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BILL



ANALYSIS

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Senate Bill 610 (Substitute S-1 as reported)

(as passed by the Senate)

Sponsor: Senator Jason E. Allen

Committee: Economic Development and Regulatory Reform

Date Completed: 11-16-09

RATIONALE

Approximately two dozen states other than Michigan have laws that provide for commercial real estate brokers' liens against some form of property for unpaid commissions. These laws were enacted in response to situations in which commercial brokers have completed a commercial lease or sales transaction that is subject to a listing or commission agreement, but receive only a portion of the agreed-upon fee or no fee at all. If the property is subject to a lien, the broker can bring an action to enforce the lien and collect his or her commission, either by reaching a settlement agreement with the former buyer or seller or by recovering from the proceeds of a foreclosure sale. Evidently, this approach is less expensive than suing for breach of contract, which a broker otherwise would do, and can be more successful if the other party is insolvent. According to the Michigan Association of Realtors, commercial brokers in this State also are experiencing the nonpayment of commissions, and the current economic climate is making the problem worse. Thus, it has been suggested that Michigan join the states that provide for a statutory commercial real estate broker's lien.

CONTENT

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

- Specify circumstances under which a commercial real estate broker's lien would attach to commercial real estate.**

- Require a claim of lien to be recorded before conveyance, as a rule.**
- Provide for the recording and attachment of a lien in the case of a lease agreement, a broker's acting as a buyer's agent, or a commission owed on a purchase option.**
- Provide that a prior-recorded lien or mortgage would have priority over a commercial real estate broker's lien.**
- Require the establishment of an escrow account if a recorded broker's lien would prevent a closing transaction.**
- Prohibit a buyer or seller from refusing to close a transaction because of the escrow requirement.**
- Authorize a person claiming a commercial real estate broker's lien to bring an action to enforce it in circuit court, and require the action to be brought within one year after the claim of lien was recorded.**
- Allow an owner of commercial real estate to serve on a lien holder a demand to enforce the lien or answer a claim.**
- Specify that a lien under the Act would be available only to a licensed real estate broker.**

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

- Real estate zoned for single family use and on which no building or structure is located.
- Real estate on which four or fewer residential units are located.

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

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

Attachment of Broker's Lien

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. It would not be available to an employee, agent, subagent, or independent contractor of a licensed real estate broker.

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.
- The broker was entitled to a commission under that agreement.
- The broker recorded a claim of lien before the actual conveyance of the commercial real estate.

Unless the proposed Act specifically provided otherwise, a commercial real estate broker's lien would attach on the date the claim of lien was recorded.

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 lien for the payments due after the date of conveyance could be recorded after that date and before the dates on which the payments were due. A lien under this provision would be effective only to the extent payment was still owed to the seller by the buyer. ("Seller" would mean the equitable or legal owner or lessor of an interest in real estate. "Buyer" would mean a purchaser or lessee of a legal or equitable interest in real estate.)

If a real estate broker were owed a commission as a result of a lease, the real estate broker could record a claim of lien

any time after the lease was signed. Except as otherwise provided, a lien under this provision would attach after the claim of lien was recorded and the lessee took possession of the leased premises. ("Lease" would include a sublease, assignment of a lease, or modification of a lease.)

If a real estate broker could be owed a commission in the future as a result of an extension of the term or the expansion of the leased premises under an existing lease, a commercial real estate broker's lien would attach after both of the following occurred:

- A claim of lien was recorded.
- The modification of the existing lease was confirmed in writing.

If written notice of the intent to enter into a lease that included a date on which it was intended to be signed were personally served on a real estate broker at least 10 days before the intended date of signing, the broker would have to file a claim of lien before that date.

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 after the buyer purchased or otherwise accepted the conveyance of commercial real estate and the claim of lien was recorded.

If a real estate broker could be owed a commission in the future as a result of an option to purchase commercial real estate, the broker could record a claim of lien at any time after the option to purchase was signed and before the transfer or conveyance pursuant to the exercise of the option. A lien would attach under this provision after the claim of lien was recorded and the real estate was transferred or conveyed pursuant to the exercise of the option to purchase.

Claim of Lien

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

- The name and the 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.
- 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.

A claim of lien recorded under the proposed Act would have to meet the requirements of Public Act 103 of 1937 and comply substantially with a form described in the bill. (Public Act 103 prescribes conditions for the execution of instruments entitled to be recorded in the office of the register of deeds.)

Within 10 days of recording a claim of lien, the real estate broker would have to provide a copy of it 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 to the address of the commercial real estate that was the subject of the claim of lien, or by personal service. Mailing a copy would be effective as notice when deposited in a U.S. mailbox with postage prepaid. The commercial real estate broker's 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 claim of lien not recorded in compliance with the Act would be void and unenforceable.

Priority over Broker's Lien

A valid prior-recorded lien or mortgage on commercial real estate would have priority over a commercial lien under the proposed Act. A valid prior-recorded lien or mortgage would include both of the following:

- A valid construction lien that was recorded after the claim of lien was recorded and that related back to a date before the claim of lien was recorded.
- A lien securing revolving credit and future advances of construction loans that was

recorded before the claim of lien was recorded.

