

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1459 CS Liens on Commercial Real Estate
SPONSOR(S): Brown
TIED BILLS: **IDEN./SIM. BILLS:** SB 2036

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Civil Justice Committee</u>	<u>4 Y, 0 N, w/CS</u>	<u>Kruse</u>	<u>Billmeier</u>
2) <u>Economic Development, Trade & Banking Committee</u>	<u>(W/D)</u>	<u></u>	<u></u>
3) <u>Justice Council</u>	<u>7 Y, 0 N, w/CS</u>	<u>Kruse</u>	<u>De La Paz</u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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 Part III and Part IV of ch. 475, F.S. Part III creates the "Commercial Real Estate Sales Commission Lien Act," and provides a sales broker with the power to place a lien on an owner's proceeds from a commercial real estate transaction when there is a dispute over the broker's commission. The proceeds are placed in the registry of the court until the dispute is resolved, but the closing may proceed and the buyer should be able to take clean title to the commercial real estate. 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" does not include one single-family residential unit or one multifamily structure containing one to four residential units, unimproved real property under certain conditions, or single-family residential units such as condominiums, townhouses, timeshares, mobile homes, or houses in a subdivision, even though these units may be part of a larger building or parcel or real estate containing more than four residential units.

Part IV creates the "Commercial Real Estate Leasing Commission Lien Act," and provides a broker in a lease transaction with the power to place a lien on an owner's interest in commercial real estate for any commission earned by a broker under a brokerage agreement. The lien is on the commercial real estate itself.

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 bill does not have a fiscal impact on state or local governments.

The law takes effect July 1, 2005.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1459b.JC.doc
DATE: 4/26/2005

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility – This bill will allow a broker to place a lien on the proceeds from a commercial real estate transaction or on the commercial real estate itself, depending upon whether the transaction is a sales or lease transaction, if there is a dispute over the broker's commission.

B. EFFECT OF PROPOSED CHANGES:

Brokers

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.

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.

Liens

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.

Florida law authorizes liens on property for certain professions. An architect, landscape architect, interior designer, engineer, or surveyor and mapper "has a lien on the real property improved for any money that is owing to him or her for his or her services used in connection with improving the real property or for his or her services in supervising any portion of the work of improving the real property, rendered in accordance with his or her contract and with the direct contract." This statute also provides that "[n]o liens under this section shall be acquired until a claim of lien is recorded."² Other liens exist, such as mechanic's liens,³ liens on personal property,⁴ liens on labor in raising crops,⁵ and liens for labor on vessels.⁶

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The first part of the bill creates Part III of ch. 475, F.S., and provides a short title called the "Commercial Real Estate Sales Commission Lien Act. The bill includes definitions for "brokerage agreement,"

¹ Section 475.42(1)(j), F.S.

² Section 713.03, F.S.

³ Section 713.56, F.S.

⁴ Section 713.58, F.S.

⁵ Section 713.59, F.S.

⁶ Section 713.60, F.S.

“closing,” “closing agent,” “commercial real estate,” “commission,” “commission notice,” “days,” “disposition,” “disputed reserve proceeds,” “owner,” “owner’s net proceeds,” and “real property.”

Broker’s Duties: The bill describes a broker’s lien for a sales commission. The bill makes clear that a broker’s lien is on the owner’s net proceeds from the transaction, and that the lien does not attach to any interest in real property. The broker’s commission must have been earned as part of a brokerage agreement. The bill requires a broker to disclose to an owner at or before a brokerage agreement is executed that the broker has lien rights once the agreement is executed and that those rights are not waivable. The contents of the commission notice are set out as well as a form for the notice. A broker may record a commission notice in the public records of the county where the commercial real estate is located. The broker must deliver a commission notice to the owner and the closing agent. Failure to deliver the notice extinguishes any right to a lien. The broker must record a written release of the commission notice once the commission has been paid.

