

## **BILL ANALYSIS**

Senate Research Center

H.B. 1052  
By: Brimer (Wentworth)  
State Affairs  
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Engrossed

### **DIGEST**

Under current law, a real estate broker may not obtain a lien on real property to secure the payment of the broker's commission from a commercial real estate transaction. Therefore, a commercial real estate broker does not have security for the commission. H.B. 1052 would create a real estate broker's and appraiser's lien on commercial real estate, and provide a penalty.

### **PURPOSE**

As proposed, H.B. 1052 creates a real estate broker's and appraiser's lien on commercial real estate, and provide a penalty.

### **RULEMAKING AUTHORITY**

This bill does not grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Title 5B, Property Code, by adding Chapter 62, as follows:

#### **CHAPTER 62. BROKER'S AND APPRAISER'S LIEN ON COMMERCIAL REAL ESTATE**

##### **SUBCHAPTER A. GENERAL PROVISIONS**

Sec. 62.001. **SHORT TITLE.** Authorizes this chapter to be cited as the Broker's and Appraiser's Lien on Commercial Real Estate Act.

Sec. 62.002. **APPLICABILITY.** Provides that this chapter applies only to real estate that is commercial real estate on the date the notice of lien is filed under this chapter. Sets forth property to which this chapter does not apply, in order to reduce the potentially adverse impact on small businesses.

Sec. 62.003. **DEFINITIONS.** Defines "broker," "commercial real estate," "commission," "commission agreement," "deferred commission," and "real estate."

Sec. 62.004. **PAYABLE COMMISSION AND EARNED COMMISSION.** Establishes that a commission is payable at the time provided in the commission agreement. Provides that a person is not obligated to pay the commission, if certain conditions are not met. Sets forth provisions by which the commission is earned, providing exception of Subsection (c). Establishes that if a broker has earned a commission under a commission agreement relating to a lease transaction and the commission agreement provides that the broker may receive an additional commission when the lease is modified to expand the lease space or renewed, that the additional commission is earned when certain conditions exist.

Sec. 62.005. **BROKER'S ADDRESS FOR RECEIPT OF NOTICE.** Requires a seller, lessor, buyer, or tenant to send any notice required to be sent to the broker under this chapter to the broker at a specific address.

##### **SUBCHAPTER B. BROKER'S LIEN**

Sec. 62.021. PERSON ENTITLED TO LIEN. Sets forth provisions by which a broker has a lien on a seller's or lessor's commercial real estate interest in the amount specified by the commission agreement. Sets forth provisions by which a broker has a lien on the commercial real estate interest purchased by a protective buyer in the amount specified by the commission agreement. Sets forth provisions by which a broker has a lien on the prospective tenant's leasehold interest in commercial real estate in the amount specified by the commission agreement. Provides that a lien described by this section is available only to the broker named in the commission agreement. Establishes that the lien is not available to an employee or independent contractor or the broker. Requires the broker's right to claim a lien based on the commission agreement to be disclosed in the commission agreement.

Sec. 62.022. WAIVER, RELEASE, OF DISCHARGE OR LIEN; ASSUMPTION OF COMMISSION OBLIGATION. Provides that the waiver of a broker's right to a lien, or a release given for the purpose of releasing the broker's lien before the commission is satisfied or forgiven, is void, except as provided by Subsection (b). Requires a broker's entitlement to a lien on the interest of an owner or tenant in commercial real estate to be automatically waived if certain conditions exist. Sets forth provisions by which a lien is discharged. Provides that a person who assumes an owner's or tenant's commercial real estate interest is bound by a commissioner agreement included in a lease agreement unless an escrow account is established under Subchapter F or a bond is provided under Subchapter G. Establishes that this section does not affect the rights of a mortgagee who forecloses on commercial real estate and does not assume the lease on which a commission agreement is based.

Sec. 62.023. AFFIDAVIT IDENTIFYING BROKER. Requires the seller of commercial real estate and the seller's broker to provide to certain requesting parties before the closing of the transaction a written affidavit identifying each broker with whom the affidavit knows or believes the seller or the seller's authorized agent has signed a commission agreement.

Sec. 62.024. FILING OF NOTICE OF LIEN. Prohibits a broker claiming a lien under this chapter from filing a notice of lien unless the commission on which the lien is based is earned. Requires a broker claiming a lien to file a notice of lien with the clerk of the county in which the commercial real estate is located. Requires the clerk of the county to record the notice of lien in records kept for that purpose and shall index and cross-index the notice of lien in the names of the broker and, each person obligated to pay the commission, and each person who has an interest in the commercial real estate if the broker claims a lien on that interest.

Sec. 62.025. CONTENTS OF NOTICE OF LIEN. Sets forth required information included in the notice of lien, as well as the required signature by the broker or by a person authorized to sign on behalf of the broker.

