# 2012-2013 UPDATE COURSE

# LICENSE LAW, COMMISSION RULE AND OTHER LAW CHANGES

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**Learning Objective:** Upon completing this Section, licensees should have an understanding of selected significant changes in the Real Estate License Law, Real Estate Commission Rules and other laws.

## LICENSE EXAMINATION CHANGES

Pursuant to a number of rule revisions effective **March 1, 2012,** the Real Estate Commission implemented major changes to the real estate license examination program on that date. To understand these changes, however, one must first recall how the previous examination program worked.

### Previous Examination Program

For many years the license examination that applicants are required to pass to initially obtain a real estate broker license (on provisional status) consisted of a *one-part comprehensive examination with 110 scored questions and a 75% passing score*. The Commission followed this one-part examination approach since 1984 when it assumed full responsibility for developing and maintaining its own examination "in-house." Initially the Commission also actually administered the examination, but beginning in 2000, the Commission contracted with PSI Examination Services, Inc. to administer the examination on computer. Also since 2000, North Carolina has had a single entry-level license examination, with no separate examination for an advanced-level broker license status.

North Carolina's one-part comprehensive examination differed from the approach followed by a majority of states whereby the state licensing agency contracts with a testing company to provide a two-part examination consisting of a "national" section on general real estate laws, principles and practices and a "state" section on state-specific laws and practices. While the Commission has been quite satisfied with its "in-house" examination, the Commission decided that a change was needed for two reasons:

1. The Commission determined that, given the great difficulty of maintaining a high quality "in-house" examination, the current high quality and standards of the examination program could best be maintained in the future by enlisting the assistance of a testing company to do more than just administer the examination.

2. The Commission also determined that the two-part examination approach followed by most other states would have the additional benefit of enabling the Commission to require persons applying based on licensure in another jurisdiction to pass the "State" section of the license examination, thereby providing some assurance that such applicants possess a good basic knowledge of North Carolina real estate laws and practices.

Consequently, the Commission went through a procurement process in 2011 to select a testing company to assist in developing and administering a two-part examination program. Following a thorough selection process, the Commission contracted with Applied Measurement Professionals, Inc. (AMP) of Lenexa, KS to handle its examination program.

### The "New" Examination

*Effective **March 1, 2012**, the license examination is now a two-part examination consisting of (1) a "national" section of 100 scored questions on general real estate laws, principles and practices and (2) a "state" section of 40 scored questions on primarily North Carolina laws and practices. The "national" section is AMP's national salesperson (entry-level) examination administered in 11 other states, while the "state" section is developed and will be maintained entirely by the Commission. The "state" section includes expanded emphasis on License Law and Commission rules and continues to include a comprehensive closing statement problem that has long been a feature of North Carolina's examination. The passing score for each section is 75%, which is the same passing score required for the previous comprehensive examination.*

Most applicants must pass both sections of the examination; however, persons applying based on licensure in another jurisdiction will be required to pass only the "state" section of the examination. [See the coverage of "License Reciprocity Changes" presented below.]

## LICENSE RECIPROCITY CHANGES

### Previous License Reciprocity Approach

For many years, North Carolina and most other states followed a practice of negotiating reciprocal licensing arrangements with other states that allowed resident licensees of one reciprocal state to obtain a license in another reciprocal state without taking any prelicensing

education or license examination. Under this "full reciprocity" approach, resident licensees of ten (10) states with which North Carolina had a reciprocal licensing arrangement could obtain a North Carolina license without having to demonstrate any knowledge of North Carolina real estate laws and practices. On the other hand, licensees from non-reciprocal states were required to take the full one-part comprehensive North Carolina license examination because North Carolina did not have a two-part examination. Thus, licensees of other states were being treated in an inconsistent manner and the Commission and North Carolina real estate consumers served by a reciprocal North Carolina licensee had no assurance that the reciprocal licensee knew anything at all about unique North Carolina laws and practices (e.g., agency practice, disclosure requirements, contract forms, closing procedures, etc.).

The Commission determined that the old reciprocal approach was not in the best interest of North Carolina real estate consumers and found that a different approach adopted by many other states in recent years was more appropriate. That approach involves requiring that licensees of State B pass the portion of State A's license examination that addresses state laws and practices before obtaining a license in State A.

## New "Limited License Recognition" Approach

For the reasons noted above, the Commission adopted Rule 21 NCAC 58A.0511 which provides the following:

1. ***Effective February 29, 2012,*** *license reciprocity with other states was terminated.*

2. ***Effective March 1, 2012,*** *any person applying for a license in North Carolina based on current licensure in another state, U.S. territory or possession, or a Canadian province, regardless of their place of residency, does not have to take the North Carolina prelicensing course or the "national" section of the North Carolina license examination; however,* ***all such applicants must pass the "state" section of the North Carolina license examination***. This approach was made possible by the change in the Commission's license examination from a one-part comprehensive examination to a two-part examination with separate "national" and "state" sections, previously discussed above.

This new approach might be described as a **"limited license recognition"** approach – it recognizes completion of prelicensing education and passing the "national" section of a license examination in another jurisdiction, but does not fully exempt the entire North Carolina license examination requirement. By requiring the applicant to pass the "state" section of the North Carolina license examination, the new approach provides some assurance that the applicant has a basic knowledge of North Carolina real estate laws and practices.

Additionally, rather than North Carolina having full license reciprocity with only a small number of states (10 prior to March 2012), the new approach allows individuals holding a license in any other state, U.S. territory or possession, or Canadian province to obtain a North Carolina license by passing only the "state" section of the license examination. Moreover, where the applicant resides, whether in North Carolina or elsewhere, no longer is an issue under this approach so long as s/he holds a license in another state or territory.

### Licensees Previously Licensed by Reciprocity

North Carolina licensees who obtained their licenses by reciprocity may retain those licenses indefinitely merely by timely renewing the license each year in order to have a "current" license. In order to use that license when in North Carolina, the person must also satisfy the continuing education requirement so the license will be on "active" status (waived if a non-resident licensee maintains an active license in his/her resident state). However, if the licensee allows his/her license to *expire for more than six months or the license is revoked or surrendered*, the former reciprocal licensee must satisfy the new requirements in order to reinstate such license. **Again, if you currently hold a North Carolina license issued by reciprocity, you may retain that license indefinitely by properly renewing the license each year; to be able to *use* that license, it must be on active status which you accomplish by satisfying the continuing education requirement or by maintaining an "active" license in your resident state.**

### North Carolina Licensee Applying for Licensure in Another State

**South Carolina** now requires North Carolina resident licensees to only pass the "state" section of its license examination, which is the same approach North Carolina is now following.

