

Second Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 10-0843.01 Duane Gall

HOUSE BILL 10-1288

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A BILL FOR AN ACT

101 **CONCERNING THE ABILITY OF A COMMERCIAL REAL ESTATE BROKER**
102 **TO SECURE PAYMENT OF COMMISSIONS EARNED, AND, IN**
103 **CONNECTION THEREWITH, ENACTING THE "COMMERCIAL REAL**
104 **ESTATE BROKERS COMMISSION SECURITY ACT".**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

Existing law allows architects, building contractors, auto mechanics, and others to enforce debts through creation of a lien on real

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

or personal property. The bill extends this enforcement mechanism to real estate brokers who procure tenants for commercial real estate, either under a listing agreement or a written compensation agreement.

The bill places conditions on the real estate broker's right to the lien, including an obligation to seek mediation of the dispute; to give notice of the intent to pursue enforcement of the debt through the lien process, both before and after recording the notice of lien; and to commence a lawsuit within 6 months if the debt is not paid.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** Title 38, Colorado Revised Statutes, is amended BY
3 THE ADDITION OF A NEW ARTICLE to read:

4 **ARTICLE 22.5**

5 **Commercial Real Estate Brokers**

6 **Commission Security Act**

7 **38-22.5-101. Short title.** THIS ARTICLE SHALL BE KNOWN AND
8 MAY BE CITED AS THE "COMMERCIAL REAL ESTATE BROKERS
9 COMMISSION SECURITY ACT".

10 **38-22.5-102. Definitions.** AS USED IN THIS ARTICLE, UNLESS THE
11 CONTEXT OTHERWISE REQUIRES:

12 (1) "COMMERCIAL REAL ESTATE" MEANS ANY REAL PROPERTY
13 OTHER THAN REAL PROPERTY CONTAINING ONE TO FOUR RESIDENTIAL
14 UNITS. "COMMERCIAL REAL ESTATE" DOES NOT INCLUDE SINGLE-FAMILY
15 OR MULTI-FAMILY RESIDENTIAL UNITS INCLUDING CONDOMINIUMS,
16 TOWNHOUSES, OR HOMES IN A SUBDIVISION WHEN SUCH REAL ESTATE IS
17 SOLD, LEASED, OR OTHERWISE CONVEYED ON A UNIT-BY-UNIT BASIS EVEN
18 THOUGH THE UNITS MAY BE PART OF A LARGER BUILDING OR PARCEL OF
19 REAL PROPERTY CONTAINING MORE THAN FOUR RESIDENTIAL UNITS.

20 (2) "OWNER" MEANS THE OWNER OF RECORD OF REAL ESTATE AND
21 INCLUDES AN AGENT OF SUCH OWNER.

1 (3) "REAL ESTATE BROKER" HAS THE MEANING SET FORTH IN
2 SECTION 12-61-101, C.R.S.

3 (4) "RENEWAL COMMISSION" MEANS AN ADDITIONAL COMMISSION
4 THAT MAY BECOME PAYABLE TO A REAL ESTATE BROKER IF A LEASE IS
5 LATER RENEWED OR MODIFIED TO EXPAND THE LEASED PREMISES OR
6 EXTEND THE LEASE TERM.

7 **38-22.5-103. Brokers' lien for compensation for services -**
8 **requirements.** (1) A REAL ESTATE BROKER SHALL HAVE A LIEN ON
9 COMMERCIAL REAL ESTATE, IN THE AMOUNT OF THE COMPENSATION AS
10 SET FORTH IN THE LISTING AGREEMENT OR COMPENSATION AGREEMENT
11 BETWEEN THE REAL ESTATE BROKER AND THE OWNER, IF:

12 (a) SUCH REAL ESTATE IS LISTED WITH THE REAL ESTATE BROKER
13 UNDER TERMS OF A WRITTEN AGREEMENT FOR THE PURPOSE OF LEASING
14 ANY INTEREST IN THE COMMERCIAL REAL ESTATE OR IS THE SUBJECT OF A
15 WRITTEN COMPENSATION AGREEMENT BETWEEN THE REAL ESTATE
16 BROKER AND THE OWNER;