Sec. 62.026. NOTICE OF FILING. Defines "business day." Requires the broker to mail a copy of the notice of lien by certified mail, returned receipt requested, or registered mail to certain individuals, not later than one business day after the date the broker files a notice of lien. Establishes that the service of the notice is complete when the notice is deposited in the United States mail, postage prepaid, and addressed to the person entitled to receive the notice. Requires the broker, before a certain date, to deliver a file-stamped copy or transmit a facsimile of a file-stamped copy of the notice of lien to certain individuals. Requires the broker to deliver the copy or transmit the facsimile directly to the individual escrow agent responsible for closing the sale or lease if the broker knows the person's name. Prohibits closing of the transaction unless the lien is released, if the escrow agent receives the notice of lien, the funds are held in escrow, or a bond is filed. Provides that if the broker fails to comply with this section, the notice of lien is void.

Sec. 62.027. INCEPTION OF BROKER'S LIEN. Establishes that a broker's lien attaches to the commercial real estate interest owned by the person obligated to pay the commission on the date the notice of lien is recorded. Provides that the lien does not relate back to the date of the commission agreement. Provides that a notice of lien for amounts earned by the broker under an installment contract or under a commission agreement for a deferred commission is enforceable only to the extent that the installment or commission has become payable.

Sec. 62.028. PRIORITY. Provides that a recorded lien, mortgage, or other encumbrance on commercial real estate recorded before the date a broker's lien is recorded has priority over the

broker's lien. Establishes that a broker's lien on the commercial real estate interest of a person obligated to pay a commission is not valid or enforceable against certain individuals if the deed, lease, or instrument transferring the interest is recorded before the notice of the broker's lien is recorded. Provides that a purchase-money mortgage lien executed by the buyer has priority over a broker's lien claimed against the prospective buyer for the commission owed by that buyer. Establishes that a mechanic's lien that is recorded after the broker's lien and that relates back to the date the broker's lien is recorded has priority over the broker's lien.

Sec. 62.029. SUBORDINATION. Sets forth provisions establishing that the broker's lien is subordinate to a recorded purchase-money first lien authorized by the buyer, if the person obligated to pay the commission sells that person's commercial real estate interest. Sets forth provisions by which the broker's lien is subordinate to the recorded refinanced first lien, regardless of the amount of the first lien after refinancing, if the person obligated to pay the commission refinances a recorded first lien secured by that person's commercial real estate interest. Sets forth provisions by which the broker's lien is subordinate to the lien securing the extension of credit, if the person obligated to pay the commission obtains an extension of credit secured by that person's commercial real estate interest. Sets forth requirements for the broker, if the person obligated to pay the commission furnishes a subordination agreement to be executed by the broker.

Sec. 62.030. MIXED-USE REAL ESTATE. Provides that the broker's lien attaches only to the portions of the real estate that constitute commercial real estate, if the real estate is zoned or restricted for more than one use.

Sec. 62.031. CHANGE IN USE OF REAL ESTATE. Establishes that any change in use of the real estate does not affect a broker's lien if the notice of the lien was filed when the real estate was commercial real estate, except as provided by Subsection (b). Sets forth provisions by which the broker's lien is extinguished.

#### SUBCHAPTER C. TIME FOR FILING NOTICE OF LIEN

Sec. 62.041. TIME TO FILE. Sets forth a time frame required for a broker to record a notice of lien, if the broker has earned commission. Provides that a broker must record a notice of lien, if a broker has earned a commission signed by a prospective buyer or a prospective buyer's authorized agent. Sets forth the date, if the lien is based on a lease transaction, by which the broker must record a notice of lien after the commission is earned. Provides that the lien is void, if a notice of lien is not filed within the required time.

#### SUBCHAPTER D. ENFORCEMENT OF LIEN

Sec. 62.061. SUIT TO FORECLOSE LIEN. Prohibits a broker from bringing a suit to foreclose a lien unless the commission is earned and payable. Authorizes a broker to bring a suit to foreclose a lien in any district court for the county in which the commercial real estate is located by filing a sworn complaint stating that the notice of lien has been recorded. Sets forth information required for a complaint in a suit filed under this section. Requires the broker to include as a defendant in a suit each person the broker believes to have an interest in the commercial real estate that is subordinate to or encumbered by the broker's lien. Establishes provisions regarding the use of alternative dispute resolution.

Sec. 62.062. STATUTE OF LIMITATIONS. Requires a broker claiming a lien to bring a suit to foreclose the lien on or before the second anniversary of the date the notice of lien is recorded. Requires a broker claiming a lien to collect a deferred commission to bring a suit to foreclose the lien on a certain date. Requires a renewal of a lien to state that it is a renewal and must be recorded within a specific time frame. Requires a broker claiming a lien for a commission that is payable to bring a suit within a specific time frame. Provides that the lien is void, if a suit to foreclose the lien is not brought within the prescribed period.