**Georgia** continues to license North Carolina resident licensees (and those of most other states) without requiring any additional education or examination, but is considering the possibility of adopting a requirement similar to that now in place in North Carolina.

**Tennessee** requires North Carolina resident licensees to pass the "state" section of its license examination, *may* require some additional education since its prelicense education requirement is 90 hours compared to North Carolina's 75 hours, and *may* require a demonstration of three years experience for broker applicants.

**Virginia** requires North Carolina resident licensees to provide proof of prelicense education which will be recognized for salesperson applicants (postlicense education *may* be partially credited toward Virginia's 180-hour broker education requirement), broker applicants must provide proof of three years full-time brokerage experience within the past four years, and all applicants must pass the "state" section of the Virginia license examination.

North Carolina licensees interested in applying for a license in another state should ***contact that state's real estate licensing agency*** for up-to-date information on their requirements.

## FAILURE TO COMPLETE POSTLICENSING EDUCATION

Prior to January 1, 2012, if a provisional broker did not complete all 90 hours of required postlicense education within three years of initial licensure, the provisional broker's license was **canceled**, meaning s/he no longer had a license. To regain the license, the *former* provisional broker would have to take all education required by the Commission for license reinstatement

AND file an application for license reinstatement (with criminal record report and $55 reinstatement fee).

As mentioned in last year's Update course materials, *effective **January 1, 2012***, the License Law provisions [G.S. 93A-4(a1) and 93A-4.3(d)] and Commission Rule provisions [Rule 21 NCAC 58.A1902(c)] were amended to provide that *when a provisional broker does not complete all 90 hours of postlicense education within three years of licensure, his/her license will be placed on **inactive status** rather than **canceled***. The rule also provides that *to activate* a license made inactive for this reason, *the provisional broker must have completed all three postlicense courses within the previous three years AND satisfy the continuing education requirements for license activation*.

These amendments made it easier for a provisional broker who failed to complete all three postlicense courses within the initial three years after licensure to cure the education deficiency and return his/her license to ***active*** status. Former provisional brokers whose licenses previously had been canceled were contacted and informed that their licenses had been reinstated on *inactive* status, but that they would need to renew their license by June 30, 2012 and each year thereafter to keep the license. The license will *expire* if the renewal fee is not timely paid.

# RESIDENTIAL PROPERTY DISCLOSURE FORM REVISIONS

## Background

Licensees may recall that last year's Update course reported passage of a law [G.S. 47E-4(b1)] requiring the Real Estate Commission to promulgate a disclosure form for use by sellers of most residential properties that calls for the seller to disclose *whether the property to be conveyed is subject to regulation by one or more owners' association(s) and any governing documents which impose various mandatory covenants, conditions and restrictions upon the property, including obligations to pay regular assessments or dues and special assessments.*

### Revised Disclosure Form Effective January 1, 2012

To comply with this statutory requirement, the Commission amended Rule 21 NCAC 58A.0114, which prescribes the *Residential Property Disclosure Statement* form, to include provisions to comply with the new requirement to disclose information on owners' associations, covenants and dues/assessments. Use of the revised disclosure statement form became mandatory **January 1, 2012** and it is now being used in most residential transactions. The current form is titled ***Residential Property and Owners' Association Disclosure Statement***.

### Development of a Disclosure Form with Substantial Revisions for Use in 2013

During the process of making the form revisions for 2012, the Commission determined that a comprehensive review of the disclosure statement form was needed. There was particular interest in the format and arrangement of the questions. A Commission staff committee was formed to study and recommend revisions to the form.

The 25 specific questions on the current form are organized into three sections, each with a general "lead-in" question. The first section (questions 1-12) deals basically with malfunctions or defects with the primary residence only; the second section (questions 13-20) deals basically with characteristics of the entire property; and the third section (questions 21-25) addresses disclosures regarding owners' associations and governing documents that impose various mandatory covenants, conditions and restrictions on the property (i.e., the additional disclosures required by the legislation that became effective January 1, 2012).

The staff committee noted that this format with three sections tends to make revisions to the form more difficult because each new disclosure has to be presented in a way that fits one of the existing lead-in questions. Consequently, the committee proposed a different approach that substantially reorganized the form. That approach features a "general disclosures" section that contains a vast majority of questions related to the property and a small "owners' association and governing documents" section dealing with disclosures on those matters. *A key feature of the reorganized form is that each question stands on its own, which should make future revisions easier. The revised approach is also believed to make the form more straightforward and "user friendly."* In addition to format changes, many other changes were proposed to address various wording and other concerns about which the Commission and staff had become aware.

A rulemaking process was commenced and the proposed revised form was published. During the process, input was obtained from the North Carolina Association of REALTORS® and various individuals and further refinements were made to the form, resulting in the adoption by the Commission at its April 2012 meeting of amendments to Rule 58A.0114 that include a completely revised form, and approval of the final rule by the North Carolina Rules Review Commission in May 2012 to be **effective January 1, 2013**.

## NOTE: A substantially revised *Residential Property and Owners' Association Disclosure Statement* form will become effective January 1, 2013!

*The version of the form that is effective January 1, 2013 should be used in connection with all properties placed on the market on or after January 1, 2013*. It will **not be necessary** to replace the current disclosure statement prepared for properties that are already listed for sale as of January 1, 2013 with a disclosure on the revised form ***unless*** there is a change in property conditions or circumstances that would require providing the purchaser with a corrected disclosure statement. ***If a corrected statement is required after January 1, 2013, then the old disclosure statement should be replaced with one completed on the revised form***.

The long lead time for implementation of the latest revision of the form is to allow adequate time for licensees to be taught the revised version in this Update course and other educational offerings.

### Significant Specific Revisions to Disclosure Form for 2013

In addition to the previously mentioned major changes in the format of the form, a number of specific changes are worthy of particular note and are mentioned below.

- **Instructions, Paragraphs 2 and 2.c.** Wording revised to clarify that the seller who chooses to make disclosures is only obligated to disclose information about which he/she has *actual knowledge* and that checking "No Representation" means the seller is choosing not to disclose the conditions or characteristics of the property even if he/she has actual knowledge of them or should have known of them.

- **Introductory Paragraph Immediately Preceding Question 1.** This was rewritten to reflect the fact that *each individual question now asks either about a matter relating to the "dwelling" or a matter relating to the "property."* If the question states "dwelling," then the question should be answered only with regard to the dwelling. If the question states "property," then the question should be answered with regard to the entire property (the lot, the dwelling and all other structures on the lot).

