

SENATE BILL No. 215

AN ACT concerning real estate; enacting the commercial real estate broker lien act; concerning real estate appraisers; relating to real estate brokers and salespersons; amending K.S.A. 58-4109 and K.S.A. 2004 Supp. 58-3062 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. Sections 1 to 18, inclusive, and amendments thereto, shall be known and may be cited as the commercial real estate broker lien act.

New Sec. 2. As used in the commercial real estate broker lien act:

(a) "Commercial real estate" means any real estate and any interest therein, except:

- (1) Real estate containing one to four residential units;
- (2) real estate containing single-family residential units such as condominiums, townhouses or homes in a subdivision when sold, leased or otherwise conveyed on a unit by unit basis, even though these units may be a part of a larger building or parcel of real estate containing more than four residential units;
- (3) real estate on which no buildings or structures are located and which is zoned for single-family residential use; or
- (4) real estate used for agricultural purposes.

(b) "Compensation" means all amounts to be paid to a broker for services provided under a written agreement including, but not limited to, the broker's commission and any brokerage, management, consulting or other fees.

(c) "Services" means any act or service for which compensation is paid and the performance of which requires a license under the real estate brokers' and salespersons' license act.

(d) Words and phrases used in this act, unless provided otherwise have the meanings ascribed thereto in K.S.A. 58-3035, and amendments thereto.

New Sec. 3. (a) Any broker shall have a lien on commercial real estate in the amount of the compensation as agreed upon by the broker and the owner or the owner's agent, if:

- (1) Such real estate is listed with the broker under terms of a written agreement signed by the owner or the owner's agent; and
- (2) the broker or salespersons retained by the broker have provided services that resulted in the procuring of a person or entity ready, willing and able to purchase, lease or otherwise accept a conveyance of the commercial real estate as provided by such agreement which were otherwise acceptable to the owner or owner's agent as evidenced by a written agreement signed by the owner or the owner's agent.

(b) A broker also shall have a lien on such commercial real estate if the broker has a written agreement with a person to represent such person in the purchase, lease or other conveyance to the buyer of such real estate when the broker becomes entitled to compensation pursuant to the written agreement.

New Sec. 4. The notice of any lien filed pursuant to this act shall state the name of the broker claiming the lien, the name of the owner of the real estate, a description of the real estate upon which the lien is being claimed, the amount for which the lien is claimed and the real estate license number of the broker. The notice of lien shall be signed by the broker and the broker shall attest that the information contained in the notice is true and accurate as to the broker's knowledge and belief.

New Sec. 5. A broker's lien attaches to the commercial real estate when:

(a) The broker procures a person or entity ready, willing and able to purchase, lease or otherwise accept a conveyance of such real estate upon the terms set forth in the written agreement with the owner or terms otherwise acceptable to the owner or owner's agent, or the broker is entitled to a fee or commission pursuant to a written agreement signed by the owner or the owner's agent; and

(b) the broker records a notice of the lien in the office of the register of deeds of the county in which the commercial real estate is located so long as such lien is filed prior to the actual conveyance or transfer of the commercial real estate subject to such broker's lien.

New Sec. 6. If compensation to a broker is due in installments and a portion of the compensation is due after the conveyance or transfer of the commercial real estate, any claim for a lien for installment payments

due after the transfer or conveyance of such real estate may be recorded any time after the transfer or conveyance of the commercial real estate on behalf of a broker who represented the current owner of the real estate but must be recorded before the date on which the payment is due. Such lien shall be effective as a lien against the commercial real estate only to the extent moneys are still owed to the broker. A single claim for a lien recorded before the transfer or conveyance of the commercial real estate, claiming all moneys due under an installment payment agreement is not valid or enforceable to the extent of the payments due after the transfer or conveyance. The lien attaches for purposes of this paragraph when the claim for lien is recorded.

New Sec. 7. In the case of a lease, the lien must be recorded within 90 days after the lessee takes possession of the property. If written notice of the intention to sign the lease is personally served on the broker entitled to claim a lien at least 10 days before the date of the intended signing of the lease, the claim for lien must be recorded before the date indicated for the signing of the lease. The lien attaches for purposes of this paragraph when the claim for lien is recorded.