17 (b) THE REAL ESTATE BROKER HAS PROVIDED LICENSED SERVICES
18 THAT RESULTED IN THE PROCURING OF A PERSON OR ENTITY WHO HAS
19 LEASED ANY INTEREST IN THE COMMERCIAL REAL ESTATE IN ACCORDANCE
20 WITH THE LISTING AGREEMENT OR COMPENSATION AGREEMENT; AND

21 (c) THE REAL ESTATE BROKER HAS EXHAUSTED ALL AVAILABLE
22 MEANS TO ENFORCE COLLECTION UNDER THE LISTING AGREEMENT OR
23 COMPENSATION AGREEMENT; EXCEPT THAT THIS PARAGRAPH (c) SHALL
24 NOT APPLY IF, AS A PRACTICAL MATTER, COMPLIANCE WITH THE TERMS OF
25 THE LISTING AGREEMENT OR COMPENSATION AGREEMENT WOULD MAKE
26 THE LIEN UNDER THIS ARTICLE UNOBTAINABLE OR UNENFORCEABLE.

27 (2) NOTWITHSTANDING SUBSECTION (1) OF THIS SECTION,

1 COMMERCIAL REAL ESTATE IS NOT SUBJECT TO A REAL ESTATE BROKERS'
2 LIEN TO ENFORCE THE PAYMENT OF A RENEWAL COMMISSION IF THE
3 PROPERTY IS CONVEYED TO A BONA FIDE PURCHASER BEFORE THE
4 RECORDING OF A NOTICE OF LIEN PURSUANT TO SECTION 38-22.5-104.

5 **38-22.5-104. Notice of intent - lien notice - service - contents -**
6 **filing.** (1) THE REAL ESTATE BROKER SHALL SERVE A NOTICE OF INTENT
7 TO RECORD A NOTICE OF LIEN UPON THE OWNER AT LEAST THIRTY DAYS
8 BEFORE RECORDING THE NOTICE OF LIEN WITH THE COUNTY CLERK AND
9 RECORDER OF THE COUNTY IN WHICH THE COMMERCIAL REAL ESTATE IS
10 LOCATED. SUCH NOTICE OF INTENT SHALL BE SERVED BY PERSONAL
11 SERVICE OR BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT
12 REQUESTED, ADDRESSED TO THE LAST-KNOWN ADDRESS OF THE OWNER OR
13 THE OWNER'S AGENT, AT LEAST THIRTY DAYS BEFORE RECORDING OF THE
14 NOTICE OF LIEN WITH THE COUNTY CLERK AND RECORDER. IF THE NOTICE
15 OF INTENT IS SERVED UPON THE OWNER'S AGENT, A COPY OF THE NOTICE
16 SHALL ALSO BE SERVED UPON THE OWNER OF RECORD BY PERSONAL
17 SERVICE OR BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT
18 REQUESTED, ADDRESSED TO THE OWNER'S LAST-KNOWN ADDRESS, AT
19 LEAST THIRTY DAYS BEFORE RECORDING OF THE NOTICE OF LIEN WITH THE
20 COUNTY CLERK AND RECORDER.

21 (2) THE NOTICE OF LIEN SHALL STATE THE NAME OF THE REAL
22 ESTATE BROKER, THE NAME OF THE OWNER, A LEGAL DESCRIPTION OF THE
23 PROPERTY UPON WHICH THE LIEN IS BEING CLAIMED, THE AMOUNT FOR
24 WHICH THE LIEN IS CLAIMED, AND THE REAL ESTATE LICENSE NUMBER OF
25 THE REAL ESTATE BROKER. THE REAL ESTATE BROKER SHALL SIGN THE
26 NOTICE OF LIEN, AND ATTEST THAT THE INFORMATION CONTAINED IN THE
27 NOTICE IS TRUE AND ACCURATE AS TO HIS OR HER KNOWLEDGE AND

