Luke Bell
General Counsel/VP of Governmental Affairs
3644 SW Burlingame Rd.
Topeka, KS 66611
785-633-6649 (Cell)
Email: lbell@kansasrealtor.com

To: Senate Judiciary Committee

Date: March 11, 2015

Subject: **HB 2256** – Extending the Deadline to File a Notice of Lien on Leased Commercial Real Property from 90 to 180 Days and Making Technical Corrections to the Kansas Commercial Real Estate Broker Lien Act

Chairman King and distinguished members of the Senate Judiciary Committee, thank you for the opportunity to provide testimony today on behalf of the Kansas Association of REALTORS® in support of **HB 2256**, which would extend the deadline for filing a notice of lien on leased commercial real property under the Kansas Commercial Real Estate Broker Lien Act (K.S.A. 58-30a01 *et seq.)* from the current 90 to 180 days after the tenant takes possession of the property. In addition, **HB 2256** would make a small technical correction to the act.

KAR is the state's largest professional trade association, representing nearly 8,000 members involved in both residential and commercial real estate and advocating on behalf of the state's 700,000 property owners for over 95 years. REALTORS® serve an important role in the state's economy and are dedicated to working with our elected officials to create better communities by supporting economic development, a high quality of life and providing affordable housing opportunities while protecting the rights of private property owners.

<u>Summary of Kansas Commercial Real Estate Broker Lien Act</u>

During the 2005 Legislative Session, the Kansas Legislature passed **SB 215**, which established the Commercial Real Estate Broker Lien Act (K.S.A. 58-30a01 *et seq*.) Under K.S.A. 58-30a03(a), a commercial real estate broker "shall have a lien on commercial real estate in the amount of the compensation as agreed upon by the broker and the owner or the owner's agent" when certain conditions specified in the statute are satisfied.

Under K.S.A. 58-30a02, "commercial real estate" means any real estate except real estate that: (1) contains one to four residential units; (2) contains single-family residential units such as condominiums or townhomes that are part of a larger building but are conveyed on a unit by unit basis; (3) has no buildings or structures and sits on land zoned for single-family residential use; and (4) is used for agricultural purposes.

Under K.S.A. 58-30a05, the commercial real estate broker's lien attaches to commercial real estate when the broker procures a ready, willing and able buyer or tenant of the property upon the terms set forth in the written agreement between the broker and the owner and the broker records a notice of the lien with the register of deeds of the county in which the property is located. For purchase transactions, the statute requires the notice of lien to be filed prior to the actual conveyance or transfer of the property subject to the lien. *Id.*

Under K.S.A. 58-30a09, the notice of the lien must be recorded with the register of deeds of the county in which the property is located within 90 days after the tenant takes possession of the property in lease transactions. If written notice of the intention to sign the lease is personally served on the broker entitled to claim a lien at least 10 days before the date of the intended signing of the lease, the notice of the lien must be recorded before the date indicated for the signing of the lease. *Id.*

Under K.S.A. 58-30a13(a), the commercial real estate broker is required to mail a copy of the notice of the lien to the owner of the commercial real estate within ten days after recording the lien. If the notice of the lien is recorded within the ten days prior to the closing of the transaction, the broker is not required to mail a copy of the notice of the lien to the owner of the commercial real estate. *Id.*

If the broker fails to comply with the requirements regarding the mailing or serving of a copy of the notice of the lien on the owner of the commercial real estate or fails to record the notice of the lien with the register of deeds of the county in which the property subject to the lien is located, then the lien is void and unenforceable. K.S.A. 58-30a13(b).

Under K.S.A. 58-30a14(a), the broker may only enforce the lien attaching against commercial real estate by filing a petition to foreclose the lien in the district court of the county in which the property is located. A failure to file such petition within two years of the recording of the notice of the lien shall extinguish the lien and the lien may not be reasserted in subsequent legal proceedings. *Id.*

How Would **HB 2256** Modify the Kansas Commercial Real Estate Broker Lien Act (K.S.A. 58-30a01 *et seq.*)?

Under Section 1 of **HB 2256**, the proposed new language would correct a technical ambiguity in K.S.A. 58-30a03(b). This language currently states that "a broker shall have a lien on such commercial real estate if the broker has a written agreement with a person to represent such person in the purchase, lease or other conveyance to the buyer of such real estate when the broker becomes entitled to compensation pursuant to the written agreement."

However, in a real estate lease transaction pursuant to the written agreement between the real estate licensee and the owner of the property, there will be no "buyer" of such real estate and instead there will be a "lessee" or "tenant." Similarly, if there is some other conveyance of the property other than a buyer or lessee, then there will be a "grantee" of the property.

Unfortunately, a literal interpretation of the current language found in K.S.A. 58-30a03(b) seems to prohibit a real estate licensee from exercising his or her lien rights on the property unless there is a "buyer" of such real estate, which would not allow the real estate licensee to exercise his or her lien rights if the property is leased to a lessee or otherwise conveyed to a grantee pursuant to the written agreement. In order to resolve this ambiguity, the new language in Section 1(b) would simply add the words "lessee or grantee" to this subsection.

