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PROPERTY Landlord and Tenant: Provide for Commission Protection for Real Estate Brokers Subsequent to Any Transfer or Conveyance of Real Property or a Leasehold Interest; Provide for Notices of Commission Rights and Waiver and Release of Commission Rights

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PROPERTY

Landlord and Tenant: Provide for Commission Protection for Real Estate Brokers Subsequent to Any Transfer or Conveyance of Real Property or a Leasehold Interest; Provide for Notices of Commission Rights and Waiver and Release of Commission Rights

CODE SECTION:	O.C.G.A. § 44-7-21 (new)
BILL NUMBER:	HB 255
ACT NUMBER:	293
GEORGIA LAWS:	1997 Ga. Laws 825
SUMMARY:	The Act makes the obligations of a landlord or tenant under a written brokerage commission agreement binding contractual obligations of such a landlord or tenant and of their respective grantees, successors, and assigns. The Act makes succeeding parties bound under such agreement after the sale, transfer, assignment, or other disposition of the subject property or leasehold interest if conditions specified in the Act are satisfied. The Act provides for the form of notice of commission rights to be filed, as well as the place and timing of the filing. The provisions of the new Code section apply only to commercial real estate. The Act requires a real estate broker to file a release and provides that the filing of the notice does not create an interest in the real property that is the subject of the agreement.
EFFECTIVE DATE:	July 1, 1997

History

Georgia is one of only a few states in which commercial real estate brokers receive their commission over the term of a lease that they have negotiated.¹ This was a market-driven development.² As a result, a practice had been occurring after foreclosure on a commercial office building in which the lender would assume the benefits of the lease and the existing tenant rents, but refuse to pay the broker's commission.³

1. See Telephone Interview with Keith Hatcher, Lobbyist, Georgia Association of Realtors (Apr. 24, 1997) [hereinafter Hatcher Interview]. Mr. Hatcher also noted that he would be attending a national conference of realtors and would be bringing this legislation to the attention of his counterparts in other states. *Id.*

2. See *id.*

3. See Telephone Interview with Rep. Roy Barnes, House District No. 33 (Apr. 24,

Georgia is the first state to enact legislation to protect broker commissions in these situations.⁴ Prior to the enactment of this legislation, foreclosure would wipe out subordinate liens, which would include commercial broker liens for remaining commission balances.⁵ Claims for unjust enrichment had been unsuccessful in mitigating these losses for brokers.⁶ Though foreclosure situations were the impetus for the bill, the new legislation applies to any type of transfer of commercial real estate.⁷

The bill was part of a two to three year effort relating to commercial real estate broker commissions.⁸ Initially, the sponsor, Representative Roy Barnes, introduced the Commercial Real Estate Broker Lien Act,⁹ which authorized commercial real estate brokers to file liens on commercial real estate as a result of a listing or any other agreement for the management, sale, or lease of commercial real estate in the 1996 legislative session.¹⁰ That legislation was held over as part of a compromise.¹¹

As a practical matter, the Act will cause financial institutions or subsequent landlords to take account of the commission obligation when deciding whether to negotiate new leases with tenants.¹² As a matter of public policy, subsequent holders of the lease will have to pay the unpaid commission balance if they assume leases with underlying value generated by the broker's efforts.¹³

HB 255

Introduction

HB 255 was introduced in the House on January 28, 1997 by Representative Barnes.¹⁴ A substitute to the bill from the House Judiciary Committee passed the House on February 21, and was sent to the Senate.¹⁵ The Senate sent the bill to the Senate Judiciary Committee, which in turn sent it back to the full Senate with a "do

1997) [hereinafter Barnes Interview]; *see also* Telephone Interview with Rep. Jim Martin, House District No. 47, and Chair, House Judiciary Committee (Jun. 13, 1997) [hereinafter Martin Interview].

4. *See* Hatcher Interview, *supra* note 1.

5. *See id.*

6. *See* Martin Interview, *supra* note 3.

7. *See* Hatcher Interview, *supra* note 1.