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

Escrow

If a lien recorded under the proposed Act otherwise would prevent the closing of a transaction involving commercial real estate, the parties to the transaction would have to establish an escrow account from the proceeds of the transaction in an amount sufficient to satisfy the lien. A buyer or seller 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, or any other method agreeable to the parties.

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

- Alternative procedures that would allow the transaction to close and that were acceptable to all the parties to the transaction were available.
- The proceeds from the transaction were insufficient to satisfy all liens against the commercial real estate.

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 the lien. A release of lien would have to meet the requirements of Public Act 103 of 1937 and comply substantially with a form described in the bill.

Circuit Court Action

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 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 was the subject of the action 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 to enforce a lien would have to be commenced within one year after the date the claim of lien was recorded. Failure to commence an action within the applicable time 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 filed under the proposed Act.

If the court found that the plaintiff was entitled to the 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 the commercial real estate, to which the lien attached. In the order of foreclosure sale, the court would have to set a period of redemption of up to four months. The order of foreclosure sale would have to be recorded. 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 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.

Demand for Enforcement

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 or by personal service.

Release of Lien

If a claim of lien had been recorded under the proposed Act and there occurred a condition that prohibited the real estate broker from receiving compensation under the terms of the written agreement on which the claim was based, the real estate broker would have to provide a release of lien to the owner of record within 10 days after a 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 if an action to enforce the lien had not been commenced within the required time, the real estate broker would have to record a release of lien within five days after a written demand by the owner of record or the owner's agent and provide a copy of the recorded release.

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 in the form provided in the bill within five days after written demand by the owner of record or the owner's agent.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The enactment of a commercial real estate broker's lien law would provide a safety net to brokers who have no means to obtain payment of their agreed-upon fee, other than costly and time-consuming litigation for breach of contract. According to the Michigan Association of Realtors (MAR), all commercial brokers that belong to MAR have experienced situations in which their commissions were not paid. Apparently, this problem occurs particularly in leasing situations, and it has increased as the economy has worsened. Since commercial real estate transactions may take months or even years to conclude, the loss of a commission can be significant.

In some cases, a buyer or seller might try to take advantage of a broker who does not want to lose the sale. While a broker's agreement already may include language providing for a lien to attach and be enforceable if the commission is not paid, evidently the buyer's or seller's attorney often will strike that language. Then, if the broker receives only part of the commission earned, or none, his or her only recourse is to bring a lawsuit for breach of contract. More often than not, according to MAR, the cost of pursuing a breach of contract action outweighs the commission itself. Even if the broker wins the suit, the commission still may be uncollectible if the buyer or seller is insolvent and the property has been sold to a third party.

Michigan law already extends the protection of liens to people in a number of other occupations. In particular, the Construction Lien Act provides that each contractor, subcontractor, supplier, or laborer who provides an improvement to real property has a construction lien upon the interest of the owner or lessee who contracted for the improvement, and provides for actions to enforce construction liens through foreclosure.

Similarly, this proposal would create a statutory lien for commercial real estate brokers, so a lien would not be dependent on contractual negotiations and a broker would not have to bring a breach of contract action to recover an unpaid commission. While foreclosure would be the ultimate remedy, it is likely that an action to enforce a broker's lien would lead to a settlement, which typically happens in these types of cases.

Opposing Argument

The bill would provide for a nonconsensual lien that would interfere with basic property rights, creating a special preferred class of people and giving them the extraordinary remedy of a lien against real property. According to the Real Property Law Section of the State Bar of Michigan, the bill could increase litigation, as well as add substantial costs, delays, and disruptions to closing transactions. It would require the filing of more documents affecting real property, leading to problems involving the timely discovery of these documents, and additional underwriting risks for title insurers.

Commercial real estate brokers have adequate legal remedies under current law. It is not necessary to create special protections for them as the Construction Lien Act does for builders, suppliers, and laborers, who have made physical improvements to the property subject to a lien. Also, unlike subcontractors, suppliers, and laborers, who have no contractual relationship with the property owner, commercial brokers deal directly with the buyers and sellers who owe them a commission, and already may negotiate a lien in their agreement.

Furthermore, the Construction Lien Act creates a lien against an owner's interest in property, but the bill does not refer to a lien against the buyer's or seller's "interest". Therefore, when a broker's lien attached, it would affect not just the person who owed the commission, but everyone having an interest in the property.

In addition, a broker's lien would benefit only the broker, not other parties who may be entitled to payment at closing. Providing lien rights to commercial real estate brokers would encourage others dealing with real estate, such as appraisers, title companies, escrow agents, property managers, and property inspectors, to request similar rights. In addition, once brokers' liens were created for commercial property, there would be the risk of extending them to residential property.

Response: Other parties involved in real estate transactions do not need the protection of a lien. For example, attorneys and accountants may receive a retainer, and appraisers typically are paid through financing transactions before the closing. Also, there would be no need to extend liens to residential property because, according to MAR, unpaid commissions are not a problem in this area.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

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

Fiscal Analyst: Bill Bowerman

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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.