

SUBJECT: Broker's and appraiser's liens on commercial real estate

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 8 ayes — Brimer, Dukes, Corte, George, Ritter, Siebert, Solomons, Woolley
0 nays
1 absent — Giddings

WITNESSES: For — James Michael Boyd; John D. Eckstrum and Ron Walker, Texas Association of Realtors; L.W. Mayo, Foundation Appraisers Coalition of Texas

Against — Michael Dardick, Granite Properties and NAIOP North Texas; Will Munding, NAIOP and Anden Group; Mitchell F. Peairson, Texas Building Owners and Managers Association; James Wilson, Institute of Real Estate Management

On — John F. Rothermel, III, Stewart Title Guaranty

DIGEST: CSHB 1052 would add chapter 62 to the Property Code, entitled the Broker's and Appraiser's Lien on Commercial Real Estate Act.

A broker would have a lien on a commercial real estate interest for the amount of the fee or other consideration specified by the commission agreement if the broker had earned the commission and recorded the notice of lien as specified. The lien would be available only to the broker named in the commission agreement, not to an employee or independent contractor of the broker. A broker under the bill would include licensed real estate brokers not acting as a residential rental locator and licenced real estate appraisers.

The bill would apply only to real estate that was commercial real estate on the date a notice of lien was filed under this chapter. It would not apply to commercial property that was the owner's primary place of business, contained fewer than five tenants, was less than 10,000 commercial square feet or 20,000 industrial square feet, or was primarily and continuously used for farming or ranching. If the real estate was zoned for more than one use,

the lien would apply only to the commercial real estate portion.

A broker claiming a lien would have to file notice of lien with the county clerk of the county in which the commercial real estate was located. The clerk would have to record the notice in county records and index the records appropriately. The bill would specify the contents of the notice of lien and the time frame in which a broker would have to file notice. The dates would vary based on the parties signing the commission agreement. The lien would be void if not filed within the specified period. The notice of lien would have to be signed by the broker or the broker's agent.

A broker claiming a lien could not file notice of lien unless the commission on which the lien was based had been earned. A lien would be attached to a commercial real estate interest on the date that a notice of lien was filed, not on the date of the commission agreement.

If a notice of lien were based on commission earned by the broker under installments or on a deferred commission, the lien would be enforceable only for portions of the commission that had become payable.

The bill would define the requirements of a commission agreement, including that the agreement disclose the broker's right to claim a lien.

CSHB 1052 would specify that a commission was payable at the time provided in a commission agreement. If payment of the commission were contingent on the occurrence of an event that did not occur, the person obligated to pay the commission would not have to pay. A commission would be considered earned on the earlier of the date that the required event occurred or the date that the obligated payor entered into a purchase contract or a lease during a period prescribed by the agreement.

CSHB 1052 would specify the circumstances and manner in which a broker would have to send a copy of the notice of lien to the owner, buyer, and escrow agent. Failure to comply with these requirements would void the lien.

A broker's entitlement to a lien on the interest of an owner or tenant could be waived if the commission had been earned for services relating to a lease transaction and the commission agreement was included as a provision of the lease agreement.

A lien could be discharged by court order, by payment of the commission to the broker, or by establishing an escrow account as specified. If a lien had not been paid at the time of a transfer of the property and would prevent closing of the transaction, any person obligated to pay the lien would have to establish an escrow account from any proceeds in an amount equal to the lien amount plus 15 percent, or to file a bond to indemnify against the lien. The parties could name an escrow agent. The bill would specify the term of the escrow account.

In the event that an escrow account was established, the broker's lien would become a lien on the proceeds in the escrow account. If an escrow account were established, no prospective buyer could refuse to close a purchase because a broker's lien had been filed. Subject to certain conditions, no party could refuse to close a transaction because of the requirement to establish an escrow account or bond. The person maintaining the escrow account could deduct any costs related to an interpleader action from the account.

Any person could file a bond to indemnify against a lien with the county clerk of the county in which the commercial real estate was located. The bill would specify the details of the bond, including the amount. After a bond was filed, the county clerk would have to send by registered or certified mail notice of the bond, including a copy of the bond, to all named obligees. The clerk also would have to record the bond, and this record would constitute absolute protection for the buyer, insurer of the title, or lender.

A person who assumed an owner's or tenant's commercial real estate interest would be bound by the commission agreement included in the lease agreement, unless an escrow account had been established or unless a bond was provided. A mortgagee who foreclosed on a property and did not assume the lease would not be bound by the commission agreement.

If requested by the buyer, the buyer's agent, or the escrow agent, a seller and broker would have to provide a written affidavit identifying each broker with whom a commission agreement had been signed. The affidavit would have to be provided before the closing date of the transaction.

A broker's address, for the purpose of certain notices, would be the broker's last known address in the records of the person sending the notice or the address as reflected in the records of the Texas Real Estate Commission.

If a broker were entitled to an additional commission when a lease was modified, the commission would be earned when the broker performed the additional prescribed services or on the date of the first commission, if the broker was not required to perform additional services.

A lien on an interest that had been transferred to a new lessee or owner would not be enforceable if the agreement to transfer possession was recorded before the notice of lien was recorded.

