



Ohio Adopts New Lien for Design Professionals and Surveyors

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Similar to mechanic's liens and commercial broker's liens, design professionals such as architects, engineers, and surveyors are now authorized by law to file a lien against real property to get paid for services rendered. Effective September 30, 2021, an architect, landscape architect, professional engineer, or professional surveyor may file a lien on *commercial* real property.

The new law adds the following sections to the Revised Code:

- 4703.20 through 4703.206 for architects;
- 4703.54 through 4703.546 for landscape architects; and
- 4733.30 through 4733.306 for professional engineers and professional surveyors.

The new lien is similar to a mechanic's lien, but it does not fall under R.C. Chapter 1311, the Mechanic's Lien Statute.

The law requires that in order to file a lien, the design professional or surveyor must have entered into a written agreement for services relating to commercial real estate, which must be signed by both the design professional or surveyor and the owner.

The term "owner" is defined as the person who has a legal or equitable interest in commercial real estate, including a contingent interest pursuant to an agreement or contract. Although the new law does not clarify this concept, it appears that a purchaser's design professional or surveyor may have a right to file a lien even if the purchaser does not ultimately close on the purchase of the property.

"Commercial real estate" is defined as any parcel of real estate in Ohio other than real estate containing or intended to contain one to four residential units. Specifically excluded from the definition of commercial real estate are single-family residential units such as condominiums, townhomes, manufactured homes, or industrialized units, or homes in a subdivision when sold, leased, or otherwise conveyed on a unit-by-unit basis. Additionally, real estate owned by a public authority is also excluded from the definition of commercial real estate.

The work of a design professional or surveyor that is covered by the lien includes designing, planning, constructing, erecting, altering, repairing, demolishing, removing, or providing other construction services with regard to the following: a building or pertinence thereto; a fixture,

bridge, or other structure; any gas pipeline or well; furnishing of tile for drainage of water; land excavation, cleanup, or removal of hazardous materials or waste from real property; embellishment or enhancement of real property by seeding, sodding, or planting of any plants; and grading or filling to establish a grade.

The lien amount is limited to the amount due to the design professional or surveyor under the contract. The lien attaches only against the interest in the commercial real estate that was the subject of the contract. To establish (*perfect*) the lien, the design professional or surveyor must record in the county where the commercial real estate is located an affidavit that lists:

1. the name of the design professional or surveyor;
2. the name of the owner of interest in the commercial real estate;
3. the name of the record owner of the commercial real estate if different than the owner of interest;
4. a legal description of the commercial real estate sufficient to reference the instrument by which the record owner took title and permanent parcel number, if any (a metes and bounds description is not required);
5. the parties to and date of the contract;
6. the amount of the design professional or surveyor's claim under the contract; and
7. a statement that the information is true and accurate to the knowledge of the design professional or surveyor.

The affidavit must be signed and notarized.

Unlike mechanic's liens or commercial broker's liens, there is no time period to file the design professional or surveyor's lien in relation to when the last date of work was performed by the professional. Nonetheless, it is good practice to promptly file any liens, as it is unclear what time limitations courts may impose. In terms of priorities, all valid and recorded mechanic's liens, regardless of recordation date, as well as all previously recorded mortgages and liens, including judgment liens, take priority over a design professional or surveyor's lien. There is no provision as to when the lien attaches to the property, but the statute implies that it would attach at the time of recordation. In contrast, a mechanic's lien dates back to the date on which work or services were supplied.

Within 30 days after recording the lien, the affidavit must be served upon the owner and the party with an interest, although failure to serve will not invalidate the lien, but allows the court to consider equitable remedies for such failure.

The design professional or surveyor who files a lien may file a complaint on the underlying lien and does not have to, but could, file foreclosure proceedings. The complaint needs to name all parties with an interest in the commercial real estate. The complaint must be filed no

later than two years after recordation of the affidavit or else the lien is extinguished.

Additionally, a person with an interest in the real estate may file a notice to commence suit with the design professional or surveyor, which will require the design professional or surveyor to take action by filing the complaint within 60 days of receipt or else the lien would be extinguished. Once the lien is paid off, the design professional or surveyor is to file a lien release within 30 days after the claim is satisfied.

The law provides several ways to remove or release the liens. Any person with an interest in commercial real estate that was subject to the lien or named in the affidavit may record an affidavit stating that the underlying lien was satisfied or that it was released by operation of law. The release of a lien does not affect the ability of the design professional or surveyor to assert a claim to any other right or appropriate action, including a claim for breach of contract. The lien may also be removed by filing a request to substitute financial security for the lien with the Court of Common Pleas in the county where the lien was recorded. The substitute security will be required to be in an amount equal to the design professional or surveyor's claim in a form such as an escrow account or surety bond held by the Clerk of Courts or other party determined adequate by the court. On approving such, the court shall direct the lien to be released.

For design professionals and surveyors, the new law establishes important rights that recognize the contribution these professionals add to a commercial project. As with anything, just because the law provides certain rights, the recording of a lien may not always be the best course of action. Consideration should be given to this new right. As for owners, purchasers, and parties with an interest in real estate, including lenders, there may be techniques to address or protect commercial real estate from these liens in your contract documents. At a minimum, if you are entering into a purchase agreement with a buyer, similar to a disclosure concerning real estate brokers, it may be advisable to also request whether the buyer is working with a design professional or surveyor that may result in a lien against your commercial property. The buyer should also indemnify the seller against any such liens. In sum, it is important to understand this new law, as it will impact all aspects of commercial real estate and construction.

Additional Information

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