- **New Question 1.** Original proposed revision asked for year "dwelling was originally constructed," but the final version deletes "originally" and adds a space for explanation in situations where the dwelling may have undergone multiple renovations. While in a vast majority of situations, the year indicated should be the year of "original" construction, if there have been subsequent major renovations or the dwelling was rebuilt after some catastrophe, an explanation of the renovations or rebuilding would also be appropriate.

- **New Questions 10 & 11.** A space was added to indicate the age of heating and cooling systems. Note that "heat pump" is listed only as a "heat source" in Question 10; however, typically if there is a heat pump, it is the source of both heating and cooling. Thus, it is probably advisable that when a heat pump provides both heating and cooling, the seller should probably check "Other" in Question 11 and write in "heat pump" to avoid any confusion.

- **New Question 12.** Language was added to the question regarding fuel sources calling for the seller, when a fuel storage tank is present, to indicate whether it is above or below ground and whether it is leased or owned by the seller.

- **New Question 13.** The option of "shared well" as the dwelling's water source was added.

- **New Question 17.** This question was added as a follow-up item for Question 16 asking about the dwelling's sewage disposal system. The question asks the seller, if there is a septic system, to indicate whether he/she knows how many bedrooms are allowed by the septic system permit, and, if he/she answers "yes," to indicate the number of bedrooms allowed. The purpose of adding this question is to call everyone's attention (seller, buyer and agents) to the issue of septic tank capacity because of the potential for this to be a major problem for a buyer in some situations. For example, if the seller had converted a bonus room or den for use as a bedroom and the number of bedrooms after such conversion now exceeds the septic tank capacity, this could be a serious problem for a buyer who was planning to occupy all the bedrooms. A similar problem results if a buyer plans to add a bedroom or convert an existing room to a bedroom and that would

exceed the septic tank capacity. Problems of this nature have arisen all too frequently when the parties and agents were not aware of occupancy restrictions because of septic tank capacity.

- **New Question 19.** A revision to the originally proposed revised form replaces the term "systems and fixtures" with a list of common systems and fixtures and the catch-all phrase "or other systems." This is an attempt to help sellers and agents better understand what items the question is addressing.

- **New Question 20.** A revision to the originally proposed revised form replaces the phrase "built-in appliances" with "any appliances that may be included in the conveyance" in order to avoid confusion where the appliances to be conveyed may not be certain at the time the disclosure statement is prepared or delivered.

- **Deleted Question 22.** The originally proposed revised form had included a new question asking if there is any problem with present infestation of ants, roaches, mice, etc. Upon further consideration of this proposed question, which addresses matters not within the scope of disclosure required by G.S 47E-4, there were concerns about interpretation of the question and that it might place an unreasonable burden on sellers and their brokers. Thus, the proposed new question was deleted.

- **New Question 23.** The old disclosure form had a question (#13) about "Room Additions or Other Structural Changes," but it was unclear whether the question was asking whether there had been such changes or if there is a *problem* with such changes. It was also unclear whether changes to buildings other than the dwelling should be reported. The new Question 23, as shown with additional changes to the originally proposed question, attempts to clarify these issues by asking whether there are structural changes/additions or mechanical changes to the *dwelling*?

- **New Question 24.** The old disclosure form had asked (Question 16) if the seller knew of any "*violations* of zoning ordinances, restrictive covenants or other land use restrictions, or building codes…" The originally proposed revised form took a different approach with this question by asking "Have you been notified by a governmental agency that the property is in violation of any …" This obviously is a very different question that should be easier for the seller to answer with confidence. The proposal to also include "federal or state law" in the list of laws, covenants, codes, etc. was deleted in the final version.

- **Deleted Question 28.** The originally proposed addition of a question about whether the property is subject to any land use restrictions imposed by land conservation programs was deleted in the final version. There was concern the question would create an unreasonable burden on sellers and their brokers.

- **New Question 29.** In its final form, this question asks about the *flood risk* to the property in what is considered to be a more objective and appropriate manner.

- **New Question 33.** This question was added to include a specific question about *transfer fees charged by the owners' association upon transfer of the property* as required by recently amended G.S. 47E-4.

- **New Questions 35 & 36.** The subject matter of question 24 in the old form, addressing the existence of any unsatisfied judgments of pending lawsuits, was split into two separate questions in the new form. New question 35 asks whether there are any unsatisfied judgments or pending lawsuits *"involving property or lot to be conveyed,"* whereas new question 36 asks the same question regarding judgments or lawsuits *"involving the planned community or the association to which the property and lots are subject"* (excluding actions filed by the association to recover delinquent assessments against lots other than the property to be conveyed).

- **New Question 37.** This question is essentially the same as question 25 in the old form, except that a space has been provided in which the seller is asked to list the amenities that are paid from association dues.

In order to help licensees better understand the major revisions made to Rule 58A.0114 and the form itself, the approved revised disclosure form effective January 1, 2013 is reprinted at the end of this Section.

## OIL & GAS DISCLOSURES IN RESIDENTIAL SALES CONTRACTS

The General Assembly in July 2012 overrode Governor Perdue's veto of Senate Bill 820 and authorized oil and gas exploration, including "... the use of horizontal drilling and hydraulic fracturing for that purpose ...," in North Carolina, although no permits for these activities are to be issued "pending subsequent legislative action." Section 5 of this bill amended G.S. 47E-4 of the Residential Property Disclosure Act to require that *in all transactions that are subject to the Act a disclosure regarding oil and gas rights be contained in those* ***real estate contracts***. Thus, while the Residential Property Disclosure Statement itself is not affected and is not being revised (other than as discussed above), the North Carolina Association of REALTORS ® and the North Carolina Bar Association revised the standard Offer to Purchase and Contract form (Std Form 2-T) to comply with this statutory mandate effective October 1, 2012.

The *Residential Property Disclosure Act generally applies to all transfers of residential real property consisting of not less than one nor more than four dwelling units where the anticipated transfer is by sale, exchange, installment land sales contract, option, or lease with option to purchase*, unless excepted under G.S. 47E-2. Thus, the mandatory oil and gas disclosure must now be contained in all contracts involving transactions subject to the Act, including two situations normally exempt from the Residential Property Disclosure Act requirements, namely,1) transfers involving the first sale of a dwelling never inhabited and 2) transfers between parties when both parties agree not to complete a residential property

disclosure statement or an owners' association and mandatory covenants disclosure statement. While the Residential Property Disclosure Statement itself does not need to be provided in the latter two instances, contracts involving the sale, exchange or option to purchase such properties must contain the mandatory oil and gas disclosure language.