1 BELIEF.

2 **38-22.5-105. Mediation period.** THE REAL ESTATE BROKER
3 SHALL MAKE A GOOD FAITH EFFORT TO ATTEMPT TO RESOLVE THE
4 NONPAYMENT OF THE COMMISSION THROUGH MEDIATION. THE
5 MEDIATOR'S RECOMMENDED RESOLUTION IS NOT BINDING UNLESS THE
6 PARTIES SO AGREE IN WRITING. THE PARTIES SHALL JOINTLY APPOINT AN
7 ACCEPTABLE MEDIATOR AND SHALL SHARE EQUALLY IN THE COST OF THE
8 MEDIATION. MEDIATION SHALL COMMENCE WHEN A WRITTEN NOTICE
9 REQUESTING MEDIATION IS DELIVERED BY ONE PARTY TO THE OTHER AT
10 THE PARTY'S LAST-KNOWN ADDRESS, AND, UNLESS OTHERWISE AGREED,
11 THE MEDIATION SHALL TERMINATE IF THE ENTIRE DISPUTE IS NOT
12 RESOLVED WITHIN THIRTY DAYS THEREAFTER. THIS SECTION DOES NOT
13 IMPAIR THE ABILITY OF A REAL ESTATE BROKER TO RECORD A NOTICE OF
14 LIEN IF A RESOLUTION IS NOT AGREED UPON BY BOTH PARTIES.

15 **38-22.5-106. When lien attaches - effect of payment by**
16 **installments.** (1) THE LIEN CREATED BY SECTION 38-22.5-103 ATTACHES
17 TO AN INTEREST IN COMMERCIAL REAL ESTATE WHEN ALL OF THE
18 FOLLOWING CONDITIONS ARE MET:

19 (a) THE REAL ESTATE BROKER EITHER:

20 (I) PROCURES A PERSON OR ENTITY WHO LEASES THE PROPERTY IN
21 ACCORDANCE WITH A WRITTEN LISTING AGREEMENT WITH THE OWNER; OR

22 (II) HAS EARNED A FEE OR COMMISSION IN ACCORDANCE WITH A
23 WRITTEN COMPENSATION AGREEMENT WITH THE OWNER;

24 (b) THE REAL ESTATE BROKER SERVES A NOTICE OF INTENT TO
25 RECORD A NOTICE OF LIEN UPON THE OWNER OR OWNER'S AGENT AS
26 PROVIDED IN SECTION 38-22.5-104;

27 (c) THE REAL ESTATE BROKER MAKES A GOOD FAITH ATTEMPT TO

1 OBTAIN SETTLEMENT THROUGH MEDIATION AS PROVIDED IN SECTION
2 38-22.5-105; AND

3 (d) AT LEAST THIRTY DAYS AFTER SERVING THE OWNER WITH
4 NOTICE OF INTENT TO RECORD A NOTICE OF LIEN, THE REAL ESTATE
5 BROKER RECORDS A NOTICE OF THE LIEN IN THE OFFICE OF THE CLERK AND
6 RECORDER OF THE COUNTY IN WHICH THE COMMERCIAL REAL ESTATE IS
7 LOCATED.

8 (2) NOTWITHSTANDING PARAGRAPH (d) OF SUBSECTION (1) OF THIS
9 SECTION:

10 (a) IF PAYMENT IS DUE IN INSTALLMENTS AND A PORTION OF THE
11 PAYMENT IS DUE AFTER THE LEASING OF ANY INTEREST IN COMMERCIAL
12 REAL ESTATE, A CLAIM FOR A LIEN FOR ONLY THAT PORTION MAY BE
13 RECORDED WITHIN NINETY DAYS AFTER THE TENANT TAKES POSSESSION
14 OF THE LEASED PROPERTY OR NINETY DAYS AFTER THE COMPENSATION IS
15 DUE UNDER THE COMPENSATION AGREEMENT, WHICHEVER IS LATER; AND

16 (b) THE LIEN SHALL BE EFFECTIVE AS A LIEN AGAINST THE
17 COMMERCIAL REAL ESTATE ONLY TO THE EXTENT MONEYS ARE STILL
18 OWED TO THE REAL ESTATE BROKER BY THE OWNER. ANY CLAIMS FOR A
19 LIEN FOR FUTURE INSTALLMENT PAYMENTS SHALL ONLY BE RECORDED
20 WITHIN NINETY DAYS AFTER THOSE INSTALLMENT PAYMENTS BECOME DUE
21 IN ACCORDANCE WITH THE WRITTEN AGREEMENT.

