



2010
celebrating 50 years

GOVERNOR SIGNS THE COMMERCIAL REAL ESTATE BROKERS COMMISSION SECURITY ACT

Randall J. Feuerstein, Esq.
David A. Closson, Esq.
DUFFORD & BROWN, P.C.
1700 Broadway, Suite 2100, Denver, CO 80290
(303) 861-8013
rfeuerstein@duffordbrown.com
dclosson@duffordbrown.com

Overview of Broker Lien Law

On April 29, 2010, Governor Ritter signed into law the Commercial Real Estate Brokers Commission Security Act, commonly known as the “Broker Lien Law.” Prior to enactment, the proposed bill was hotly debated by brokers, building owners, and other professionals within Colorado’s real estate community.

Similar to Lien Rights for Other Real Estate Professionals

The law provides commercial real estate brokers in Colorado the ability to file a lien against commercial property when the owner fails to pay a lease commission due to the broker for procuring a tenant for the property. The law is intended to give commercial real estate brokers lien rights similar to other real estate professionals, including architects and building contractors, who are already afforded lien rights through Colorado’s existing mechanic’s lien statutes.

Procedure for Filing Broker Lien

In order for a broker to assert a lien under the new law, there must be a written listing or other compensation agreement with the owner of the building. Assuming that the broker then procures a tenant for the building and is not paid, the broker is entitled to assert a lien against the property subject to the lease in an amount equal to the commission amount set forth in the listing agreement.

{00383815.1}

However, before the lien will attach to the property, the law requires the broker to take certain actions such as providing the property owner with thirty (30) days advanced notice of the broker's intent to file a lien for nonpayment of the commission. The law further requires the broker to make a good faith effort to attempt to resolve the nonpayment of the commission with the property owner through mediation before the lien will attach to the property. The associated mediation will not be binding, unless the parties have otherwise agreed in writing. Finally, to properly attach the lien to the property it must be recorded within ninety (90) days from the later of: (1) the date the tenant takes possession of the leased premises; or (2) the date compensation is due the broker pursuant to the terms of the listing or other compensation agreement.

Effect and Enforcement of Lien

Once the lien is recorded and attaches to the property, the lien will be subordinate to all prior recorded liens and encumbrances affecting the property. The lien will remain effective as a valid encumbrance against the property for a period of six (6) months following the recording of the lien. A broker must initiate a judicial foreclosure prior to the expiration of the six month period in order to enforce the lien thereafter.

Protections for Commercial Property Owners

The law also provides commercial property owners with certain protections from potential lien filings. Most importantly, the law permits brokers and property owners to prospectively waive lien rights that would otherwise be permitted as a result of the law. Such waivers will likely be incorporated as standard provisions in future commercial leasing listing agreements.

With respect to potential improper liens, the law incorporates Colorado's spurious lien statute, which provides property owners with a mechanism to have groundless liens removed as an encumbrance to title. Additionally, once a lien is recorded pursuant to the new law, property owners have the ability to file a bond with the court in an amount equal to one and one-half times the amount of the lien. Once the bond is filed, the lien shall be deemed to be discharged and released in full. The bond provision is intended to provide the property owner with the ability to sell or refinance the property while ensuring financial recourse to the broker should the claim for nonpayment ultimately prove successful.

Effect of the New Law

As a result of the new law, there will likely be a period of uncertainty regarding the nuisances and practical application of such liens until such time as case law develops interpreting the new law. Over time, there will also undoubtedly be changes with respect to how commercial building owners and brokers structure and handle commercial leasing transactions. In light of these changes, commercial building owners and brokers should review their current listing agreements and leasing practices and consider the potential impact of the new law on these agreements and practices.

If you have any questions or need additional information, please contact either of the following:

Randall J. Feuerstein, Esq.
(303) 861-8013
rfeuerstein@duffordbrown.com

David A. Closson, Esq.
(303) 861-8013
dclosson@duffordbrown.com