The need for this disclosure arose in part from the General Assembly legalizing hydraulic fracturing ("fracking") in North Carolina and because at least one national builder had in recent years retained mineral rights in sales of property it owned. Thus, as of October 1, 2012, Standard Form 2-T and Standard Form 800-T (Offer to Purchase and Contract - New Construction) have been revised to incorporate a new subparagraph under "Seller Representations." The new language is taken verbatim from the statute and reads:

(f) OIL AND GAS RIGHTS DISCLOSURE:
Oil and gas rights can be severed from the title to real property by conveyance (deed) of the oil and gas rights from the owner or by reservation of the oil and gas rights by the owner. If oil and gas rights are or will be severed from the property, the owner of those rights may have the perpetual right to drill, mine, explore, and remove any of the subsurface resources on or from the property either directly from the surface of the property or from a nearby location. With regard to the severance of oil and gas rights, Seller makes the following disclosures:

| | | Yes | No | No Representation |
|---|---|---|---|---|
| _____ _____ Buyer Initials | 1. Oil and gas rights were severed from the property by a previous owner. | ____ | ____ | _____ |
| | | Yes | No | |
| _____ _____ Buyer Initials | 2. Seller has severed the oil and gas rights from the property. | ____ | ____ | |
| | | Yes | No | |
| _____ _____ Buyer Initials | 3. Seller intends to sever the oil and gas rights from the property prior to transfer of title to Buyer. | ____ | ____ | |

Because the statute requires the inclusion of these disclosures in most real estate contracts for residential property as of October 1, 2012, there is no grace or transition period for the use of the new forms. *Rather, **any contract** for the sale, exchange or option to purchase real property subject to the new law entered into on or after October 1, 2012 must contain these disclosures,* including builder/developer generated contracts since the law applies to new construction. Needless to say, severance or retention of any property rights by the seller is a material fact that must be disclosed by a real estate licensee, if known to him or her. Further, the General Assembly has decided that, caveat emptor notwithstanding, property owners now are compelled to at least disclose whether they have severed or retained or intend to sever or retain any oil and gas rights from the property interest being transferred to the buyer.

### Duties of Agents

How should a buyer/buyer agent complete this section when preparing an Offer? As with other seller representations found in Paragraph 7 of the standard Offer to Purchase and Contract form, e.g., seller's ownership of property and confirmed/proposed assessments, the general advice is that a *buyer agent complete these sections to the best of his/her knowledge and ability, but it is incumbent on the seller to review the representations in Paragraph 7* (or Paragraph 9 of Std Form 800-T) *and to correct any that are inaccurate before signing the Offer as* ***by signing, the seller adopts those representations as his/her own and may be liable to the buyer for any misstatements or misrepresentations***. Prudent listing agents should elicit this information from the seller prior to marketing the property and might include this information either in their advertising or appended to the Residential Property Disclosure Statement, when applicable. Alternatively, the buyer agent could contact the listing agent for this information prior to preparing the offer.

If the buyer agent has the necessary information from the listing agent/seller to complete these representations, then s/he could and have the buyer initial the new disclosures. If this information is not provided by the listing agent/seller, then the buyer agent might choose to leave these representations blank, thereby requiring the seller to complete these provisions, which would result, however, in a counteroffer, since terms of buyer's offer had been changed.

What if the seller has no idea whether a prior owner had severed or retained mineral rights? The listing agent might suggest that the seller hire an attorney to perform a title search, but if the seller is not so inclined, s/he may check "no representation" as to previous owners. The listing broker has no obligation to attempt a title search as part of the duty to discover, as title searches constitute the practice of law. However, a broker who has personal knowledge that the mineral rights for at least one property in an older subdivision had been severed and retained by the original developer, should disclose to both the seller and any prospective buyers that some property rights for the subject property may have been previously severed.

# BROKER PRICE OPINION (BPO) LAW AND RULES

## Law and Practice Prior to October 2012

### Brokers' Right to Perform Comparative Market Analysis in Certain Situations

Since the advent of appraisal and appraiser regulation in North Carolina (and nationally) in 1990, most appraisals of real property have been (and still are) required to be performed by a licensed or certified real estate appraiser. However, the North Carolina Appraisers Act, like the laws of many other states, has allowed a limited exception to this requirement which allows real estate licenses to perform a "comparative market analysis (CMA)" so long as the real estate licensee does not represent himself or herself as a licensed or certified appraiser or registered appraiser trainee. This limited exception has been as follows: *A real estate broker may perform a "comparative market analysis" for compensation or other valuable consideration only for actual or prospective brokerage clients or for real property involved in an employee*

*relocation program.* The Act defined a **"comparative market analysis"** as "…the analysis of sales of similar recently sold properties in order to derive an indication of the *probable sales price* of a particular property by a licensed real estate broker." The term **"broker price opinion (BPO)"** has been considered to be synonymous with the term "comparative market analysis."

**Key Limitation on Brokers under Law Prior to October 2012**

The key limitation on a broker's right to perform a comparative market analysis (CMA) for compensation under the old law has been the restriction to CMAs performed *for actual or* ***prospective*** *brokerage clients.* There has been no controversy over CMAs performed for "actual" brokerage clients (i.e., for sellers by listing agents or for buyers by buyer agents). The primary issue has always involved CMAs performed for parties who are NOT "actual" brokerage clients and the question is whether the party for whom the CMA is performed is a legitimate "prospective" client. The Commission has provided guidance that *for a broker to be able to perform a CMA under the "prospective client" concept, there must be a genuinely reasonable possibility that the broker will enter into a brokerage agreement as a seller's or buyer's agent for the property that is the subject of the CMA.* [Licensees will recall that this subject was covered in the *2011-12 Real Estate Update Course*.]

**The Changing BPO Environment**

Despite the efforts of the Commission and the North Carolina Appraisal Board to enforce the restriction against brokers performing CMAs or BPOs for parties who are not "actual or prospective clients," some brokers violated the law and performed for a fee what they typically referred to as BPOs for parties with whom they had no brokerage agreement and with whom there was no reasonable expectation of having such an agreement. These situations most commonly occurred when a lender wanted to obtain an estimate of a property's current value for some reason other than making a mortgage loan (e.g., to make a decision regarding foreclosure or a short sale), but did not want to pay hundreds of dollars to obtain an appraisal which by law must be performed by a licensed or certified appraiser. Thus, some lenders sought brokers who were willing to provide a BPO for a much lower fee than the typical fee charged by an appraiser for an appraisal. The incidence of "illegal" BPOs increased substantially in the aftermath of the real estate market collapse in 2007 as the number of "distressed" properties ballooned. With the large number of properties in foreclosure or in danger of foreclosure and the huge increase in "short sale" situations, the demand from lenders for low-priced BPOs substantially increased. As a consequence, the real estate brokerage industry across the country began to seek legislative changes in those states, such as North Carolina, that restricted the performance of CMAs or BPOs for a fee by real estate licensees to those performed for actual or prospective clients.

