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## BILL ANALYSIS



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Senate Bill 610 (as introduced 5-27-09)  
Sponsor: Senator Jason E. Allen  
Committee: Economic Development and Regulatory Reform

Date Completed: 10-27-09

**CONTENT**

The bill would create the "Commercial Real Estate Broker's Lien Act" to do 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 that a prior-recorded lien or mortgage would have priority over a commercial real estate broker's lien.
- Require an escrow account to be established if a recorded broker's lien would prevent a closing transaction.
- Authorize a person claiming a commercial real estate broker's lien to bring an action to enforce it, 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, and one or more of the installments 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. The lien would be effective only to the extent the buyer still owed payment to the seller. ("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 broker could record a claim of lien any time after the lease was signed. Except as provided below, 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. The lien would attach 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 comply substantially with a form described in the bill.

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. 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 real estate broker's 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 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, 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 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 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 bring 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. Subject to the period of redemption, the sale would be final 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 the demand was served, the lien would be extinguished without further action. The demand could be served 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 broker would have to provide a release of lien to the owner of record within 10 days after a written demand by the owner 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 brought within the required time, the real estate broker would have to provide a release of lien within five days after a written demand by the owner of record or the owner's agent.

If a recorded claim of lien 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.

Legislative Analyst: Suzanne Lowe

#### **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.