Closing Agent: The bill describes a closing agent’s obligations. If a closing agent has notice of a commission notice, then the closing agent must reserve from the owner’s net proceeds an amount equal to the commission claimed by the broker in the commission notice. The closing agent may require additional information from the owner regarding any other brokers who may be entitled to a commission. The closing agent must notify the broker and the owner if the owner’s net proceeds are insufficient to cover the broker’s commission. If there is a dispute over the commission, the closing agent must place any disputed funds in the registry of the court. A closing agent is immune from liability for complying with these requirements.

Civil Action: The bill provides that if a broker has delivered a commission notice to an owner and there is a dispute over the commission, the broker or owner may file a civil action in the county or circuit court, depending on which court has jurisdiction. An owner who files an action may move the court to issue an order to show cause to the broker as to why the commission should be paid. A prevailing party of such a civil action is entitled to costs and reasonable attorneys’ fees of the owner and the closing agent, and the amount of any costs, recording charges, and service charges of the clerk of the court.

Priority of Liens: The bill provides for the priority of a recorded commission notice. All other liens recorded prior to the commission notice have priority over the commission notice to the owner’s proceeds.

Service: The bill establishes that service may be made by service of process or by registered or certified mail, return receipt requested, or by personal or electronic delivery in the form of a receipt or other paper or electronic acknowledgment by the party to whom the notice is delivered. Delivery is effective at the time of service or 3 days following deposit in the mail.

Buyer’s Broker: The bill provides that a buyer’s broker is not entitled to a lien against the owner’s net proceeds, but if a contract provides for a buyer’s broker to receive a fee, then a buyer’s broker may give notice to the closing agent or any other party of the broker’s right to such fee.

The second part of the bill creates Part IV of ch. 475, F.S., entitled the “Commercial Real Estate Leasing Commission Lien Act.” The bill provides definitions for certain terms that apply to lease transactions, such as the terms “automatic renewal commission” and “renewal commission.”

Broker’s Duties: The bill provides that a broker has a right to a lien against an owner’s interest in commercial real estate for any commission earned by the broker under a brokerage agreement with respect to a lease of commercial real estate. The bill also describes when a commission is earned under several circumstances that apply to leases. The bill requires a broker to disclose to an owner at or before a brokerage agreement is executed that the broker has lien rights once the agreement is executed and that those rights are not waivable. The contents of the commission notice are set out as well as a form for the notice. A broker may be record a commission notice in the public records of the county where the commercial real estate is located. The broker must deliver a commission notice to the

owner and the closing agent in order for the lien to be effective. Additionally, failure to record the notice in the public records also extinguishes any right to a lien. The broker must record a written release of the commission notice once the commission has been paid. A lien expires 2 years after recording unless the broker commences a foreclosure action. If the broker claims an automatic renewal commission, then the lien notice expires 10 years after recording unless the broker commences a foreclosure action. An owner may attempt to shorten the time by filing a notice of contest of a broker's lien.

Foreclosure/Civil Action: The bill provides that a broker may enforce a lien for a commission through a foreclosure suit in the same manner as if the lien notice were a mortgage recorded against the commercial real estate of the owner obligated to pay the claimed commission. If an owner disputes the commission, then the owner may file a civil action to discharge the lien. The prevailing party in either the foreclosure or civil action is entitled to costs and reasonable attorney's fees.

Transfer of Lien to Security: The bill provides that a lien that has been recorded may be transferred by any person having an interest in the commercial real estate to a security by filing a sum with the clerk of the court or filing a bond with the clerk in an amount equal to the amount claimed and a certain sum to cover attorneys' fees.

Priority of Liens: The bill provides that a broker may agree to subordinate a lien in favor of the holder of any mortgage or other lien against the owner's interest in the commercial real estate that is the subject of the broker's lien. Further, the bill provides that with or without the broker's consent, an owner may subordinate a lien claimed by the broker for an automatic renewal commission in favor of a holder of a subsequent mortgage encumbering the owner's interest in the commercial real estate. The bill also provides that a broker's lien notice recorded against commercial real estate is subordinate to any mortgage that has at any time secured any purchase money indebtedness, provided that the mortgage is made by the owner of the commercial real estate in favor of a person unrelated to the owner.

The bill also amends ch. 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.