New Sec. 8. If the broker has a written agreement with a prospective buyer as provided in subsection (b) of section 3, and amendments thereto, the lien attaches when the broker records a notice of the lien within 90 days after the purchase, conveyance or transfer in the office of the register of deeds in the county in which the commercial real estate is located.

New Sec. 9. If a lease also includes provisions for a sublease or assignment of lease, the notice of lien must be recorded not later than 90 days after the lessee takes possession of the leased premises. If the transferor personally serves written notice of the intended execution of the lease on the broker entitled to claim a lien at least 10 days prior to the date of the intended execution of the lease, the notice of lien must be recorded before the date indicated in such notice for the execution of the lease. The lien shall attach as of the recording of the notice of lien and shall not relate back to the date of the written instrument.

New Sec. 10. If additional compensation is owed to a broker as a result of the exercise of an option to expand the leased premises, the renewal or extension of a lease, the purchase of the property or other transaction pursuant to a written agreement signed by the current owner or tenant, the broker may record its notice of lien at any time after execution of the lease or other written agreement containing such option but not later than 90 days after the occurrence of the transaction for which the additional commission is claimed.

New Sec. 11. Any action to foreclose a lien to collect additional compensation must be commenced within two years of the date of the transaction on which the additional compensation is claimed. If the property is sold or otherwise conveyed prior to the date on which additional compensation is due, and if the broker has filed a valid notice of lien prior to the sale or other conveyance of the property, the purchaser or transferee shall be deemed to have notice of and shall take title to the property subject to the notice of lien. If a broker claiming additional compensation fails to record its notice of lien for additional compensation prior to the recording of a deed conveying legal title to the property to the purchaser or transferee, such broker may not claim a lien on the property. The provisions of this subsection shall not limit or otherwise affect claims or defenses a broker, owner or other party may have on any other basis, in law or in equity.

New Sec. 12. If a claim for a lien has been filed with the register of deeds and a condition occurs that would preclude the broker from receiving compensation under the terms of the broker's written agreement, the broker shall record and provide the owner of record a written release or satisfaction of the lien.

New Sec. 13. (a) Within 10 days of recording the notice of lien, the broker shall mail a copy of the notice of the lien to the owner of record of the commercial real estate or the agent thereof at the address of the owner stated in the written agreement on which the claim for lien is based. If no address is given, such notice shall be mailed to the address of the real estate on which the claim of lien is based. If the notice of lien is recorded within 10 days prior to closing, the broker is not required to

mail or personally serve a copy of the notice of lien. Mailing a copy of the notice of lien is effective when deposited in the United States mail, with postage prepaid.

(b) The broker's lien shall be unenforceable if mailing or service of a copy of notice of lien does not occur at the time and in the manner required by this section. The broker's lien is void if the broker does not record the lien as provided in this act.

New Sec. 14. (a) A broker may enforce a lien attaching against commercial real estate by filing a petition to foreclose such lien in the district court of the county in which such real estate is located. Failure to file such petition within two years of recording a lien shall extinguish such lien. A claim for a lien extinguished pursuant to this section may not be asserted in subsequent proceedings.

(b) A foreclosure petition shall contain the name of the broker and the broker's license number, the name of the owner or owners of the real estate, a statement of the terms of the contract or agreement on which the lien is based, the date when the contract or agreement was made, a description of the services performed, the amount due and unpaid, a description of the real estate that is subject to the lien and any other facts necessary for a full understanding of the rights of the parties. The plaintiff shall file the action against all known parties who have an interest in such real estate. A foreclosure action for a lien claimed pursuant to this act shall be brought in the manner provided by article 24 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.

(c) Any valid prior recorded liens or mortgages shall have priority over a real estate broker's lien.

New Sec. 15. If a broker claiming a lien pursuant to this act fails to file suit to enforce the lien within 30 days after a properly served written demand of the owner, the lien shall be extinguished. Service of such demand shall be by restricted mail as defined by K.S.A. 60-103 and amendments thereto or by personal service.

