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HOUSE OF REPRESENTATIVES
147th GENERAL ASSEMBLY

HOUSE BILL NO. 29

AN ACT TO AMEND TITLE 25 OF THE DELAWARE CODE RELATING TO PROPERTY AND COMMERCIAL
REAL ESTATE BROKER'S LIENS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Title 25 of the Delaware Code by making insertions as shown by underlining as follows:

§ 2601. Short title.

This Chapter shall be known and may be cited as the "Commercial Real Estate Broker's Lien Act".

§ 2602. Definitions.

As used in this Chapter, the term:

(1) "Broker" means any individual who holds a broker license from the Delaware Real Estate Commission and who for a compensation or valuable consideration, is self-employed or is employed directly or indirectly by a brokerage organization to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase, sale, or exchange of real estate, or to lease or rent or offer for rent any real estate, or to negotiate leases or rental agreements thereof or of the improvements thereon for others. The Broker is responsible for providing real estate services and is primarily responsible for the day to day management and supervision of a brokerage organization. "Broker" does not include any associate broker, real estate salesperson, or appraiser.

(2) "Brokerage Agreement" means any written agreement for the payment for brokerage services of a Broker for the management, sale, purchase, lease, or other conveyance or acquisition of commercial real estate. The Brokerage Agreement may be stated in any document signed by the party obligated to make payment for the services of a Broker such as a listing agreement, representation agreement, property management agreement, agreement of sale, lease, option, or exchange agreement that expressly states the amount or the method of calculating the amount of compensation for the services of a Broker. No oral brokerage agreements are subject to enforcement under this Chapter.

(3) "Broker's Lien" means the lien of a Broker as permitted by this Chapter.

(4) "Commercial real estate" means any estate or interest owned in:

(a) Any real estate with improvements other than one (1) to four (4) residential units;

(b) Any real estate with improvements, including one (1) to four (4) residential units, that has any part of the property used for non-residential purposes;

(c) Land on which no buildings or structures are located and which is zoned or available for commercial, manufacturing, industrial, retail, or multifamily use;

(d) Land of any zoning classification being purchased for development or subdivision other than land with four (4) or fewer single family residential lots; or

(e) Real estate that is used for agricultural purposes unless the purchaser is buying the property for the purpose of continuing the agricultural use.

Notwithstanding the above, commercial real estate shall not include single-family residential units such as residential condominiums, townhomes, mobile homes, or homes sold, purchased, leased, or otherwise conveyed or acquired on a unit-by-unit basis even though these units may be part of a larger building or property containing more than four (4) residential units unless used for non-residential purposes.

(5) "Conveyance" or "conveying" means a sale, lease, exchange, or other transfer of any estate or interest in commercial real estate.

§ 2603. Right to lien.

Upon performance of all of the duties of the real estate Broker as stated in the Brokerage Agreement except completing settlement, the Broker shall have the right to place a lien upon commercial real estate that is the subject of the Brokerage Agreement for the unpaid amount of compensation due the Broker as stated in the Brokerage Agreement. The Brokerage Agreement must expressly state:

(1) the amount or the method of calculating the amount of compensation for the services of the Broker; and

(2) That the Brokerage Agreement is a binding contract under State law; and

(3) Identify the real estate that is covered by the Brokerage Agreement by description and/or tax parcel number.

Failure of the Brokerage Agreement to contain these provisions shall render the Brokerage Agreement ineligible for a Broker's Lien, but shall not otherwise affect the validity or enforceability of the Brokerage Agreement.

§ 2604. Claim of lien.

(a) The claim for a Broker's Lien shall attach to the commercial real estate upon the Broker filing an affidavit and notice of Broker's Lien in the form required in this Chapter in the Office of the Recorder of Deeds in the county (including any incorporated or unincorporated municipality located therein) where the commercial real estate is located. If the commercial real estate is located in more than one county, the affidavit and notice of Broker's Lien shall be filed in the Office of the Recorder of Deeds for each such county. Affidavits and notices of Broker's Liens shall be indexed by the name of the person or entity charged and the name of the Broker claiming the lien. The index shall also include the name of the person or entity charged, and the date and time the affidavit and notice of Broker's Lien was filed. A fee for filing the affidavit and notice of Broker's Lien shall be the same as for filing a miscellaneous document and shall be paid at the time of filing. The notice of Broker's Lien shall be available to the public upon request. The Broker who placed the lien

shall within 10 days cause a copy to be served upon the person or entity charged by certified mail, return receipt requested, or process server. The return receipt or other official proof of delivery shall constitute presumptive evidence that the notice mailed was received by the party or party's agent; and notation of refusal shall constitute presumptive evidence that refusal was by the party or party's agent.