22 (3) THE LIEN ATTACHES FOR PURPOSES OF THIS SECTION WHEN THE
23 CLAIM FOR LIEN IS RECORDED, AND SHALL NOT RELATE BACK TO THE DATE
24 OF THE WRITTEN AGREEMENT.

25 **38-22.5-107. Conditions on validity of lien - subsequent service**
26 **of notice to owner - action commenced within six months.** (1) NO
27 LIEN CLAIMED BY VIRTUE OF THIS ARTICLE SHALL HOLD THE PROPERTY

1 LONGER THAN TEN DAYS AFTER THE RECORDING OF THE NOTICE OF LIEN
2 UNDER SECTION 38-22.5-104 UNLESS THE REAL ESTATE BROKER PROVIDES
3 A COPY OF THE NOTICE OF LIEN TO THE OWNER OR OWNER'S AGENT BY
4 PERSONAL SERVICE OR BY REGISTERED OR CERTIFIED MAIL, RETURN
5 RECEIPT REQUESTED, ADDRESSED TO THE LAST-KNOWN ADDRESS OF SUCH
6 PERSON, WITHIN TEN DAYS AFTER RECORDING THE NOTICE OF LIEN.

7 (2) NO LIEN CLAIMED BY VIRTUE OF THIS ARTICLE SHALL HOLD THE
8 PROPERTY LONGER THAN SIX MONTHS AFTER THE RECORDING OF THE
9 NOTICE OF LIEN UNDER SECTION 38-22.5-104 UNLESS AN ACTION HAS BEEN
10 COMMENCED WITHIN THAT TIME TO ENFORCE THE SAME, AND UNLESS ALSO
11 A NOTICE STATING THAT SUCH ACTION HAS BEEN COMMENCED IS FILED FOR
12 RECORD WITHIN THAT TIME IN THE OFFICE OF THE COUNTY CLERK AND
13 RECORDER OF THE COUNTY IN WHICH THE PROPERTY IS SITUATED. WHERE
14 TWO OR MORE LIENS UNDER THIS ARTICLE ARE CLAIMED OF RECORD
15 AGAINST THE SAME PROPERTY, THE COMMENCEMENT OF ANY ACTION AND
16 THE FILING OF THE NOTICE OF THE COMMENCEMENT OF SUCH ACTION
17 WITHIN THAT TIME BY ANY ONE OR MORE OF SUCH LIEN CLAIMANTS IN
18 WHICH ACTION ALL THE LIEN CLAIMANTS AS APPEAR OF RECORD ARE MADE
19 PARTIES, EITHER PLAINTIFF OR DEFENDANT, SHALL BE SUFFICIENT.

20 **38-22.5-108. Liens having priority over brokers' lien.**

21 (1) VALID PRIOR RECORDED LIENS, MORTGAGES, AND ENCUMBRANCES
22 HAVE PRIORITY OVER A REAL ESTATE BROKERS' LIEN. SUCH RECORDED
23 LIENS, MORTGAGES, AND ENCUMBRANCES INCLUDE:

24 (a) A VALID MECHANICS' LIEN CLAIM THAT IS RECORDED AFTER
25 THE BROKER'S NOTICE OF LIEN BUT WHICH RELATES BACK TO A DATE PRIOR
26 TO THE RECORDING DATE OF THE BROKER'S NOTICE OF LIEN; AND

27 (b) A PRIOR RECORDED LIEN SECURING REVOLVING CREDIT OR

1 FUTURE ADVANCES OF CONSTRUCTION LOANS.

2 **38-22.5-109. Satisfaction or release of brokers' lien - written**
3 **demand by owner - obligation to record.** IF A REAL ESTATE BROKERS'
4 LIEN HAS BEEN RECORDED PURSUANT TO SECTION 38-22.5-106 AND THE
5 INDEBTEDNESS HAS BEEN PAID IN FULL OR THE LIEN IS NOT VALID AND
6 ENFORCEABLE IN ACCORDANCE WITH THIS ARTICLE AND OTHER
7 APPLICABLE LAW, THE REAL ESTATE BROKER SHALL ACKNOWLEDGE
8 SATISFACTION OR RELEASE OF SUCH LIEN IN WRITING WITHIN TEN DAYS
9 AFTER RECEIVING WRITTEN DEMAND FROM THE OWNER AND SHALL
10 RECORD A WRITTEN RELEASE OR SATISFACTION OF THE LIEN IN THE OFFICE
11 OF THE CLERK AND RECORDER OF THE COUNTY IN WHICH THE PROPERTY IS
12 LOCATED.