## New BPO Laws Effective October 1, 2012

In June/July 2012 the North Carolina General Assembly enacted amendments to both the Real Estate License Law and the Appraisers Act (Senate Bill 521, Session Law 2012-163) that substantially change the law regarding the extent to which broker price opinions (BPOs) or comparative market analyses (CMAs) may be performed for a fee by licensed brokers. These amendments are **effective October 1, 2012.**

## Summary of Major Law Changes and Provisions

- **Primary Change.** *A **"non-provisional" broker*** (i.e., a broker who has completed all postlicensing courses and thereby removed his or her "provisional" status) *whose license is in good standing* (i.e., renewed in a timely manner by the previous June 30) *and on active status may prepare a broker price opinion (BPO) or comparative market analysis (CMA) and charge and collect a fee for the opinion.* The BPO may now be performed for a fee *for a variety of persons and entities for a variety of reasons, not just for actual or prospective brokerage clients.* Note, however, that a **provisional broker may no longer perform a BPO or CMA for a fee for anyone**. (The old Appraisers Act provision allowed any real estate licensee to perform a CMA for a fee for an actual or prospective client or for property involved in an employee relocation program.) [G.S. §93A-83(a) and (b)]

- **Important Restriction.** Just as was the case with the old law, *a broker may NOT prepare a BPO (or CMA) for an existing or potential lienholder or other third party where the BPO is to serve as the basis to determine the value of a property for the purpose of originating a mortgage loan, including first and second mortgages, refinances or equity lines of credit.* [G.S. §93A-83(b)(6)]

- **Other Restrictions.** Note that a BPO or CMA that estimates the *value* or *worth* of a parcel of or interest in real estate rather than the "probable sales or leasing price" *shall be deemed to be an **appraisal** and may NOT be prepared by a broker.* A BPO or CMA also may NOT be referred to as a "valuation" or "appraisal." A broker also may NOT knowingly prepare a BPO or CMA for any purpose in lieu of an appraisal when an appraisal is required by federal or state law. [G.S. §93A-83(f)]

- **Use of Income Analysis Methodology Now Permitted Where Appropriate.** The revised statutes eliminated the old Appraisers Act restriction that a broker's CMA for actual or prospective clients and for compensation was permitted only if the analysis involved sales of similar recently sold properties in order to derive an indication of the probable sales price. A broker performing a BPO to determine an estimated "*probable selling price or leasing price"* is now permitted to utilize methods involving the analysis of income where appropriate (i.e., for income-producing properties) as well as the sales comparison method. [G.S. §93A-83(c)(3)] **Note:** As will be addressed in the coverage of Commission rules, the use of income analysis methodology (e.g., income capitalization or gross rent multiplier) is actually **required** by Commission rule where appropriate. [Rule A .2202(e)]

- A BPO or CMA must be *in writing* and must address those matters specifically required by the statute or Commission rule. [G.S. §93A-83©)]

- The amended Real Estate License Law authorizes the Commission to adopt implementing rules not inconsistent with provisions of the statute. The Commission's rules will be discussed subsequently in this section. [G.S. §93A-83(d)]

# Text of Real Estate License Law Amendment

## Article 6

## "Broker Price Opinions and Comparative Market Analyses."

**§ 93A-82. Definitions.**

As used in this Article, the terms "broker price opinion" and "comparative market analysis" mean an estimate prepared by a licensed real estate broker that details the probable selling price or leasing price of a particular parcel of or interest in property and provides a varying level of detail about the property's condition, market, and neighborhood, and information on comparable properties, but does not include an automated valuation model.

**§ 93A-83. Broker price opinions and comparative market analyses for a fee.**

(a) Authorized. – A person licensed under this Chapter, other than a provisional broker, may prepare a broker price opinion or comparative market analysis and charge and collect a fee for the opinion if:

(1) The license of that licensee is active and in good standing; and

(2) The broker price opinion or comparative market analysis meets the requirements of subsection (c) of this section.

(3) The requirements of this Article shall not apply to any broker price opinion or comparative market analysis performed by a licensee for no fee or consideration.

(b) For Whom Opinion May Be Prepared. – Notwithstanding any provision to the contrary, a person licensed under this Chapter may prepare a broker price opinion or comparative market analysis for any of the following:

(1) An existing or potential seller of a parcel of real property.

(2) An existing or potential buyer of a parcel of real property.

(3) An existing or potential lessor of a parcel of or interest in real property.

(4) An existing or potential lessee of a parcel of or interest in real property.

(5) A third party making decisions or performing due diligence related to the potential listing, offering, sale, option, lease, or acquisition price of a parcel of or interest in real property.

(6) An existing or potential lienholder or other third party for any purpose other than as the basis to determine the value of a parcel of or interest in property, for a mortgage loan origination, including first and second mortgages, refinances, or equity lines of credit.

(7) The provisions of this subsection do not preclude the preparation of a broker price opinion or comparative market analysis to be used in conjunction with or in addition to an appraisal.

(c) Required Contents of a Broker Price Opinion or Comparative Market Analysis. – A broker price opinion or comparative market analysis shall be in writing and conform to the standards provided in this Article that shall include, but are not limited to, the following:

(1) A statement of the intended purpose of the broker price opinion or comparative market analysis.

(2) A brief description of the subject property and property interest to be priced.

(3) The basis of reasoning used to reach the conclusion of the price, including the applicable market data or capitalization computation.

(4) Any assumptions or limiting conditions.

(5) A disclosure of any existing or contemplated interest of the broker issuing the broker price opinion, including the possibility of representing the landlord/tenant or seller/buyer.

(6) The effective date of the broker price opinion.

(7) The name and signature of the broker issuing the broker price opinion and broker license number.

(8) The name of the real estate brokerage firm for which the broker is acting.

(9) The signature date.

(10) A disclaimer stating that "This opinion is not an appraisal of the market value of the property, and may not be used in lieu of an appraisal. If an appraisal is desired, the services of a licensed or certified appraiser shall be obtained. This opinion may not be used by any party as the primary basis to determine the value of a parcel of or interest in real property for a mortgage loan origination, including first and second mortgages, refinances, or equity lines of credit."

(11) A copy of the assignment request for the broker price opinion or comparative market analysis.

(d) Rules. – The North Carolina Real Estate Commission shall have the power to adopt rules that are not inconsistent with the provisions in this Article.

(e) Additional Requirements for Electronic or Form Submission. – In addition to the requirement of subsection (c) of this section, if a broker price opinion is submitted electronically or on a form supplied by the requesting party, the following provisions apply:

(1) A signature required by subdivision (7) of subsection (c) of this section may be an electronic signature, as defined in G.S. 47-16.2.

