interest in the commercial real estate that would be divested or impaired by the foreclosure of the lien.

The complaint could include a claim on the contract from which the lien arose.

An action would have to be commenced within two years after the date the claim of lien was recorded. If the lien were based on

an option to purchase the commercial real estate, however, an action would have to be commenced within six months after the date the commercial real estate was transferred or conveyed pursuant to the exercise of the option to purchase. If the lien were based on an option to extend a lease or expand leased premises, an action would have to be commenced within six months of the commencement of the new lease term.

Failure to commence an action within the applicable time period would extinguish the lien. A later claim of lien for the same commission or services could not be made and could not be the basis of an action to enforce a lien.

Sale to Enforce Judgment

If the court in an action to enforce a lien found that the plaintiff was entitled to the commercial real estate lien and that the amount claimed had not been paid, the court could enter a judgment ordering the sale of any interest in the commercial real estate, or part of it, to which the lien was attached. In the order of foreclosure sale, the court would have to set a period of redemption not exceeding four months.

The sale would have to be conducted in the same manner as a sale on execution. The sale would be final, subject to the period of redemption, on the entry of an order of confirmation by the court. When the period of redemption expired, the grantee named in the deed would be vested with all right, title, and interest in the commercial real estate that was subject to the lien.

Redemption from a foreclosure sale would be complete on full payment of the amount in the judgment of foreclosure. If the court determined that the proceeds of the sale were insufficient to satisfy the judgment, the court could enter a deficiency of judgment against the person who signed the written agreement to pay the real estate broker.

The court would have to award costs to a prevailing plaintiff, including reasonable attorney fees, court and litigation costs, and prejudgment interest.

Owner's Demand; Release of Lien

A written demand on behalf of the owner of commercial real estate could be served on a person claiming a commercial real estate

broker's lien, demanding that an action be commenced to enforce the lien or that an answer be filed in an action pending between the owner and the lien claimant.

If the action were not commenced or the answer were not filed within 30 days after service of the demand, the lien would be extinguished without further action. Service of the demand could be by registered or certified mail, return receipt requested, or by personal service.

If a claim of lien had been recorded under the proposed Act and a condition that prohibited the real estate broker from receiving compensation under the terms of the written agreement on which the claim was based occurred, the real estate broker would have to provide a release of lien to the owner of record within 10 days after the written demand by the owner of record or the owner's agent.

If a claim of lien recorded under the Act had been paid, or an action to enforce the lien had not been commenced within the time provided, the real estate broker would have to provide a release of lien within five days after a written demand by the owner or the owner's agent.

If a claim of lien recorded under the Act had been partially paid, the real estate broker would have to provide a partial satisfaction and release of lien within five days after written demand by the owner or the owner's agent. The partial satisfaction and release of lien would have to be substantially in the form provided in the bill.

Termination of Notice

If a notice of potential lien had been recorded and a condition that would prohibit the claimant from receiving compensation under the terms of the written agreement on which the notice was based occurred, the claimant would have to provide a termination of notice of potential lien within five days after a written demand by the owner or the owner's agent. The termination of notice would have to be substantially in the form provided in the bill.

Legislative Analyst: J.P. Finet

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Stephanie Yu

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.