#### SUBCHAPTER E. RELEASE OF LIEN

Sec. 62.081. RELEASE OF LIEN. Requires the broker to furnish to the owner a release of indebtedness and any lien claimed, not later than the fifth day after the date a broker receives written request from the owner, provided that certain conditions exist. Requires the broker within

a certain amount of time, when a condition occurs that would preclude the broker from receiving a commission, to furnish the owner a release of indebtedness and any lien claimed. Requires a release of lien to be in a form that permits the instrument to be filed of record.

#### SUBCHAPTER F. ESCROW OF DISPUTED AMOUNTS

Sec. 62.101. ESCROW ACCOUNT. Establishes requirements if a claim for a lien under a recorded notice of lien is not paid or assumed at the closing of the commercial real estate interest subject to the lien and would prevent the closing of the transaction or conveyance, than any person named in the notice of lien shall be obligated to pay the commission on the date of the closing, as well as fulfill certain conditions.

Sec. 62.102. NAMED ESCROW AGENT. Requires the escrow agent to be established with the named escrow agent, if the escrow agent is named in the contract on which the transaction or conveyance is based.

Sec. 62.103. COSTS OF INTERPLEADER. Authorizes related costs for any interpleader action to be deducted from the escrow account by the person maintaining the escrow account.

Sec. 62.104. REFUSAL TO ESTABLISH ESCROW ACCOUNT OR BOND. Prohibits a party from refusing to close a transaction because of the requirement to establish an escrow account or bond if certain conditions are fulfilled. Prohibits a prospective buyer from a commercial real estate interest from refusing to close the purchase solely because a broker's lien is filed after the date a title commitment or abstract of title relating to the interest is issued if an escrow account is established or a bond is filed.

Sec. 62.105. TERM OF ESCROW ACCOUNT. Sets forth the time frame for which the account shall be held in escrow.

Sec. 62.106. EXTINGUISHMENT OF LIEN UPON ESCROW. Provides that a broker's lien against the commercial real estate is extinguished and becomes a lien on the proceeds in the escrow account, when the escrow account is established.

#### SUBCHAPTER G. BOND TO INDEMNIFY AGAINST LIEN

Sec. 62.121. BOND. Authorizes a person to file a bond to indemnify against the lien, if the lien is fixed or is attempted to be fixed by a recorded instrument. Requires the bond to be filed with the county clerk of the county in which the commercial real estate subject to the lien is located.

Sec. 62.122. BOND REQUIREMENTS. Sets forth certain bond requirements.

Sec. 62.123. NOTICE OF BOND. Requires the county clerk to issue notice of the bond to all named obligees, after the bond is filed. Requires a copy of the bond to be attached to the notice. Requires the notice to be served on each obligee by specifically mailing to the claimant at the address stated in the bond for the obligee.

Sec. 62.124. RECORDING OF BOND AND NOTICE. Requires the county clerk to record the bond, the notice, and a certificate of mailing in the real property records. Authorizes a buyer, insurer of title, or lender to rely on and be absolutely protected by the record of the bond and the notice to the same extent as if the lien claimant had filed a release of lien in the real property records.

Sec. 62.125. ACTION ON BOND. Prohibits a party making a lien claim from suing on the bond later than the last date on which a person may bring a suit to foreclose the lien. Provides that the bond is not exhausted by one action against it. Authorizes each obligee or assignee of an obligee to maintain a separate suit on the bond in any district court for the county in which the commercial real estate is located.

#### SUBCHAPTER H. REMEDIES

Sec. 62.141. OWNER OR TENANT'S REMEDIES. Authorizes an owner or tenant to file a suit against a broker. Requires the court to discharge a broker's lien if the broker fulfills certain

conditions. Sets forth provisions by which a broker is liable to an owner or tenant for certain damages. Provides that an individual broker who was the designated officer of a corporate or partnership broker violated this chapter is liable for any unsatisfied damages or civil penalties if the individual broker was named as a defendant in an action filed under this section. Provides that this section does not prevent certain complaint filings, investigations, or initiation of a disciplinary proceeding.

Sec. 62.142. **BROKER'S REMEDIES.** Authorizes a broker to file suit against an owner or tenant to enforce a commission agreement. Authorizes the court to make certain awards to the broker, if the court finds that the broker waived the right to file a lien and that the owner or tenant violated the commission agreement.

SECTION 2. Effective date: September 1, 1999.  
Makes application of this Act prospective.

SECTION 3. Emergency clause.