(2) A signature required by subdivision (7) of subsection (c) of this section and the disclaimer required by subdivision (10) of subsection (c) of this section may be transmitted in a separate attachment if the electronic format or form supplied by the requesting party does not allow additional comments to be written by the licensee. The electronic format or form supplied by the requesting party shall do the following:

a. Reference the existence of a separate attachment.

b. Include a statement that the broker price opinion or comparative market analysis is not complete without the attachment.

(f) Restrictions. – Notwithstanding any provisions to the contrary, a person licensed pursuant to this Chapter may not knowingly prepare a broker price opinion or comparative market analysis for any purpose in lieu of an appraisal when an appraisal is required by federal or State law. A broker price opinion or comparative market analysis that estimates the value of or worth a parcel of or interest in real estate rather than sales or leasing price shall be deemed to be an appraisal and may not be prepared by a licensed broker under the authority of this Article, but may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board. A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.

(g) No Report of Predetermined Result. – A broker price opinion or comparative market analysis shall not include the reporting of a predetermined result.

### Additional Comments on Article 6

- Note in §93A-82 that the terms "broker price opinion" and "comparative market analysis" are synonymous.

- The reason the law limits the right to perform BPOs *for a fee* to licensed **non-provisional brokers** (i.e., brokers whose licenses are *not on provisional status)* is because there was much concern that many provisional brokers will have neither sufficient instruction on how to properly perform a BPO nor sufficient experience in brokerage to exercise the judgment necessary to properly perform a BPO. The primary instruction on BPOs is now included in the *Broker Relationships and Responsibilities* postlicensing course and the Commission plans to expand such instruction in postlicensing courses in the near future.

## Appraiser's Act Revisions Relevant to Brokers

**§ 93E-1-3(c) was revised as follows:**

"Nothing in this Chapter shall preclude a real estate broker licensed under Chapter 93A of the General Statutes from performing a broker price opinion or comparative market analysis as defined in G.S. 93E-1-4, provided the person does not represent himself of herself as being a registered trainee or a licensed or certified real estate appraiser, and provided they follow the standards set forth in Article 6 of Chapter 93A. ~~A real estate broker may perform a comparative market analysis for compensation or other valuable consideration only for prospective or actual brokerage clients or for real property involved in an employee relocation program."~~

**§ 93E-1-3(f)(6) was revised by adding the following sentence:**

"The provisions of this Chapter shall not apply to certified real estate appraisers who perform a broker price opinion or comparative market analysis pursuant to G.S. 93E-1-3(c), so long as the appraiser is licensed as a real estate broker by the North Carolina Real Estate Commission and does not refer to himself or herself as an appraiser in the broker price opinion or comparative market analysis."

**§ 93E-1-4(7c) – The definition of "comparative market analysis" in the statute was revised to be exactly the same as the definition in G.S. 93A-82 of the Real Estate License Law.**

**§ 93E-1-12 was revised by adding the following provision:**

"(e) No appraiser shall be disciplined for completing an appraisal that includes a reduced scope of work or reporting level as long as it is appropriate for the intended use and is performed in accordance with the Uniform Standards of Professional Practice."

## Real Estate Commission's BPO Rules

To implement the new BPO law, the Commission adopted *temporary* rules in order to have rules in place by the **October 1, 2012** effective date of the law change. Because these rules are technically temporary, they will go through an additional rulemaking procedure before they

become permanent and they may be modified at that time. The rules presented and discussed in these materials are the ***temporary rules*** effective October 1, 2012.

It is very important to note that ***the law and rules must be read together***. State law does not permit rules to simply restate a statutory provision. The rules expand on the statutory provisions, but do not replace those provisions. It is, therefore, insufficient to merely read the rules without also reading the statutory provisions to which the rules relate.

# Text of Commission's BPO Rules with Comments

## SECTION .2200 - BROKER PRICE OPINIONS AND COMPARATIVE MARKET ANALYSES

### 21 NCAC 58A .2201 APPLICABILITY

This Section applies to broker price opinions and comparative market analyses provided for a fee by a real estate broker whose license is not on provisional status pursuant to Article 6, Chapter 93A of the General Statutes.

### 21 NCAC 58A .2202 STANDARDS

(a) A broker performing a broker price opinion or comparative market analysis for a fee shall comply with all the requirements in G.S. 93A-83 and in this Rule.

> **Comment**
> Note that BPOs must be performed in compliance with **both** the provisions of G.S. §93A-83 **and** Rule A .2202, both of which describe the minimum standards for BPOs.

(b) A broker shall only accept an assignment to provide a broker price opinion or comparative market analysis for a property if the broker has knowledge of the real estate market, direct access to real estate market sales or leasing data, and brokerage or appraisal experience in the subject property's geographic location.

> **Comment**
> The broker must have knowledge of the real estate market *where the subject property is located*, direct access to market sales or leasing data *where the subject property is located*, and brokerage or appraisal experience *in the subject property's geographic location*. This means that (1) the broker must have actually worked as a broker or appraiser in the area where the subject property is located, (2) have knowledge of the *current real estate market conditions* in the area where the subject property is located, and (3) have *current direct access to market sales or leasing data* in the area where the subject property is located. The "subject property's geographic location" means *the **local** area where the subject property is located* – NOT anywhere in North Carolina or the general region where the property is located.

(c) A broker shall not provide a broker price opinion or comparative market analysis for a property unless the broker can exercise objective, independent judgment free of any influence

from any interested party in the performance of his or her analysis of the facts relevant to determination of a probable selling or leasing price.

**Comment**

The requirement for a broker to exercise objective, independent judgment free of any influence from any interested party applies to **ALL** BPO/CMA assignments performed for a fee, including those performed for an actual or prospective client. While the broker may for good reason recommend to his or her client a listing or offer price or leasing price different from his or her estimate of probable selling or leasing price, the broker must not allow the estimate itself to be influenced by that client.

(d) A broker shall not provide a broker price opinion or comparative market analysis for a property unless the broker has personally inspected the exterior and interior of that property, provided, however, that an inspection of the exterior or interior is not required if this is waived in writing by the party for whom the opinion or analysis is being performed.

**Comment**

If the party for whom a BPO/CMA is being performed indicates in writing that the party does not desire an exterior and/or interior inspection of the subject property, then the broker is not required to perform such inspection; however, an inspection waiver should not be suggested by the broker. Moreover, even if a property inspection is waived by the client, a broker is strongly encouraged to perform both exterior and interior inspections whenever feasible in order to produce a more accurate estimate of probable selling or leasing price.