(b) If a Broker has a Brokerage Agreement with a buyer or tenant for the buyer or tenant to compensate the Broker, then the claim for lien pursuant to the notice of lien so filed according to subsection (a) shall attach to the buyer's or tenant's estate or interest in the commercial real estate only upon either: (1) the recording of the document conveying the commercial real estate to the buyer; or (2) the signing of the lease by the landlord and tenant whichever is applicable, and not before either of those events has occurred. Since in this instance the Broker's Lien only attaches to the buyer's or tenant's interest in the property, it shall not be a lien upon the seller's or landlord's interest in the property even if it was filed prior to completion of the conveyance to the buyer or tenant.

(c) Notwithstanding the filing of an affidavit and notice of Broker's Lien, the Broker's Lien shall not be enforceable or enforced except as provided in § 2610. Notwithstanding any other provision in this Chapter, the affidavit and notice of Broker's Lien may only be filed by an attorney-at-law admitted to the bar of the Supreme Court of the State of Delaware and in good standing.

§ 2605. When to file the affidavit and notice of Broker's Lien.

The lien shall be recorded within 90 days of the failure to pay upon completion of the duties under § 2603 or the agreed upon payment schedule. The affidavit and notice of Broker's Lien shall be effective for one (1) year following the date of filing and while any litigation concerning it is pending. For a notice of lien to be effective while a complaint is pending under § 2610, the Broker is required to file a continuation of lien prior to the expiration of the current notice of lien to provide notice that litigation concerning the lien is pending. Renewal of leases that were the subject of a Brokerage Agreement shall restart the 90-day period in which to file the form of affidavit and notice upon failure to pay the stated compensation.

§ 2606. Form of affidavit and notice.

The affidavit and notice of Broker's Lien shall state the name of the Broker claiming the Broker's Lien, the name of the record owner of the commercial real estate that is the subject of the Broker's Lien as stated in the Brokerage Agreement, the name of the tenant if the lien is upon the leasehold estate of the tenant, a description of the commercial real estate upon which the Broker's Lien is being claimed, the amount or method of computing the compensation for which the Broker's Lien is claimed, the real estate license number of the Broker claiming the Broker's Lien, the names of the parties to the Brokerage Agreement, and the date of the Brokerage Agreement. The affidavit and notice of Broker's Lien shall contain a sworn statement of the person signing before a notary public that the information contained in the notice of lien is true and correct. In the event of any lien claimed against a leasehold estate of a tenant, the Broker who placed the lien shall

within 10 days serve a copy of the affidavit and notice of Broker's Lien upon the landlord of such tenant by certified mail, return receipt requested, or process server, however, the lien against the leasehold estate of a tenant shall not be a lien against the landlord's interest in the property.

§ 2607. Notice of lien to be mailed.

The Broker shall cause a copy of the affidavit and notice of Broker's Lien to be mailed to the record owner of the commercial real estate by certified mail, return receipt requested, or by process server, to the last known address of the owner or, if that is unknown, then to the address for the owner shown on the county real estate tax records, or, if the lien is claimed on the leasehold estate of the tenant, then to the tenant at the address shown on the lease agreement.

§ 2608. Lien void if not filed timely.

The Broker's Lien shall be void and unenforceable if filing does not occur within the time and in the manner required by this Chapter. A Broker's Lien properly asserted against a seller because the seller was obligated to pay the Broker, but not filed until after the deed to the buyer is recorded, shall not be a lien against the property.

§ 2609. Escrow of lien amount.

Whenever an affidavit and notice of Broker's Lien has been recorded, the record owner of the commercial real estate or the tenant in case of a lien upon the leasehold estate may have the lien released by depositing funds equal to the full amount stated in the notice of lien plus 10% to be applied towards any sums awarded the Broker under § 2611. These funds shall be held in escrow by such person and by such process which may be agreed to by the parties, either in the Brokerage Agreement or otherwise, for the payment to the Broker or otherwise for resolution for their dispute or, in the absence of any such mutually agreed person or process, the funds may be deposited with the Superior Court by the filing of an interpleader. Upon such deposit of funds by interpleader, the commercial real estate shall be considered released from such lien or claim of lien. Upon written notice to the Broker that the funds have been escrowed or an interpleader filed, the Broker shall within 10 business days file in the same Office of the Recorder of Deeds where the affidavit and notice of Broker's Lien was filed a document stating that the lien is released, and the commercial real estate released, by an escrow established pursuant to this section or by interpleader. If the Broker fails to file such document, the person holding the funds may sign and file such document and deduct from the escrow the reasonable cost of preparing and filing the document. Upon the filing of such document, the Broker shall be deemed to have an equitable lien on the escrow funds pending a resolution of the Broker's claim for payment and the funds shall not be paid to any person (except for such payment to the holder of the funds as aforesaid) until a resolution of the Broker's claim for payment has been agreed to by all necessary parties or ordered by a court having jurisdiction.

§ 2610. Enforcement of lien.

A Broker may bring suit to enforce the Broker's Lien in the Superior Court in the county where the commercial real estate is located (or in either county if the commercial real estate is located in more than one county) by filing and

prosecuting a complaint as a debt action pursuant to that court's rules of civil procedure. Such complaint may be filed following the occurrence of the failure to make the payment to the Broker, as required by the Brokerage Agreement, for which the affidavit and notice of Broker's Lien had been filed. Notwithstanding any statute of limitation or repose or other procedural limitation, any such complaint may be brought any time prior to the expiration of a notice of lien or continuation of lien, and shall be subject to alternative dispute resolution in the Superior Court pursuant to court rules regardless of the claimed amount.