8. *See* Barnes Interview, *supra* note 3.

9. 1993 Ga. Laws 1490 (codified at O.C.G.A. § 44-14-600 (Supp. 1997)).

10. *See Legislative Review*, GA. ST. U. L. REV. 201, 201 (1993).

11. *See* Barnes Interview, *supra* note 3.

12. *See* Martin Interview, *supra* note 3.

13. *See* Barnes Interview, *supra* note 3; Martin Interview, *supra* note 3.

14. *See* Final Composite Status Sheet, Mar. 28, 1997.

15. *See id.*

pass" recommendation.¹⁶ The Senate passed the bill on March 21,¹⁷ and the Governor signed the bill on April 14.¹⁸

Committee Substitute

The House Judiciary Committee made changes to the conditions for the continuance of obligations under a written brokerage commission agreement; provided for an evidentiary determination of a successor's agreement to continued payments under a written brokerage commission agreement; provided for the timing of the filing of the notice of commission rights; made changes in the notice of commission rights form; provided for waiver and release of commission rights; and provided for the effect of said interest on the real property that is the subject of such commission agreements.¹⁹ The Committee was concerned about balancing the potentially conflicting interests of protecting commission rights against any chilling effect that the Act might have on the ability to attract real estate investors to Georgia.²⁰ The substitute sought to make a responsible compromise between these interests.²¹

The substitute provided the third and fourth conditions for continuance of obligation under the Code section as to assumption of benefits, rental amount, and terms of the lease.²² Further, the conditions setting forth conclusive evidence of the successor's agreement to payments under the terms of the written brokerage agreement were added in the substitute.²³

The substitute also added the requirement that a broker file such notice within thirty days of the execution of a lease containing a written brokerage agreement.²⁴ There was no time requirement included in the original version of the bill.²⁵ The Committee wanted to ensure that brokers would not sit on such a claim and then come forward with it at the last minute.²⁶ The substitute also added the requirement that the filing precede conveyance of the real property.²⁷

16. See Georgia Bill Tracking, HB 255, Apr. 17, 1997 (available in LEXIS-NEXIS Library, Statenet File) (available in Georgia State University College of Law Library)).

17. See *id.*

18. See *id.*

19. See HB 255 (HCS), 1997 Ga. Gen. Assem.

20. See Martin Interview, *supra* note 3.

21. See *id.*

22. Compare HB 255, as introduced, 1997 Ga. Gen. Assem., with HB 255 (HCS), 1997 Ga. Gen. Assem.

23. See *id.*

24. See *id.*

25. See *id.*

26. See Martin Interview, *supra* note 3.

27. Compare HB 255, as introduced, 1997 Ga. Gen. Assem., with HB 255 (HCS),

The notice form in the substitute required additional information including the name of the landlord and the lease term.²⁸ The legal description required in the substitute's form was also made a requirement of the form.²⁹ The original version had no such requirement as to the legal description, nor did it require an "Exhibit A" containing the legal description as the substitute requires.³⁰

The original version of HB 255 did not provide for release of commission rights as provided in the substitute.³¹ The Committee wanted to ensure that the broker had an affirmative duty to release or cancel the notice of commission rights as a matter of fairness to all parties.³² Further, the original version of the bill did not clearly specify that no interest in real property is created by the Code as provided in the substitute.³³

Applicability

The Act adds a new Code section that applies only to leaseholds of all or a portion of commercial real estate³⁴ that are entered into on or after July 1, 1997.³⁵

Commercial real estate is given the same definition as in Code section 44-14-601³⁶ and is any real estate other than real estate containing one to four residential units; real estate on which no buildings or structures are located and which is not zoned for, nor available for, commercial, multifamily, or retail use; or real estate classified as agricultural for tax assessment purposes.³⁷

Requirements for Commission Protection

The Act provides that written brokerage commission agreements shall constitute binding contractual obligations of landlords or tenants who are a party to such agreements.³⁸ The grantees, successors, or assigns of such a landlord or tenant shall also be bound by the terms of

1997 Ga. Gen. Assem.

28. *See id.*

29. HB 255 (HCS), 1997 Ga. Gen. Assem.

30. *Compare* HB 255, as introduced, 1997 Ga. Gen. Assem., *with* HB 255 (HCS), 1997 Ga. Gen. Assem.