New Sec. 16. If a lien filed pursuant to this act has been paid in full or otherwise discharged, or if the broker fails to institute a suit to enforce the lien within the time provided by section 11 and section 14, and amendments thereto, the broker shall record the satisfaction or release of such lien in writing upon written demand within 20 days after such demand in the office of the register of deeds of the county in which the commercial real estate is located.

New Sec. 17. (a) The following persons may make demand upon a broker for the entering of satisfaction or release of the lien, as provided for in sections 12 and 16, and amendments thereto:

- (1) An owner or the owner's heirs or assigns or anyone acting for such owner, heirs or assigns;
- (2) an owner of real estate upon which a lien has been recorded by someone having no legitimate claim in the real estate; or
- (3) a lender or designated closing agent acting as a closing agent in the sale, financing or refinancing of the real estate subject to such lien.

(b) Any broker or assignee of a broker who refuses or neglects to enter satisfaction or release of such lien within 20 days after demand has been made as provided in subsection (a) shall be liable to the person for whom the demand was made in the sum of \$500 as a civil penalty, together with a reasonable attorney's fee for preparing and prosecuting the action. The plaintiff in such action may recover any additional damages that the evidence in the case warrants. Civil actions may be brought under this section before any court of competent jurisdiction, and attachments may be had as in other cases.

New Sec. 18. The costs of any proceeding arising out of a lien filed pursuant to this act, including reasonable attorney's fees, shall be awarded to the prevailing party or parties.

Sec. 19. K.S.A. 2004 Supp. 58-3062 is hereby amended to read as follows: 58-3062. (a) No licensee, whether acting as an agent, transaction broker or a principal, shall:

- (1) Intentionally use advertising that is misleading or inaccurate in any material particular or that in any way misrepresents any property, terms, values, policies or services of the business conducted, or uses the trade name, collective membership mark, service mark or logo of any

organization owning such name, mark or logo without being authorized to do so.

(2) Fail to account for and remit any money which comes into the licensee's possession and which belongs to others.

(3) Misappropriate moneys required to be deposited in a trust account pursuant to K.S.A. 58-3061, and amendments thereto, convert such moneys to the licensee's personal use or commingle the money or other property of the licensee's principals with the licensee's own money or property, except that nothing herein shall prohibit a broker from having funds in an amount not to exceed \$100 in the broker's trust account to pay expenses for the use and maintenance of such account.

(4) Accept, give or charge any rebate or undisclosed commission.

(5) Pay a referral fee to a person who is properly licensed as a broker or salesperson in Kansas or another jurisdiction or who holds a corporate real estate license in another jurisdiction if the licensee knows that the payment of the referral fee will result in the payment of a rebate by the Kansas or out-of-state licensee.

(6) Represent or attempt to represent a broker without the broker's express knowledge and consent.

(7) Guarantee or authorize any person to guarantee future profits that may result from the resale of real property.

(8) Place a sign on any property offering it for sale or lease without the written consent of the owner or the owner's authorized agent.

(9) Offer real estate for sale or lease without the knowledge and consent of the owner or the owner's authorized agent or on terms other than those authorized by the owner or the owner's authorized agent.

(10) Induce any party to break any contract of sale or lease.

(11) Pay a commission or compensation to any person, not licensed under this act, for performing any activity for which a license is required under this act.

(12) Fail to see that financial obligations and commitments between the parties to an agreement to sell, exchange or lease real estate are in writing, expressing the exact agreement of the parties or to provide, within a reasonable time, copies thereof to all parties involved.

(13) Procure a signature to a purchase contract which has no definite purchase price, method of payment, description of property or method of determining the closing date.

(14) Engage in fraud or make any substantial misrepresentation.

(15) Represent to any lender, guaranteeing agency or any other interested party, either verbally or through the preparation of false documents, an amount in excess of the true and actual sale price of the real estate or terms differing from those actually agreed upon.

(16) Fail to make known to any purchaser or lessee any interest the licensee has in the real estate the licensee is selling or leasing or to make known to any seller or lessor any interest the licensee will have in the real estate the licensee is purchasing or leasing.

(17) Fail to inform both the buyer, at the time an offer is made, and the seller, at the time an offer is presented, that certain closing costs must be paid and the approximate amount of such costs.

(18) Fail without just cause to surrender any document or instrument to the rightful owner.

