

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 461 w/CS Liens on Commercial Real Estate
SPONSOR(S): Brown
TIED BILLS: IDEN./SIM. BILLS: SB 1788

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: 1) Business Regulation, 33 Y, 0 N w/CS, Gallen, Liepshutz. Row 2: 2) Appropriations, Belcher, Baker.

SUMMARY ANALYSIS

Real estate brokers are regulated under Chapter 475, Florida Statutes. The Florida Real Estate Commission under the Division of Real Estate within the Department of Business and Professional Regulation administers regulation of real estate brokers.

The bill creates the "Commercial Real Estate Lien Act," and provides that a broker may place a lien upon commercial real estate in the amount the broker is due for licensed services. A lien will attach to the commercial real estate or any interest in commercial real estate if the broker is entitled to a fee or commission under a written instrument, signed by the transferor or transferee, and records a notice of lien.

Currently, a broker is entitled to a lien on property for nonpayment of commission only if the broker is expressly authorized to do so in a contractual agreement.

A "broker" is a person who for compensation appraises, auctions, buys, sells, exchanges, or leases real property or negotiates the transaction for others. "Commercial real estate" includes any real estate except: real estate containing one to four residential units or real estate on which no structure is located and is zoned for single-family residential use.

The bill provides for a lien to shift from the property to an escrow account when the lien may disrupt a closing.

The bill provides legal procedures and requirements for filing a lawsuit to enforce a lien, resolve payment of commission owed, and release parties from liens.

The Division of Real Estate should experience an increase in complaints. The additional workload will be absorbed within existing resources resulting in no significant fiscal impact to the department. There would be additional work generated from the complaint stage through legal prosecution to absorb the additional complaints this may generate. Groups affected would be Florida Real Estate Commission, Florida Real Estate Appraisal Board, real estate brokers, real estate appraiser, Clerk of the Circuit Courts, and consumers.

The law takes effect July 1, 2004.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Current Situation

Real estate brokers are regulated by Chapter 475, Florida Statutes. The Florida Real Estate Commission under the Division of Real Estate within the Department of Business and Professional Regulation (DBPR) administers the regulation of real estate brokers.

Currently, a broker may place a lien on real property for nonpayment of commission *only if* the broker is expressly authorized to do so in a contractual agreement.¹ Otherwise, when a buyer or seller refuses to pay a broker's commission after the commission is due the broker would be required to take legal action by filing a suit against the party to collect the amount owed.

A lien is a right given to a creditor to have a debt satisfied out of some specific property belonging to a debtor. Liens can entitle the holder (lienor) to have a property sold, regardless of the desires of the owner (lienee). As a debtor, the property owner has no choice but to pay the lienor or have the property disposed of by the courts in order to satisfy the lien.

The term "broker" is statutorily defined as a person who for compensation appraises, auctions, buys, sells, exchanges, or leases real property or negotiates the transaction for others. The definition includes a general partner, officer, or director of a partnership or corporation which acts as a broker.

Effect of Proposed Changes

The bill creates Chapter 714, entitling commercial brokers to a lien on commercial property that is the subject of a purchase, lease, or other conveyance. The bill provides that a broker is entitled to a lien in the amount that the broker is due for licensed services, such as brokerage fees, consulting fees, and management fees. A lien is available to a broker named in a written instrument that is signed by the transferor or transferee.²

A lien will attach to the commercial real estate if the broker is entitled to a commission under a written instrument and records a notice of lien prior to the transfer of the commercial real estate which the broker is claiming the lien. The bill provides express exceptions to this recording requirement.

¹ s. 475.42, F.S.

² Under the bill, "transferee" means a person purchasing or otherwise receiving any interest in commercial real estate, and "transferor" means any person selling or otherwise conveying any interest in commercial real estate.

Prior recorded liens, mortgages, and encumbrances, including mechanic's lien, revolving credit liens and future advances of construction loans, have priority over a broker's lien.

"Commercial real estate" means any real estate *other than* real estate containing one to four residential units, or real estate on which no structures are located and which is zoned for single-family residential use. "Commission" means any compensation or consideration owed to a broker licensed in this state for services performed within the scope of the broker's license.

The notice of lien must include; the name of the claimant, the name of the owner of record of the commercial property, a description of the property, the amount for which the lien is claimed, and the real estate license number of the broker. The notice must be signed by the broker and notarized.

The recording requirements for a notice of lien vary, depending on the type of property transaction and the agreed upon time upon which a commission is due:

Commission Due in Installments: A notice of lien may be recorded up to 90 days after the date payment is due. Brokers must provide partial releases as partial payments of commission are received, therefore reducing the amount due under the broker's notice of lien.

Lease of Commercial Real Estate: A notice of lien must be recorded no later than 90 days after the transferee takes possession of the leased premises. If a transferor (i.e. lessor) serves written notice of the intended execution of the lease on a broker at least 10 days prior to the intended execution of the lease, a notice of lien must be recorded before the date indicated in the notice for the execution of the lease.