(e) When developing a broker price opinion or comparative market analysis for a property or interest therein, a broker shall utilize methodology such as analysis of sales or income of sold or leased properties comparable to the subject property or capitalization as is appropriate for the assignment and type of subject property.

**Comment**

A broker is expected to utilize methodology when developing a BPO/CMA that is appropriate for the particular assignment and type of subject property. While analysis of sold comparable properties is clearly needed for all residential single-family subject properties, it may also be necessary to analyze rents of comparable properties if the residential single-family subject property is a rental property. Similarly, it is likely to be appropriate to analyze both the sales and income of comparable properties for income-producing properties.

**CAUTION: While Article 6 and Section 2200 of the Commission's rules do not specifically state that a BPO must be performed in a competent manner, G.S. §93A-6(a)(1), (4) and (8) have always made willful or negligent misrepresentation, undisclosed conflict of interest or incompetence grounds for disciplinary action against a licensee. Thus, a broker is expected to perform all BPOs and CMAs in a competent manner that reports a reasonably reliable result without any undisclosed conflict of interest. If a broker is not**

**properly qualified by way of education and experience to utilize certain methodology (e.g., income capitalization methodology) that may be required to properly perform an assignment, then the broker is expected to decline the assignment.**

(f) When analyzing sales of properties comparable to the property that is the subject of a broker price opinion or comparative market analysis assignment, a broker shall comply with the following standards:

(1) The broker shall select from reliable information sources a minimum of three sold or leased comparable properties for use in his or her analysis that are similar to the subject property with regard to characteristics such as property type, use, location, age, size, design, physical features, amenities, utility, property condition and conditions of sale. The comparable properties selected shall reflect the prevailing factors or market conditions influencing the sale or lease prices of similar properties in the subject property's local market.

(2) The broker shall make adjustments to the selling or leasing price of selected comparable properties for differences between the characteristics of the comparable properties and the subject property as necessary to produce a credible estimate of the probable selling or leasing price. Adjustments shall be considered for differences in property characteristics such as location, age, size, design, physical features, amenities, utility, condition, economic or functional obsolescence and conditions of sale. The amounts of adjustments shall reflect the values that the local real estate market places on the differences in the characteristics in question.

**Comment**

Note that these standards for analyzing sales of comparable properties when performing a BPO/CMA are *not new!* The Commission for many years has applied these standards to any CMA/BPO performed by a licensee, regardless of whether the CMA/BPO is performed for a fee. These standards have long been taught in prelicense and postlicense courses.

(g) A broker price opinion or comparative market analysis provided to a client shall address, in addition to matters required to be addressed by G.S. 93A-83 and other provisions of this Rule, the following items:

(1) a description of the comparable properties used in the analysis (including any unsold properties listed for sale or rent that were used as comparable properties),

(2) the adjustments made to the selling or leasing prices of comparable properties,

(3) local real estate market conditions, and

(4) each method used in deriving the estimate of probable selling or leasing price.

(h) In connection with a broker price opinion or comparative market analysis, an estimated probable leasing price may be reported by a broker as a lease rate and an estimated probable selling or leasing price may be reported by a broker either as a single figure or as a price range. When the estimated probable selling or leasing price is stated as a price range and the higher figure exceeds the lower figure by more than 10 percent, the broker shall include an explanation of why the higher figure exceeds the lower figure by more than 10 percent.

In addition to the new temporary rules set out above, Commission **Rule 58A.0108, Retention of Records**, was revised to include among the records licensees must retain for three years after all funds held by the licensee in connection with the transaction have been disbursed to the proper party or parties or until the successful or unsuccessful conclusion of the transaction, whichever occurs later, the following: "(12) *broker price opinions and comparative market analyses prepared pursuant to G.S. 93A, Article 6, including any notes and supporting documentation ....*" Recall that all such records shall be made available for inspection and reproduction by the Commission or its authorized representatives without prior notice.

### BPOs/CMAs Performed for NO FEE

Any broker *(non-provisional or provisional)* has always been permitted to perform a BPO/CMA for any party when NO FEE is charged, and this continues to be true under the revised law and rules. Note that *the Commission does not consider compensation of a broker for general brokerage services under a brokerage agreement to constitute a "fee" under Article 6*. "General brokerage services" means services provided under a brokerage agreement to property owners in connection with listing/selling/leasing property and to prospective buyers or tenants in connection with purchasing or leasing a property. Such services include the provision by a licensee of a CMA or BPO. Similarly, the possibility of entering into a brokerage agreement (and earning a brokerage fee) does not constitute a "fee" when a licensee performs a CMA/BPO for a *prospective* client without charging a fee for the CMA/BPO.

***It is important for licensees to remember, however, that the Commission expects every CMA/BPO performed by a licensee to be performed in a competent manner and without any undisclosed conflict of interest, even if no fee is received for the CMA/BPO. Thus, as a practical matter, a licensee performing a CMA/BPO for no fee should still look to the standards described in Commission Rule 58A.2202 for guidance regarding the proper performance of a CMA/BPO.***

### Instruction on How to Perform a BPO/CMA

This coverage of the law and rule changes related to BPOs/CMAs performed by real estate licensees does not attempt to address *how to properly perform a BPO/CMA.* For instruction on the proper performance of BPOs/CMAs, licensees are urged to attend a CE elective course on this topic that has been updated to reflect the recent law/rule changes. Updated coverage of proper performance of BPOs/CMAs will also be included in the next edition (2013-2014 edition) of the Commission's *North Carolina Real Estate Manual* that will be available in early 2013.

## COMMERCIAL REAL ESTATE BROKER LIEN ACT

### Introduction

All real estate brokers, especially those who engage in commercial real estate brokerage practice, should be aware of the **Commercial Real Estate Broker Lien Act** that was enacted by the 2011 North Carolina General Assembly and became **effective October 1, 2011.** This law

has two important features, one related exclusively to commercial real estate brokerage practice and one related to all real estate brokerage services.

## "Statute of Frauds" for All Real Estate Brokerage Services Agreements

The new statute quoted below effective October 1, 2011 was covered in the 2011-2012 Update Course, Final Edition, but is briefly mentioned again because it is important that all brokers understand that any brokerage service contract must be in writing in order for the broker/firm to enforce the contract and collect a brokerage fee from the consumer.