C. SECTION DIRECTORY:

Section 1. Creates sections 475.700, 475.701, 475.703, 475.705, 475.707, 475.709, 475.711, 475.713, 475.715, 475.717, and 475.719, F.S., and provides the popular name the "Commercial Real Estate Sales Commission Lien Act;" provides definitions and terms; provides that a broker under a written instrument is entitled to a lien on an owner's proceeds in the amount that the broker is due for licensed services; provides for contents for a notice of lien; provides a form; requires disclosure; provides procedures for recording a notice of lien; provides a statute of limitations; provides the duties of a closing agent; provides for the deposit of disputed funds in a court registry; provides procedures and requirements for filing a lawsuit to enforce a lien; provides for the priority of a recorded lien; provides requirements for service of notice of a lien; provides for satisfaction or release of lien; provides that costs for proceedings brought under this act are borne by the nonprevailing party; and provides that a waiver of lien rights is void.

Section 2. Creates sections 475.800, 475.801, 475.803, 475.805, 475.807, 475.809, and 475.811, F.S., and provides the popular name the "Commercial Real Estate Leasing Commission Lien Act;" provides definitions and terms; provides that a broker under a written instrument is entitled to a lien on an owner's interest in commercial real estate in the amount that the broker is due for licensed services; requires disclosure; provides for contents for a notice of lien; provides a form; provides procedures for recording a notice of lien; provides a statute of limitations; provides for a notice of contest of a broker's lien; provides procedures and requirements for filing a lawsuit to enforce a lien; provides for the transfer of a lien to a security; provides for subordination of a broker's lien; provides for satisfaction or release of lien; provides that costs for proceedings brought under this act are borne by the nonprevailing party; and provides that a waiver of lien rights is void.

Section 3. Amends s. 475.42, F.S.; allowing a broker's lien on property where allowed by law.

Section 4. Provides that the act takes effect July 1, 2005.

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

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:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

N/A.

C. DRAFTING ISSUES OR OTHER COMMENTS:

A version of this bill filed in the 2004 Legislative session, HB 461, was vetoed by the Governor on June 23, 2004. In the veto message the Governor stated, among other reasons, that he is opposed to increased state interference in commercial transactions without a compelling reason. Additionally, the Governor stated that commission agreements would be removed from contract law and the broker's fees would be elevated to lien status. The Governor also stated that nothing appears to justify preferential treatment for broker's fees over the numerous other types of fees that are involved in commercial real estate transactions. However, the Governor also stated that he could support legislation that protects a broker's right to receive future accruing leasing commissions from a successor owner of a leased commercial property. The proponents of this bill state that the bill addresses the concerns raised in the Governor's veto message.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 6, 2005, the Civil Justice Committee considered the bill and adopted a strike-all amendment. The amendment provides a sales broker with the power to place a lien on an owner's proceeds from a commercial real estate transaction when there is a dispute over the broker's commission. The proceeds are placed in the registry of the court until the dispute is resolved, but the closing may proceed and the buyer should be able to take clean title to the commercial real estate. The original bill placed the lien on the commercial real estate itself. Additionally, the strike-all provides a broker in a lease transaction with the power to place a lien on an owner's interest in commercial real estate for any commission earned by a broker under a brokerage agreement. The lien is on the commercial real estate. The bill, as amended, was reported favorably as a committee substitute.

On April 22, 2005, the Justice Council considered the bill and adopted one amendment. The amendment provides that a broker may agree to subordinate a lien in favor of the holder of any mortgage or other lien against the owner's interest in the commercial real estate that is the subject of the broker's lien. The amendment also provides that with or without the broker's consent, an owner may subordinate a lien claimed by the broker for an automatic renewal commission in favor of a holder of a subsequent mortgage encumbering the owner's interest in the commercial real estate. The amendment also provides that a broker's lien notice recorded against commercial real estate is subordinate to any mortgage that has at any time secured any purchase money indebtedness, provided that the mortgage is made by the owner of the commercial real estate in favor of a person unrelated to the owner. The bill, as amended, was reported favorably as a committee substitute. This analysis reflects the changes made by the amendment.