§ 2611. Costs, expenses, and attorney's fees.

The costs and expenses of all proceedings brought under this Chapter, including the enforcement of the Broker's Lien, including reasonable attorney's fees actually incurred, costs, and prejudgment and post-judgment interest at the contract rate specified in the Brokerage Agreement or, if no rate is specified, then at the legal rate, shall be borne by the party or parties to such proceeding against whom judgment is entered. If more than one (1) party is so responsible for such costs, fees, expenses, and interest, then the costs, fees, expenses, and interest may be equitably apportioned by the court among those responsible parties, but in the absence of such apportionment, such responsible parties shall be jointly and severally liable.

In the event that a Court or arbitrator determines that no lien should have been filed under this Chapter, then the Court or arbitrator shall order the Broker to pay the prevailing defendant's expenses of all proceedings under this Chapter, including reasonable attorney's fees actually incurred, and costs.

§ 2612. Priority of liens.

The Broker's Lien shall be a lien on the commercial real estate that is the subject of the notice of lien and shall have priority from the time it has been filed as required by this Chapter, except as to all mortgages whenever recorded or filed, mechanic's liens, other liens imposed or created by statute, and liens of the federal government, State government and/or their respective political subdivisions, each of which shall have priority over a Broker's Lien.

§ 2613. Release or satisfaction of lien.

(a) Whenever a notice of lien has been filed and a condition occurs that in good faith would preclude the Broker from receiving compensation under the terms of the Brokerage Agreement, the Broker shall provide to the record owner of the commercial real estate and the person who would have been liable for such payment, a written release or satisfaction of the Broker's Lien.

(b) The record owner, the person liable for payment to the Broker pursuant to the Brokerage Agreement, or the holder of any lien against the commercial real estate may serve a demand on the Broker who filed the affidavit and notice of Broker's Lien requiring that suit be commenced to enforce the Broker's Lien, a suit shall be commenced as provided in this Chapter within 20 days, or the Broker's Lien shall be deemed released and satisfied. Service of such demand shall be in the manner required for the service of a summons and complaint under the rules of civil procedure of the Superior Court.

(c) Whenever a claim is paid for which an affidavit and notice of Broker's Lien has been timely filed, or where there is failure to institute a suit to enforce the Broker's Lien within the times provided by this Chapter, or if the affidavit and notice of lien has not been continued as provided in this Chapter, the Broker's Lien shall be deemed released and satisfied and the Broker shall file a satisfaction and release as provided in this Chapter with the Office of the Recorder of Deeds where the affidavit and notice of Broker's Lien is filed and acknowledge release and satisfaction of the Broker's Lien, in writing, on written demand of the record owner or the person who was liable for the payment pursuant to the Brokerage Agreement.

(d) A Delaware lawyer representing a party in a real estate settlement may require a Broker who has been paid the full compensation due at settlement to execute a release or estoppels affidavit stating that no lien has been filed for the compensation that has been paid, no lien will be filed, and if a notice of lien was filed, that the Broker authorizes the filing of a written release or satisfaction of the lien by the settlement attorney. Such release, whether signed by the Broker or an associate broker or salesperson licensed under the Broker, is binding upon the Broker and brokerage organization and may be relied upon by the parties and title insurance company.

§ 2614. No waiver.

An agreement by a Broker to waive its right to a Broker's Lien without having first received full payment is against public policy, void, and unenforceable.

§ 2615. Inconsistent law invalid.

To the extent that this Chapter conflicts with § 1601(b)(1) of this Title, this later Act shall control.

Section 2. Effective date.

This Act shall apply to any written Brokerage Agreement becoming effective on a date that is at least 90 days after this Act becomes law, but not to any Brokerage Agreement that has become effective prior to that date unless by written agreement of the parties to that Brokerage Agreement.

SYNOPSIS

This bill creates a commercial real estate Broker's Lien and is patterned after similar legislation enacted in several other states. Commercial real estate brokers perform valuable services making a market for real estate and assisting sellers, buyers, landlords, and tenants. These services increase the value of real estate. The broker's right to compensation should be protected by the right to file a lien.

At the same time, this bill protects sellers, buyers, landlords or tenants by being sure they are only charged for brokerage services if they signed a document agreeing to pay.

The bill also protects mortgage lenders, real estate taxes and municipal utilities by providing that all of these lienholders have a higher lien status than the Broker's Lien and will not be affected by the Broker's Lien.

This bill also provides for a procedure to establish an escrow account to extinguish a Broker's Lien so as not to delay a real estate settlement for a Broker's Lien that is genuinely in dispute.

For a notice of lien to be effective while a complaint is pending under section 2610, the Broker is required to file a continuation of lien prior to the expiration of the current notice of lien.