Section 2 of the Commercial Real Estate Broker Lien Act amended the North Carolina Real Estate License Law by adding **NCGS §93A-13** which reads as follows:

> *No action between a broker and the broker's client for recovery under an agreement for broker services is valid unless the contract is reduced to writing and signed by the party to be charged or by some other person lawfully authorized by the party to sign.*

**Note that this statutory provision amounts to a "statute of frauds" for real estate brokerage services contracts and applies to ALL TYPES OF BROKERAGE SERVICES CONTRACTS, not just commercial brokerage service contracts.** *If a broker/firm does not have a written brokerage services contract (i.e., agency agreement) signed by the client, there is no legal basis for recovery of any brokerage fee.*

## Lien Right for Brokers Providing Commercial Brokerage Services

Commercial brokers in North Carolina have long sought to obtain passage of a law that affords them the opportunity to protect their right receive a brokerage fee in commercial sales and lease transactions they broker. Commercial transactions commonly take months or years to negotiate and bring to fruition, requiring the broker(s) involved to devote massive amounts of time to a transaction. Such transactions also frequently involve large brokerage commissions and in the past have sometimes involved brokers providing services without having a written brokerage agreement with their client. Not surprisingly, then, it has not been uncommon for commission disputes between brokers and clients to arise and not be resolved by the closing date. In that case, the disputes could lead to civil litigation because the broker had no right to place a lien on the property being transferred. Once title to the property was transferred, the broker had no "leverage" and could only resort to suing the former property owner who owed the brokerage fee.

*The Commercial Real Estate Broker Lien Act, Section 1 of which is codified as Part 4 of Article 2 of Chapter 44A of the General Statutes [NCGS §44A-24.1-14], attempts to mitigate this problem for commercial real estate brokers by granting a broker a right to file a lien against a parcel of commercial real estate being sold or leased to protect the broker's right to recover a brokerage fee.*

## Major Features of the Commercial Real Estate Broker Lien

**Important Note to Brokers.** *Note that coverage of the commercial real estate broker lien in this course is intended only to make brokers aware of the existence of the lien right and the major features of the lien. The statute establishing the lien contains many detailed provisions regarding requirements for filing and enforcement of the lien that are beyond the scope of coverage in this course. Brokers who deal in commercial real estate are strongly advised to seek further education on the lien and to promptly consult with their attorney regarding the filing of the lien when they perform the contracted service under a commercial brokerage services contract with a property owner. Brokers are also cautioned to make certain the brokerage services contract form they use contains language regarding their performance and compensation that will allow them to utilize the lien right.*

### Who Is Entitled to the Lien

The lien is available to real estate brokers licensed in North Carolina, including an out-state-broker who holds a North Carolina Limited Non-Resident Commercial License.

### Property that May Be Subject to the Lien

The lien is permitted only in connection with services rendered by a broker in the sale or leasing of **commercial real estate**. "Commercial real estate" is defined in the statute as any real property or interest therein, whether freehold or leasehold, which is used "…primarily for sales, office, research, institutional, warehouse, manufacturing, industrial, or mining purposes or for multifamily residential purposes involving five or more dwelling units,…" or property which is zoned to permit such use, or which is subject to a petition for rezoning for such use, or which is in good faith intended to be immediately used for such purposes. [Note that the "good faith" provision is applicable only in areas of the state where there are no land use regulations governing the property's use.]

### Lien Is Limited to Broker/Firm with Written Brokerage Services Agreement with the Owner

*The lien is available only to **listing brokers/firms** who have a written contract with the property owner to sell or lease the owner's property.* A cooperating broker who is acting as a subagent of the owner pursuant to a cooperation agreement with the listing broker/firm has no right to the lien because the cooperating broker has no direct contractual relationship with the owner. [Note that a cooperating broker acting under a cooperation agreement with a listing broker has never had any legal standing to sue the owner for a brokerage fee.]

Note also that it is owner broker or brokerage firm who has the right to the lien, not the affiliated individual broker who may be the listing agent and who may have signed the listing agreement in behalf of his or her employing broker or firm.

### Lien Applies Only to Property That Is Subject to the Transaction

The lien only applies to the parcel of commercial real estate for which an interest is being conveyed and that is the subject of the brokerage services agreement, not to any other property of the owner.

### Other Prerequisites for Filing a Lien

In order to be entitled to a lien, all of the following requirements must be met:

- The broker must have performed pursuant to the terms of the written brokerage services agreement;
- The written agreement must clearly set forth the broker's duties to the owner; and
- The written agreement for broker services must set forth the conditions upon which the compensation shall be earned and the amount of the compensation.

### When Lien Must Be Filed

A lien must be filed **after the claimant's performance** under the written agreement **and before the conveyance or transfer of the commercial real estate subject to the lien.** Additionally, **a lien should not be filed more than 30 days prior to the closing date (for a sale) or possession date (for a lease)** because a lien filed more than 30 days prior to the closing or possession date shall be available only upon grounds of the owner's breach of the brokerage services agreement.

**Caution:** These provisions have the effect of making the lien unavailable to a broker if the listing agreement provides that the broker's fee will be earned **only upon closing** because the lien must be filed after the fee is earned but prior to closing. If the fee is only earned at closing, the broker cannot meet the statutory requirement for timely filing of the lien.

For a **lease** transaction, the statute provides an exception to the requirement for filing the lien prior to transfer of possession by allowing, in the case of transfer of a nonfreehold (i.e., leasehold) interest, the lien may be filed no later than **90 days following the tenant's possession or 60 days after the due date of a payment pursuant to the brokerage services agreement.**

There are also special provisions for lien filing after the transfer or conveyance for portions of a commission that are due after the transfer or conveyance, as well as provisions for a single filing to cover all installments due regarding the commission if the broker amends the lien after each paid installment to reduce the amount of the lien.

### Time Limit for Lien Enforcement; Lien Priority

If a lien is not paid or otherwise satisfied, the lien claimant (broker/firm) has up to 18 months from the filing of the lien to file a suit to enforce the lien (basically to foreclose on the property subject to the lien).

The commercial broker's lien is effective only from the date of lien filing, meaning that other liens filed prior to the filing of the commercial broker's lien will have priority. Moreover, under the statute, **mechanic's and materialmen's liens** are always superior to the commercial broker's lien even if filed after the filing of the broker's lien. Thus, the broker's lien is lower in priority than any liens existing at the time the broker's lien is filed (e.g., a mortgage or tax lien) as well as any mechanic's lien filed after the broker's lien is filed.

### Termination or Cancellation of Broker's Lien

This topic is beyond the scope of coverage in this course.

### Costs of Legal Proceeding to Enforce a Broker's Lien

Brokers should be aware that the statute provides that **the costs of any proceeding to enforce a lien, including reasonable attorneys' fees, shall be paid by the non-prevailing party.** This provision is obviously very beneficial to the broker who has a legitimate claim to a commission and has strictly adhered to all the statutory lien requirements. On the other hand, a broker who incorrectly or wrongfully files a lien and pursues enforcement not only will not be able to collect a fee, but also may be assessed court costs and attorneys' fees incurred by the owner in defending the broker's claim.