(19) Accept anything other than cash as earnest money unless that fact is communicated to the owner prior to the owner's acceptance of the offer to purchase, and such fact is shown in the purchase agreement.

(20) Fail to deposit any check or cash received as an earnest money deposit or as a deposit on the purchase of a lot within five business days after the purchase agreement or lot reservation agreement is signed by all parties, unless otherwise specifically provided by written agreement of all parties to the purchase agreement or lot reservation agreement, in which case the licensee shall deposit the check or cash received on the date provided by such written agreement.

(21) Fail in response to a request by the commission or the director to produce any document, book or record in the licensee's possession or under the licensee's control that concerns, directly or indirectly, any real estate transaction or the licensee's real estate business.

(22) Refuse to appear or testify under oath at any hearing held by the commission.

(23) Demonstrate incompetency to act as a broker, associate broker or salesperson.

(24) *Except as provided by K.S.A. 40-2404, and amendments thereto,* knowingly receive or accept, directly or indirectly, any rebate, reduction or abatement of any charge, or any special favor or advantage or any monetary consideration or inducement, involving the issuance of a title insurance policy or contract concerning which the licensee is directly or indirectly connected, from a title insurance company or title insurance agent, or any officer, employee, attorney, agent or solicitor thereof.

(25) Engage in the purchase of one-, two-, three- or four-family dwellings, including condominiums and cooperatives, or the acquisition of any right, title or interest therein, including any equity or redemption interests, if:

(A) (i) At the time of such purchase, the dwellings are subject to a right of redemption pursuant to foreclosure of a mortgage on such dwellings; (ii) the licensee fails to give written notice of the purchase, within 20 days thereafter, to the mortgage holder or judgment creditor who held such mortgage; and (iii) the licensee, unless otherwise required by law or court order, fails to apply any rent proceeds from the dwellings to the judgment lien arising from the foreclosure of such mortgage, as payments become due under the loan, regardless of whether the licensee is obligated to do so;

(B) (i) the dwellings are subject to a loan which is secured by a mortgage and which is in default at the time of such purchase or in default within one year after such purchase; (ii) the licensee fails to give written notice of the purchase, within 20 days thereafter, to the mortgage holder; and (iii) the licensee, unless otherwise required by law or court order, fails to apply any rent proceeds from the dwellings to the mortgage as the payments come due, regardless of whether the licensee is obligated on the loan; or

(C) the licensee fails to notify, at the time of rental, any person renting any such dwelling of the extent and nature of the licensee's interest in such dwelling and the probable time until possession will be taken by the mortgage holder or judgment creditor.

(26) Commit forgery or, unless authorized to do so by a duly executed power of attorney, sign or initial any contractual agreement on behalf of another person in a real estate transaction.

(27) Enter into contracts with persons not licensed by the commission to perform services requiring a license under K.S.A. 58-3034 *et seq.*, and amendments thereto, except as provided by K.S.A. 2004 Supp. 58-3077, and amendments thereto.

(b) No salesperson or associate broker shall:

(1) Except as provided in paragraph (A) or (B), accept a commission or other valuable consideration from anyone other than the broker by whom the licensee is employed or with whom the licensee is associated as an independent contractor.

(A) A salesperson or associate broker may accept a commission or other valuable consideration from a licensee who employs the salesperson or associate broker as a personal assistant provided that: (i) the licensee and the salesperson or associate broker who is employed as a personal assistant are licensed under the supervision of the same broker, and (ii) the supervising broker agrees in writing that the personal assistant may be paid by the licensee.

(B) If a salesperson or associate broker has (i) organized as a professional corporation pursuant to K.S.A. 17-2706 *et seq.*, and amendments thereto, (ii) incorporated under the Kansas general corporation code contained in K.S.A. 17-6001 *et seq.*, and amendments thereto, (iii) organized under the Kansas limited liability company act contained in K.S.A. 2004 Supp. 17-7662 *et seq.*, and amendments thereto, or (iv) has organized as a limited liability partnership as defined in K.S.A. 2004 Supp. 56a-101, and amendments thereto, the commission or other valuable consideration may be paid by the licensee's broker to such professional corporation, corporation, limited liability company or limited liability partnership. This provision shall not alter any other provisions of this act.