Furthermore, under Section 2 of **HB 2256**, the proposed new language is intended to address situations where a commercial real estate broker intends to file a notice of lien on leased commercial real estate. Under the current language found in K.S.A. 58-30a07, the real estate licensee is required to file the notice of lien within the first 90 days of the tenant's possession of the property. Under Section 2 of **HB 2256**, the deadline to file the notice of lien on the leased property would simply be extended from the current 90 to 180 days.

Similarly, the new language in Section 3 of **HB 2256** would extend the deadline to file the notice of lien on leased property that includes provisions for the sublease or assignment of the lease from the current 90 to 180 days after the tenant takes possession of the property. In both K.S.A. 58-30a07 and 58-30a09, the real estate licensee must file the notice of lien prior to the execution of the lease agreement if a written notice of intention to sign the lease agreement is served on the real estate licensee at least 10 days before the date of the intended execution of the lease agreement.

Why Do Real Estate Licensees Want an Additional 90 Days to File a Notice of Lien on Leased Property?

In many commercial real estate lease transactions, the real estate licensee agrees to accept the payment of any real estate commissions due under the listing agreement with the owner of the property and the lease agreement between the owner and the tenant in installments at specified times during the duration of the lease agreement. In doing so, the real estate licensee subjects himself or herself to substantial risk of non-payment or default on the obligation to pay real estate commissions that are due under the written agreements.

Under the current language found in K.S.A. 58-30a07, the notice of lien must be filed by the real estate licensee within 90 days after the tenant takes possession of the property. If the real estate licensee fails to file the notice of lien within this time period, they will lose the right to enforce his or her lien rights on the property if the tenant or owner later fails to pay the promised compensation to the real estate licensee under the written agreements.

Not surprisingly, real estate licensees are extremely reluctant to file a notice of lien on leased commercial real estate when the owner and tenants are fulfilling their obligations to provide compensation to the real estate licensee for services provided under the written agreements between the parties. In most cases, the act of filing a notice of lien against the property causes substantial friction and sours the working relationship between the parties to the lease agreement and the real estate licensee.

However, the manner in which the statute is structured basically requires the real estate licensee to preemptively file the notice of lien against the property before either one of the parties has an opportunity to default on their respective obligation to pay compensation to the real estate licensee under the written agreements. Again, for obvious reasons, it generally is not a good business practice for the real estate licensee to file the notice of lien against the property when the parties are currently not in default on their obligations.

Having said that, our members have encountered numerous situations in which the parties to the lease agreement default on their obligation to provide compensation to the real estate licensee after the first 90 days of the tenant's possession of the property and the expiration of the real estate licensee's ability to file a notice of lien against the property to preserve his or her lien rights. In these situations, the real estate licensee completely loses his or her ability to compel the payment of the compensation through the execution of his or her lien rights.

Based on my practical experience in the time that has elapsed since the act was enacted in 2005, it is exceedingly rare for a real estate licensee to actually file a notice of lien on leased commercial real estate. Instead, the lien rights created under the act are typically used as leverage to convince a party that has defaulted on their obligations to resume compliance with the written agreement before a notice of lien is filed against the property.

If the real estate licensee will lose the ability to file a notice of lien on the leased property after the first 90 days of the tenant's possession of the property, then the real estate licensee will lose this leverage if the owner or tenant later defaults on their obligations under the lease agreement. As a result, my commercial real estate members have requested an additional 90 days to determine whether the parties to the lease agreement will honor their obligations under the written listing and lease agreements.

<u>Extending the Deadline to File Notices of Lien Rights on Leased Property Could Reduce the Number of Filings</u>

If the Kansas Legislature agrees, this would give real estate licensees more time to evaluate the parties' intent to honor their obligations. In addition, this would also limit the number of notices of lien rights that are preemptively filed against leased properties where the parties are not in default and the real estate licensee is simply seeking to defensively preserve his or her lien rights to enforce the written agreements.

Although it may be counterintuitive, we believe that extending the deadline by an additional 90 days may actually reduce the number of notices of lien rights that are filed against leased properties. In our opinion, once a real estate licensee has verified that the parties have honored their obligations under the written agreements for at least 180 days, he or she is much more likely to waive their lien rights by failing to exercise them than he or she would have been after just 90 days.

<u>Banking, Legal and Title Insurance Industry Representatives Were Consulted and Do Not Object to the Changes</u>

Prior to the introduction of **HB 2256**, the Kansas Association of REALTORS® made a good faith effort to reach out to representatives of the Kansas Bankers Association, Kansas Bar Association and Kansas Land Title Association to ensure that our real estate industry partners had no objections to the proposed changes. Representatives of each association have confirmed that they do not believe the proposed changes in **HB 2256** will be harmful to their respective interests in real property and real estate transactions.

<u>Conclusion</u>

In closing, we would respectfully request that the members of the Senate Judiciary Committee support **HB 2256**, which was approved by the House on a vote of 121 to 0. Thank you for the opportunity to provide comments.