A change in the property's use would not affect a broker's lien if the lien had been filed while the property was commercial real estate. The lien would be voided if within 360 days of the date that the broker's commission became payable, the commercial real estate became zoned for single-family use and if these new zoning ordinances were in effect for two years after the date that the commission became payable.

Certain recorded liens, mortgages, purchase-money mortgage liens, and mechanic's liens would have priority over a broker's lien.

CSHB 1052 would outline the conditions under which a broker's lien was subordinate to a purchase-money first lien, a refinanced recorded first lien, and an extension of credit. If the person obligated to pay the commission furnished a subordination agreement to be executed by the broker, the broker would have to acknowledge the agreement in front of a notary public and return the agreement to the person within seven days of receipt.

A broker could bring a suit to foreclose a lien only if the commission had been earned and was payable. The broker could bring suit by filing a sworn complaint in any district court for the county in which the commercial real estate was located. The bill would specify information the complaint must contain.

A broker would have to bring a suit within two years of the recording of the notice of lien. If the broker received a written demand from the property owner to bring suit to foreclose the lien, the broker would have to bring the suit within 30 days of receiving the demand. If the lien was on a deferred commission, the broker would have to bring suit within two years of the date the commission became payable or within 10 years after the lien or notice of lien was recorded, whichever was earlier.

The broker would have to name as a defendant every person believed to have been encumbered by the broker's lien. If the broker and the defendant chose an alternative dispute-resolution procedure, the lien would be stayed until the process had been completed.

The prevailing party in the suit would be entitled to court costs, attorney's fees, and prejudgment interest.

A person holding a lien claim and wishing to sue on a bond would be subject to the same time frame for foreclosure of a lien. A bond could be subject to multiple actions or separate suits.

CSHB 1052 would allow an owner or a tenant to sue a broker for damages or discharge of a lien if the broker failed to file notice of lien properly, failed to return properly a subordination agreement, or failed to release a lien within the appropriate time period. The broker could be liable for actual damages and a civil penalty equal to three times the claimed commission. The bill would not prevent a person from filing a complaint against a broker with the Texas Real Estate Commission, nor would it prevent the commission from investigating or initiating disciplinary proceedings against a broker.

A broker could sue an owner or tenant to enforce a commission agreement. The owner or tenant could be liable for actual damages and a civil penalty equal to three times the amount of the claimed commission.

A renewal of a notice of lien would have to state that it was a renewal and would have to be recorded between nine and 10 years after the original notice or previous renewal notice had been filed.

If a lien had been satisfied or discharged, the owner of the property that was the subject of the lien could send to the broker in writing a request of release from indebtedness. The broker would have to furnish the release within five days of receiving the request, or within 10 days if any condition occurred that precluded the broker from receiving the commission that was the basis for the lien. A release of indebtedness would have to be created in a form that could be filed on record.

CSHB 1052 would take effect September 1, 1999, and would apply only to agreements entered into on or after that date.

SUPPORTERS
SAY:

CSHB 1052 would provide brokers with lien protection they deserve on payments owed for completed services. Contractors, mechanics, and others who provide services for the real estate industry already have this protection. Brokers bring tenants — and therefore value — to commercial real estate in the same way that material providers enhance the value of a property. Therefore, brokers should have the same protections.

Sometimes property owners or tenants refuse to pay a broker's commission, knowing that it would be costly for a broker to sue to recover this commission. Allowing a broker to place a lien for a commission would ensure that the broker received the deserved and agreed-upon payment.

Deferred commissions may be payable over several years. If a building transfers ownership during that period, the seller may not inform the buyer of commission due to a broker. A lien notice would properly notify buyers of existing commitments. Currently, a broker has little recourse in these situations but to try to recover the commission from the seller. Sometimes the seller is a corporation that dissolves after the sale of the property, making it impossible for the broker to recover the commission.

The bill would provide for a waiver of lien, ensuring that only consenting parties would enter into such an agreement. It also would provide remedies that would discourage unnecessary liens.

OPPONENTS
SAY:

Material providers, contractors, and mechanics provide tangible assets to a property. Brokers do not, and therefore they should not be extended the same lien rights.

Mortgage agreements or title transfers provide that an owner has an obligation to a lender to keep a property free of encumbrances and liens. Allowing brokers to place liens on commercial property interests could discourage lenders from lending in Texas, since such interests would be encumbered. Real estate investments and property closings in Texas could suffer as a result.

Landlords and brokers need each other, and landlords have a vested interest in keeping brokers happy. If a landlord wrongs a broker, that broker will not bring the landlord additional business. The landlord-broker relationship regulates itself and does not require government intervention.

Brokers are not a disadvantaged group, and they do not need special protection under the law. Any broker who is owed money has the right to sue for damages. If brokers feel they are being disadvantaged, the problem should be solved through contract law. More regulation of the real estate industry and encumbrance on property are not the solution.

NOTES:

The committee substitute changed the definition of “commercial real estate” to exclude real estate used primarily for farming and ranching. It also added provisions for waiving a lien.

The companion bill, SB 1008 by Wentworth, has been referred to the Senate State Affairs Committee.

A similar bill filed in 1997, HB 1650 by Place, died in the House Calendars Committee near the end of the session.