(2) Fail to place, as soon after receipt as practicable, any deposit money or other funds entrusted to the salesperson or associate broker in the custody of the broker whom the salesperson or associate broker represents.

(3) (A) Except as provided by paragraph (B), be employed by or associated with a licensee at any one time other than the supervising broker who employs such salesperson or associate broker or with who the salesperson or associate broker is associated as an independent contractor.

(B) An associate broker may be employed by or associated with more than one supervising broker at any one time if each supervising broker who employs or associates with the associate broker consents to such multiple employment or association. Such consent shall be on a form provided by the commission and shall not be effective until a signed copy of the completed form has been filed with the commission.

(4) Except as provided by subsection (b), pay a commission or compensation to any person for performing any activity for which a license is required under this act.

(5) Fail to disclose to such salesperson's or associate broker's supervising broker or branch broker that such salesperson or associate broker is performing any activity for which a license is required under K.S.A. 58-3036, and amendments thereto, outside the supervision of the supervising broker or branch broker. The provisions of this subsection shall not apply to any activity or person exempted from the real estate brokers' and salespersons' license act pursuant to K.S.A. 58-3037, and amendments thereto.

(c) No broker shall:

(1) Pay a commission or compensation to any person for performing the services of an associate broker or salesperson unless such person is licensed under this act and employed by or associated with the broker.

(2) Fail to deliver to the seller in every real estate transaction, at the time the transaction is closed, a complete, detailed closing statement showing all of the receipts and disbursements handled by the broker for the seller, or fail to deliver to the buyer a complete statement showing all money received in the transaction from such buyer and how and for what the same was disbursed, or fail to retain true copies of such statements in the broker's files, except that the furnishing of such statements to the seller and buyer by an escrow agent shall relieve the broker's responsibility to the seller and the buyer.

(3) Fail to properly supervise the activities of an associated or employed salesperson or associate broker.

(4) Lend the broker's license to a salesperson, or permit a salesperson to operate as a broker.

(5) Fail to provide to the principal a written report every 30 days, along with a final report, itemizing disbursements made by the broker from advance listing fees.

(d) (1) If a purchase agreement provides that the earnest money be held by an escrow agent other than a real estate broker, no listing broker shall:

(A) Fail to deliver the purchase agreement and earnest money deposit to the escrow agent named in the purchase agreement within five business days after the purchase agreement is signed by all parties unless otherwise specifically provided by written agreement of all parties to the purchase agreement, in which case the broker shall deliver the purchase agreement and earnest money deposit to the escrow agent named in the purchase agreement on the date provided by such written agreement; or

(B) fail to obtain and keep in the transaction file a receipt from the escrow agent showing date of delivery of the purchase agreement and earnest money deposit.

(2) If a purchase agreement provides that the earnest money be held by an escrow agent other than a real estate broker and the property was not listed with a broker, no broker for the buyer shall:

(A) Fail to deliver the purchase agreement and earnest money deposit to the escrow agent named in the purchase agreement within five business days after the purchase agreement is signed by all parties unless otherwise specifically provided by written agreement of all parties to the purchase agreement, in which case the broker shall deliver the purchase agreement and earnest money deposit to the escrow agent named in the purchase agreement on the date provided by such written agreement; or

(B) fail to obtain and keep in the transaction file a receipt from the escrow agent showing date of delivery of the purchase agreement and earnest money deposit.

(3) If a purchase agreement provides that the earnest money be held

by an escrow agent other than a real estate broker and neither the seller nor buyer is represented by a broker, no transaction broker shall:

(A) Fail to deliver the purchase agreement and earnest money deposit to the escrow agent named in the purchase agreement within five business days after the purchase agreement is signed by all parties unless otherwise specifically provided by written agreement of all parties to the purchase agreement, in which case the broker shall deliver the purchase agreement and earnest money deposit to the escrow agent named in the purchase agreement on the date provided by such written agreement; or

(B) fail to obtain and keep in the transaction file a receipt from the escrow agent showing date of delivery of the purchase agreement and earnest money deposit.