31. *See id.*

32. *See* Martin Interview, *supra* note 3.

33. *Compare* HB 255, as introduced, 1997 Ga. Gen. Assem., *with* HB 255 (HCS), 1997 Ga. Gen. Assem.

34. 1993 Ga. Laws 1490 (codified at O.C.G.A. § 44-14-601 (Supp. 1997)) (defining "commercial real estate").

35. O.C.G.A. § 44-7-21 (Supp. 1997).

36. *Id.*

37. 1993 Ga. Laws 1490 (codified at O.C.G.A. § 44-14-601 (Supp. 1997)).

38. O.C.G.A. § 44-7-21(a) (Supp. 1997).

such a written brokerage commission agreement when four conditions are met.³⁹ First, a written brokerage commission must be incorporated into the lease.⁴⁰ Second, the real estate broker must comply with the requirements of the new Code section.⁴¹ Third, the succeeding party must assume the benefits of the tenancy, rental amount, and terms of the lease.⁴² Finally, the written brokerage agreement must not have been waived by the broker.⁴³ The Act provides that such waiver must be in writing.⁴⁴

The Act further provides that conveyance or transfer of real property coupled with the continuing assumption of the tenancy, rental amount, and term of said lease is conclusive evidence that the succeeding party agrees to continue payments to a broker under a written brokerage commission agreement.⁴⁵

A broker has thirty days to file a notice of commission rights following execution of a lease incorporating a written brokerage commission agreement in order to be entitled to the protection afforded by the Act.⁴⁶ The notice must be filed in the deed records in the office of the clerk of the superior court in the county in which the real property or leasehold interest is located.⁴⁷ The notice requires the signature of the broker or someone authorized to sign on his behalf and must conform to the notice form provided in the Code.⁴⁸

The notice form sets forth information describing the owner, landlord, tenant, lease date, lease term, project name, and a legal description of the subject property.⁴⁹ An "Exhibit A" must be attached with a more particular legal description.⁵⁰ The notice requires a full and complete legal description for validity.⁵¹ The purpose of this is to put a title examiner on notice of such rights and to identify the particular property to which the notice applies.⁵²

The Act requires a broker to release such commission rights within thirty days of receipt of the final payment of commissions under a written brokerage commission agreement.⁵³ Finally, the Act also

39. *See id.*

40. *See id.* § 44-7-21(a)(1).

41. *See id.* § 44-7-21(a)(2).

42. *See id.* § 44-7-21(a)(3).

43. *See id.* § 44-7-21(a)(4).

44. *Id.*

45. *Id.* § 44-7-21(a).

46. *See id.* § 44-7-21(b).

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See* Martin Interview, *supra* note 3.

53. O.C.G.A. § 44-7-21(c) (Supp. 1997).

provides that no interest in real property is created by this Code section.⁵⁴

Opposition to HB 255

Opposition to HB 255 was scant; there were only three votes in the House against it, and there was no opposition in the Senate.⁵⁵ One of the House members who voted against the measure did so because he did not believe the state should be involved in regulating the type of transactions that were the subject of the bill.⁵⁶ The legislator also expressed concern about free enterprise and special treatment for commercial real estate brokers.⁵⁷ His belief was that a broker can structure his commission income any way he may wish, and if he has chosen to extend the receipt of that income over time, that is a risk he has chosen and should bear.⁵⁸

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54. *Id.* § 44-7-21(e).

55. *See* Georgia House of Representatives Voting Record, HB 255 (Feb. 21, 1997).

56. *See* Telephone Interview with Rep. Dan Lakly, House District No. 105 (Apr. 21, 1997).

57. *See id.*

58. *See id.*