13 **38-22.5-110. Spurious liens.** SECTION 38-35-204 APPLIES TO
14 LIENS ASSERTED PURSUANT TO THIS ARTICLE.

15 **38-22.5-111. Substitution of bond allowed - lien to be**
16 **discharged.** (1) WHENEVER A BROKERS' LIEN HAS BEEN RECORDED IN
17 ACCORDANCE WITH THIS ARTICLE, THE OWNER OF ANY INTEREST IN THE
18 PROPERTY SUBJECT TO THE LIEN MAY, AT ANY TIME, FILE WITH THE CLERK
19 OF THE DISTRICT COURT OF THE COUNTY WHEREIN THE PROPERTY IS
20 SITUATED A CORPORATE SURETY BOND OR SIMILAR FINANCIAL
21 ASSURANCE. SUCH BOND OR ASSURANCE SHALL BE IN AN AMOUNT EQUAL
22 TO ONE AND ONE-HALF TIMES THE AMOUNT OF THE LIEN PLUS COSTS
23 ALLOWED TO DATE AND IS SUBJECT TO APPROVAL BY A JUDGE OF THE
24 DISTRICT COURT WITH WHICH SUCH BOND OR ASSURANCE IS FILED.

25 (2) THE BOND OR ASSURANCE SHALL BE CONDITIONED THAT, IF THE
26 LIEN CLAIMANT IS FINALLY ADJUDGED TO BE ENTITLED TO RECOVER ON
27 THE CLAIM UPON WHICH THE LIEN IS BASED, THE PRINCIPAL OR SURETY

1 SHALL PAY TO SUCH CLAIMANT THE AMOUNT OF THE JUDGMENT,
2 INCLUDING ANY INTEREST, COSTS, OR OTHER SUMS TO WHICH THE
3 CLAIMANT WOULD BE ENTITLED UPON FORECLOSURE OF THE LIEN.

4 (3) UPON THE FILING OF A BOND OR UNDERTAKING AS PROVIDED
5 IN THIS SECTION, THE LIEN AGAINST THE PROPERTY SHALL BE
6 IMMEDIATELY DISCHARGED AND RELEASED IN FULL, AND THE REAL
7 PROPERTY DESCRIBED IN SUCH BOND OR UNDERTAKING SHALL BE
8 RELEASED FROM THE LIEN AND FROM ANY ACTION BROUGHT TO
9 FORECLOSE THE LIEN, AND THE BOND OR UNDERTAKING SHALL BE
10 SUBSTITUTED. THE CLERK OF THE DISTRICT COURT WITH WHICH THE BOND
11 OR UNDERTAKING HAS BEEN FILED SHALL ISSUE A CERTIFICATE OF
12 RELEASE, WHICH SHALL BE RECORDED IN THE OFFICE OF THE CLERK AND
13 RECORDER OF THE COUNTY IN WHICH THE ORIGINAL REAL ESTATE
14 BROKERS' LIEN WAS FILED, AND THE CERTIFICATE OF RELEASE SHALL SHOW
15 THAT THE PROPERTY HAS BEEN RELEASED FROM THE LIEN AND FROM ANY
16 ACTION BROUGHT TO FORECLOSE THE LIEN.

17 **SECTION 2. Act subject to petition - effective date -**
18 **applicability.** (1) This act shall take effect at 12:01 a.m. on the day
19 following the expiration of the ninety-day period after final adjournment
20 of the general assembly (August 11, 2010, if adjournment sine die is on
21 May 12, 2010); except that, if a referendum petition is filed pursuant to
22 section 1 (3) of article V of the state constitution against this act or an
23 item, section, or part of this act within such period, then the act, item,
24 section, or part shall not take effect unless approved by the people at the
25 general election to be held in November 2010 and shall take effect on the
26 date of the official declaration of the vote thereon by the governor.

27 (2) The provisions of this act shall apply to cases in which a

- 1 written listing agreement or compensation agreement is entered into on
- 2 or after the applicable effective date of this act.