The commission may adopt rules and regulations to require that such purchase agreement which provides that the earnest money be held by an escrow agent other than a real estate broker include: (1) notification of whether or not the escrow agent named in the purchase agreement maintains a surety bond, and (2) notification that statutes governing the disbursement of earnest money held in trust accounts of real estate brokers do not apply to earnest money deposited with the escrow agent named in the purchase agreement.

(e) A branch broker shall not be employed by or associated with more than one supervising broker at any one time unless each supervising broker who employs or associates with the branch broker consents to such multiple employment or association. Such consent shall be on a form provided by the commission and shall not be effective until a signed copy of the completed form has been filed with the commission.

(f) Nothing in this section shall be construed to grant any person a private right of action for damages or to eliminate any right of action pursuant to other statutes or common law.

Sec. 20. K.S.A. 58-4109 is hereby amended to read as follows: 58-4109. (a) There is hereby established the following classes of real property appraisers:

- (1) State licensed real property appraiser classification;
- (2) certified general real property appraiser classification;
- (3) certified residential real property appraiser classification; and
- (4) state provisional licensed real property appraiser classification.

(b) The board may establish, by rules and regulations, such other classifications as permitted by federal law.

(c) The board shall adopt rules and regulations, consistent with requirements and criteria adopted pursuant to federal law, to:

- (1) Define each classification;
- (2) establish education and experience requirements for each classification;
- (3) establish examination specifications for each classification; and
- (4) establish continuing education requirements for renewal of each classification.

(d) In adopting rules and regulations pursuant to subsection (c), the board shall determine the education, experience and examination requirements necessary to provide appropriate assurance that an applicant for certification or licensure is competent to perform appraisals within the scope of practice of the appraisal work authorized for the classification applied for and that persons renewing their certificates or licenses have current knowledge of real property appraisal theory, practices and techniques which will provide a high degree of service and protection to those members of the public with whom they deal. In making such determination, the board shall take into consideration the following:

(1) Appropriate knowledge of technical terms commonly used in or related to real estate appraising, appraisal report writing and economic concepts applicable to real estate;

(2) understanding of the principles of land economics, real estate appraisal processes and problems likely to be encountered in gathering, interpreting and processing data in carrying out appraisal disciplines;

(3) understanding of the standards for the development and communication of real estate appraisals as provided in this act;

(4) knowledge of theories of depreciation, cost estimating, methods of capitalization and mathematics of real estate appraisal that are appropriate for the classification applied for;

(5) knowledge of such other principles and procedures as may be appropriate for the respective classifications;

(6) basic understanding of real estate law;

(7) understanding of the types of misconduct for which disciplinary proceedings may be initiated against a state certified or licensed appraiser, as set forth in this act;

(8) the requirements of federal law; and

(9) such other matters as the board determines appropriate and relevant.

(e) The application for original certification or licensure and examination shall specify the classification being applied for.

~~(f) In no event shall a certificate or license be issued to an individual unless the examination required for the classification applied for was passed by the applicant within the five-year period immediately preceding the date of application.~~

~~(g) The board may approve applications for transitional licenses received prior to December 31, 1991, if the board determines the applicant has met the education and examination requirements established for state licensed appraisers.~~

~~A transitional license shall expire on the next June 30 after issuance and shall not be renewed more than two times. The license shall include a statement that it is a transitional license. If the transitional license is renewed a second time, the renewed license shall include a statement that it may not be renewed and extended beyond the expiration date appearing on the license.~~

~~The holder of a transitional license may obtain forms from the board to submit evidence of having completed the experience requirements established for state licensed appraisers. If the board approves issuance of a license prior to the expiration date of the transitional license, the applicant shall return the transitional license to the board.~~

~~Except as provided in this subsection, applicants for transitional licenses and holders of transitional licenses are subject to all provisions of this act and any rules and regulations adopted hereunder.~~

Sec. 21. K.S.A. 58-4109 and K.S.A. 2004 Supp. 58-3062 are hereby repealed.

Sec. 22. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

SENATE adopted
Conference Committee Report _____

President of the Senate.

Secretary of the Senate.

Passed the HOUSE
as amended _____

HOUSE adopted
Conference Committee Report _____

Speaker of the House.

Chief Clerk of the House.

APPROVED _____

Governor.