Future Commission: A notice of lien may be recorded anytime after execution of the lease but no later than 90 days after the event on which the future commission occurs. An action to enforce this type of lien must occur within 2 years after the occurrence on which the future commission is claimed.

Real Estate Sold Before Commission is Due: If the broker has recorded a valid notice of lien prior to the sale or other conveyance of real estate, then the purchaser or transferee will be considered as having notice and will take title to the real estate subject to the lien. A broker claiming a future commission that fails to file a notice of lien before the recording of a deed conveying legal title to the transferee may not claim a lien on the real estate.

In certain circumstances the bill authorizes a notice of lien to be recorded subsequent to an actual conveyance or transfer of commercial real estate. As a result title insurers may not have an opportunity to reveal an unrecorded lien.

A broker must serve notice of lien to the owner of the commercial real estate within 10 days after recording a notice of lien. However a broker is not required to deliver a copy of the notice of lien if the notice of lien is recorded within 10 days prior to closing. Failure to deliver a copy of the notice of lien will result in an unenforceable lien.

A broker may file suit to enforce a lien by filing a complaint and sworn affidavit that the notice of lien has been recorded. The proceedings must commence within 2 years after recording the notice of lien or within 2 years after the transfer of the real estate if the lien is based on an option to purchase or lease. The notice of lien will extinguish if proceedings are not commenced within the provided 2 year period.

A complaint must contain: a brief statement of the contract or written instrument with its effective date, a description of the services performed, the amount due and unpaid, a description of the property, and any other facts that are necessary. All liens claimed will be foreclosed in the manner of foreclosing a mortgage under the provision of chapter 702, F.S.

A broker must release the lien in writing upon a written demand by the owner if the claimed commission has been paid to the broker or the time period has expired in which to initiate a suit. Additionally, a broker must release the lien if a condition occurs that would preclude a broker from receiving compensation under the terms of the written agreement.

A broker and the party from whom the commission is claimed may seek alternative dispute resolution upon agreement. The broker's notice of lien will be stayed pending the resolution.

A broker's right to a lien may not be waived, unless the waiver or release of lien is in consideration of payment of the fee or commission claimed by a broker.

When a properly filed lien prevents the closing of a transaction an escrow account will be established from the proceeds of the transaction in an amount sufficient to release the lien. This will grant a broker an equitable lien on the escrow funds, thereby, releasing any lien on the property. If an alternative procedure is acceptable to the transferee that enables the transaction to close then the escrow procedures will not be required.

The bill amends Chapter 475, F.S., in order to permit a broker's lien that is expressly "allowed by law;" currently the chapter permits a broker's lien only when agreed upon by contract. This authorizes commercial liens in Chapter 475, which relates to real estate brokers.

C. SECTION DIRECTORY:

Section 1. Creates sections 714.001, 714.003, 714.005, 714.007, 714.009, F.S., to create the popular name "Commercial Real Estate Lien Act;" provides definitions and terms; provides that a broker under a written instrument is entitled to a lien in the amount that the broker is due for licensed services; provides for contents for a notice of lien; provides procedures for filing a notice of lien and recording a notice of lien; provides requirement of service of notice of lien; provides procedures and requirements for filing a lawsuit to enforce a lien; provides a statute of limitations; provides for satisfaction or release of lien; provides for an alternative dispute resolution; provides that costs for proceedings brought under this act are borne by the nonprevailing party; provides that a waiver of lien rights is void; provides that prior liens have priority over a broker's lien; provides for an escrow of disputed amounts.

Section 2. Amends section 475.42, F.S.; allowing a broker's lien on property where allowed by law.

Section 3. The act takes effect July 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may effectively decrease the number of civil suits brought by commercial brokers to recover brokerage fees or debts owed.

The bill authorizes, in certain circumstances, for a notice of lien to be recorded subsequent to an actual conveyance or transfer of commercial real estate. As a result title insurers may not have an opportunity to reveal an unrecorded lien.

D. FISCAL COMMENTS:

The bill allows brokers to file a lien for current and future commissions. Section 475.42(j), F.S., prohibits the improper filing of authorized liens for commissions. Any broker who improperly files a lien under this law is subject to disciplinary action against their license. Consequently, there is the potential for a small increase in disciplinary actions. The Division of Real Estate should experience an increase in complaints. The additional workload will be absorbed within existing resources resulting in no significant fiscal impact to the department. The specific impact is difficult to determine. There would be additional work generated from the complaint stage through the legal prosecution to absorb the additional complaints this may generate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not require the counties or cities to spend funds or take an action requiring the expenditure of funds.

2. Other:

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 13, 2004, the Committee on Business Regulation adopted four technical amendments to the bill. The amendments do not change the substance of the bill. The amendments:

- clarify that written instruments containing the brokerage fee amount must be valid and enforceable.
- clarify what consideration may be accepted by a broker for commission.
- clarify that future commissions are valid only to the extent they pertain to payments due from the transferee to the transferor after the transfer.